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## Theorizing 'Transitional Justice'

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Supervisor: Joanna R. Quinn, *The University of Western Ontario*

A thesis submitted in partial fulfillment of the requirements for the Doctor of Philosophy degree in Political Science

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THEORIZING 'TRANSITIONAL JUSTICE'

(Monograph)

by

David Anton Hoogenboom

Graduate Program in Political Science

A thesis submitted in partial fulfillment  
of the requirements for the degree of  
Doctor of Philosophy

The School of Graduate and Postdoctoral Studies  
The University of Western Ontario  
London, Ontario, Canada

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## Abstract

Early literature in the field of transitional justice was dominated by debates over the meaning of justice, with retributivists arguing for the need for criminal prosecutions following mass human rights violations and advocates of restorative justice claiming that non-prosecutorial forms of justice like truth-telling are better suited for post-conflict societies. This debate was eventually settled, at least in the field, by a belief that post-conflict societies require both criminal prosecutions and truth-telling. More recently, the debate over justice has centred on the question of whether the field and practice of transitional justice has prioritized civil and political rights over economic and social rights. While this is a significant development in the field, it points to a more fundamental reality. Debates over justice are interminable. To try to sculpt justice to fit a preconceived definition limits its capacity to respond to the needs of survivors. This realization serves as the starting point for this project—that justice must remain open to re-interpretation for it to maintain its relevance in post-conflict societies. There is, however, a central problem in the field: *Transitional* justice implies a justice that is in the service of the transition. What this suggests, then, is that the debates over justice, or, the *justice question*, have been substantially circumscribed by the *transition question*, thereby limiting the possible definitions of justice. While the justice question has received a great deal of attention, this project suggests that if debates over justice are to indeed remain interminable, the more fundamental concern of the field should be the way the *transition question* has, in fact, shaped our theorizing about justice.

## Keywords

Transitional Justice, Human Rights, Critical Theory.

## Acknowledgments

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I dedicate this thesis to my daughter Henny Hoogenboom. Your arrival gave me the strength I needed to finish this project. Use Body Text or Normal style for text in this section.

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## Chapter 1

### 1 Introduction

The research undertaken in this project looks to challenge the dominant theories in transitional justice. This project is not meant to provide a better form of justice. Rather, it asks us to think about the way “justice” has been shaped by its attachment to “transitional.” I argue that theory in the field has been bounded by a fundamental consensus—that the right kind of justice should help transition a state to a final end-point: a liberal democracy. This is evident in much of the theorizing in the field, as well as emerging large-N quantitative studies that look to evaluate transitional justice mechanisms. This consensus is built on a belief that transitional justice, as the protection of human rights, was finally able to blossom in the political space opened up by the end of the Cold War. For the most part, these beliefs have gone unchecked in the field. Part of the explanation for this is the lack of critical theory in the field. The field was built on normative, legal-philosophical works and small-N ethnographic case studies by Western scholars.<sup>1</sup> These scholars were significantly influenced by the third wave of democratization and the belief that the international community was increasingly moving towards a more liberal and, as a result, more humane system. More recently, there has been a call for large-N quantitative studies as a way to evaluate the claims made by these scholars.<sup>2</sup> However, these quantitative studies rely largely on the criteria set by the early

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<sup>1</sup> For example, see Neil Kritz, ed. *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Washington DC: United States Institute of Peace Press, 1995); and Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Hill Press, 1998).

<sup>2</sup> For example, see Oskar N.T. Thoms, James Ron, and Roland Paris, “Does Transitional Justice Work?”

literature. Thus, the effectiveness of transitional justice is defined by its ability to promote human rights and liberal democracy.

Central to the field has been the ongoing debate around what I call the *justice question*: What is justice? What are the effects of justice? What form does justice take? These questions have been the motor propelling transitional justice forward from its focus on retributive justice through criminal prosecution to its eventual incorporation of restorative and reparative justice with the recognition of the importance of truth commissions and reparations. Yet, while the justice question has garnered considerable attention, very little focus has been placed on the *transition question* and, in particular, what is implied by a transition and how justice is impacted by this transition?

Early literature in the field was dominated by debates over the meaning of justice, with retributivists arguing for the need for criminal prosecutions following mass human rights violations and restorativists claiming that non-prosecutorial forms of justice like truth-telling are better suited for such societies. This debate was eventually settled, at least in the field, by a belief that post-conflict societies require both criminal prosecutions and truth-telling. More recently, the debate over justice has focused on whether the field and practice of transitional justice has prioritized civil and political rights over economic and social rights. While this is a significant development in the field, it points to a more



fundamental issue: debates over justice are interminable. To try to hold justice to a final definition limits its capacity to respond to the needs of survivors. This realization serves as the starting point for this project: justice must remain open to re-interpretation for it to maintain its relevance in post-conflict societies. There is, however, a fundamental problem in the field: *Transitional* justice implies a justice that is in the service of the transition. This *transition* encircles justice, thereby limiting its possible definitions. What this suggests, then, is that debates over justice, or, the *justice question*, are fundamentally bound by the *transition question*. While the justice question has received a great deal of focus, this project suggests that if justice is to remain open and fluid, the more fundamental concern of the field should be the way the transition question has shaped our theorizing.

Scholars in the field of transitional justice seem to have coalesced around the consensus that when a state transitions from conflict, the ideal end-point is the liberal democratic state. Recent work discussed in chapter two, below, points to the importance of a series of conferences at the end of the 1980s and 1990s in which the scholars in attendance set the path for the eventual establishment of transitional justice as a field of study. Of particular note was the influence of transitology for participants at these conferences. As a sub-field of Political Science, transitology focused on regime transformation following authoritarian rule and was unabashedly pro-democracy. As the study of transitional justice shifts toward more quantitative methods as a way to evaluate the success of justice mechanisms the impact of democracy has become ever clearer. Indeed, for many of these studies, the attainment of a liberal democracy and respect of civil and political rights is held as the main indicator of success.

While the influence of transitology tells us something about why the field adopted a pro-liberal democracy stance early in its development, it does not tell us why the privileging of these values has remained largely unchallenged. This project suggests that the dominant historical narrative of the field's entrance into mainstream international politics—its normalization as a field—helps shed light on why this is the case. Ruti Teitel has been a central figure in the field of transitional justice since before its inception as a coherent field of study. In addition to her impact on the theorization of the field, her work has provided a widely accepted narrative of how transitional justice emerged from its origins in the prosecution of Nazi leaders following the Second World War to the normalization of transitional justice at the international level with the establishment of the International Criminal Court (ICC) in The Hague. In her most recent work, *Humanity's Law*, Teitel provides an account of an emerging trend in international politics in which the diverse rights of humanity are increasingly being recognized at the international level. Teitel traces the growing recognition of *humanity's law*, suggesting that the convergence of International Human Rights law, International Humanitarian Law and International Criminal Law has created a new subject in the international system, humanity. According to Teitel, the “telos” of this *humanity's law* is a new legal regime and moral discourse which protects individuals regardless of the state in which they reside—that is, this new subject is clearly supplanting the primacy of the state in international politics. Drawing on the work of communitarianism, Teitel argues that *humanity's law* does not have in mind a single, universal law. Rather, she says that the claims increasingly made on states will reflect the diversity of humanity.

In addition to Teitel, Kathryn Sikkink has provided an equally important narrative of the field's past and future. Drawing on what she calls agentic constructivism, Sikkink argues that there is a *justice cascade* at the international level which is challenging the old ideas about state sovereignty and sovereign immunity when it comes to the prosecution of high-ranking state officials for international crimes. Sikkink argues that the foundation of this *justice cascade* is the work of the human rights movement. As a result of this, state leaders are increasingly being held accountable whether through retributive mechanisms like criminal prosecutions or restorative mechanisms like truth commissions.

Central to both of these claims is the argument that the traditionally anarchic, state-centred international system is being domesticated by the right-holding individual or what Teitel identifies as the *humanity's law* subject. Further, both authors argue that the impetus for this shift in the international system was the end of the Cold War. The changes in the international system following the collapse of the Soviet Union created the necessary political space for these actors to assert their demands at the international level. I refer to this argument as the Cold War Thesis, and it has been widely accepted by scholars in the field of transitional justice as characterizing *the* defining moment for the field. The thesis suggests that, prior to the end of the Cold War, demands for greater accountability of states were stifled by the conflict between the United States and Soviet Union and the demands of power politics. The fall of the Soviet Union, therefore, signified the victory of liberalism in the marketplace of ideas, which meant that chains could finally be placed on state leaders who violate the basic rights of their citizens. This consequently led to the decision to adopt the International Criminal Tribunal for the

former Yugoslavia and the International Criminal Tribunal for Rwanda thereby unleashing the power of justice onto the international scene. Teitel refers to this phenomenon as the normalization of transitional justice.

The early 1990s also saw the growth of the academic theory known as the Democratic Peace Theory. This theory is based on a series of historical empirical analyses, which suggest that democracies do not fight one another. Influenced by Immanuel Kant's perpetual peace argument, these scholars argue that as the world increasingly democratizes, we will reach greater and greater levels of peace in the international system. The central normative claim of Democratic Peace Theory is that the promotion of democracy internationally is good for international peace. This claim is also supported by its sister thesis, known as the Liberal Peace Thesis. The Liberal Peace Thesis asserts that for states emerging from conflict the best route to ameliorate the sources of this conflict is the adoption of liberal democratic institutions. Yet, beyond this idealistic notion of international peace, the growth of democracies around the world has particularly strategic value for the United States. Consequently, the Democratic Peace Theory and the Liberal Peace Thesis were used as justification for merchandizing democracy and free market capitalism abroad. In contrast to the Cold War Theory, this project argues that it was this strategic value placed on Democratic Peace Theory and Liberal Peace Thesis by the United States that was integral in the normalization of transitional justice at the international level.

The relationship between Democratic Peace Theory and the Liberal Peace Thesis on the one hand and the Cold War Thesis on the other is central to this argument. For many scholars, the Democratic Peace Theory and the Liberal Peace Thesis have an air of

neo-imperialism or, at the very least, privilege certain western ideals.<sup>3</sup> However, the field of transitional justice has remained largely insulated from such criticism. This project suggests that the Cold War Thesis helps explain why this is the case. While Democratic Peace Theory and, more recently, the Liberal Peace Thesis have been criticized for the role they play in legitimating American democracy promotion, transitional justice is often viewed as a project, not of the most powerful states, but, instead, of the *least* powerful actors in the international system: vulnerable individuals (whose claims are supported by human rights activists). Transitional justice theory is often praised for the work it has done in challenging state sovereignty and lifting human rights to the international level. Important here is the belief that the end of the Cold War allowed for an opening of political space for the work of human rights activists to take hold. What this suggests, then, is that transitional justice stands outside and against power.

Central to the field of transitional justice is the belief that it has been an effective tool for the protection of international human rights, and that in doing so, it has challenged state sovereignty. This project suggests instead that this reading requires a liberal interpretation of the importance of human rights. In contrast, more critical scholars challenge the moral certainty of human rights, suggesting that they have a more ambiguous character than most would like to admit. They can certainly be understood as tools for contesting the power of the state, but by taking a more Foucauldian understanding of power, human rights can also be understood as a disciplinary discourse,

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<sup>3</sup> For example, see Oliver Richmond, *Peace in International Relations* (New York: Routledge, 2008).

which sets specific standards of behaviour. By accepting the Cold War Theory without reserve, theorists in the field have failed to critically interrogate the way transitional justice mechanisms are, perhaps, instrumental in perpetuating this disciplinary discourse.

In adopting such a view, this project looks to examine the way the growth of transitional justice cannot be understood apart from American democracy promotion. Of utmost importance for this work was Ronald Reagan's re-interpretation of human rights, transforming them from international standards to values that are fundamentally embedded in a state's political institutions and legal structures. For Reagan, the protection of human rights was best served through the promotion of democracy abroad with the American system serving as the foremost model to follow. Reagan's re-interpretation is significant because it took human rights from an obscure concept to concrete policy recommendations; human rights protection and democratization became synonymous. From then on, human rights became an important tool in the American foreign policy arsenal. As a symbol of human rights protection, it is understandable that the international community, led by the United States, turned to transitional justice as a central tool in democracy building during the 1990s. It was in this era, of course, that the international community established the International Criminal Tribunal for the Former Yugoslavia, followed closely by the International Criminal Tribunal for Rwanda. Much less a tool of challenging state sovereignty, transitional justice was quickly adopted as a practice to confirm the importance of democracy.

Ultimately, one can ask why this matters at all. Regardless of its connection to democracy promotion (American led or not), transitional justice has been important for bringing attention to the needs of survivors after conflict. However, as recent criticism in

the field suggests, justice in this context has been shaped by the assumption of a transition to liberal democracy. A fundamental component of liberal democracy building is the construction of free market capitalism, driven by neoliberalism. While neoliberalism is generally associated with its economic dictates, its importance must be understood in terms of a normative theory which suggests that human well-being is best advanced by liberating individual entrepreneurial freedoms within a governance structure that protects private property and promotes free trade. In this view, the state's role is limited to guaranteeing the integrity of money and private property through the establishment of a military, police force, and legal structures. Importantly, neoliberalism advocates the removal of welfare entitlements, which might act as a disincentive for individuals to participate in the market. What this means is that attempts to protect economic and social rights, which in many cases require a strong social safety net, are severely limited. Here, we can see that the values important to *the transition* are considered prior to justice and, therefore, set the boundaries of what is acceptable as justice. What this suggests is that the transition question which privileges liberal democracy must be subject to further scrutiny if justice is to remain an open concept and therefore, responsive to the diverse understandings of justice.

In order to destabilize this consensus around liberal democracy, this project argues that the liberal society is not a moral necessity. Of importance here is the work of Foucault. In the field of transitional justice, we have failed to consider the operation of power as anything but a repressive force. Of course, the idea of challenging state power is supposedly at the centre of the transitional justice discourse. The field is built on the notion that certain mechanisms, including legal prosecutions and truth commissions, can

curtail the power of state leaders (as well as rebel leaders) when they act against international norms of behaviour. As Bassiouni writes, there is a “growing discontent with the practice of granting impunity, particularly for the leaders who have ordered the commission of atrocities and the senior commanders who executed these unlawful orders... the *realpolitik* of reaching political settlements without regard to a post-conflict justice component is no longer acceptable.”<sup>4</sup> Here, the literature is very clear on the relations of power. Transitional justice can provide once powerless victims, with the necessary tools (i.e. human rights) to challenge the seemingly untouchable power of state leaders.

In response to this, I draw on the Foucault-inspired work of Ivison, Golder, and Douzinas to suggest that human rights may be better understood as a conduit for power rather than checks on power. For Foucault, power must be understood as something that is diffuse and never in the possession of a single agent.<sup>5</sup> In other words, individuals do not wield power like a stick; rather, they mediate power by regulating behaviour. Such an understanding recognizes that power is not simply an aspect of the political arena but is “produced from one moment to the next, at every point, or rather in every relation from one point to another.”<sup>6</sup> Thus, power is indeterminate and omnipresent because it is

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<sup>4</sup> M. Cherif Bassiouni, “Accountability for violations of International Humanitarian Law and other Serious Violations of Human Rights,” in *Post-Conflict Justice* ed. by M. Cherif Bassiouni (Ardsey, NY: Transnational Publishers, Inc., 2002), 3.

<sup>5</sup> Michel Foucault, “Two Lectures,” in *Power/Knowledge: Selected Interviews & Other Writings 1972-1977*, ed. Colin Gordon (New York: Pantheon Books, 1980), 98.

<sup>6</sup> Michel Foucault, *The History of Sexuality*, vol. 1, *An Introduction*, trans. Robert Hurley (New York: Vintage Books, 1990), 93.



“exercised from innumerable points.”<sup>7</sup> Accordingly, power is diffused and embodied in the dominant discursive structure “that sets the standards of accepted or expected behaviour.”<sup>8</sup> As the rite of passage for the transformation of societies from conflict to peace and authoritarianism to liberal democracy, as advanced by Teitel and others, transitional justice is fully enmeshed in this manifold of power. Further, it is not simply the practice of transitional justice that needs to be challenged, but the academic field, itself. We cannot fully grasp Foucault’s understanding of power in isolation from his understanding of discourse and knowledge generation:<sup>9</sup> “there can be no possible exercise of power without a certain economy of discourses of truth which operates through and on the basis of this association. We are subjected to the production of truth through power and we cannot exercise power except through the production of truth.”<sup>10</sup> This is what Foucault means by power/knowledge. Power is articulated in the accepted forms of knowledge, scientific understandings, and ‘truth’. Indeed, the knowledge that transitional justice produces further entrenches these practices.

Given that the site of transition in which the language of transitional justice is used is a place of continued deep contestation, it seems necessary for the field to be centred on more fluid and flexible concepts in order for theorization to avoid closure around any single vision of society. To open up transitional justice, then, is to call into question the ontological certainty around *the transition* in transitional justice theory.

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<sup>7</sup> Foucault, *The History of Sexuality*, 92.

<sup>8</sup> Ivan Manokha, “Foucault’s Concept of Power and the Global Discourse of Human Rights,” *Global Society* 23, no. 4 (2009): 430.

<sup>9</sup> Manokha, “Foucault’s Concept of Power and the Global Discourse of Human Rights,” 430.

<sup>10</sup> Foucault, “Two Lectures,” 93.

Drawing on the work of scholars like Richard Rorty, Jacques Derrida, and Stuart Hampshire, this project argues that, for justice to remain a responsive concept we must avoid closure around a single definition—that is, our theories of justice must not be limited by the transition to liberal democracy. The work of Rorty is central for understanding that the language we use to speak about the external world is not neutral. Words are not merely labels for a material reality but rather give meaning to “our” world. Central here is that we all carry with us a particular language that we use to rationalize our beliefs and desires, but that these do not express any truths about the world. They are not, as Rorty would say, final, but are merely one set of words—or a vocabulary—among many. Therefore, I argue that we must resist viewing these paradigms as expressing a universal truth about justice. Rather, they are vocabularies, which express particular beliefs about the world. In the field of transitional justice, these vocabularies have been theorized as necessary rules to be followed in the transition to liberal democracy.

In response, I rely on Derrida’s unique perspective on justice to challenge these boundaries in transitional justice. For Derrida, the “impossibility” of justice is to recognize that we must strive for justice, but know that justice will never be conclusively defined. It will never be something we can touch and hold onto. Instead, justice is something that we cannot define because to do so is to reduce it to a finite object. To desire the “impossible,” then, is to “strain against the constraints of the foreseeable and possible, to open horizons of possibility to what one cannot foresee or foretell.”<sup>11</sup> For

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<sup>11</sup> John D. Caputo, *Deconstruction in a Nutshell: A Conversation with Jacques Derrida* (New York: Fordham University Press, 1997), 133-134.

Derrida, justice requires one to pass through the “ordeal of the undecidable.”<sup>12</sup> That is, a just decision is one that is not guaranteed by a rule. In this light, for transitional justice theory to impose a definite purpose for transitional justice mechanisms—the attainment of a liberal democracy—it eliminates the possibility of justice. The only “legitimate” action, therefore, is that which conforms to the authoritative liberal democratic framework. This must be challenged.

Hampshire’s approach to conflict and justice can shed light on the necessary task of transitional justice theory. Hampshire suggests that one cannot approach conflict in a society with the belief that it can be resolved once and for all. Instead, when it comes to matters of substantive justice including beliefs about morality and ethics, Hampshire argues that conflict is interminable. All we can strive for are institutions that allow for all sides to be heard. In other words, there is no final solution to be had, but the solution is to hear all sides. Of course, transitional justice theory approaches conflict with a solution that is fundamentally grounded in the Liberal Peace Thesis. What transitional justice has failed to recognize is that this fundamentally privileges certain voices at the expense of others. The central aim of this dissertation is to generate greater discussion in the field around this decision.

Chapter two of this project reviews the literature and examines the study of the field of transitional justice. More than a literature review, this chapter provides an account of the two consensuses in the field: (1) that societies emerging from conflict can in every case transition to a final end-point—liberal democracy; and (2) that transitional

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<sup>12</sup> Jacques Derrida, “Forces of Law,” in *Acts of Religion* ed. Gil Anidjar (New York: Routledge, 2002), 252.

justice mechanisms, which assist in this transition, emerged as a result of the liberalizing international system following the end of the Cold War.

Chapter three provides the tools for carrying out an interrogation of the theory of transitional justice. This chapter draws a fundamental distinction between traditional theory, which operates within fixed parameters without question, and critical theory, which looks to challenge these boundaries. Much of transitional justice scholarship operates within boundaries that it does not question. By adopting a critical stance, this project looks to transgress these boundaries. The framework for this project is defined by a deconstructive attitude. Deconstructing transitional justice theory should not be interpreted as an attempt to destroy the field altogether. Instead, this analysis is driven by a desire to loosen the boundaries that circumscribe justice. In doing so, it hopes to show that the current vocabularies dominant in the field privilege certain perspectives over others.

Chapter four provides a more in-depth examination of the dominant paradigms of justice in transitional justice including retributive, restorative and reparative. While each paradigm draws on a diverse set of ideas regarding justice, this chapter argues that the field of transitional justice has imposed a definition of justice that supports the construction of a liberal democracy. Further, this chapter examines the emerging quantitative studies in the field of transitional justice which look to evaluate the effectiveness of these transitional justice mechanisms. Interestingly, the indicators of success that are often adopted are those that conform to the values of liberal democracy. In doing so, these studies produce knowledge about transitional justice that further entrenches these values in the field.

Chapter five argues that the field's prominence is not a matter of a progressive unfolding of events, as the Cold War Theory asserts. Instead, I argue that the myth of the end of the Cold War as an opening for the domestication of the international system is a nice story that conceals the fact that transitional justice only became useful as a tool in democracy promotion. This, then, explains why the consensus of finality is so important to the field. For without the belief that transitional justice is working towards a final endpoint—liberal democracy—its strategic usefulness withers away.

Chapter six draws on the work of Derrida, Hampshire, and Agamben, in order to transgress the imposed boundaries in transitional justice theory. The dominant theories in transitional justice rely on a Platonic understanding of justice in which justice is the attainment of some ideal endpoint. Overwhelmingly, the theorized endpoint is a liberal democracy. This teleological thinking actually undermines the possibility of justice. In contrast, if we view the world in Heracleitean terms, we must understand that conflict is interminable. Justice, therefore, is not the attainment of some ideal endpoint, but must also be understood as an interminable process. Such a reading is meant to open transitional justice theory to allow in those voices that do not conform to the vocabulary of liberalism dominant in the field.

Finally, in the conclusion, I argue that the impetus for this project was the recognition that transitional justice has failed to respond to the calls for greater economic and social justice. Yet, the task was not one of merely imposing another new definition of justice as this cannot account for the “unforeseeable” demands of justice. Instead, the challenge is to show that the current theorizing in transitional justice allows for the privileging or domination of certain voices over others. Therefore, the introduction of

postmodern theory into the field of transitional justice is important for guarding against the closing of justice around *any* particular conception.

## Chapter 2

### 2 Literature Review

#### 2.1 Introduction

The definition of transitional justice remains contested, but, in general, refers to the legal and non-legal mechanisms that societies can adopt in the wake of mass human rights violations. These mechanisms primarily include criminal prosecutions, truth commissions, reparations, lustration, and institutional reform. Conceptually, the range of crimes covered under this definition *can* be broad; however, the field has tended to focus principally on Genocide, Crimes against Humanity, War Crimes, grave breaches of the Geneva Conventions, and violations of civil and political rights. These crimes reflect the primary concern of transitional justice: states in transition from repressive authoritarian rule and/or from armed conflict to peace. Historically, these “transitional” states have struggled with a set of moral, legal, and political challenges including *what to do about the past* and *how to move forward*. Fueled by fears of never-ending cycles of conflict, the field of transitional justice emerged to promote specific mechanisms to aid in the transitions to democracy and peace.

#### 2.2 The Study of Transitional Justice

Transitional justice as a distinct field of study emerged sometime in the late 1990s to early 2000s.<sup>1</sup> Led by legal scholars like Diane Orentlicher and Neil Kritz, the field quickly gained in popularity and is now fully enmeshed in academia with its own

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<sup>1</sup> Christine Bell, “Transitional Justice, Interdisciplinarity, and the State of the ‘Field’ or ‘Non-Field’,” *International Journal of Transitional Justice* 3, no. 1 (2009): 8.

journals, centres of research and academic programs. In addition to the academic side, various non-governmental organizations, including the International Center for Transitional Justice, support the work of transitional justice practitioners.

Initially dominated by legal scholars, the early focus of the field was on questions of accountability in democratic transition. According to Ní Aoláin and Campbell, this “led to the development of ‘transitional justice’ as an identifiable set of discourses in the first instance.”<sup>2</sup> However, as the field expanded across disciplines to include anthropology, development studies, philosophy, political science, psychology, sociology, and theology, the focus went beyond legal justice to include non-legal conceptions of justice, including truth-telling and reparations as well as questions of reconciliation, healing, forgiveness, and so on. Consequently, as the field progressed, there was a surge of comparative institutional analyses of the justice mechanisms employed by societies as they sought justice following mass atrocities.<sup>3</sup> Despite the apparent consensus on the need for justice, there was little agreement on what form justice should take in the field.

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<sup>2</sup> Fionnuala Ní Aoláin & Colm Campbell, “The Paradox of Transition in Conflicted Democracies,” *Human Rights Quarterly* 27. 1 (February 2005): 174. (A classic example is the question posed by Michael Feher, “How should nascent democracies address the human rights violations that plagued their societies’ recent past?” See: Michael Feher, “Terms of Reconciliation,” in *Human Rights in Political Transitions: Gettysburg to Bosnia*, ed. Carla Hess and Robert Post, 325-338 (Cambridge, Mass.: Zone Books, 1999).

<sup>3</sup> See: Alexandra Barahona de Brito, Carmen Gonzalez-Enriquez, and Paloma Aguilar, eds., *The Politics of Memory: Transitional Justice in Democratizing Societies* (Oxford: Oxford University Press, 2001); Tristan Anne Borer, ed., *Telling the Truths: Truth-telling and Peace Building in Post- Conflict Societies* (Notre Dame: University of Notre Dame Press, 2006); Eric Stover and Harvey M. Weinstein, eds., *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (Cambridge: Cambridge University Press, 2004); Neil Kritz, ed. *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Washington DC: United States Institute of Peace Press, 1995); Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Hill Press, 1998); Robert I. Rotberg and Dennis Thompson, eds., *Truth v. Justice: The Morality of Truth Commissions*, Princeton: Princeton University Press, 2000); Naomi Roht-Arriaza and Javier Mariezcurrena, eds., *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice*, Cambridge: Cambridge University Press, 2006); Priscilla Hayner, *Unspeakable Truths: Facing the Challenges of Truth Commissions* (London: Routledge, 2002).



The expansion of transitional justice beyond its legalistic beginnings resulted in a debate between those who advocated for criminal prosecutions in the wake of mass human rights violations and those who promoted truth commissions, and the search for truth as vital following intense conflict.<sup>4</sup> Connected to this was the debate between retributive justice and restorative justice. Taking on a more philosophical tone, this debate centred on the “underlying philosophy of justice that should inform accountability for past violence.”<sup>5</sup>

For scholars who subscribe to justice as within the retributive paradigm, justice resembles the western-styled understanding by taking the form of criminal prosecutions followed by some form of punishment for those found guilty.<sup>6</sup> These scholars suggest that there are several positive consequences of punishment including, among others: the deterrence of future crimes;<sup>7</sup> preventing act of vengeance, thus breaking the cycle of

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<sup>4</sup> For an early argument for criminal prosecutions, see Diane Orentlicher, “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,” *Yale Law Journal* 100, no. 8 (1991): 2537-2615; Similarly, for an early argument for truth commissions, see Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (New York: Routledge, 2002); and Miriam J. Aukerman, “Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice,” *Harvard Human Rights Journal* 15 (2002): 29-98.

<sup>5</sup> Nevin Aiken, *Identity, Reconciliation and Transitional Justice: Overcoming Intractability in Divided Societies* (New York: Routledge, 2013), 24.

<sup>6</sup> Literature on retributive justice is vast. See: Jean Hampton, “The retributive idea,” in *Forgiveness and Mercy*, eds. Jeffrie Murphy and Jean Hampton (Cambridge: Cambridge University Press, 1988); Naomi Roht-Arriaza, “State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law,” *California Law Review* 78. 2 (1990): 449-513; Declan Roche, “Retribution and restorative justice,” in *The Handbook of Restorative Justice*, ed. Gerry Johnstone and Daniel W. Van Ness (Portland, OR: Willan Publishing, 2007).

<sup>7</sup> Jon Elster, “Retribution,” in *Retribution and Reparations in the Transition to Democracy* ed. Jon Elster (Cambridge: Cambridge University Press, 2006), 48.

violence;<sup>8</sup> and building the status of a new state (by rejecting the old state) and increasing the respect for law.<sup>9</sup>

On the other hand, restorative justice emerged from a much different view of wrongdoing.<sup>10</sup> In recognizing the communal aspect of life, such a perspective views crime as both a consequence of, and contributor to, damaged relationships within a community. A criminal act, therefore, signals an existing brokenness within the community. In contrast to the retributive paradigm, restorative justice emphasizes the “transformation of subjective factors that impair community, such as anger, resentment, and desire for vengeance.”<sup>11</sup> Any response to such collective brokenness must seek to restore the basic fabric of society by including the victim and the offender, as well as other community members.<sup>12</sup> Restorative justice draws inspiration from philosophies and beliefs from around the world, including Christianity,<sup>13</sup> Aboriginal approaches to justice,<sup>14</sup> and African cultural concepts like *Ubuntu*.<sup>15</sup> Such restorative justice principles

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<sup>8</sup> Graham T. Blewitt, “The Importance of a Retributive Approach to Justice,” in *The Legacy of Nuremberg: Civilizing Influence or Institutionalized Vengeance?* ed. David A. Blumenthal and Timothy L.H. McCormack (Leiden: Martinus Nijhoff Publishers, 2008), 39.

<sup>9</sup> Mark Drumbl, *Atrocity, Punishment, and International Law* (New York: Cambridge University Press, 2007), 173.

<sup>10</sup> Howard Zehr, *The Little Book of Restorative Justice* (Intercourse, PA: Good Books, 2002), 22.

<sup>11</sup> Mark R. Amstutz, “Restorative Justice, Political Forgiveness and the Possibility of Political Reconciliation,” in *The Politics of Past Evils: Religion, Reconciliation, and the Dilemmas of Transitional Justice*, ed. Daniel Philpott (Notre Dame: University of Notre Dame Press, 2006), 166-167.

<sup>12</sup> Zehr, *The Little Book of Restorative Justice*, 21.

<sup>13</sup> Zehr, *The Little Book of Restorative Justice*; Daniel Philpott, “Peace after Genocide,” *First Things* (Jun/Jul 2012): 39-46.

<sup>14</sup> Rupert Ross, *Returning to the Teachings: Exploring Aboriginal Justice* (Toronto: Penguin Canada, 1996).

<sup>15</sup> Elizabeth Kiss, “Moral ambitions within and beyond political constraints,” in *Truth v. justice: The Morality of Truth Commissions*, ed. Robert I. Rotberg and Dennis Thompson, 68-98 (Princeton: Princeton University Press), 81.

have become the guiding moral force behind the development of truth and reconciliation commissions following mass atrocities. The purported benefits of truth and reconciliation commissions include, among others: eliminating a regime's ability to deny truth;<sup>16</sup> restoring the dignity of victims;<sup>17</sup> promoting forgiveness;<sup>18</sup> and fostering reconciliation.<sup>19</sup>

Finally, scholars of transitional justice have identified reparative justice as a third paradigm. The starting ground for the reparative paradigm is the notion that humans and the relationships they build need to be repaired from time to time.<sup>20</sup> Such brokenness is certainly evident following episodes of mass violence. For Weitekamp, the generally accepted rationale behind the concept of reparations is the "act of restoring; restoring to its rightful owner; the act of making good or giving equivalent for any loss, damage or injury; and indemnification."<sup>21</sup> Such a response to crime was historically much more common than relatively more recent conceptions of justice like retribution.<sup>22</sup>

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<sup>16</sup> Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* 2<sup>nd</sup> ed. (New York: Routledge, 2011), 22.

<sup>17</sup> Kiss, "Moral ambitions within and beyond political constraints," 71-72.

<sup>18</sup> Minow, *Between Vengeance and Forgiveness*.

<sup>19</sup> Kader Asmal, Louise Asmal, and Ronald Suresh Roberts, *Reconciliation through truth: a reckoning of apartheid's criminal governance* (Cape Town: David Philip Publishers, 1997), 6.

<sup>20</sup> Elizabeth V. Spelman, "Coexistence and Repair," in *Imagine Coexistence*, ed. Antonia Chayes and Martha Minow (San Francisco: Jossey-Bass, 2003), 236. For more information on the purported power of truth commissions see: David Mendeloff, "Truth-Seeking, Truth-Telling, and Post-conflict Peacebuilding: Curb the Enthusiasm?" *International Studies Review* 6, no. 3 (2004): 363-375.

<sup>21</sup> Elmar Weitekamp, "Reparative Justice: Towards a victim oriented system," *European Journal on Criminal Policy and Research* 1. 1 (1993): 70. Current terminology for reparative justice includes: restitution, reparative schemes, victim-offender reconciliation, redress, mediation programmes, community service, atonement, indemnification, and compensation. According to the author, such terms are generally used interchangeably, but share this same conceptual basis.

<sup>22</sup> Weitekamp, *Reparative Justice*, 70-73.

In post-conflict societies, the concept of reparations is frequently broadened from its historically narrow focus on monetary compensation. In the transitional justice literature, the term refers to several legal and social measures including material reparations like cash payments or provisions for education, health and housing, restitution, and symbolic measures like commemorations, memorials, and apologies.<sup>23</sup> Reparative mechanisms have largely been overshadowed by the attention given to retributive and restorative justice; however, as for some victims the latter are the most concrete response to human rights abuses.<sup>24</sup>

### 2.3 Emerging Criticism of Justice

Transitional justice has not been without its critics, from both within the field and outside of it. First, various critics have sought to challenge the assumptions of legalism embedded in the field. This, of course, goes back to the debate between retributive and restorative justice that dominated the early transitional justice literature. For some restorative advocates, the dominance of retributive justice has very much been about the power of the international community to impose its will on weaker, conflict-ridden states. These critics envision power as the international community's ability to get smaller states to prosecute their leaders, where they, in all likelihood, might not otherwise have done so.

Such a conception of power relies on an unequal relationship between those who employ power—the international community—and those who are subject to it—states

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<sup>23</sup> Pablo de Greiff, "Justice and Reparations," in *The Handbook of Reparations*, ed. Pablo de Greiff (Oxford: Oxford University Press, 2006), 453.

<sup>24</sup> Pablo de Greiff, "Repairing the Past: Compensation for Victims of Human Rights Violations," in *The Handbook of Reparations*, ed. Pablo De Grieff (Oxford: Oxford University Press, 2006), 1-2.

and state leaders emerging from conflict. The creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) and, following this, the establishment of the International Criminal Court (ICC), are examples of the external imposition of justice in cases where impunity for crimes might have otherwise occurred. As Llewellyn and Howse suggest, the “criminal prosecution of perpetrators... has seemed the most obvious avenue, especially to Western human rights activists or international lawyers.”<sup>25</sup> As the field developed, restorative and retributive models were eventually viewed as legitimate approaches to justice after mass atrocities. In the UN Secretary-General’s Report of 2004, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, truth commissions were cited as an “important mechanism for addressing past human rights abuses.”<sup>26</sup> Further, under the section, “Articulating a Common Language of Justice for the UN,” the report states that,

The notion of transitional justice discussed in the present report comprises the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.”<sup>27</sup>

The report made it clear that both truth commissions, as mechanisms of restorative justice, and criminal prosecutions, as mechanisms of retributive justice, as well as reparations, are viewed on equal footing by the UN.

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<sup>25</sup> Jennifer J. Llewellyn and Robert Howse, "Institutions for restorative justice: The South African Truth and Reconciliation Commission." *University of Toronto Law Journal* 49, no. 3 (1999): 358.

<sup>26</sup> *United Nations Secretary General, Report of the Secretary General: The rule of law and transitional justice in conflict and post-conflict situations, 2004, S/2004/616*: 17.

<sup>27</sup> *United Nations Secretary General, Report of the Secretary General: The rule of law and transitional justice in conflict and post-conflict situations, 2004, S/2004/616*: 4.

More recently, there has been a focus on the neglect of socio-economic rights in states transitioning from conflict.<sup>28</sup> This work draws considerable inspiration from human rights activist Paul Farmer, who argues that “human rights violations are not accidents; they are not random in distribution or effect. Rights violations are, rather, symptoms of deeper pathologies of power and are linked intimately to the social conditions that so often determine who will suffer abuse and who will be shielded from harm.”<sup>29</sup> In terms of transitional justice, a focus on trials and reparations, which ignores economic and social inequalities, is “like treating the symptoms while leaving the underlying illness to fester” and the “diagnosis of human rights violations abstracted from the dynamics of social power and conflict” overlooks the fundamental pathologies of a

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<sup>28</sup> This project will focus on the general critiques leveled against transitional justice and its prioritization of civil and political rights over economic and social rights. In addition to these critiques, there is a growing body of feminist critical scholarship that examines the way transitional justice mechanisms have failed to adequately address crimes of sexual violence against women. See for example, Karen Engle, “Feminism and its (Dis)contents: Criminalizing War time Rape in Bosnia-Herzegovina,” *The American Journal of International Law* 99, no. 4 (Oct, 2005): 778-816. Other critical feminist scholarship has focused on the way the western adversarial model of justice has tended to reduce women to mere victims lacking agency. For example, see Julie Mertus, “Southing from the bottom of the well: the impact of international trials for wartime rape on women’s agency,” *International Feminist Journal of Politics* 6, no. 1 (2004): 110-128. Finally, in terms of the argument made here, the work of Fionnuala Ní Aoláin is important as it examines the way transitional justice mechanisms have tended to hierarchize civil and political violations of bodily integrity at the expense of violations that are a result of the lived experience of women during conflict. As Ní Aoláin argues, “[w]omen experience violence in multiple forms in many societies. Violence is experienced in both the public and private spheres ... in conflicted societies, women remain vulnerable to intimate violence but are also, as has been extensively documented, the target of sex-based violence that is intimately related to the methods and means of warfare used by combatants. International law has historically avoided regulating such sex-based violence” (832). The narrow focus on civil and political rights means that, while some harms experienced by women will be addressed by transitional justice mechanisms, many will not. The social context of violence must necessarily be addressed in order for transitional justice mechanisms to better respond to the various ways women have experienced conflict. See: Fionnuala Ní Aoláin, “Political Violence and Gender During Times of Transition,” *Columbia Journal of Gender and the Law* 15, no. 3 (2006): 829-849.

<sup>29</sup> Paul Farmer, *Pathologies of Power: Health, Human Rights, and the New War on the Poor*, (Berkeley: University of California Press, 2005), 7.

society.<sup>30</sup> Other critics in the field are slowly noting the limited exposure socio-economic, structural factors receive within transitional justice. Miller argues that “the reduction of economic questions to the need for reparations and, in turn, a focus on the pressure on reparations as an issue of limited resources in a nascent economy curb the redistributive possibilities of the project of transitional justice.”<sup>31</sup> By ignoring economic questions, the transitional justice literature does not focus on the economic causes of conflict, or on their potential to undermine peace. Further, Miller suggests that there is often a complete disregard for the role that international actors, including external states and multinational corporations, play in conflict. Such oversight, according to Miller, makes “transnational structural imbalances seem irrelevant with regard to internal violence or repression.”<sup>32</sup>

Mani concludes that this failure to address questions of equality in post-conflict society is the result of a mix of factors including risking a negative response from elite groups and institutions that, for some reason, reject ideas of redistribution; a desire to maintain an economically-friendly environment for business communities and international investors; and/or a lack of resources to carry out any significant policy of redistribution.<sup>33</sup> Mani suggests that peacebuilding, including transitional justice, has failed to adequately address the real concerns of survivors of conflict. Peacebuilding

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<sup>30</sup> Lisa J. Laplante, “Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework,” *International Journal of Transitional Justice* 2, no. 3 (2008): 333.

<sup>31</sup> Zinaida Miller, “Effects of Invisibility: In Search of the ‘Economic’ in Transitional Justice,” *International Journal of Transitional Justice* 2, no. 3 (2008): 286.

<sup>32</sup> Miller, *Effects of Invisibility*, 287.

<sup>33</sup> Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Cambridge: Polity Press, 2002), 151.

agents have often focused on reconstructing state institutions while overlooking questions of distributive justice, which often underlie conflict in many countries.<sup>34</sup> While general poverty as a result of resource scarcity is considered a probable cause of conflict, in reality, a more likely explanation of civil strife is injustice—that is, the prevailing social, economic, and political structures that favour an elite few at the expense of the rest of society.

Similarly, Laplante suggests that the international community must broaden its understanding of justice to include structural violence, referring to the embedded socioeconomic conditions that have combined to produce such poverty and inequality in a society.<sup>35</sup> For example, she believes that there needs to be an explicit recognition of economic, social, and cultural rights, in order to legitimate and protect social justice. While some mechanisms, like truth commissions, highlight the impact of socioeconomic factors in a historical context, they do not present them as a rights violation, *per se*. Without situating them in a language of rights, there are no explicit duties to be fulfilled. Instead, Laplante suggests that it is left to political leaders to decide whether or not to address such structural concerns.<sup>36</sup> The lack of focus on socio-economic injustices is a failure of justice in the field and is, perhaps, a result of the prioritization of civil and political rights over economic and social rights.

These concerns are borne out in the work of Simon Robins. Robin's fieldwork in Nepal suggests that "a liberal discourse, combining ideas of democracy, rights, and

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<sup>34</sup> Mani, *Beyond Retribution*, 127.

<sup>35</sup> Laplante, *Transitional Justice and Peace Building*, 333.

<sup>36</sup> Laplante, *Transitional Justice and Peace Building*, 341.



development has become hegemonic as a result of the priorities and resources of international agencies and the willing co-optation of national elites who have benefited from an association with it, through access to funds and careers.”<sup>37</sup> Robin’s interviews, however, reveal a fundamental disconnect between the priorities put forward by this liberal discourse and the needs of victims. In particular, he suggests that, while the civil society in Nepal generally advocates a judicial agenda, the victims themselves place a higher priority on social and economic needs.<sup>38</sup>

Robins suggests that while, theoretically, the international community recognizes the importance of both civil and political, *and* economic and social rights, “in both the global rights discourse and in praxis (in Nepal and elsewhere), social, economic, and cultural rights are far less emphasized... potential compensation and economic support for victims is always framed in terms of a legally based ‘right to reparation’, essentially reframing the issue as a civil/political right.”<sup>39</sup> Robins concludes that, “while human rights remains a tool of strategy and mobilization for oppressed groups seeking justice after conflict... locally grown, ‘non-human rights’ efforts to both address the issues arising from conflict and fight for political and social change in the system that led to conflict can provide unique input to create a transitional justice process that can give space to the agendas of victims.”<sup>40</sup>

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<sup>37</sup> Simon Robins, “Transitional Justice as an Elite Discourse: Human Rights Practice Where the Global Meets the Local in Post-conflict Nepal,” *Critical Asian Studies* 44, no. 1 (2012): 9.

<sup>38</sup> Robins, “Transitional Justice as an Elite Discourse,” 15.

<sup>39</sup> Robins, “Transitional Justice as an Elite Discourse,” 20.

<sup>40</sup> Robins, “Transitional Justice as an Elite Discourse,” 27.

These criticisms serve as an important starting point for this project. That the socio-economic plight of victims in post-conflict societies has only, until recently, resonated very little within the field of transitional justice is problematic. The prioritization of civil and political rights over economic and social rights was a common feature of early literature on human rights. As Shue points out, the fulfillment of economic and social rights was believed to place an unreasonable burden on the duty-bearer and, therefore, the aspiration to honour such rights was viewed as having “dangerously utopian overtones.”<sup>41</sup> This treatment of economic and social rights was carried over into the field of transitional justice. Consequently, these criticisms are an important reminder that justice in response to human rights violations must be an open concept. Shue seeks to put economic and social rights on par with civil and political rights. For Shue, “one of the chief purposes of morality in general, and certainly of conceptions of rights, and of basic rights, above all, is indeed to provide some minimal protection against utter helplessness to those too weak to protect themselves. Basic rights are a shield for the defenseless against at least some of the more devastating and more common of life’s threats, which include... loss of security and loss of subsistence.”<sup>42</sup> The question, then, is how to translate these beliefs into the field of transitional justice.

In highlighting the prioritization of retributive over distributive justice, and civil and political over economic and social violations, these critiques suggest that transitional

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<sup>41</sup> Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* 2<sup>nd</sup> Edition (Princeton: Princeton University Press, 1996), 154-155. For an example of a position which views economic and social rights as inferior to CIVOPOL see: Maurice Cranston, *What are Human Rights?* (New York: Basic Books, 1973).

<sup>42</sup> Shue, *Basic Rights*, 18.

justice, in many ways, represents the interests of the West and, particularly, of global capitalism. They challenge the conception of justice in transitional justice, pushing for a more inclusive definition of justice in post-conflict societies. Returning to Laplante's analogy of "treating the symptoms while leaving the underlying illness to fester" these critiques suggest that the current cure for the illness in these post-conflict societies is lacking.<sup>43</sup> In highlighting this, they hope to find a more accurate diagnosis in order to heal these societies.<sup>44</sup>

These critiques, while pertinent within the field of transitional justice, highlight a significant assumption in the field: *that with the right kind of justice, we can progress to a state of existence that no longer requires such justice.* Transitional justice implies finality. In other words, the rights kind of justice will lead us out of transition. Such a teleological view maintains the assumption that all societies are transitioning, or progressing, towards a final end-point.

The idea that transitional justice, and the societies in which it operates, is advancing towards a final end-point is problematic for four reasons: First, it fundamentally structures our actions—that is, once we have set our sights on an ideal end-point, we tend to close ourselves off to all options except those that will contribute to this final point. Second, setting a final end-point, of course, closes the door on alternative end-points. Third, setting a final end-point, especially if it relate to justice, suggests a certain level of permanency that over-simplifies the complexity of life. In societies

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<sup>43</sup> Laplante, "Transitional Justice and Peace Building," 333.

<sup>44</sup> Laplante, "Transitional Justice and Peace Building," 333.

emerging from conflict, such an assumption suggests that the quantity of justice needed for societies emerging from conflict can be measured in doses. A dose of retributive and a dose of restorative, therefore, are viewed as sufficient to heal society. Finally, to assert that we are advancing towards a final end-point opens the door for the most powerful to decide what that end-point is going to look like. It does not maintain the flexibility that is arguably necessary in states emerging from conflict. Indeed, the site of transition is bombarded by a multitude of actors and ideas. To close this site to all but a select few ideas is to open up the country to further eruptions of violence when those ideas become a point of contention. In other words, to do so is to deny the ineradicable conflict in any free society.

## 2.4 Transitions in Transitional Justice

The debates over justice have been the motor driving transitional justice forward beyond its origins in international justice to a field that now views retributive, restorative, and reparative justice as integral to a societies emerging from conflict. However, when it comes to the “transitional” component of transitional justice, there has been very little debate. Indeed, literature in the field regarding transitions is scant. Quinn provides a useful typology of transition:

- (1) Post-conflict transitional societies, meaning societies that are “recover[ing] after mass atrocity, civil conflict, genocide, authoritarian regimes, and so on.”<sup>45</sup> According to Quinn, these societies are “clearly in the process of seeking to move forward from the past, by dealing with questions of justice.”<sup>46</sup> “Forward,” here, is defined as “*transitioning toward* peace and democracy.”<sup>47</sup>

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<sup>45</sup> Joanna R. Quinn, “Whither the “Transition” of Transitional Justice?” a paper prepared for presentation at the Annual Meeting of the Canadian Political Science Association, 16 May 2011, Waterloo, Canada, 9.

<sup>46</sup> Quinn, “Whither the “Transition” of Transitional Justice?” 9.

<sup>47</sup> Quinn, “Whither the “Transition” of Transitional Justice?” 12.

- (2) Pre-transitional states are defined as “those in which there has not been a definite transition from one regime to the next, nor a clear move from conflict to peace. Fighting often continues, and the population continues to live in a state of ‘suspended animation’.”<sup>48</sup> According to Quinn, Uganda is a good example of a pre-transitional state. She writes, “The election of President Museveni might once have signaled a kind of opening for the possibility of democracy and peace, but more than 25 years after he first seized power, this seems increasingly less likely. His actions belie any semblance of democratic intention.”<sup>49</sup>
- (3) Non-transitional states are defined as “countries that may well be regarded by the rest of the world as solidly democratic, peaceful states. And yet under their ‘good guy’ veneer often lurks a violent past.”<sup>50</sup> Most of the former British colonies including the United States, Canada, and Australia would fall into this category in view of their past and, in many cases, current treatment of the Indigenous peoples.

While extremely useful for generating discussion around transition, Quinn’s typology is important more for understanding the kinds of states we are transitioning *from* rather than the kinds of states we are transitioning *to*. In fact, her typology points to the reason for this: there is, in fact, a general consensus in the field that “transition” refers to liberal democratization. When we think of countries in “transition,” we assume they are transitioning from X (i.e. Iraq, Bosnia, Afghanistan, etc.) to a liberal democracy. According to this model, the history, culture, economics, and so on of X does not matter. But, the question remains, how did we get from theorizing about questions *of justice after mass atrocities*, as we did at Nuremberg, to *justice for democracy promotion* as we do today? In other words, when did justice after mass atrocities become transitional justice?

### 2.4.1 Getting from Justice to Transitional Justice

If the start of the twentieth century was defined by conflicts between states, the end of the century was marked by a surge of largely internal conflicts. These various conflicts were

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<sup>48</sup> Quinn, “Whither the “Transition” of Transitional Justice?” 12.

<sup>49</sup> Quinn, “Whither the “Transition” of Transitional Justice?” 14.

<sup>50</sup> Quinn, “Whither the “Transition” of Transitional Justice?” 16.

characterized by systematic human right violations and extreme repression, which “tore apart the social fabric of a number of countries, leaving a toll of deaths, injuries, broken lives, trauma, and deepened antagonism.”<sup>51</sup> As a result of these conflicts, many of the countries were left with intense political and social divisions.<sup>52</sup> As political change swept over many of these countries, subsequent governments, as well as the international community, struggled with a set of moral, legal, and political challenges. As Hayner points out, “the basic question, that of how to reckon with massive past crimes and abuses, raises a wide range of difficult issues.”<sup>53</sup> In response, the international community, led by the United Nations (UN), has accepted that, after such mass atrocities, the concept of “justice” needs to be promoted.<sup>54</sup> This impulse for justice is generally regarded as the driving rationale for the field of transitional justice.

Transitional justice is defined by Teitel as “the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.”<sup>55</sup> More specifically, Kerr and Mobekk write that transitional justice has been employed to “denote the range of judicial and non-judicial mechanisms aimed at dealing with a legacy of large-scale abuses of human rights and/or violations of international humanitarian law.”<sup>56</sup> For Kerr and Mobekk, “these

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<sup>51</sup> Audrey R. Chapman and Hugo van der Merwe, “Introduction: Assessing the South African Transitional Justice Model,” in *Truth and Reconciliation in South Africa: Did the TRC Deliver?* eds. Audrey R. Chapman and Hugo van der Merwe (Philadelphia: University of Pennsylvania Press, 2008), 1.

<sup>52</sup> Chapman and van der Merwe, “Introduction,” 1.

<sup>53</sup> Hayner, *Unspeakable Truth*, 7.

<sup>54</sup> United Nations Secretary General, *Report of the Secretary General: The rule of law and transitional justice in conflict and post-conflict situations*, 2004, S/2004/616.

<sup>55</sup> Ruti Teitel, “Transitional Justice Genealogy,” *Harvard Human Rights Journal* 16 (2003): 69.

<sup>56</sup> Kerr and Mobekk, *Peace & Justice*, 3.

mechanisms are designed, to a greater or lesser extent, to address the need for accountability, to provide justice and to foster reconciliation in societies in transition from authoritarian to democratic rule or from war to peace.”<sup>57</sup>

Central to these definitions is the belief that transitional justice is a language of change. We adopt the language of transitional justice to address the past, but we inevitably instill in it a vision of the future. As Mendez asserts,

redressing the wrongs committed through human rights violations is not only a legal obligation and a moral imperative imposed on governments. It also makes good political sense in the transition from dictatorship to democracy. In fact, the pursuit of retrospective [transitional] justice is an urgent task of democratization, as it highlights the fundamental character of the new order to be established, an order based on the rule of law and on respect for the dignity and worth of each human person.<sup>58</sup>

Similarly, Teitel argues that “for there to be meaningful change in societies driven by racial, ethnic, and religious conflict, ‘identity politics’ should be exposed for what it is—a political construction. Ethnicity politics has no place in the liberal state. What needs construction is the liberal response to injustice.”<sup>59</sup> And, while Teitel recognizes the limitations of such liberal responses as the International Criminal Tribunal for the former Yugoslavia,<sup>60</sup> she concludes that, “in such transitional circumstances, perhaps the best that can be brought into view is the image, rather than the reality, of the liberal state.”<sup>61</sup>

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<sup>57</sup> Kerr and Mobekk, *Peace & Justice*, 3.

<sup>58</sup> Juan E. Mendez, “In Defense of Transitional Justice,” in *Transitional Justice and the Rule of Law in New Democracies* ed. A. James McAdams (Notre Dame: University of Notre Dame Press, 1997), 1.

<sup>59</sup> Teitel, “Bringing the Messiah Through the Law,” 188-189.

<sup>60</sup> For example, Teitel suggests that the court suffered from selectivity.

<sup>61</sup> Teitel, “Bringing the Messiah Through the Law,” 190.

Both Mendez and Teitel suggest that this change implies democratization. Yet, this still fails to answer the question of why. What these authors are suggesting is that, when injustices occur, the only viable response to ensure that they do not occur again is to create a liberal democracy—that is, that liberal democracy is the best model for organizing society to ensure violence does not erupt again. Paige Arthur sheds considerable light on how the field came to this consensus or, perhaps more accurately, how this consensus was embedded in the field from the start.

In her article, “How ‘Transitions’ Reshaped Human Rights: A Conceptual History of Transitional Justice,” Arthur provides insight into the founding ideas behind the concept of transitional justice. Arthur’s analysis is centered on a series of conferences including the 1988 Aspen Institute conference, “State Crimes: Punishment or Pardon,” the 1992 Charter 77 Foundation conference, “Justice in Times of Transition,” and the 1994 Institute for Democracy in south Africa conference, “Dealing with the Past,” which established the “intellectual framework” within which we now examine how societies should deal with their outgoing, rights-abusing regimes.<sup>62</sup> According to Arthur, many of the individuals involved in these conferences helped to establish the foundations of the field, including Juan Mendez, Ruti Teitel, Aryeh Neier, and Diane Orentlicher, among others.<sup>63</sup> It was at these conferences as well as in the first major book on transitional

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<sup>62</sup> In 1988, the Aspen Institute held a conference entitled “State Crimes: Punishment or Pardon,” and in 1992, the Charter 77 Foundation held a conference entitled, “Justice in Times of Transition,” In attendance were prominent human rights activists (José Zalaquet, Juan Méndez, Aryeh Neier), legal scholars (Diane Orentlicher, Alice Henkin), philosophers (Ronald Dworkin, Thomas Nagel), journalists (Lawrence Weschler), and those who straddled the academic/political realm (Jaime Malamud-Goti).

<sup>63</sup> Paige Arthur, “How ‘Transitions’ Reshaped Human Rights: A Conceptual History of Transitional Justice,” *Human Rights Quarterly* 31, no. 2 (2009): 334-336. In the appendix to the article, Arthur



justice, Neil Kritz's *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, that the two normative aims of transitional justice were cemented: accountability and building democracy. Participants at the conference expressed a desire to see "some measure of justice [for] those who suffered under repressive state regimes."<sup>64</sup> Following this, participants were concerned with "facilitating an exit from authoritarianism and shoring up a fragile democracy."<sup>65</sup> These priorities have both structured the conceptual boundaries of the field and provided the accepted mechanisms we now associate with transitional justice. As Arthur writes,

It was not by chance that the structure of conversations at this conference— and similar conversations at the 1992 Charter 77 Foundation conference and the 1994 IDASA-sponsored conference on dealing with the past in South Africa, as well as Kritz's work—consistently reflected an interest in a particular set of measures as objects of debate: prosecutions, truth-telling, transformation of an abusive state security apparatus, and rehabilitation or compensation for harms. Nor is it by chance that this structure implied that a comprehensive approach, including elements of all of these measures, should at least be considered by transitional regimes. These measures fit closely with [the] two normative aims that many of the participants expressed."<sup>66</sup>

That these ideas were dominant does not explain their origins. According to Arthur, the participants at these conferences including Kritz were particularly influenced by the work

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provides a table of all the participants at the conference arranged in a manner, which allows the reader to see the significant crossover of participants.

<sup>64</sup> Arthur, *How Transitions Reshaped Human Rights*, 355.

<sup>65</sup> Arthur, *How Transitions Reshaped Human Rights*, 355.

<sup>66</sup> Arthur, *How Transitions Reshaped Human Rights*, 355.

of transitology and in particular, the writings of Guillermo O'Donnell and Philippe Schmitter.<sup>67</sup>

Transitology was the study of regime transformation which gained prominence in the late 1970s and 1980s. Transitologists suggested that a stable transition away from authoritarian rule must be accompanied by mutual guarantees of protection between elites and important interest groups including the military, business leaders, political leaders, etc.<sup>68</sup> O'Donnell and Schmitter focus on the importance of elite decision making and legal-institutional reform in establishing the importance of the rule of law and, of great importance for transitional justice, the need to address the past. The authors assert that while prosecution poses significant risks, “by refusing to confront and to purge itself of its worst fears and resentments, such a society would be burying not just its past but the very ethical values it needs to make its future livable.”<sup>69</sup>

The literature on transitology filled an important vacuum in the study of democratization. Whereas prior paradigms dominant in the development and democratization fields had focused on structural factors like socio-economic conditions for understanding the transition from traditional to modern societies, their work suggested that a transition to democracy is best achieved through elite negotiation. Thus, by rejecting these structural paradigms, transitology opened the door for more direct forms of democratization, as well as the introduction of top-down models to assist in this

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<sup>67</sup> Arthur, *How Transitions Reshaped Human Rights*, 343.

<sup>68</sup> Guillermo O'Donnell and Philippe C. Schmitter, “Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies,” in *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, ed. Neil J. Kritz (Washington: United States Institute of Peace Press, 1995), 64.

<sup>69</sup> O'Donnell and Schmitter, *Transitions from Authoritarian Rule*, 59.

transition. According to Arthur, the work done by transitologists was influential in structuring the conceptual boundaries for transitional justice, as it was carried out within an overtly pro-democracy normative framework. That this literature was included in the first major books on the topic, including Neil Kritz's edited volume, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* is rather telling. Arthur's analysis focuses on the way the field has been bounded by this "transition to democracy" lens.

Arthur provides considerable insight into the intellectual beginnings of the field of transitional justice as well as providing a brief introduction to the general consensus that has framed the field. However, her work suggests that the field of transitional justice is solely an individual actor-driven endeavour. This is typical of the field of transitional justice, given that it comprises mainly scholars/activists who view themselves as central to the functioning of the field. Such a view is predicated on a second major consensus in the field: that the end of the Cold War provided the necessary political room for transitional justice to flourish outside of academia. Scholars tend to believe that the growth of transitional justice is a result of the liberalization of the international community following the end of the Cold War.<sup>70</sup> Accordingly, in the marketplace of ideas, once state socialism proved untenable, liberal democracy was finally able to take its place as the only legitimate form of government in the eyes of the international community, thus creating a space for transitional justice to flourish. In order to

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<sup>70</sup> Teitel, "Transitional Justice Genealogy," 71.

interrogate this assumption further, the following section will examine two dominant narratives of the field's current trajectory.

## 2.5 Hypotheses on the Trajectory of Transitional Justice

Recently, there has been a surge of books and journal articles that attempt to better contextualize and evaluate what we know about transitional justice. Some of these studies focus on the field's past,<sup>71</sup> on the present,<sup>72</sup> and its future.<sup>73</sup> Of particular concern for this study is the question of from where transitional justice emerged. From these texts, there seem to be two dominant perspectives on the trajectory of transitional justice—that is, where it came from and where it is going. First, Kathryn Sikkink, along with a variety of co-authors, has shaped what has become known as the *justice cascade*. These writings culminated in her book, *The Justice Cascade*, which provides an account of the emerging justice trend in international relations. Second, Ruti Teitel has written extensively on this matter. Her 2000 book, *Transitional Justice*, provided some of the first insights into the path that transitional justice has taken and where this might be leading. Since then, she has elaborated further on this through her article, "Transitional Justice Genealogy," and most recently, in her 2011 book, *Humanity's Law*. The two authors attempt to capture both the historical antecedents of the field and the impact transitional justice is having on international relations.

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<sup>71</sup> See Arthur, "How 'Transitions' Reshaped Human Rights," 326.

<sup>72</sup> See Bell, "Transitional Justice, Interdisciplinarity, and the State of the 'Field' or 'Non-Field,'" 5-27; and Hugo van der Merwe, Victoria Baxter, and Audrey R. Chapman, eds, *Assessing the Impact of Transitional Justice: Challenges for Empirical Research* (Washington: United States Institute of Peace Press, 2009).

<sup>73</sup> See Zachary Kaufman, "The Future of Transitional Justice," *St. Antony's International Review* 1. 1 (2005): 58-81.

### 2.5.1 The Justice Cascade

The *justice cascade* argument is built on what Sikkink calls an agentic constructivist framework. According to Sikkink, “agentic constructivism is concerned with how agents—that is, real people and organizations—promote new ideas and practices. If successful, such new ideas may catch on and over time... will create new understandings of the ways in which states ought to behave [i.e. structural constructivism’s logic of appropriateness], and new understandings of the national interest of states [i.e. realism’s logic of consequences].”<sup>74</sup> To explain the *justice cascade* in the international system, then, we need to focus on the way new ideas emerge, proliferate, and, eventually, displace old ideas.

At the centre of the *justice cascade* is the ascendancy of the individual in the international system and the way this has challenged traditional notions of sovereignty in the state system. The importance of the individual, recognized by the emergence of the human rights regime, fundamentally challenges “the old ideas about sovereignty and sovereign immunity [which] maintained that high-ranking state officials should not and could not be prosecuted.”<sup>75</sup> Over time, these ideas were replaced by “new ideas about individual criminal accountability for human rights violations [which] stress that state officials should and could be held accountable.”<sup>76</sup> Admittedly, Sikkink attributes tremendous explanatory power to human consciousness, arguing that,

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<sup>74</sup> Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (W.W. Norton and Company, 2011), 236-237.

<sup>75</sup> Sikkink, *The Justice Cascade*, 234.

<sup>76</sup> Sikkink, *The Justice Cascade*, 234.

The early adopters and innovators of trials were largely unaware of one another, and they were not drawing on international models. They chose to use prosecutions because of domestic pressures, not because they were told or obliged to do so by other powerful countries or institutions in the North...In both Greece and all the early adopters in Latin America, regional human rights commissions wrote crucial country reports on human rights violations during the authoritarian regimes that provided evidence and encouragement for such prosecutions, while not in any sense determining the outcomes. Early adopters of transitional policies then acted as laboratories of justice, which innovated and experimented with new and different transitional justice practices. Eventually, some of these practices served as models that could be used in other countries.<sup>77</sup>

For Sikkink, then, the *justice cascade* “was not spontaneous, nor was it the result of the natural evolution of law or global culture in the countries where the prosecution occurred.”<sup>78</sup> Instead, “these changes in ideas were fueled by the human rights movement. The cascade started as a result of the concerted efforts of small groups of public interest lawyers, jurists, and activists, who pioneered strategies, developed legal arguments, recruited plaintiffs and witnesses, marshaled evidence, and persevered throughout years of legal challenges.”<sup>79</sup> Whereas the tendency is to view the implementation of international justice as a result of top-down pressure,<sup>80</sup> Sikkink wants to draw attention to the way ideas flow both outwards and upwards. The cascade originated in the domestic politics of countries in what she identifies as the semi-periphery (Greece, and eventually Latin America) where it then diffused horizontally to other countries, as well as vertically, up to international institutions.<sup>81</sup>

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<sup>77</sup> Sikkink, *The Justice Cascade*, 246.

<sup>78</sup> Sikkink, *The Justice Cascade*, 24.

<sup>79</sup> Sikkink, *The Justice Cascade*, 24.

<sup>80</sup> See Kieran McEvoy, “Letting Go of Legalism: Developing a ‘Thicker’ Version of Transitional Justice in *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* eds. Kieran McEvoy and Lorna McGregor (Oxford: Hart Publishing, 2008).

<sup>81</sup> Sikkink, *The Justice Cascade*, 250.

While Sikkink focuses predominantly on the use of criminal prosecutions, she does allow that truth commissions are just as important in the story of the *justice cascade*. She asserts that, “one of the most interesting characteristics about the *justice cascade* is the confrontation and convergence of two new and powerful international norms: criminal accountability and restorative justice.”<sup>82</sup> While the advocates of restorative justice have often denied the continued importance of criminal prosecutions, Sikkink argues that restorative justice mechanisms like truth commissions can work “very effectively together with retributive justice, such as domestic and foreign prosecutions.”<sup>83</sup> Thus, while “some advocates like to stress the differences between them, it is perfectly legitimate both theoretically and practically to see these as complementary ideas that form part of the broader movement for accountability for past human rights violations.”<sup>84</sup>

And, just as criminal prosecutions spread via human rights activists, so, too, did truth commissions. While we associate the truth commission with South Africa, the first prominent commission took place in Argentina followed by Chile. Experts from Argentina and Chile, including Patricia Valdex, Cataline Smulovitz, and Jose Zalaquett subsequently shared their experiences with South Africa as that country set out to create its own commission. Alex Boraine and Paul van Zyl, deputy chair and executive secretary of the South African Truth and Reconciliation Commission respectively, have further contributed to the spread of these ideas with the establishment of the prominent transitional justice non-governmental organization, International Center for Transitional

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<sup>82</sup> Sikkink, *The Justice Cascade*, 257.

<sup>83</sup> Sikkink, *The Justice Cascade*, 257.

<sup>84</sup> Sikkink, *The Justice Cascade*, 257.

Justice (IJTJ).<sup>85</sup> ICTJ has since helped guide the establishment of truth commissions across the globe.<sup>86</sup>

While these new norms can have a powerful influence, Sikkink does recognize the importance of the wider context. She argues that “the interests of actors don’t exist in the abstract, but change over time in relation to the changing institutional and ideational context in which they are operating. Unless victims can imagine prosecutions, they can’t calculate that it would be in their interests to pursue them.”<sup>87</sup> According to Sikkink, two major structural changes precede the *justice cascade*: First, the increase in the number of transitional states during the third wave of democracy provided the sites at which prosecutions can occur;<sup>88</sup> and, second, the end of the Cold War and the eventual break-up of the Soviet Union, took “attention away from a polarized struggle between communism and anti-communism... [which] created a more permissive atmosphere for holding former repressive leaders of whatever ideological stripe accountable for past human rights violations.”<sup>89</sup> For Sikkink, activists exploited this opening in the international system in order to advance their human rights agenda.

The first half of Sikkink’s book tells a story about the building of an international norm regarding the accountability of leaders for human rights abuses. However, the book takes a more rationalist turn when she attempts to measure the impact of such

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<sup>85</sup> Sikkink, *The Justice Cascade*, 251-252.

<sup>86</sup> See: “Our Work,” *International Center for Transitional Justice*, available from <http://ictj.org/our-work>, accessed 20 July 2013.

<sup>87</sup> Sikkink, *The Justice Cascade*, 237.

<sup>88</sup> Sikkink, *The Justice Cascade*, 24.

<sup>89</sup> Sikkink, *The Justice Cascade*, 246.



mechanisms on human rights and democracy. Her tests look at both the individual impact these mechanisms have, and the impact they have in concert. In the end, her analysis suggests that human rights and truth commissions have an independent effect on human rights practices in a country.<sup>90</sup> When considered together—that is, if a country has both human rights prosecutions and a truth commission—the impact on human rights practices is even greater.<sup>91</sup> Further, she finds evidence to support the claim that these mechanisms are having a deterrent effect on other countries, as well.

This consequently poses the question: what is the causal logic at work? She writes, “human rights prosecutions are not only instances of punishment or enforcement but also high-profile symbolic events that communicate and dramatize norms.”<sup>92</sup> Yet, “because trials involve simultaneous punishment and communication, it is hard to know which is doing the work in bringing about improvements in human rights. Are future perpetrators deterred by the fear of punishment, or have they been socialized by the normative process of observing the trials?”<sup>93</sup> This is why the positive impact of truth commissions is important. If the only causal factor for deterrence was punishment, and given that truth commissions don’t result in such punishment, then one could reasonably expect that truth commissions should not have an effect. Yet, according to her research, “the fact that both truth commissions and prosecutions are associated with improvements suggests that transitional justice works through a normative mechanism like socialization

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<sup>90</sup> Sikkink, *The Justice Cascade*, 185

<sup>91</sup> Sikkink, *The Justice Cascade*, 185.

<sup>92</sup> Sikkink, *The Justice Cascade*, 258.

<sup>93</sup> Sikkink, *The Justice Cascade*, 258.

as well as through deterrence.”<sup>94</sup> Sikkink uses this evidence to confirm her initial sketch of this emerging norm. She argues that the *justice cascade* is not just a rhetorical phenomenon, nor is it merely limited to effects on adopting countries. Its impact must be understood as a form of socialization that can potentially impact the behaviour of state leaders throughout the international system.<sup>95</sup> Such a perspective views the trajectory of transitional justice in an upward and outward fashion from its origins in the work of human rights to its installation at the international level following the end of the Cold War to its universalization around the world.

### 2.5.2 Humanity’s Law

In her most recent book, Teitel postulates an emerging normative framework taking shape in the international community, which she calls ‘Humanity’s law’. Humanity’s law is the construction of a structure of protection built on the notion of the human race and not based on “membership in a particular political community.”<sup>96</sup> Philosophically, it is based on the work of “Hobbes, but also other pivotal philosophers such as Montesquieu, who wrote that liberty is the opinion each citizen has of their own security, and of Locke, or of Spinoza, who opined that ‘the virtue of the state is security’.”<sup>97</sup> What stands out for Teitel is the focus these authors place on the “capacity of the state to protect as central to its legitimacy—rather than on democracy, or the state, as an expression of collective will.” For Teitel, such an

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<sup>94</sup> Sikkink, *The Justice Cascade*, 258.

<sup>95</sup> Sikkink, *The Justice Cascade*, 258.

<sup>96</sup> Teitel, *Humanity’s Law*, 195.

<sup>97</sup> Teitel, *Humanity’s Law*, 162.

understanding of the state... points to the possibility of a global perspective – since, of course, the threats or vulnerabilities to which citizens or civilians are exposed are, in many cases, not limited by national boundaries. In this sense, what emerges is that the liberal idea of the human has a global telos. This notion—which possibly legitimates contemporary institutionalization—may go some way toward supporting a notion of global society.<sup>98</sup>

In terms of historical events, Teitel locates the origins of this framework in the postwar period following the defeat of Nazi Germany. Specifically, she argues that the establishment of the International Military Tribunal at Nuremberg marked a watershed moment: the convergence of three areas of international law: International Human Rights Law, International Humanitarian Law, and International Criminal Law.

While the relationship between these three bodies of international law is certainly not coterminous, it is clear that the three areas are connected. Human Rights Law refers to law which attempt to regulate relations between individuals and their state.<sup>99</sup> International Humanitarian Law (IHL), also known as the Laws of War refers to the body of international law that attempts to civilize conflict by outlining the protection of vulnerable individuals including civilians and prisoners of war as well outlawing inhumane killings through legal provisions like the ban on Cluster Munitions.<sup>100</sup> Finally, whereas International Human Rights Law refers to the relationship between citizen and state and IHL is built largely on the international treaties signed between states, International Criminal Law holds accountable individual persons “who commit extraordinary international crimes such as genocide, Crimes against Humanity, or

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<sup>98</sup> Teitel, *Humanity's Law*, 162-163.

<sup>99</sup> Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts* (Portland, OR: Hart, 2008), 269.

<sup>100</sup> For more information, see: Aldo Zammit Borda, “Introduction to International Humanitarian Law,” *Commonwealth Law Bulletin* 34, no. 4 (2008): 739.

widespread War Crimes.<sup>101</sup> As Drumbl points out, the Nuremberg tribunal held that, “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”<sup>102</sup> Prior to this convergence, international law, for the most part, governed only the relations between states. How individuals were treated by their state was a matter of domestic jurisdiction and not international law.<sup>103</sup> There were, however, only a few examples where “concern for individual human welfare seeped into the international system.”<sup>104</sup>

Acting together, these three areas of law, Teitel suggests, created a distinctively new subject in the international system: humanity. She quotes the Nuremberg Tribunal which declared that “humanity need not supplicate for a Tribunal in which to proclaim its rights... Humanity can assert itself by law. It has taken on the robe of authority.”<sup>105</sup> The “telos” of this new legal regime and moral discourse is the protection of individuals, regardless of the state in which they reside.<sup>106</sup> She writes,

The increasing recognition of Crimes against Humanity goes to the heart of the emerging global rule of law. It expresses the change in the rule of law by sending a message that ‘humanity rights’ are inviolable, and by expressing the value of protection – that is, of freedom from persecution by the state or other state-like entities –on a global basis. Indeed, this offense encapsulates the paradigm shift in

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<sup>101</sup> Mark Drumbl, “International Criminal Law: Taking Stock of a Busy Decade,” *Melbourne Journal of International Law* 10, no. 1 (2009): 38-39.

<sup>102</sup> Drumbl, “International Criminal Law,” 39.

<sup>103</sup> There were a few exceptions including the Hague Conventions of 1899 and 1907, as well as the first three Geneva Conventions of 1864, 1906, and 1929.

<sup>104</sup> Philip Alston and Ryan Goodman, *International Human Rights* (Oxford: Oxford University Press, 2013), 136.

<sup>105</sup> Teitel, *Humanity’s Law*, 9.

<sup>106</sup> Teitel, *Humanity’s Law*, 19.

normativity, as it expresses the status of the new subject and defines the place of the individual—in terms of and connected up on the basis of the collective, as well as other transnational affiliations.<sup>107</sup>

Central to Teitel's argument is a shifting, or progressively liberal, notion of state sovereignty in the international system.

Traditionally, state sovereignty provided for the protection of state leaders who “were largely unconstrained in terms of what they did within their own borders (except for the minimal standards relating to the treatment of aliens – the law of diplomatic protection).”<sup>108</sup> Outside those borders, “apart from *jus cogens* [principles in international law from which no derogation is allowed], states were constrained only by norms to which they had consented, either by explicit agreement (as in the case of conventional law), or by state practice (as in the case of customary law).”<sup>109</sup> In other words, the state was the primary actor with no supreme authority. Not only were states unconstrained, but also the international law that they constructed merely reinforced this system, mainly through the protection given to state sovereignty that was at the heart of international law. As Brownlie states, “sovereignty and equality of states represent the basic constitutional doctrine of the law of nations, which governs a community consisting primarily of states having a uniform legal personality.”<sup>110</sup> However, according to Teitel, the *humanity's law* framework and its subject, the individual, has supplanted the traditional subject of international law since the Peace of Westphalia, the state. And, as the framework extends

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<sup>107</sup> Teitel, *Humanity's Law*, 58.

<sup>108</sup> Teitel, *Humanity's Law*, 8.

<sup>109</sup> Teitel, *Humanity's Law*, 8.

<sup>110</sup> Ian Brownlie, *Principles of Public International Law*, 4<sup>th</sup> ed. (Oxford: Oxford University Press, 1990), 287.

to more and more populations, she suggests that the contemporary rule of law at the international level will increasingly be “equated with the assurance of humanitarian norms regulating violence within a coercive scheme.”<sup>111</sup> This shift is, perhaps, most vivid in the increasing focus on human security. She writes that

one can see how the protection of human rights poses a direct challenge to the preeminence of state security and, indeed, how the shift to a humanity-based regime reflects a change in the very meaning of international security. As the humanity law framework in important respects, modifies (without wholly replacing) older norms based on territoriality and the protection of state borders, it produces a transformed understanding, whereby international security becomes part and parcel of human security, the security of persons and peoples.<sup>112</sup>

This progress is already evident in the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) and Rwanda (ICTR) and, of course, the establishment of the International Criminal Court (ICC). For Teitel, the establishment of these courts reflects a “greater reliance generally on legal processes and norms in the ordering of international society, the regulation of conflict, and the protection of human security.”<sup>113</sup> Building on the legal work of Nuremberg, these tribunals set in motion a “jurisdictional revolution,” in which the convergence of humanitarian law, human rights, and international criminal law provides for a more comprehensive framework. This framework asserts that War Crimes and Crimes against Humanity are indictable offenses regardless of the nature of the conflict (international or domestic). This increased protection was initially established at the ICTY, which “found the normative protection against War Crimes and Crimes against Humanity applicable in both international and

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<sup>111</sup> Teitel, *Humanity Law*, 32.

<sup>112</sup> Teitel, *Humanity's Law*, 109.

<sup>113</sup> Teitel, *Humanity's Law*, 216.

internal conflicts—relying on the postwar Geneva Conventions extending rights beyond interstate conflict.”<sup>114</sup> The ramifications of this shift are monumental. To drive this point home, Teitel quotes an ICTY ruling which asserted that, “a state-sovereignty-oriented approach have [*sic*] been gradually supplanted by a human-being-oriented approach... Why protect civilians from belligerent violence or ban rape, torture or the wanton destruction of hospitals, churches... as well as proscribe weapons causing unnecessary suffering when two sovereign states are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted ‘only’ within the territory of a sovereign state.”<sup>115</sup>

While the ICTY blazed the initial path, it was the ICTR and, eventually, the ICC that really marked the jurisdictional revolution. Teitel writes, “despite that the offenses at issue were being committed within that country’s ethnic conflict, the ICTR’s statute explicitly contemplates *international* enforcement of prohibitions on Crimes against Humanity. Here, we see that institutionalization of the most serious offenses is being directed at protecting core individual and group humanity rights affinities beyond their nexus to the state.”<sup>116</sup> Thus, whereas prohibitions on Crimes against Humanity historically required a nexus with armed conflict, the ICTR’s statute provided for a more inclusive jurisdiction. Importantly, this jurisdictional revolution also provides protection from atrocities committed by non-state actors. According to Teitel, “from the very first case before the Balkans tribunal, the ICTY declared that ‘the law in relation to Crimes

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<sup>114</sup> Teitel, *Humanity’s Law*, 46.

<sup>115</sup> Teitel, *Humanity’s Law*, 11.

<sup>116</sup> Teitel, *Humanity’s Law*, 48.

against Humanity has developed to take into account of forces which, although not those of the legitimate government, have *de facto* control.”<sup>117</sup> This development is especially important for weak or failed states.

Ultimately, she is claiming that the emergence of *humanity's law* provides the basis for new forms of action for people at the international level that are not mediated by their political attachments (i.e. as subjects/citizens of the state). Perhaps more importantly, what this suggests is that there will in the future be greater action to protect endangered persons regardless of the particular state in which they find themselves located. Teitel supports this claim with various examples of institutional contexts where the language of humanity is being utilized including NATO's bombing of Serbia, the establishment of the ICTY and subsequently the ICTR, which, according to Teitel, all have an explicit agenda of both protecting and, thus, reconfirming *humanity's law*. However, she draws a distinction between her argument and the work of cosmopolitans and constructivists like Kathryn Sikkink, who interpret the “growing universalization of the humanitarian norms... [as] a sign of an ever-expanding legal system—one that has the potential of attaining universal scope, and thus carries the allure of the promise that we may someday see a ‘one-law’ world.”<sup>118</sup>

Teitel recognizes that the notion of a global rule of law “implies a measure of universalizability across situations and regimes.”<sup>119</sup> However, drawing, in part, on the work of communitarianism, she argues that different cultures and traditions will produce

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<sup>117</sup> Teitel, *Humanity's Law*, 48

<sup>118</sup> Teitel, *Humanity's Law*, 30.

<sup>119</sup> Teitel, *Humanity's Law*, 203.



a variety of interests and norms.<sup>120</sup> Therefore, she suggests that we eschew the “individualist, or hyperliberal conceptions of rights as derivatives from the claim of the unsituated self,”<sup>121</sup> in favour of an interpretivist framework that allows for evolving practices that respect the dynamism of humanity with all its “multiple actors, persons, peoples, and states.”<sup>122</sup> By this term “interpretivism,” she is referring to an approach that can rule in cases of injustice but does not close justice to future re-interpretations. She refers to judicial interpretation as an example: “judicial interpretation is well suited to making sense of diverse normative sources, under conditions of political conflict and moral disagreement. Courts are inherently in dialogue with other courts and institutions that also play interpretive roles, and their decisions in individual cases can give meaning to law without purporting to give ‘closure’ to normative controversies in politics and morals.”<sup>123</sup> Thus, the “dynamic character of the status of the human,” implies that international law needs to recognize that “the status of the human is a basis for new and diverse claims”—that is, a necessary subject of international law.<sup>124</sup> In doing so, “persons and peoples” will have the “opportunity to shape the law to which they are subject, and to shape the relevant values that are at issue.”<sup>125</sup>

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<sup>120</sup> Teitel, *Humanity’s Law*, 170.

<sup>121</sup> In criticizing cosmopolitan universalization, she invokes Michael Sandel’s term, the unsituated self, to refer the abstracted self who lacks constitutive attachments and is therefore ideally free and rational to make decisions. This unsituated or unencumbered self is the starting point of John Rawl’s Original Position. For more, see: Michael Sandel, “The Procedural Republic and the Unencumbered Self,” *Political Theory* 12. 1 (1984): 81-96. At stake here, then, is an understanding of the human subject as an embodied agent in the world whose values and ethics rely on a thicker conception of morality. For more, see Michael Walzer, *Thick and Thin* (Notre Dame: University of Notre Dame Press, 1994).

<sup>122</sup> Teitel, *Humanity’s Law*, 203.

<sup>123</sup> Teitel, *Humanity’s Law*, 169.

<sup>124</sup> Teitel, *Humanity’s Law*, 31.

<sup>125</sup> Teitel, *Humanity’s Law*, 171,

In such a framework, our duties and rights are not grounded in an *a priori* view of norms that humans share by virtue of being rational individuals, but, rather, the “shared experiences of the memory of inhumanity, and the claims to rights of situated, affected agents.”<sup>126</sup> However, she does argue that *humanity’s law* recognizes that the diversity of persons and people does function within a “context of a common humanity—a humanity that transcends the particular persons who are organizing as peoples; goes beyond fixed or ‘essentialist’ racial, ethnic, or religious categories; and possesses a strong subjective element, a matter of a will to live collectively that may be inherent in what it is to be human.”<sup>127</sup>

Thus, by allowing for the evolution of our definitions while being rooted in a common bond of humanity, Teitel’s interpretivist framework seeks to “navigate the narrow strait between the Scylla of difference and the Charybdis of universalism.”<sup>128</sup> Such a framework will allow for the evolution of our definitions while being rooted in the common bond of humanity. Here, Teitel has shifted from an explanation of events to normative theory, but she is clear that her interpretivist framework is rooted in the already existing legal and political conditions.<sup>129</sup> She writes, “Humanity’s law—as a basis for a universal, global rule of law—depends on a discourse and structure of claims-

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<sup>126</sup> Teitel, *Humanity’s Law*, 205.

<sup>127</sup> Teitel, *Humanity’s Law*, 205.

<sup>128</sup> Teitel, *Humanity’s Law*, 170.

<sup>129</sup> Teitel, *Humanity’s Law*, 169.

making that has become the world's lingua franca, surpassing while also encompassing human rights law and norms.”<sup>130</sup>

According to Teitel, the genesis of Humanity's Law is the Nuremberg Tribunal following the Second World War. However, these forces did not gain traction until after the end of the Cold War. While the end of the Cold War initially gave rise to “hopes of a new peace,” the outbreak of intra-state wars suggested otherwise.<sup>131</sup> Yet, in the face of these tragedies, there were a “range of interventions and engagements undertaken in the name of ‘humanity’.”<sup>132</sup> Thus, “born at a moment of great uncertainty and flux in global affairs, *humanity's law* supplie[d] a new discourse for politics.”<sup>133</sup> For Teitel, “this discourse goes hand in hand with judicialization and greater reliance generally on legal processes and norms in the ordering of international society, the regulation of conflict, and the protection of human security.”<sup>134</sup> She continues, “the pivotal role of law in the discourse of diplomacy has become clear since the end of the Cold war; humanity-centred claims permeate much foreign affairs discourse.”<sup>135</sup> For Teitel, then, the trajectory of transitional justice is not all that different than Sikkink's. While Teitel's understanding of the potential substantive content of transitional justice is more diverse, the trajectory she sketches in Humanity's Law takes transitional justice from its origins in the Nuremberg trials following the Second World War to its establishment at the

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<sup>130</sup> Teitel, *Humanity's Law*, 205.

<sup>131</sup> Teitel, *Humanity's Law*, 3.

<sup>132</sup> Teitel, *Humanity's Law*, 3.

<sup>133</sup> Teitel, *Humanity's Law*, 216.

<sup>134</sup> Teitel, *Humanity's Law*, 216.

<sup>135</sup> Teitel, *Humanity's Law*, 217.

international level following the end of the Cold War, to its proliferation around the world.

### 2.5.3 Interrogating the Claims

Both the *justice cascade* and *humanity's law* posit an emerging framework for the protection of human rights in the international system. While Teitel's work attempts to account for a more diverse subject in international law, they both take as their starting point the importance of human rights as a moral force in international relations. These two accounts are illustrative of a larger blind spot in transitional justice: an oversimplification of power.<sup>136</sup>

On its face, Sikkink's argument is rather persuasive. By closely documenting the flow of ideas from the ground up and across space, she provides a clear account of the emergence of the *justice cascade*. Questions of power, including both coercive and structural forms, do figure prominently in Sikkink's framework but are better at "explaining why accountability was kept off the agenda for so many years, and why even people harmed by human rights violations rarely considered the possibility of prosecuting repressive state officials" and not why it emerged in the first place.<sup>137</sup> In the end, her analysis of power and, specifically, her failure to account for more diffused

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<sup>136</sup> There are some exceptions to this blind spot. For example, Thomson and Nagy note that the Rwandan government has co-opted the language of transitional justice including truth, justice and reconciliation in order to serve its own interests, namely the consolidation of its power. This example, which examines the power dynamics between the national and local level, provides a useful example of how the field of transitional justice must broaden its conception of power beyond coercion. See: Susan Thomson and Rosemary Nagy, "Law, Power and Justice: What Legalism Fails to Address in the Functioning of Rwanda's *Gacaca* Courts," *The International Journal of Transitional Justice* 5, no. 1 (2011): 11-30.

<sup>137</sup> Sikkink, *The Justice Cascade*, 234.

understandings of power leads her quickly down the path of moral certainty, where caution should be exercised.

Sikkink's framework consequently rejects claims that the *justice cascade* was a product of powerful states or structural power. According to Sikkink, "except in a handful of cases, like the former Yugoslavia" powerful states have not led the trend towards accountability.<sup>138</sup> In fact, powerful states like the United States have stood in direct opposition to the development of this norm.<sup>139</sup> As for structural power, Sikkink recognizes that "a Western liberal legal and philosophical tradition [is] hegemonic in the world today and at the time most human rights law was drafted" and, therefore, "the move to individual criminal accountability could be seen as the result of the structural power of the hegemonic Western worldview."<sup>140</sup> However, she argues that such an agenda which empowers "an individual vis-à-vis his or her state runs deeply counter to the structural power of states in the state system."<sup>141</sup> And, as the data confirms, the *justice cascade* is not a myth: "the idea of the individual sometimes wins over the ability of state officials to protect themselves from prosecution."<sup>142</sup> Finally, Sikkink addresses Marxist-inspired claims, which attempt to connect the power of the individual and the consequent human rights trials with the ascendance of the capitalist worldview.<sup>143</sup> Similar claims about the power of capitalism were made by dependency theory to explain

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<sup>138</sup> Sikkink, *The Justice Cascade*, 232.

<sup>139</sup> Sikkink, *The Justice Cascade*, 233.

<sup>140</sup> Sikkink, *The Justice Cascade*, 234.

<sup>141</sup> Sikkink, *The Justice Cascade*, 234.

<sup>142</sup> Sikkink, *The Justice Cascade*, 234.

<sup>143</sup> Sikkink, *The Justice Cascade*, 234.

the increase in military coups and repressive governments. She rejects these arguments on the grounds that capitalism cannot be used to explain both the rise of authoritarian regimes and liberal democracies. Instead, she writes, “the capitalist economic system and ideology have co-existed with both labor repression and human rights prosecutions.”<sup>144</sup>

The explanation of the *justice cascade* is predicated on the “intrinsic power of a new norm,”<sup>145</sup> a norm that was eventually “put forward by a coalition of like-minded states and NGOs who are in favor of change, embedded in law and institutions.”<sup>146</sup> To suggest that the power of the norm is intrinsic suggests that it somehow appeals to a universal sense of humanity. As Sikkink writes, “this norm is powerful and persuasive in itself—not just because of the power of the states that advocated it, or the financial power of the foundations that supported the human rights NGOs, but because the idea is inherently appealing to a broad range of individuals.”<sup>147</sup> For Sikkink, power does factor into the equation, but is better understood as an explanation of why the *justice cascade* took so long to gain momentum, and not for its eventual dominance at the international level. Therefore, this is not a story of a top-down imposition of ideas. Much to the contrary, “the *justice cascade* started in domestic politics in the semi-periphery and diffused outwards and upwards through horizontal diffusion from one country to another,

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<sup>144</sup> Sikkink, *The Justice Cascade*, 234.

<sup>145</sup> Sikkink, *The Justice Cascade*, 230.

<sup>146</sup> Sikkink, *The Justice Cascade*, 230.

<sup>147</sup> Sikkink, *The Justice Cascade*, 230.

and then via bottom-up vertical diffusion from individual countries to international organizations and international NGOs.”<sup>148</sup>

In the case of *humanity's law*, Teitel is overtly trying to make a case against constructivists like Sikkink and cosmopolitans like Jürgen Habermas. For example, while Teitel recognizes that cosmopolitans “effectively capture the spirit that animates the proliferation of law,” she argues that they “tend to essentialize this spirit as a timeless moral truth” and, in doing so, “it somehow elides the range of historically contingent factors that *explain* the law’s normative direction in the present era.”<sup>149</sup> In contrast, Teitel’s interpretivist turn hopes to account for this shift towards international rule of law (the proliferation of law) without prescribing the universalization of a Western ideal. She writes, “*humanity's law* is universalizing enough to offer a new legal and political subjectivity,” but “the subjectivity is defined and shaped by the humanity concept itself, and is articulated and achieved through the multiplication of claims in diverse actor’s struggles over access to courts and other institutions of global law.”<sup>150</sup> Yet, Teitel, herself, does not escape criticism. According to the critical international legal scholar, Martti Koskenniemi, Teitel “provides us with a Whig history of international legalism.”<sup>151</sup> Koskenniemi suggests that, throughout her book, Teitel finds “glimmerings of the human law framework,” whether in the League of Nations, the Nuremberg trials or

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<sup>148</sup> Sikkink, *The Justice Cascade*, 250.

<sup>149</sup> Teitel, *Humanity's Law*, 167.

<sup>150</sup> Teitel, *Humanity's Law*, 216.

<sup>151</sup> Martti Koskenniemi, review of *Humanity's Law*, by Ruti Teitel, *Ethics & International Affairs* 26, no. 3 (2012): 396.

the writings of Hugo Grotius.<sup>152</sup> Indeed, “the story she tells is one of a long struggle against statehood, waged predominantly by European and American activists using international law and institutions to bind states to their ethical principles.”<sup>153</sup> For Koskenniemi, then, “rather than history, this reads like ideology.”<sup>154</sup> In other words, Teitel’s account is ignorant to the workings of power. He writes, “instead of examining that discourse in terms of its implications in the world of power and policy, she has chosen to survey and map the many instances where we met it in today’s politics and law. It is used by human rights organizations and international courts, by political philosophers and military interveners.”<sup>155</sup> How this language of humanity is used, however, is of little concern to Teitel: “questions as to whom it empowers, or whose preferences are implicit within it, are broached hardly at all. The humanity vocabulary is taken at face value to represent the good post-sovereignty world that she wants to celebrate.”<sup>156</sup> While Teitel has expressed concern over the use and abuse of this language by state leaders,<sup>157</sup> she fails to see the way power is already functioning through the words themselves.

What these historical accounts of the rise of transitional justice suggest is that the field has uncritically inherited concepts into its discourse in a way that ignores the functioning of power. While Teitel draws on authors like Derrida and Foucault, she does

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<sup>152</sup> Koskenniemi, review of *Humanity’s Law*, 396.

<sup>153</sup> Koskenniemi, review of *Humanity’s Law*, 396.

<sup>154</sup> Koskenniemi, review of *Humanity’s Law*, 396.

<sup>155</sup> Koskenniemi, review of *Humanity’s Law*, 396.

<sup>156</sup> Koskenniemi, review of *Humanity’s Law*, 396.

<sup>157</sup> See: Teitel, “Transitional Justice Genealogy.”



so with disregard to the argument that language, itself, is imbued with power. For Sikkink, the question of power is ignored, given the central role played by human rights activists in the rise of transitional justice. Similarly, she fails to see the way power is always already functioning through our languages. Instead, the authors rely on a causal story, which views the end of the Cold War as the catalyst for the progression of these ideas at the international level. Such progress can be understood through a simplified causal story:



The end of the Cold War plays a central role in the mythology of the field of transitional justice. It is in this period that we not only see the expansion of the practice of transitional justice, what Teitel calls the *normalization* of transitional justice, but its emergence as a distinct field of study. Yet, this founding myth hides a much more complex story: a series of events that must be hidden from view if we are to maintain the shiny façade.

The argument put forward here is that transitional justice must be understood as an integral component of the pro-democracy movement that started in the Reagan era, but was expedited by the end of the Cold War. In other words, to understand the emergence of transitional justice, it is vital to understand the democracy promotion paradigm that came to dominate first the normative projects of the United States, and, subsequently, those of the international community.

For many, the end of the Cold War signaled a major triumph for the United States. Practically overnight, the United States assumed the role of the lone superpower in the world as the dissolution of the Soviet Union brought a crashing halt to the Cold War paradigm that had shaped much of inter-state relations during the second half of the twentieth century. The break-up of the Soviet Union was not just a major victory for the United States, but marked a significant victory for liberal democracy, in general. Just over 20 years after U.S. President Ronald Reagan set out to re-engage his country in a battle of ideas against the Soviet Union, scholars resolutely claimed the superiority of liberal democracy over communism.

In the field of international relations, the dissolution of the Soviet Union transformed the international system. For many observers, this victory for liberal democracy “was the realization of the final goal of the history of humankind, the successful outcome of a long developmental process.”<sup>158</sup> This is, perhaps, best captured by the oft-cited title of Francis Fukayama’s book, *The End of History and the Last Man*, in which Western liberal democracy is the end point of humanity’s ideological evolution. Based on a Hegelian reading of history, Fukuyama posits that liberal democracy and free market capitalism best meet the needs of human nature. According to Fukuyama, then, this same logic can be applied to relations among states. Just as individuals’ needs were best satisfied within liberal democracies, Fukuyama suggests that, in an international society full of liberal democracies, the need to engage in war will be replaced by the

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<sup>158</sup> Steven J. Hood, *Political Development and Democratic Theory: Rethinking Comparative Politics* (New York: M.E. Sharpe, 2004), 6.

rational recognition of each other's legitimacy.<sup>159</sup> Fukuyama's assessment of the capacity for states to achieve peace is echoed in the work of other contemporary liberal scholars like Michael Doyle, Bruce Russett, and James Lee Ray. These contemporary liberals share with their earlier counterparts a belief that progress can be made in the human condition. And, in terms of international relations, it is "through their faith in the power of human reason and the capacity of human beings to realize their inner potential, [that] they remain confident that the stain of war can be removed from human experience."<sup>160</sup> Liberals across generations see the ailment of war as a curable disease in the international system. Accordingly, "the treatment which liberals began prescribing in the eighteenth century [has] not changed" and includes "the twin medicines of democracy and free trade. Democratic processes and institutions would break the power of the ruling elites and curb their propensity for violence. Free trade and commerce would overcome the artificial barriers between individuals and unite them everywhere into one community."<sup>161</sup> The liberal prescription of *more democracy* has gained increasing legitimacy as an actual pathway for securing peace in the international community. This increased legitimacy is, in large part, due to empirical work in international relations scholarship based on the Democratic Peace Theory.

The Democratic Peace Theory is a general label for a large body of literature, which revolves around the observed phenomenon that democratic states do not engage in

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<sup>159</sup> Francis Fukuyama, *The End of History and the Last Man* (New York: Free Press, 1992).

<sup>160</sup> Scott Burchill, "Liberalism," in *Theories of International Relations 3<sup>rd</sup> Edition*, (Basingstoke: Palgrave Macmillan, 2005), 58.

<sup>161</sup> Burchill, "Liberalism," 59.

large-scale wars.<sup>162</sup> In opposition to neo-realist theories, the democratic peace is premised on the liberal belief that the internal make-up of a state impacts its behaviour and that it will find perpetual peace with other states that share their liberal democratic structures. Such findings, according to democratic peace theorists, suggest that the growth of democracies will lead to a growth in overall inter-state peace, thus transforming international politics.<sup>163</sup> Russett articulates this vision for a new world suggesting that, “[t]he new century presents more than just the passing of a particular adversarial relationship; it offers a chance for fundamentally-changed relations among nations.”<sup>164</sup> The work of democratic peace theorists is largely rooted in the writings of the German idealist, Immanuel Kant.

Of most influence were Kant’s writings on perpetual peace, a state of affairs that exists where there is a consolidation of peace among nations. Kant stipulated three definitive articles of perpetual peace. First, he believed that a republican constitution established on the principles of freedom and equality imposes on the state an obligation to obtain approval from its citizens to wage war. According to Kant, this presents the citizens with an opportunity to “consider very carefully whether to enter into such a terrible game, since they would have to resolve to bring the hardships of war upon

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<sup>162</sup> Benjamin Miller, “Democracy Promotion: Offensive Liberalism Versus the Rest (of IR theory)” *Millennium: Journal of International Studies* 38, no. 3 (2010): 570.

<sup>163</sup> Bruce Russett, *Grasping the Democratic Peace: Principles for a Post-Cold War World* (Princeton: Princeton University Press, 1993), 138.

<sup>164</sup> Bruce Russett, “How Democracy, Interdependence, and International Organizations Create a System of Peace,” in *The Democracy Sourcebook*, ed. Robert A. Dahl, Ian Shapiro, and Jose Antonio Cheibub, (Cambridge: The MIT Press, 2003), 492; and John M. Owens, “How Liberalism Produces Democratic Peace,” *International Security* 19, no. 2 (1994): 87-125.

themselves.”<sup>165</sup> This was in contrast to a non-republican state, in which the decision to wage war is taken without due consideration of the interests of the citizens.

Second, Kant discussed the existence of “cosmopolitan law,” which, according to contemporary scholars, embodies ties of international commerce and free trade.<sup>166</sup> Finally, Kant proposed the establishment of a “pacific union” between sovereign states. He asserted that each nation, “for the sake of [its] own security, can and ought to demand of others that they enter with [it] into a constitution, similar to that of a civil one, under which each is guaranteed [its] rights.”<sup>167</sup> Kant argued that, “peace can be neither brought about nor secured without a treaty among peoples, and for this reason a special sort of federation must be created, which one might call a pacific federation or union. This union would be distinct from a peace treaty in that it seeks to end, not merely one war, as does the latter, but all wars, forever.”<sup>168</sup> According to this, he believed that the idea of a “pacific union” could progressively include all states, thereby leading to perpetual peace.

The various authors working within the *democratic peace* tradition have debated over the causal logics that explain the possibility of democratic peace. In general, the observed pacification of relations between liberal states is a product of their shared democratic norms and institutions. In terms of democratic institutions, the representative aspect of a modern liberal democratic state tends to create a transparent and accountable

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<sup>165</sup> Immanuel Kant, *Toward Perpetual Peace and Other Writings on Politics, Peace, and History* (New Haven: Yale University Press, 2006), 74.

<sup>166</sup> Russett, *Grasping the Democratic Peace: Principles for a Post-Cold War World* (Princeton: Princeton University Press, 1993), 4.

<sup>167</sup> Kant, *Toward Perpetual Peace*, 78.

<sup>168</sup> Kant, *Toward Perpetual Peace*, 80.

relationship between the state and its citizens. Thus, according to Michael Doyle, “democratic representation introduces republican caution and precludes autocratic caprice.”<sup>169</sup> Because political elites in democracies are dependent on the willingness of the public to bear the brunt of any conflict, they must seek broad support for any risky state actions in international politics. Consequently, adventurism in international affairs without sufficient public support opens politicians up to punishment through elections.<sup>170</sup> According to this rationale, the threat of being thrown out of office tames the behaviour of politicians.

In addition to the intimidation of electoral punishment, liberal theorists argue that international action in a democratic political system necessitates the mobilization of a range of institutions within the system of government. These may include the legislature, the political bureaucracy, and key interest groups. Given this significant hurdle, movement towards aggressive state action is both “difficult and cumbersome.”<sup>171</sup> Moreover, engaging in conflict defined as war must be seen as either a necessity for survival or justified by liberal goals like human rights.<sup>172</sup> Generally, democratic peace theorists contend that this further restricts the behaviour of politicians.

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<sup>169</sup> Michael Doyle, “Three Pillars of the Liberal Peace,” *American Political Science Review* 99, no. 3 (2005): 464.

<sup>170</sup> Barbara Farnham, “The Theory of Democratic Peace and Threat Perception,” *International Studies Quarterly* 47, no. 3 (2003): 397; and R. J. Rummel, “Libertarianism and International Violence,” *Journal of Conflict Resolution* 27, no. 1 (1983): 28.

<sup>171</sup> Zeev Maoz and Bruce Russett, “Normative and Structural Causes of Democratic Peace,” *American Political Science Review*, 87, no. 3 (1993): 626.

<sup>172</sup> Maoz and Russett, “Normative and Structural Causes of Democratic Peace,” 626.

In addition to democratic institutions, some scholars point to the influence of democratic norms on the relationship between two liberal states. The resolution of political competition through peaceful means, backed by a commitment to individual rights and the rule of law, suggests that liberals are more likely to resort to negotiations than the use of force to resolve their conflicts. William Dixon refers to this practice as “bounded competition,” and suggests that, “political actors [in a democratic state] whether inside or outside of government agree not to employ physically coercive or violent means to secure a winning position on contentious public issues.”<sup>173</sup> Indeed, disputes can be resolved through a democratic process that, generally, “ensure[s] both majority rule and minority rights.”<sup>174</sup> Such an expectation limits the fear that relations between two democracies will break down into violence. For example, if state officials in Democracy A see in Democracy B the same structures and behaviours that limit their own aggression, they will be less fearful that Democracy B will resort to violence.

In this respect, it appears that both norms and institutions contribute to the emergence of peace between democracies, as the two concepts generally, complement each other and, indeed, overlap to produce a democratic peace.<sup>175</sup> However, this pacifist preference only translates into peaceful relations with other democracies. In conflicts with non-democracies, scholars suggest that democracies can be just as violent as non-

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<sup>173</sup> William J. Dixon, “Democracy and the Peaceful Settlement of International Conflict,” *American Political Science Review* 88, no. 1 (1994): 16.

<sup>174</sup> Russett, *Grasping the Democratic Peace*, 31.

<sup>175</sup> Russett, *Grasping the Democratic Peace*, 41; and John M. Owen, “How Liberalism Produces Democratic Peace,” *International Security* 19, no. 2 (1994): 124.

democracies.<sup>176</sup> This has given rise to two distinct research streams in the democratic peace scholarship: The *dyadic* version, a dominant approach among liberal international relations (IR) theorists, suggests that democracies do not fight each other. The more extreme stream of research, known as the *monadic* version, suggests that, in general, democracies are more peaceful than other regimes. This concept, of course, is highly contested, especially given the propensity of liberal democracies like the United States to engage in wars with authoritarian regimes and to support them.

The democratic peace is a dominant theory and has had a powerful impact on IR scholarship. Its influence, however, has not been limited to the realm of scholarship and, increasingly, policymakers have adopted the language of democratic peace in their own rhetoric. In particular, these ideas were popular among Western powers, specifically the United States. For example, in 1994 then-U.S. President, Bill Clinton, asserted that, “Ultimately, the best strategy to ensure our security and to build a durable peace is to support the advance of democracy elsewhere. Democracies don’t attack each other.”<sup>177</sup>

For liberal proponents, the goal of building liberal democracies is not just desirable for inter-state relations, but for intra-state relations, as well. Such beliefs spawned the *Liberal Peace Thesis*: a theory of conflict resolution, which asserts that liberal democratic institutions are inherently good for societies emerging from conflict.<sup>178</sup>

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<sup>176</sup> Anna Geis and Wolfgang Wagner, “From Democratic Peace to Democratic Distinctiveness: A Critique of Democratic Exceptionalism in Peace and Conflict Studies,” *CLPE Research Paper* 4, no. 8 (2008): 6.

<sup>177</sup> “The Politics of Peace,” *The Economist* (April 1, 1995), 17.

<sup>178</sup> Quinn and Cox point out that policymakers believed that if the basic institutions of a liberal democracy can become embedded in a society, then “the sources of its internal conflict would be ameliorated, or at least suppressed until ultimately forgotten amid other priorities, and peace could take root.” For more



The Liberal Peace is, of course, connected to its counterpart in international relations, the Democratic Peace Theory. As such, “both theories place importance on the role of representative institutions and shared values in constraining liberal/democratic societies from visiting aggressive violence upon one another.”<sup>179</sup> The Liberal Peace Thesis, however, emphasizes a “broader set of specifications than simply democracy, most notably the adoption of liberal capitalist economics, and also a more specifically liberal interpretation of how democracy should be defined.”<sup>180</sup>

Specifically, the Liberal Peace Thesis offers several recommendations for states emerging from conflict. Politically, the Liberal Peace Thesis advocates for the establishment of a liberal democracy (or representative multi-party democracy), which includes periodic elections, limitations on the exercise of governmental power guaranteed through the establishment of a written constitution, and respect for civil and political rights, such as the right to free speech and a free press, as well as freedom of association and movement.<sup>181</sup> In the economic realm, the Liberal Peace Thesis advocates for the “movement toward a market-oriented economic model, including measures aimed at minimizing government intrusion in the economy, and maximizing the freedom for

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information, see: Adam Quinn and Michael Cox, “For Better, for Worse: How America’s Foreign Policy became Wedded to Liberal Universalism,” *Global Society* 21. 4 (2007): 501.

<sup>179</sup> Quinn and Cox, “For Better,” 501.

<sup>180</sup> Quinn and Cox, “For Better,” 501.

<sup>181</sup> Edward Newman, Roland Paris and Oliver P. Richmond, “Introduction,” in *New Perspectives on Liberal Peacebuilding*, eds. Edward Newman, Roland Paris, and Oliver P. Richmond (New York: United Nations University Press, 2009), 12; and Quinn and Cox, “For Better,” 501; and Roland Paris. *At War’s End: Building Peace after Civil Conflict* (Cambridge: Cambridge University Press, 2003), 5.

private investors, producers, and consumers to pursue their respective economic interests.”<sup>182</sup> The Liberal Peace Thesis was an exercise in social engineering. Although, its true effects remained unknown, it quickly gained prominence among politicians and the peacebuilding community. For example, U.S. President Bill Clinton’s foreign policy circle “saw free-market democracy as the antidote to the poverty, tyranny, and ethnic hatred that generated political instability in Third World countries.”<sup>183</sup> The underlying hope in its design was that “democratization would shift societal conflicts away from the battlefield and into the peaceful arena of electoral politics, thereby replacing the breaking of heads with the counting of heads; and that marketization would promote sustainable economic growth, which would also help to reduce tensions.”<sup>184</sup>

Throughout the 1990s, the Liberal Peace Thesis became the central doctrine for agents of peacebuilding. As Paris points out, “given the multiplicity of peacebuilding agencies and the absence of a centralized peacebuilding authority, perhaps the most remarkable feature of the peacebuilding operations in the 1990s was that they all pursued the same general strategy for promoting stable and lasting peace in war-shattered states: democratization and marketization.”<sup>185</sup> From the United Nations Development Program to the Bretton Woods institutions (the International Monetary Fund and the World Bank) to the United States Agency for International Development (USAID) and international nongovernmental organizations like the Open Society Institute, the Liberal Peace became

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<sup>182</sup> Paris, *At War’s End*, 5.

<sup>183</sup> Mark Peceny, *Democracy at the Point of Bayonets* (University Park, Pennsylvania: The Pennsylvania State University Press, 1999), 160.

<sup>184</sup> Paris, *At War’s End*, 5-6.

<sup>185</sup> Paris, *At War’s End*, 19.

the “de facto central organizing framework for peace interventions and reconstruction efforts in the aftermath of contemporary civil wars.”<sup>186</sup>

The liberal state model is not a radical departure from the general vision embodied in most western countries’ constitutions. Indeed, the ideas behind this particular model of the state date back to the works of John Locke and Adam Smith, and were popularized by U.S. president, Woodrow Wilson, as a universal concept for all states to eventually adopt. Yet, this increase in liberal democracy’s appeal following the end of the Cold War seemed to translate into a renewed belief in an ever-expanding sphere of liberalism across the world and democracy quickly became the gold standard for international legitimacy. Diamond summarizes this position:

The experience of this century offers important lessons. Countries that govern themselves in a truly democratic fashion do not go to war with one another. They do not aggress against their neighbor to aggrandize themselves or glorify their leaders. Democratic governments do not ethnically ‘cleanse’ their own populations, and they are much less likely to face ethnic insurgency. Democracies do not sponsor terrorism against one another. They do not build weapons of mass destruction to use on or to threaten one another. Democratic countries form more reliable, open, and enduring trading partnerships. In the long run they offer better and more stable climates for investment. They are more environmentally responsible because they must answer to their own citizens, who organize to protest the destruction of their environments. They are better bets to honor international treaties since they value legal obligations and because their openness makes it much more difficult to breach agreements in secret. Precisely because, within their own borders, they respect competition, civil liberties, property rights, and the rule of law, democracies are the only reliable foundation on which a new world order of international security and prosperity can be built.<sup>187</sup>

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<sup>186</sup> Roger MacGinty and Oliver Richmond, “Myth or Reality: Opposing Views on the Liberal Peace and Post-War Reconstruction,” *Global Society* 21, no. 4 (2007): 492. See, also Oliver Richmond, *The Transformation of Peace* (London: Palgrave Macmillan, 2005), 155.

<sup>187</sup> Larry Diamond, *Promoting Democracy in the 1990s: Actors and Instruments, Issues and Imperatives. Report to the Carnegie Commission of Preventing Deadly Violence* (New York: Carnegie Corporation, 1995), 6-7.

For Magen and McFaul, this renewed fervor for democracy has meant that states outside of the liberal fold have increasingly needed to qualify their positions, suggesting that, “even where authoritarians still prevail, they mostly no longer champion an alternative form of government, but either claim that their regimes are democratic or that they are gradually moving their countries towards democracy.”<sup>188</sup> According to Magen and McFaul, such bold claims are supported by the actual growth of democracies around the world with the total number of democratic regimes increasing from 40, in 1974, to 121, in 2006.<sup>189</sup>

## 2.6 Reflecting on the Project

Transitional justice as a field of inquiry has grown significantly over the last two decades. In this short time frame, transitional justice has garnered considerable attention not just among academics but also from the wider international community. Indeed, it is clear that there is a genuine consensus that, following periods of mass atrocities (however those atrocities are defined), some form of justice must be promoted. Yet, despite this consensus, there has been a great deal of debate over what justice looks like. The *justice question* occupied a central role in the early debates in the field of transitional justice. Initially, justice in transitional justice took on mainly a retributive form and was embodied in the criminal prosecution. In time, alternative forms of justice including mechanisms derived from restorative and reparative conceptions of justice like truth commissions were accepted as legitimate, thus expanding the field’s overall reach. Of

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<sup>188</sup> Amichai Magen and Michael McFaul, “Introduction,” in *Promoting Democracy and the Rule of Law: American and European Strategies* eds. Amichai Magen, Thomas Risse, and Michael McFaul (London: Palgrave Macmillan, 2009), 6.

<sup>189</sup> Magen and McFaul, “Introduction,” 6.

course, this expansion of the field was hard fought; the retributive/restorative debate occupied much of the discussion throughout the 1990s and early 2000s. Even today, questions over what constitutes justice remain a vital area of scholarship in the field, with the field continuing to expand to include traditional mechanisms of justice like the *mato oput* ceremonies of Northern Uganda.

The *justice question* has been, and continues to be, a point of contention for scholars in the field. But this has, perhaps, come at the expense of a general acceptance of the *transitional* question. Arthur's article provides us with considerable insight into the conceptual boundaries of the field. Within these boundaries, it is clear that there is an accepted consensus regarding, first, the idea that justice is working towards a final goal, otherwise known as the transition to democracy; and two, that human rights activists/scholars have been central to the field's growth following the end of the Cold War and the opening up of the international community. It is these two consensuses that this project looks to further interrogate and, in the end, to challenge.

## Chapter 3

### 3 Theoretical Tools of Analysis

This chapter outlines the theoretical tools of analysis that will be used in this project. The analytical framework draws largely on the work of postmodern writers including Michel Foucault, Jacques Derrida, and Richard Rorty. In International Relations (IR), postmodern theory came to prominence in the 1980s in what is generally referred to as the third great debate between positivists (neorealists and neoliberals) and postpositivist theory.<sup>1</sup> This “critical impulse” in IR emerged in response to the “widespread dissatisfaction with both realism (particularly Popperian rationalism in IR), Kantian-derived liberalism as a more normative response, and structurally determinist approaches derived from Marxism.”<sup>2</sup> The two fronts (modern critical theory and Postmodern critical theory) of the attack on mainstream IR theory drew on critical social theory including the works of Max Horkheimer, Theodore Adorno and other writers of the Frankfurt School; Italian Marxist Antonio Gramsci; and postmodern writers including Foucault and Derrida, among others. While these authors have diverse opinions across ontological, epistemological and methodological grounds, these groups do exhibit a commonality in what they oppose, namely the positivist school of thought.

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<sup>1</sup> See, for example, Richard Ashley, “The Geopolitics of Geopolitical Space: Toward a Critical Social Theory of International Politics,” *Alternatives* 12, no. 4 (1987): 403-434; David Campbell, *Writing Security: United States Foreign Policy and the Politics of Identity* (Minneapolis, MN: University of Minnesota Press, 1992); R.B.J. Walker, “Realism, Change and International Political Theory,” *International Studies Quarterly* 21, no. 1 (1987): 65-86; and Cynthia Weber, *Simulating Sovereignty: Intervention, the State and Symbolic Exchange* (Cambridge: Cambridge University Press, 1995).

<sup>2</sup> Oliver P. Richmond, *Peace in International Relations* (New York: Routledge, 2008), 122.

While it might seem counter-intuitive to begin with an approach that will not be used in this project, it is necessary in order to situate critical theory. Given the dominance of positivism in political science, a project which uses critical theory tools must address both what it *is* and what it *is not* trying to achieve with its analysis. Following this general overview of positivism I examine the work of modern critical theory and, specifically, the work of Horkheimer. Horkheimer's work is important for drawing a substantive distinction between positivist scholarship—what he would have identified as traditional theory—and the critical theoretical tools used in this project. From there, I introduce the postmodern lenses that are used in the analysis of this project. These lenses are informed primary by the work of Rorty, Derrida, and Foucault.

### 3.1 Positivism and its Critics

Positivism is a philosophy of science which seeks “objective, value-free, timeless, and neutral knowledge about human society.”<sup>3</sup> Accordingly, “the role of research is to test theories and to provide material for the development of laws.”<sup>4</sup> Positivism is based on the belief that the world of the social sciences consists of the same kinds of regularities that one might find in the natural world of the physical sciences, regardless of time and place.<sup>5</sup> Therefore, the pursuit of knowledge of society can only be achieved by emulating the methodological approaches of the natural sciences—“that is, by experience, observation, and experiment.”<sup>6</sup> Positivism drew heavily on the work of David

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<sup>3</sup> Ken Booth, *Theory of World Security* (Cambridge: Cambridge University Press, 2007), 48.

<sup>4</sup> Bryman, 12.

<sup>5</sup> Mark Neufeld, *The Restructuring of International Relations Theory* (Cambridge: Cambridge University Press, 1995), 34.

<sup>6</sup> Alexander Rosenberg, *Philosophy of Social Science*, 2<sup>nd</sup> ed. (Boulder, CO: Westview Press, Inc., 1995), 8.

Hume, an eighteenth century British philosopher who asserted that “there is nothing we can directly observe in any single observed sequence of events, independent of our past experiences, that makes the first cause the second; there is no detectable glue attaching the cause to its effects that enable one to distinguish between causal and accidental sequences.”<sup>7</sup> As a result, the only way to distinguish between causation and correlation is to “identify well-confirmed regularities that stand behind causes and that are absent in cases of correlation.”<sup>8</sup> According to Hume, “in the absence of strict exceptionless laws, in everyday life we make do with rough-and-ready empirical regularities to underwrite particular causal claims.”<sup>9</sup>

Today, positivists subscribe to a deductive logic whereby theory is used to generate hypotheses about the world. These hypotheses are subsequently “exposed to rigorous empirical scrutiny” and “the hypotheses [are] either confirmed or rejected.”<sup>10</sup> Indeed, the domain of science encompasses only phenomena that can be observed and measured.<sup>11</sup> Sentences derived from theory that cannot be verified or, following Popper, falsified, are of little use.<sup>12</sup> Thus, positivists draw a sharp distinction between facts (scientific statements) and values (normative statements). In other words, much like the natural sciences, positivist researchers believe in the possibility of objective (unbiased)

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<sup>7</sup> Rosenberg, *Philosophy of Social Science*, 10.

<sup>8</sup> Rosenberg, *Philosophy of Social Science*, 9.

<sup>9</sup> Rosenberg, *Philosophy of Social Science*, 9.

<sup>10</sup> Hay, *Political Analysis*, 30.

<sup>11</sup> Martin Griffiths, *Rethinking International Relations Theory* (New York: Palgrave Macmillan, 2011), 10; and Alan Bryman, *Social Research Methods*, 2<sup>nd</sup> ed. (Oxford: Oxford University Press, 2004), 11.

<sup>12</sup> Karl Popper, *Unended Quest* (London: Routledge, 1992), 159-160



research in the social realm. Ultimately, by uncovering regularities in social phenomena in the past, the hope is to make predictions about social phenomena in the future.

The value of this type of theory lies in its ability to “fix limits or parameters to the problem area and to reduce the statements of a particular problem to a limited number of variables which are amenable to relatively close and precise examination.”<sup>13</sup> Yet, since the days of the Vienna Circle of the logical positivists, their approach has been subject to much scrutiny.<sup>14</sup> In his 1937 article, “Traditional and Critical Theory,” Max Horkheimer drew a fundamental distinction between critical theory and the traditional theory of positivism. In IR theory, Horkheimer, and the subsequent work of the Frankfurt School, were rather influential for postpositivists of both modern and postmodern stripes.<sup>15</sup> For Horkheimer, traditional theory consisted of a linked set of primary propositions (the fewer the better) about a subject on which derivatives were built. Hypotheses about a subject are fashioned along the lines of a set of causal connections: “if circumstances *a*, *b*, *c*, and *d* are given, then event *q* must be expected; if *d* is lacking, event *r*; if *g* is added, event *s*, and so on.”<sup>16</sup> According to Horkheimer, for positivists the relationship between scientific theory and reality is distinct: “There is always, on the one hand, the conceptually formulated knowledge and, on the other, the facts to be subsumed under it.

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<sup>13</sup> Robert W. Cox, “Social Forces, States, and World Orders: Beyond International Relations Theory,” *Millennium: Journal of International Studies* 10. 2 (1981): 128-129.

<sup>14</sup> Positivism has undergone significant transformation since the Vienna Circle, especially given the critique offered by Karl Popper and his notion of falsification. For more information, see George Steinmetz, ed., *The Politics of Method in the Human Sciences: Positivism and its Epistemological Others* (Durham: Duke University Press, 2005).

<sup>15</sup> Andrew Linklater, “The Changing Contours of Critical International Relations Theory,” in *Critical Theory & World Politics*, ed. Richard Wyn Jones (Boulder: Lynne Rienner Publishers, 2001), 25.

<sup>16</sup> Max Horkheimer, “Traditional and Critical Theory,” in *Critical Theory: Selected Essays* (New York: The Continuum Publishing Company, 1972), 194.

Such a subsumption or establishing of a relation between the simple perception or verification of a fact and the conceptual structure of our knowing is called its theoretical explanation.”<sup>17</sup> The validity of theory is judged according to how well it approximates reality. From this perspective, *good* theory is the construction of parsimonious generalizations best corresponding to experience. When the derived propositions do not fit reality, either the scientist’s observations are inaccurate or the theory’s principles are incorrect.<sup>18</sup> According to Honneth, “as more and more segments of reality are caught in the net of hypothetical statements, natural and social processes as a whole can finally be theoretically predicted and controlled.”<sup>19</sup>

This understanding of theory is based on the notion of ‘truth as correspondence’, which asserts that there is an objective and knowable world. And by studying this world, we can acquire, for certain, an understanding of the “things” out there. Epistemologically, authoritative knowledge is judged by its ability to accurately capture reality as it is presented to us. Such sentiment is based on the *Cartesian duality*: a fundamental distinction between the subject (investigator) and the object (that being investigated). The Cartesian mind views the world as a thing-in-itself with an intrinsic order waiting to be discovered by the disinterested scientists.<sup>20</sup> Knowledge of society can

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<sup>17</sup> Horkheimer, “Traditional and Critical Theory,” 193.

<sup>18</sup> Horkheimer, “Traditional and Critical Theory,” 194.

<sup>19</sup> Axel Honneth, *The Critique of Power: Reflective Stages in a Critical Social Theory* (Cambridge, Massachusetts: 1991), 6.

<sup>20</sup> Richard Tarnas, *The Passion of the Western Mind* (New York: Ballantine Books, 1993), 396.

and should be *value-free*—if obtained using academically rigorous methods and research designs, knowledge remains impervious to the values of the researcher.<sup>21</sup>

Developed in Descartes' *Meditations on First Philosophy*, published in 1641, the Cartesian duality is derived from his particular 'method', which sought to "ground all knowledge in basic truths and principles accessible to a rational mind."<sup>22</sup> His method started with a thought process: What if the world contained an "evil genie" who entertained himself by deceiving our very senses. The existence of such a genie would force us to call into question absolutely every idea about the world. Even our most settled truths could be the result of the genie's desire to deceive us. Pressed to absolute skepticism, Descartes argued that we could still be certain of one thing: the thinking subject. Our existence as the thinking subject is secured by the mere fact that we have the ability to think of these things: "I think therefore I am."<sup>23</sup> As Ferry observes, according to Descartes, our ideas may be false or we may be vulnerable to deception, "but in order for [us] to be deceived, or to deceive [ourselves], [we] must at the very least be something that exists!"<sup>24</sup> Such a method, according to Ferry, leads "to a definition of truth as that which resists doubt, as that of which the individual subject can have absolute certainty. Thus a state of subjective consciousness—certainty—becomes nothing less

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<sup>21</sup> Neufeld, *The Restructuring of International Relations Theory*, 35.

<sup>22</sup> Martin Hollis, *The Philosophy of Science: An Introduction* (Cambridge: Cambridge University Press, 2003), 24.

<sup>23</sup> "René Descartes," *The Cambridge Dictionary of Philosophy*, ed. Robert Audi (Cambridge: Cambridge University Press, 1995), 195.

<sup>24</sup> Luc Ferry, *A Brief History of Thought: A Philosophical Guide to Living* (New York: Harper Perennial, 2011), 129.

than the new criterion of truth.”<sup>25</sup> For Descartes, truth is dependent on our ability to call into questions all inherited ‘knowledge’. If we seek absolute certainty in our minds, we must “subject to the most rigorous process of doubt all those opinions, beliefs and preconceptions which have not undergone minute examination.”<sup>26</sup> Proceeding from Descartes’ method of absolute skepticism, what he called *tabula rasa*, is “a new version of nature, founded on individual conscience rather than tradition, of a unique certitude which compels recognition before all other kinds: that of the individual subject in his relation to himself,”<sup>27</sup> a relation characterized by the mind’s “absolute distinction from the (mortal) body”—the immateriality of the mind.<sup>28</sup> For Descartes, then, “it is no longer belief or faith which enables us to reach an ultimate truth, but awareness of self.”<sup>29</sup>

By freeing reason from traditional authorities and locating it the mind of the individual, Descartes’ work had an extraordinary impact on the age of enlightenment in Europe—a movement in Western philosophy, which promised mankind a new kind of freedom through rationality and the scientific method.<sup>30</sup> Descartes’ belief in the ability of the subject to shed all beliefs in order to represent the “world as it is” laid the foundation for “increasingly impersonal forms of inquiry.”<sup>31</sup> Certainly, his work continues to resonate in the social sciences, especially within the positivist school of thought currently

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<sup>25</sup> Ferry, *A Brief History of Thought*, 129.

<sup>26</sup> Ferry, *A Brief History of Thought*, 131-132.

<sup>27</sup> Ferry, *A Brief History of Thought*, 132.

<sup>28</sup> James Miller, *Examined Lives: From Socrates to Nietzsche* (New York: Farrar, Straus and Giroux, 2011), 218.

<sup>29</sup> Ferry, *A Brief History of Thought*, 132.

<sup>30</sup> Kenneth Allan, *The Social Lens: An Invitation to Social and Sociological Theory*, 2<sup>nd</sup> ed. (Thousand Oaks, CA: Pine Forge Press, 2011), 366; and Hollis, *The Philosophy of Science*, 24.

<sup>31</sup> Miller, *Examined Lives*, 226.

dominant within North American social sciences. Positivist research has primarily been associated with quantitative studies; however, in their seminal work, *Designing Social Inquiry*, King, Keohane, and Verba have called for its use in qualitative studies as well, asserting that, “non-statistical research will produce more reliable results if researchers pay attention to the rules of scientific inference.”<sup>32</sup>

Theory that is critical (both modern and postmodern) calls into question this objective Cartesian subject central to traditional theory. By viewing the subject as a blank slate (*tabula rasa*), traditional theory “occupies itself with received principles and methods whose fundamental purpose is to organize and clarify experience and to eliminate contradictions among our inherited ideas. It works within an apparatus of judgments and concepts that it does not question, or not fundamentally and not critically.”<sup>33</sup> In doing so, it treats objective facts as “permanent, unchanging aspects of our knowledge of the world.”<sup>34</sup> Thus, the scholar who seeks truth as correspondence to some apparent reality cannot see the boundaries of his/her thinking and fails to consider the structures in which their theorizing takes place. In doing so, traditional theory “operates in favour of prevailing ideological priorities.”<sup>35</sup>

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<sup>32</sup> Gary King, Robert Keohane, and Sidney Verba, *Designing Social Inquiry: Scientific inference in qualitative research* (Princeton: Princeton University Press, 1994), 6.

<sup>33</sup> Paul Fairfield, *Philosophical Hermeneutics Reinterpreted: Dialogues with Existentialism, Pragmatism, Critical Theory and Postmodernism* (London: Continuum, 2011), 120.

<sup>34</sup> Steven Roach, *Critical Theory of International Politics: Complementarity, Justice and Governance* (London: Routledge, 2010), 51.

<sup>35</sup> Richard Devetak, “Critical Theory,” *Theories of International Relations*, ed. Scott Burchill (New York: Palgrave Macmillan, 2005), 142; and David Couzens Hoy, “Genealogy, Phenomenology, Critical Theory,” *Journal of the Philosophy of History* 2. 3 (2008): 281.

In contrast, critical theory recognizes that the “reality” addressed in social theory is a social reality and, therefore, “no single perspective can claim to be exclusively correct.”<sup>36</sup> As Cox similarly notes, “all theories have a perspective. Perspectives derive from a position in time and space, specifically social and political time and space.”<sup>37</sup> In recognizing this, theory that is critical has to be self-referential and “account for [its] own distortion.”<sup>38</sup> In other words, critical theorists do not view knowledge as merely “a reflection of an inert world ‘out there,’” as an epistemology committed to truth as correspondence would suggest, but as “an active construction by scientists and theorists who necessarily make certain assumptions about the worlds they study and thus are not strictly value free.”<sup>39</sup> Therefore, our accounts of reality—our thoughts—and the objects of this reality must be seen as historically shaped.<sup>40</sup> As Giddens notes, “we cannot treat human activities as though they were determined by causes in the same way as natural events are. We have to grasp what I would call the double involvement of individuals and institutions: we create society as the same time as we are created by it... Social systems are like buildings that are at every moment constantly being reconstructed by the very bricks that compose them.”<sup>41</sup> Such an understanding of the relationship between subject and object exposes the limits of the objective knowledge sought by the positivists. These conditions suggest that any knowledge of society is not analogous to knowledge of

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<sup>36</sup> Hoy, “Genealogy, Phenomenology, Critical Theory,” 281.

<sup>37</sup> Cox, “Social Forces, States, and World Orders,” 128.

<sup>38</sup> Hoy, “Genealogy, Phenomenology, Critical Theory,” 281.

<sup>39</sup> Ben Agger, *Critical Social Theory* (Boulder: Westview Press, 1998), 4-5.

<sup>40</sup> Anthony Leysens, *The Critical Theory of Robert W. Cox: Fugitive or Guru* (London: Palgrave Macmillan, 2008), 81.

<sup>41</sup> Anthony Giddens, *Sociology: A Brief but Critical Introduction* (Orlando, FL: Harcourt Brace Jovanovich), 13-14.

physics or chemistry. For Linklater, this “observation that there are no disembodied cognitive subjects who can acquire objective knowledge of external reality is a crucial theme running through all critical standpoints.”<sup>42</sup>

For Horkheimer, by ignoring perspectivism, the approach taken by traditional theory “absolutized the conception of theory as though it were grounded in the inner nature of knowledge as such, or justified in some other ahistorical way, and thus it became a reified, ideological category.”<sup>43</sup> To oppose this, critical theory must take a self-referential position. The situated knowledge that Horkheimer sought started “from specific social problems and work[ed] toward an explanation of how they came about.”<sup>44</sup> According to Devetak, in doing so, it attempts to uncover the “unexamined assumptions that guide traditional modes of thought,” and show how these traditional modes of thought participate in the making of the “prevailing political and social conditions.”<sup>45</sup> This “criticism of the present,” closely allies Horkheimer’s work with that of Foucault and his “history of the present.”<sup>46</sup>

Horkheimer’s modernist critical theory and the critical theory of postmodern writers like Foucault exhibit a similar attitude towards the past by challenging traditional theory’s premise that “how we acquired our beliefs and knowledge is irrelevant to the

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<sup>42</sup> Linklater, “The Changing Contours of Critical International Relations Theory,” 25.

<sup>43</sup> Horkheimer, “Traditional and Critical Theory,” 194. The natural sciences, on the other hand, did not have to contend with these power dynamics.

<sup>44</sup> Hoy, “Genealogy, Phenomenology, Critical Theory,” 281.

<sup>45</sup> Devetak, “Critical Theory,” 143.

<sup>46</sup> Hoy, “Genealogy, Phenomenology, Critical Theory,” 281.

validity of those beliefs.”<sup>47</sup> Further, as Hoy points out, “both [Horkheimer’s] critical theory and [Foucault’s] genealogy are asking precisely how we came to forget the contingency of the historical beginnings of our practices and why we persuaded ourselves that these practices were necessary and universal rather than arbitrary and contingent.”<sup>48</sup> Thus, both authors are oriented towards challenging these positions as a means to open up a future of possibilities: critical theory and genealogy both try to unmask power and show it for what it is. Insofar as this unmasking works, it does not necessarily bring about social change, although it does make social transformation more likely.”<sup>49</sup>

Where modernist and postmodern theorists diverge, however, is in the idea of progress and the repression of real interests. Horkheimer saw the ailment of “his current society as the result of either oppression or the blind outcome of competing forces,”<sup>50</sup> but not, as Horkheimer wrote, the “result of conscious spontaneity on the part of free individuals.”<sup>51</sup> By reproducing the bourgeois society and maintaining inequality in the system, traditional theory as an objective science was an illusion—a product of the “false consciousness of the bourgeois savant.”<sup>52</sup> Thus, Horkheimer believed that critical theory should be geared towards emancipation by promoting the historical progress of human freedom.<sup>53</sup> In contrast, the notion of progress for Foucault and other postmodern writers

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<sup>47</sup> Hoy, “Genealogy, Phenomenology, Critical Theory,” 282.

<sup>48</sup> Hoy, “Genealogy, Phenomenology, Critical Theory,” 282.

<sup>49</sup> Hoy, “Genealogy, Phenomenology, Critical Theory,” 282.

<sup>50</sup> Hoy, “Genealogy, Phenomenology, Critical Theory,” 282.

<sup>51</sup> Horkheimer, “Traditional and Critical Theory,” 283

<sup>52</sup> Horkheimer, “traditional and Critical Theory,” 198.

<sup>53</sup> Hoy, “Genealogy, Phenomenology, Critical Theory,” 283.



presupposes that we can find ground to stand on “outside or above history from which to make the judgment that history is progressing and universal freedom is increasing.”<sup>54</sup>

Second, the modernist critical theory of Horkheimer and the postmodern approach generally disagree over whether or not there are “real interests” that are being repressed by power.<sup>55</sup> Drawing on the Marxian-Lukacsian notion of false consciousness, Horkheimer’s work argues that ideology “permeates every social stratum,” and explains why “people act contrary to what is obviously in their real interests.”<sup>56</sup> Again, postmodern approaches point out that, in order to uncover real interests, there must be an Archimedean point—a view outside society—to make such a judgement. Second, post modern approaches deny the existence of a natural essence of humanity: the unmasking of power (or false consciousness) will not uncover “real interests” but, rather, the fragments of previous masks.

### 3.2 Language and Final Vocabulary

Rorty, like the Frankfurt School, challenges the Cartesian duality and its insinuation of transcendence. This perspective has falsely propagated a ‘truth as correspondence’ epistemology and the search for eternal truths or essences. And such a search, according to Rorty, will lead only to human constructs. Truth, for Rorty, then, is a “property of sentences,” and “since sentences are dependent for their existence upon vocabularies, since vocabularies are made by human beings, so are truths.”<sup>57</sup> When we attempt to

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<sup>54</sup> Hoy, “Genealogy, Phenomenology, Critical Theory,” 284.

<sup>55</sup> Hoy, “Genealogy, Phenomenology, Critical Theory,” 284.

<sup>56</sup> Hoy, “Genealogy, Phenomenology, Critical Theory,” 285.

<sup>57</sup> Richard Rorty, *Contingency, Irony, and Solidarity* (Cambridge: Cambridge University Press, 1989), 21.

provide a theory as a “best fit” as ‘truth as correspondence’, we are actually privileging “one among the many languages in which we habitually describe the world or ourselves.”<sup>58</sup>

Rorty’s critique builds on the work of Ludwig Wittgenstein. For Rorty, Wittgenstein’s importance lies in his “wrenching” us from the desire to ask “which pieces of our language lock on to reality, and which do not?”<sup>59</sup> In his book, *Philosophical Investigations*, Wittgenstein challenges the truth as correspondence epistemology. Such a view, according to Wittgenstein, depends on the assumption that the relationship between reality and the language we use to describe it is neutral. His primary target is, in many respects, his own earlier ideas about the relationship between language and the world found in his first book, *Tractatus Logico-Philosophicus* (hereafter, *Tractatus*).<sup>60</sup>

In the *Tractatus*, Wittgenstein oversimplified this relationship by viewing the linkage between language and the world in a rather simple manner, in which words (names) are merely labels of objects that together formed propositions. “A proposition,” wrote Wittgenstein, is “a model of reality as we imagine it.”<sup>61</sup> Thus, propositions, if logical, “express a portion of reality by picturing a true state of affairs.”<sup>62</sup> Further, Wittgenstein did not just believe that language could represent the “world as it really is,”

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<sup>58</sup> Rorty, *Contingency, Irony, and Solidarity*, 7.

<sup>59</sup> Richard Rorty, “Wittgenstein and the linguistic turn,” in *Wittgenstein’s Philosophical Investigations: A Critical Guide*, ed. Arif Ahmed (Cambridge: Cambridge University Press, 2010), 132.

<sup>60</sup> Anthony Kenny, *A Brief History of Western Philosophy* (Oxford: Blackwell Publishers, 1998), 341.

<sup>61</sup> Ludwig Wittgenstein, *Tractatus Logico-Philosophicus*, trans. D. F. Pears and B. F. McGuinness (New York: Routledge, 2006), 4.01.

<sup>62</sup> Ray Monk, *How to Read Wittgenstein* (London: Granta Books, 2005), 49.

but he argued that all inquiry that did not take this form was merely senseless.<sup>63</sup> Thus, he concluded the *Tractatus* with the statement: “What we cannot speak about we must pass over in silence.”<sup>64</sup> Such claims about the neutral relationship between language and the world made the *Tractatus* a central text for logical positivists, who, themselves, were committed to a science of society driven by the objective forms of inquiry dominant in the natural sciences.<sup>65</sup>

In *Philosophical Investigations*, Wittgenstein’s views on language made an about face, giving up on the idea that language has a direct connection to reality. Instead of viewing language in terms of true and untrue propositions, he saw language as bound up in human life and human practices, and wholly intertwined in the world. For that reason, “language cannot usefully be understood as a tool for describing an objective reality.”<sup>66</sup> Instead, language use needs to be understood as a type of action that can take a variety of forms. While philosophy has been overly concerned with discovering some essence of language, according to Wittgenstein, it needs to pay more attention to the way we use our language. Thus, he views language use as he views games: we see games of all sorts, including those that are competitive and those that are not, those that use balls and those that use wooden pieces.<sup>67</sup> What gives meaning to language is not its connection to reality, but rather the use we give them. As Wittgenstein wrote, “the fundamental fact here is that we lay down rules, a technique, for a game, and that then when we follow

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<sup>63</sup> Miller, *Examined Lives*, 226.

<sup>64</sup> Wittgenstein, *Tractatus Logico-Philosophicus*, 89.

<sup>65</sup> Hans Sluga, *Wittgenstein* (Malden, MA: Wiley-Blackwell, 2011), viii.

<sup>66</sup> Murray Edelman, “Political Language and Political Reality,” *PS* 18, no. 1 (1985): 10.

<sup>67</sup> Kenny, *A Brief History of Western Philosophy*, 336.

rules, things do not turn out as we had assumed. That we are therefore as it were entangled in our own rules. This entanglement in our rules is what we want to understand (i.e. get a clear view of).<sup>68</sup> Therefore, words do not have an absolute essence, but vary in meaning according to the context in which they are used.

Wittgenstein's chess analogy illustrates this point: outside of its brute fact of being a piece of wood, a chess piece is rendered meaningless unless we know the rules of the game. Its nature is determined, instead, by the rules of the game; there is no intrinsic nature, no essence, outside of the rules of chess. Rorty adopts Wittgenstein's position that there are no essences out there, waiting to be discovered. Truths about the world are, instead, "a property of linguistic entities, of sentences."<sup>69</sup>

According to Rorty, we need to clarify the distinction between the existence of an independent world, which, of course, exists outside of any "human mental state" and truth claims about that world that depend on the utterances of human language.<sup>70</sup> Through language, "we create representations of reality that are never mere reflections of a pre-existing reality but contribute to constructing reality."<sup>71</sup> Reality exists; physical objects like houses, cars, and a lake exist, regardless of my representations of them. But they only gain meaning through our language. To illustrate this point, Jorgenson and Phillips use the example of a flood:

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<sup>68</sup> Ludwig Wittgenstein, *Philosophical Investigations*, trans. P.M.S. Hacker and Joachim Schulte (Malden, MA: Wiley Blackwell, 2009), 125.

<sup>69</sup> Rorty, *Contingency, Irony, and Solidarity*, 7.

<sup>70</sup> Rorty, *Contingency, Irony, and Solidarity*, 7.

<sup>71</sup> Marianne Jorgenson and Louise Phillips, *Discourse Analysis as Theory and Method* (Thousand Oaks: SAGE Publications, 2002), 8.

The rise in the water level that leads to the flood is an event that takes place independently of people's thoughts and talk. Everybody drowns if they are in the wrong place, irrespective of what they think or say. The rise in the water level is a material fact. But as soon as people try to ascribe meaning to it, it is no longer outside discourse. Most would place it in the category of 'natural phenomena', but they would not necessarily describe it in the same way. Some would draw on a meteorological discourse, attributing the rise in the water level to an unusually heavy downpour. Others might account for it in terms of the El Nino phenomenon, or see it as one of the many global consequences of the 'greenhouse effect'. Still others would see it as the result of 'political mismanagement', such as the national government's failure to commission and fund the building of dykes. Finally, some might see it as a manifestation of God's will, attributing it to God's anger over a people's sinful way of life or seeing it as a sign of the arrival of Armageddon. The rise in the water level, as an event taking place at a particular point in time, can, then, be ascribed meaning in terms of many different perspectives or discourses.<sup>72</sup>

What this suggests, is that language is a "machine" that generates, and, as a result, constitutes the social world."<sup>73</sup> For Rorty, it is not that a reality does not exist, but, rather, truths about that reality are made and not found. This is what Wittgenstein meant when he wrote that we become "entangled in our own rules."<sup>74</sup>

As humans, we carry with us a "set of words"—a final vocabulary—which we adopt to rationalize our "actions, beliefs, and lives."<sup>75</sup> Rorty writes, "these are the words in which we formulate praise of our friends and contempt for our enemies, our long-term projects, our deepest self-doubts and our highest hopes."<sup>76</sup> They are final in that,

if doubt is cast on the worth of these words, their user has no noncircular argumentative recourse. Those words are as far as he can go with language; beyond them there is only helpless passivity or a resort to force. A small part of a final vocabulary is made up of thin, flexible, and ubiquitous terms such as 'true',

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<sup>72</sup> Jorgensen and Phillips, *Discourse Analysis as Theory and Method*, 9.

<sup>73</sup> Jorgensen and Phillips, *Discourse Analysis as Theory and Method*, 9.

<sup>74</sup> Wittgenstein, *Philosophical Investigations*, 125.

<sup>75</sup> Rorty, *Contingency, Irony, and Solidarity*, 73.

<sup>76</sup> Rorty, *Contingency, Irony, and Solidarity*, 73.

‘good’, ‘right’, and ‘beautiful’. The larger part contains thicker, more rigid, and more parochial terms, for example, ‘Christ’, ‘England’, ‘professional standards’, ‘decency’, ‘kindness’, ‘the Revolution’, ‘the Church’, ‘progressive’, ‘rigorous’, ‘creative’. The more parochial terms do most of the work.”<sup>77</sup>

The key, here, is that we need to recognize and embrace the contingency and fragility of these most central beliefs.<sup>78</sup> Language is not a means to discover truths about the world—we are not getting ever closer to a language that best represents reality and expresses the self. Therefore, our most central beliefs do not refer to “something beyond the reach of time and chance,” they are merely one set of words among many.<sup>79</sup> The problem is that we theorize *as if* our vocabulary is final, thus freezing it into place. Thus, we must treat alternative vocabularies—those that are not part of our final vocabulary—not as “bits of a jigsaw puzzle” but as “alternative tools.”<sup>80</sup> In other words, there is no grand vocabulary that unites these final vocabularies. There is no meta-vocabulary which can distinguish the correctness of one final vocabulary over another.<sup>81</sup> Instead, they are often mutually exclusive and incapable of being reduced to or united with other vocabularies. This does not deny the usefulness of these vocabularies, but their value is fundamentally confined to a specific frame and we cannot mistake this for Reality. They are, as Friedrich Nietzsche would argue, metaphors and not literal. That is, truth must be understood as a

movable host of metaphors, metonymies, and anthropomorphisms: in short, a sum of human relations which have been poetically and rhetorically intensified, transferred, and embellished, and which, after long usage, seem to a people to be fixed, canonical, and binding. Truths are illusions which we have forgotten are illusions; they are metaphors that have become worn out and have been drained of

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<sup>77</sup> Rorty, *Contingency, Irony, and Solidarity*, 73.

<sup>78</sup> Rorty, *Contingency, Irony, and Solidarity*, 74.

<sup>79</sup> Rorty, *Contingency, Irony, and Solidarity*, xv.

<sup>80</sup> Rorty, *Contingency, Irony, and Solidarity*, 11.

<sup>81</sup> Rorty, *Contingency, Irony, and Solidarity*, 11.

sensuous force, coins that have lost their embossing and are not considered as metal and no longer as coins.<sup>82</sup>

Nietzsche, too, rejected the dogmatic search for truth that has driven the philosophical discipline since the Greeks. Truth is not something out there to be discovered, but is wholly attached to this world and the humans who inhabit it; truth is “linked to the context of its production.”<sup>83</sup> Therefore, the subject, for Nietzsche, is always situated in the world. As such,

Judgments, value judgments on life, whether for or against, can in the last resort never be true: they possess value only as symptoms, they come into consideration only as symptoms—in themselves such judgments are stupidities. One must reach out and try to grasp this astonishing finesse, that the value of life cannot be estimated [assessed]. Not by a living man, because he is a party to the dispute, indeed its object, and not the judge of it; not by a dead one, for another reason – For a philosopher to see a problem in the value of life thus even constitutes an objection to him, a question-mark as to his wisdom, a piece of unwisdom.<sup>84</sup>

Nietzsche’s work is important for challenging the transcendent set of standards, the absolute Truth, in which morality is couched.<sup>85</sup> However, if, as Nietzsche argues, there is no Truth in this world to judge humanity, what are we left with? For Rorty, all we can do is critically appraise the languages we do use to describe the world around us. The fundamental question for Rorty, then, is “Does our use of these words get in the way of our use of those words?” To do so, is to prevent the walls of our final vocabularies from closing in on us and to remain open to other, perhaps more useful, alternative

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<sup>82</sup> Friedrich Nietzsche, “On Truth and Lie in an Extra-Moral Sense,” in *The Continental Aesthetics Reader*, ed. Clive Cazeaux (New York: Routledge, 2000), 55.

<sup>83</sup> Peter R. Sedgwick, *Nietzsche: The Key Concepts* (New York: Routledge, 2009), 148.

<sup>84</sup> Friedrich Nietzsche, *The Twilight of the Idols and The Anti-Christ*, trans. R. J. Hollingdale (London: Penguin Books, 2003), 40.

<sup>85</sup> Todd May, *Gilles Deleuze: An Introduction* (Cambridge: Cambridge University Press, 2005), 7.

vocabularies. Rorty's work here is heavily influenced by the writings of the French philosopher, Jacques Derrida.

### 3.3 Deconstruction

If Wittgenstein is important for helping us see the way language gives meaning to our world, Derrida's work is significant in showing us that we are fundamentally constrained by the structure of our language.<sup>86</sup> As May observes in his study of postmodern thought, we are oppressed by "our very words. Each time we speak, we rely on constraints that haunt our language."<sup>87</sup> Yet, Derrida does not believe that we can look behind text to capture an essence—an ahistorical thing-in-itself—that has been lost.<sup>88</sup> Such a task is impossible given that we are "always and already... embedded in various networks—social, historical, linguistic, political, sexual networks."<sup>89</sup> Instead, Derrida is interested in breaking down the categories of experience that we use to make sense of this world. To start, he argues that the project of philosophy, which "consists largely in attempting to build foundations for thought," is significantly constrained by our language use and, specifically, the way we privilege certain concepts over others.<sup>90</sup> At the centre of this is the problematization of the logic of identity. As Dooley and Kavanagh note, "identity has traditionally implied purity and wholeness."<sup>91</sup> That is, "[t]o identify with someone or something means to have full knowledge of that person or object. As such, knowledge

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<sup>86</sup> May, *Gilles Deleuze*, 11.

<sup>87</sup> May, *Gilles Deleuze*, 11.

<sup>88</sup> Caputo, *Deconstruction in a Nutshell*, 77.

<sup>89</sup> Caputo, *Deconstruction in a Nutshell*, 77.

<sup>90</sup> May, *Gilles Deleuze*, 11.

<sup>91</sup> Mark Dooley and Liam Kavanagh, *The Philosophy of Derrida* (Montreal & Kingston: McGill-Queen's University Press, 2007), 2.



admits of no black spots or inaccessible dimensions. What we identify with is completely present to consciousness.”<sup>92</sup> Ontologically, this views “Being as presence.”<sup>93</sup> As Derrida writes, “It could be shown that all the names related to fundamentals, to principles, or to the centre have always designated an invariable presence—*eidōs, arche, telos, energeia, ousia* (essence, existence, substance, subject) *aletheia*, transcendentality, consciousness, God, man, and so forth.”<sup>94</sup> Yet, for Derrida, such a perspective fails to capture the way presence is never whole. Presence is not pure (i.e. there is no essence), but is always dependent on the absence of the other. For example, what we consider masculinity and femininity, which have traditionally been viewed as quite distinct, are, in fact, interwoven in a hierarchical relationship that privileges masculinity at the expense of femininity.<sup>95</sup> Such privileging has had ghastly consequences for women, but Derrida does not stop there. For, it is not merely the privileging of masculinity over femininity that constrains us, but the realization that femininity is fundamentally internal to masculinity’s understanding; it is not merely its other (or opposite), but is constituted by it. Masculinity cannot be understood except by the femininity that is excluded.<sup>96</sup> Masculinity and femininity, therefore, “operate in a dynamic relation of distinctness and mutual envelopment where the line between them can be neither clearly drawn nor completely erased.”<sup>97</sup> If we cannot fix borders around concepts like masculinity and

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<sup>92</sup> Dooley and Kavanagh, *The Philosophy of Derrida*, 2.

<sup>93</sup> Jacques Derrida, *Writing and Difference* (London: Routledge, 2001), 353.

<sup>94</sup> Derrida, *Writing and Difference*, 353.

<sup>95</sup> May, *Gilles Deleuze*, 11.

<sup>96</sup> May, *Gilles Deleuze*, 11.

<sup>97</sup> May, *Gilles Deleuze*, 12.

femininity, then our language fails to capture reality in the way positivists have assumed. Instead, the truth our language articulates is better understood as metaphor than factual representation.

Given that philosophy depends on thought, as noted above, if we cannot fix meanings to terms, then our foundation for philosophy will eventually give way. As Norris points out, though “philosophy strives to efface its textual character, the signs of that struggle are there to be read in its blind-spots of metaphor and other rhetorical strategies.”<sup>98</sup> Philosophers have been able to “impose their various systems of thought only by ignoring or suppressing the disruptive effects of language.”<sup>99</sup> Yet, this is not merely an academic debate. The privileging of masculinity over femininity is an injustice that must be rectified: concepts like these play a central role in our day-to-day lives and, in so doing, they shape the way we see both others and ourselves in this world.<sup>100</sup> In response, Derrida’s concept of deconstruction works to “draw out these effects by a critical reading which fastens on, and skillfully unpicks, the elements of metaphor and other figural devices at work in the texts of philosophy.”<sup>101</sup> In this light, deconstruction is rectification. By acting “as a constant reminder of the ways in which language deflects or complicates the philosopher’s project,” deconstruction disrupts this notion “that reason

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<sup>98</sup> Christopher Norris, *Deconstruction: Theory and Practice* 3<sup>rd</sup> ed. (New York: Routledge, 2003), 19.

<sup>99</sup> Norris, *Deconstruction*, 19.

<sup>100</sup> May, *Gilles Deleuze*, 12.

<sup>101</sup> Norris, *Deconstruction*, 19.

can somehow dispense with language and achieve knowledge ideally unaffected by such mere linguistic foibles.”<sup>102</sup>

It is not a matter of inverting the privileged relationship; instead, we must recognize the fluidity of these concepts. To do so, is to be mindful of our language so as to allow for expression and not suppression.<sup>103</sup> As May suggests, “when we see that these categories bleed into each other, then we are no longer worried about the ‘essence’ of the masculine and the feminine. We become free to borrow from realms that once seemed barred from us.”<sup>104</sup> And, in doing so, “we are no longer bound to make those borrowings conform to a pre-given model of what our lives and our world should look like, since the categories within which we would conceive our lives and our world are themselves fluid.”<sup>105</sup> Thus, Derrida’s deconstruction urges us to abandon our desire for definite end-points and moral truths (or moral certainties). While some equate deconstruction with destruction or demolition, it must, instead, be understood as a way of responding to those who seek closure: for those who, according to Rorty, see their vocabulary as final. Hence, deconstruction is fundamentally about “affirming the irreducible alterity of the world we are trying to construe.”<sup>106</sup>

The overall framework of this analysis is driven by a deconstructive approach. Deconstruction of a text proceeds with a two-step reading: a *dominant-reproductive*

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<sup>102</sup> Norris, *Deconstruction*, 19.

<sup>103</sup> May, *Gilles Deleuze*, 12.

<sup>104</sup> May, *Gilles Deleuze*, 13.

<sup>105</sup> May, *Gilles Deleuze*, 13.

<sup>106</sup> Caputo, *Deconstruction in a Nutshell*, 57.

reading followed by a *transgressive-productive* reading. The *dominant-reproductive* reading provides the foundation of the text and would be considered closest to the text's traditional understanding. As Caputo suggests, this reading would remain on all the major expressways by outlining the dominant tendencies of a text. Such a reading would be followed up by the *transgressive-productive* reading, which, instead of taking the expressways, dares to embark on a journey though the secondary roads; to the places that are not visible when driving along the expressway. It is only by taking these secondary roads that the deconstructivist can "explore the tensions, the loose threads, the little openings in the text which the classical reading tends to close over or put off as a problem for another day, which is really just a way to forget them."<sup>107</sup> Deconstruction is not about destroying. In fact, it is quite the opposite: by disturbing the well-travelled paths—exploring the "dead-ends and aporias"—deconstruction hopes to maintain the livability or fluidity of a text.<sup>108</sup>

By *transgressive-productive*, deconstructionists do not mean that anyone has complete liberty to say whatever she wants about a text. Rather, "a deconstructive reading is exceedingly close, fine-grained, meticulous, scholarly, serious, and, above all, responsible, both in the sense of being able to give an account of itself in scholarly terms and in the sense of responding to something in the text that tends to drop out of view."<sup>109</sup> It is not, as some observers suggest, about destroying or wreaking havoc. Deconstruction is responsible. It is loyal to a tradition. As Caputo notes, "the only way to conserve a

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<sup>107</sup> Caputo, *Deconstruction in a Nutshell*, 76.

<sup>108</sup> Caputo, *Deconstruction in a Nutshell*, 76.

<sup>109</sup> Caputo, *Deconstruction in a Nutshell*, 77.

tradition is not to be a conservative. That is why the possibility must be kept alive of reading otherwise, which means always passing through the classical discipline, and never having abandoned or jettisoned it, to explore what it omits, forgets, excludes, expels, marginalizes, dismisses, ignores, scorns, slights, takes too lightly, waves off, is just not serious enough about!”<sup>110</sup> The deconstructor wants to return to these dead-ends, these aporias, like “an inspector who is gravely concerned with a little crack he observes in an airplane’s fuselage, while everyone else on the inspection team is eager to break for lunch.”<sup>111</sup> The purpose of this method is to see that the “orthodox, received, dominant interpretation has been produced by a wave of the hand that brushes aside the deviations and transgressive moments.”<sup>112</sup>

To deconstruct is to create the necessary space for the possibility of “the other.” “The other” is a term Derrida borrows from Emmanuel Levinas, which captures the idea of the unforeseeable and unidentifiable other which is ‘to come.’<sup>113</sup> In other words, ‘the other’ does not refer to a stable identity, but is, instead, a radical ‘other.’ What Derrida is trying to suggest is that we must expose today for what it is: a contingent possibility. And, as a contingent possibility, the present is not necessary and, therefore, could be something different.<sup>114</sup> The question then becomes how do we think about today in a way that is open to this unforeseeable and unidentifiable other to come rushing in.

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<sup>110</sup> Caputo, *Deconstruction in a Nutshell*, 79.

<sup>111</sup> Caputo, *Deconstruction in a Nutshell*, 79.

<sup>112</sup> Caputo, *Deconstruction in a Nutshell*, 85.

<sup>113</sup> Jacques Derrida, “Forces of Law,” in *Acts of Religion* ed. Gil Anidjar (New York: Routledge, 2002) 235.

<sup>114</sup> Jacques Derrida, “Specters of Marx, 81.

### 3.4 Foucault, Power, and the Uncertainty of Liberalism

Of central importance for this project is Foucault's understanding of power. Foucault's later work looks to challenge traditional political theory's one-dimensional understanding of power relations. For scholars like Robert Dahl, their understanding of power focused solely on its observable usage in the political realm.<sup>115</sup> This conception of power highlighted only the negative aspects of power: power was conceived of as the ability of actor *A* to make actor *B* do things that actor *B* would not otherwise have done.<sup>116</sup> Accordingly, "the closest equivalent to the power relation [was] the causal relation. For the assertion '*C* has power over *R*', one can substitute the assertion, '*C*'s behaviour causes *R*'s behaviour'. If one can define the causal relation, one can define influence, power, or authority, and vice versa."<sup>117</sup> Here, understanding the relations of power is possible "only in cases of overt conflict—since those who prevail in such cases are able to do so precisely because they do, in fact, have more power than their opponents."<sup>118</sup> This one-dimensional view of power was rejected by Peter Bachrach and Morton S. Baratz, and, later, Steven Lukes.

In their article, "Two Faces of Power," Bachrach and Baratz introduced a second dimension of power. Where Dahl's understanding focused solely on the public face of power, Bachrach and Baratz added a second, or private, face of power. Here, power "can

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<sup>115</sup> Barry Hindess, *Discourse of Power: From Hobbes to Foucault* (Blackwell Publishers, 1996), 2.

<sup>116</sup> Ivan Manokha, "Foucault's Concept of Power and the Global Discourse of Human Rights," *Global Society* 23, no. 4 (2009): 430.

<sup>117</sup> Robert Dahl, "Power," in *Power: A Reader*, ed. Mark Haugaard (Manchester: Manchester University Press, 2002), 16

<sup>118</sup> Hindess, *Discourse of Power*, 4.

be seen in the covert exclusion of the interests of particular individuals or groups from consideration in legislative assemblies, council chambers and other arenas in which decisions affecting the life of the community are taken.”<sup>119</sup> According to this conception, “power is exercised when *A* participates in the making of decisions that affect *B*. But power is also exercised when *A* devotes his energies to creating or reinforcing social and political values and institutional practices that limit the scope of the political process to public consideration of only those issues which are comparatively innocuous to *A*.”<sup>120</sup> In this instance, power is effective. “To the extent that *A* succeeds in doing this, *B* is prevented, for all practical purposes, from bringing to the fore any issues that might in their resolution be seriously detrimental to *A*’s set of preferences.”<sup>121</sup> Yet, according to Lukes, Bachrach and Baratz’s analysis fails to consider a more insidious, third face of power.

Centrally, Lukes criticizes Bachrach and Baratz’s conception of power as it remains within the realm of behaviouralism. In doing so, it is unable to account for the unobservable ways power is exercised.<sup>122</sup> A radical conception of power, according to Lukes, must take into account the way *A* exercises power over *B* by “influencing, shaping or determining his very wants.”<sup>123</sup> Thus, “men’s wants may themselves be a product of a

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<sup>119</sup> Hindess, *Discourse of Power*, 4.

<sup>120</sup> Peter Bachrach and Morton S. Baratz, “Two Faces of Power,” *American Political Science Review* 56, no. 4 (1962): 948.

<sup>121</sup> Bachrach and Baratz, “Two Faces of Power,” 948.

<sup>122</sup> Steven Lukes, *Power: A Radical View* (New York: Palgrave Macmillan, 2005), 23.

<sup>123</sup> Lukes, *Power*, 22.

system which works against their interests.”<sup>124</sup> Such a view is significantly influenced by Antonio Gramsci’s discussion of bourgeois hegemony in which “the consent of the popular classes to bourgeois rule is possible... only because they are not aware of their interest in the overthrow of capitalist domination.”<sup>125</sup> While Lukes certainly improves upon previous attempts at conceptualizing power in society, he maintains a negative and rather reductionist understanding of power.

One of Foucault’s major contributions has been to move the debate beyond this reductionist view in which power is the possession of a single agent (or group/class of agents). However, it is important to note that Foucault’s approach to power should not be understood as a “context-free, ahistorical, and objective” theory like those discussed in the “faces of power” debate.<sup>126</sup> Instead, he is proposing an analytics of power—that is, “instead of attempting to say what power is, we must attempt to show how it operates in concrete and historical frameworks.”<sup>127</sup> For Foucault, “power is never localized here or there, never in anybody’s hands, never appropriated as a commodity or piece of wealth.”<sup>128</sup> We must resist viewing power, for example, as merely a “group of institutions and mechanisms that ensure the subservience of the citizens of a given state.”<sup>129</sup> What this suggests is that power is not a “general system of domination exerted

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<sup>124</sup> Lukes, *Power*, 38.

<sup>125</sup> Hindess, *Discourse of Power*, 6.

<sup>126</sup> Dreyfus and Rabinow, *Michel Foucault*, 184.

<sup>127</sup> Roger Deacon, “An Analytics of Power Relations: Foucault on the history of Discipline,” *History of the Human Sciences* 15, no. 1 (2002): 91.

<sup>128</sup> Michel Foucault, “Two Lectures,” in *Power/Knowledge: Selected Interviews & Other Writings 1972-1977*, ed. Colin Gordon (New York: Pantheon Books, 1980), 98.

<sup>129</sup> Michel Foucault, *The History of Sexuality*, vol. 1, *An Introduction*, trans. Robert Hurley (New York: Vintage Books, 1990), 92.



by one group (e.g. class) over another, a system whose effects, through successive derivations, pervade the entire social body.”<sup>130</sup> Such reductionist understandings, for Foucault, are merely the “terminal forms power takes.”<sup>131</sup> Thus, “if power is not a thing, or the control of a set of institutions, or the hidden rationality to history, then the task for the analyst is to identify how it operates.”<sup>132</sup>

Power is “the name that one attributes to a complex strategical situation in a particular society.”<sup>133</sup> It is “employed and exercised through a net-like organization.”<sup>134</sup> Such an understanding, therefore, recognizes that power is not simply an aspect of the political arena but is “produced from one moment to the next, at every point, or rather in every relation from one point to another.”<sup>135</sup> Thus, power is indeterminate and omnipresent because it is “exercised from innumerable points.”<sup>136</sup> To suggest that power is everywhere could easily eliminate the analytical strength of power, but Foucault connects this non-reductive definition to his understanding of discourses.<sup>137</sup> We must understand that power can be everywhere not because it engulfs us like the sheer force of a tsunami, but because individuals are not simply the targets of power, “they are always

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<sup>130</sup> Foucault, *The History of Sexuality*, 92.

<sup>131</sup> Foucault, *The History of Sexuality*, 92.

<sup>132</sup> Dreyfus and Rabinow, *Michel Foucault*, 185.

<sup>133</sup> Foucault, *The History of Sexuality*, 93.

<sup>134</sup> Foucault, *The History of Sexuality*, 93.

<sup>135</sup> Foucault, *The History of Sexuality*, 93.

<sup>136</sup> Foucault, *The History of Sexuality*, 92.

<sup>137</sup> Foucault defines discourses in the following way: “We shall call discourse a group of statements in so far as they belong to the same discursive formation...[Discourse] is made up of a limited number of statements for which a group of conditions of existence can be defined. Discourse in this sense is not an ideal, timeless form...it is, from beginning to end, historical – a fragment of history...posing its own limits, its divisions, its transformations, the specific modes of its temporality.” For more, see Michel Foucault, *The Archaeology of Knowledge* (London: Routledge, 1972), 117.

also the elements of its articulation.”<sup>138</sup> In this respect, power is not simply a negative or repressive force, but a productive one:

The individual is not to be conceived as a sort of elementary nucleus, a primitive atom, a multiple and inert material on which power comes to fasten or against which it happens to strike, and in so doing subdues or crushes individuals. In fact, it is already one of the prime effects of power that certain bodies, certain gestures, certain discourses, certain desires, come to be identified and constituted as individuals. The individual, that is, is not the vis-à-vis of power; it is, I believe, one of its prime effects, or precisely to the extent to which it is that effect, it is the element of its articulation. The individual which power has constituted is at the same time its vehicle.<sup>139</sup>

Individuals do not merely wield power like a stick. Instead, the individual is the go-between for power. The body mediates power by regulating behaviour according to the dominant views of normality. Accordingly, power is diffused and embodied in the dominant discursive structure “that sets the standards of accepted or expected behaviour.”<sup>140</sup> Therefore, we cannot fully grasp Foucault’s conception of power in isolation from his understanding of discourse and knowledge generation.<sup>141</sup> According to Foucault, “there can be no possible exercise of power without a certain economy of discourses of truth which operates through and on the basis of this association.”<sup>142</sup> We are “subjected to the production of truth through power and we cannot exercise power except through the production of truth.”<sup>143</sup>

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<sup>138</sup> Foucault, “Two Lectures,” 98.

<sup>139</sup> Foucault, “Two Lectures,” 98.

<sup>140</sup> Manokha, “Foucault’s Concept of Power and the Global Discourse of Human Rights,” 430.

<sup>141</sup> Manokha, “Foucault’s Concept of Power and the Global Discourse of Human Rights,” 430.

<sup>142</sup> Foucault, “Two Lectures,” 93.

<sup>143</sup> Foucault, “Two Lectures,” 93.

This is what Foucault means by power/knowledge. Power is fixed (at least temporarily) in the accepted forms of knowledge, scientific understandings, and ‘truth’. According to Foucault, “in a society such as ours, but basically in any society, there are manifold relations of power which permeate, characterize and constitute the social body, and these relations of power cannot themselves be established, consolidated nor implemented without the production, accumulation, circulation and functioning of a discourse.”<sup>144</sup> For each society, then, there is a unique regime of truth, understood as the specific discourses which function as barometers of truth.<sup>145</sup> Foucault writes that

power never ceases its interrogation, its inquisition, its registration of truth: it institutionalizes, professionalises and rewards its pursuit. In the last analysis, we must produce truth as we must produce wealth, indeed we must produce truth in order to produce wealth in the first place. In another way, we are also subjected to truth in the sense in which it is truth that makes the laws, that produces the true discourse which, at least partially, decides, transmits and itself extends upon the effects of power. In the end, we are judged, condemned, classified, determined in our undertaking, destined to a certain mode of living or dying, as a function of the true discourses which are the bearers of the specific effects of power.<sup>146</sup>

For example, in Western societies,

‘truth’ is centered in scientific discourse and institutions; it is central to economic production and political power; it is widely circulated; it is produced and disseminated by great economic and political apparatuses like the university, the media, or the army. In this system of truth there are many forms of excluded and subjected knowledge. Those who occupy the lowest status in various institutions or conditions of life—the patient, inmate, prisoner, welfare mother, laborer, student- all find their knowledge dis- counted. They are part of a system of power which invalidates their discourse, occasionally by blatant denial, but continuously by a set of implicit rules concerning what sorts of concepts and vocabulary are acceptable and what credentials and status are requisite for one's discourse to count as knowledge.<sup>147</sup>

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<sup>144</sup> Foucault, “Two Lectures,” 88.

<sup>145</sup> Foucault, “Truth and Power,” 131.

<sup>146</sup> Foucault, “Two Lectures, 93-94.

<sup>147</sup> Larry Shiner, “Reading Foucault: Anti-method and the Genealogy of Power-Knowledge,” *History and Theory* 21, no. 3 (1982): 384

It is clear, then, that what power produces is precisely the subject. This is Foucault's message in his books, *Discipline and Punish*, and *History of Sexuality*. In *Discipline and Punish*, while Foucault's apparent focus is on the constant observation, assessment and control that is employed in the modern penitentiary, its more general theme is the production of the "contemporary norm-governed social individual"—the docile subject.<sup>148</sup> The modern self is not a *tabula rasa*, as it is for Descartes, but, rather, is a historical product—a construct. As Foucault writes, "the individual is not a pre-given entity which is seized on by the exercise of power [e.g. Descartes' evil genie]. The individual, with his identity and characteristics, is the product of a relation of power, exercised over bodies, multiplicities, movements, desires, forces."<sup>149</sup> The modern self is an "irreducible node" that takes on the right sort of beliefs and psychological states—the self is forged by what society defines as *normal*.<sup>150</sup>

This is what is ultimately meant when Foucault argues that power is productive: the modern self—the subject—is a product of power.<sup>151</sup> That power is productive hides the insidious nature of its effects. As Foucault writes, power "does not only weigh on us as a force that says no, but it traverses and produces things, it induces pleasure, forms knowledge, produces discourse."<sup>152</sup> In this manner, the effect of power is more pleasure

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<sup>148</sup> C.G. Prado, *Starting with Foucault: An Introduction to Genealogy* (Boulder: Westview Press, 1995), 51.

<sup>149</sup> Michel Foucault, "Questions on Geography," in *Power/Knowledge: Selected Interviews & Other Writings 1972-1977*, ed. Colin Gordon (New York: Pantheon Books, 1980), 73-74.

<sup>150</sup> Prado, *Starting with Foucault*, 54.

<sup>151</sup> Prado, *Starting with Foucault*, 55.

<sup>152</sup> Foucault, "Truth and Power," 119.

than pain. Thus, we do not resist its effects as we would if it was a purely repressive force.<sup>153</sup>

Foucault's understanding of power is quite complex. While power's insidious nature produces a particular subject, Foucault refuses to see this as fulfilling any sort of coherent master plan of a singular group (i.e. a conspiracy of the bourgeois class). Instead, Foucault "sees all psychological motivation not as the source but as the result of strategies without strategists."<sup>154</sup> For Foucault "people know what they do; they frequently know why they do what they do; but what they don't know is what they do does."<sup>155</sup> In this way, Foucault's work attempts to de-psychologize power by investigating "how both scientific objectivity and subjective intentions emerge together in a space set up *not by individuals* but by social practices."<sup>156</sup>

To illustrate this argument, Foucault draws on two examples, the internment of the insane throughout the sixteenth and seventeenth centuries, and the repression of infantile sexuality during the seventeenth and eighteenth centuries. In the case of the internment of the insane, one could easily show that this was a plan of the bourgeoisie, as "lunatics are precisely those persons who are useless to industrial production."<sup>157</sup> Similarly, the repression of infantile sexuality could just as easily be seen as a consequence of bourgeois class domination "given that the human body had become

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<sup>153</sup> Foucault, "Truth and Power," 119.

<sup>154</sup> Hubert L. Dreyfus and Paul Rabinow, *Michel Foucault: Beyond Structural and Hermeneutics*, 2<sup>nd</sup> ed., (Chicago, The University of Chicago Press, 1983), 109.

<sup>155</sup> Dreyfus and Rabinow, *Michel Foucault*, 187.

<sup>156</sup> Dreyfus and Rabinow, *Michel Foucault*, 108. My emphasis added.

<sup>157</sup> Foucault, "Two Lectures," 101.

essentially a force of production from the time of the seventeenth and eighteenth century, all the forms of its expenditure which did not lend themselves to the constitution of the productive forces—and were therefore exposed as redundant—were banned, excluded and repressed.”<sup>158</sup> For Foucault, “these kinds of deductions are always possible,” but they are “simultaneously correct and false.”<sup>159</sup> But such lines of thinking are “too glib” for Foucault because “it is equally plausible to suggest that what was needed was sexual training, the encouragement of a sexual precociousness, given that... the greater the labour force, the better able would the system of capitalist production have been to fulfill and improve its functions.”<sup>160</sup> In other words, he suggests that, if we take this kind of conspiratorial view of power, we could arrive at any number of logical conclusions from the very general observation of the bourgeois classes’ obvious domination.<sup>161</sup>

Instead of locating these types of causal relationships, Foucault is more interested in how these techniques for dealing with the insane or with sexuality were maintained from the lowest level up. This requires a focus on the level of the family and the immediate environment of the subject. Therefore, instead of grouping these techniques “under the formula of a generalized bourgeoisie” such an examination would focus on the real agents responsible for these techniques including the parents, family, doctors, and so on.<sup>162</sup> For Foucault, it is at this most basic level of society where we find the logic of these techniques of repression or confinement and the certain needs they were meant to

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<sup>158</sup> Foucault, “Two Lectures,” 100.

<sup>159</sup> Foucault, “Two Lectures,” 100.

<sup>160</sup> Foucault, “Two Lectures,” 100.

<sup>161</sup> Foucault, “Two Lectures,” 100.

<sup>162</sup> Foucault, “Two Lectures,” 100-101.

address. Indeed, “at the local level there is often a high degree of conscious decision making, planning, plotting and coordination of political activity,” but it is critical to see that this does not imply a grand strategy.<sup>163</sup> Foucault recognizes that actors at the lowest level, “more or less know what they are doing when they do it and can often be quite clear in articulating it. But it does not follow that the broader consequences of these local actions are coordinated. The fact that individuals make decisions about specific policies or particular groups jockey for their own advantage does not mean that the overall activation and directionality of power relations in a society implies a subject.”<sup>164</sup> It is in this way, then, that power relations are “intentional and non-subjective. Their intelligibility derives from their intentionality. ‘They are imbued, through and through, with calculation: there is no power that is exercised without a series of aims and objectives’.”<sup>165</sup>

To be clear, Foucault does not deny that the confinement of the insane or the repression of sexuality helped the bourgeoisie, but he wants to avoid any conspiratorial explanations. In other words, Foucault rejects any claims which suggest the bourgeoisie elaborately devised these techniques in order to meet their specific needs. Rather, these techniques and procedures were a response to certain needs at the basic societal level, and only after they were established did they come “to represent the interests of the bourgeoisie.”<sup>166</sup> The bourgeoisie did not invent these micro-mechanisms of power but,

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<sup>163</sup> Dreyfus and Rabinow, *Michel Foucault*, 187.

<sup>164</sup> Dreyfus and Rabinow, *Michel Foucault*, 187.

<sup>165</sup> Dreyfus and Rabinow, *Michel Foucault*, 187.

<sup>166</sup> Foucault, “Two Lectures,” 101.

once their political or economic usefulness was revealed, they were, no doubt, “colonized and maintained by global mechanism and the entire state system.”<sup>167</sup> The conclusion which must be drawn from this analysis is that we need to abandon our search “for the headquarters that presides over [power’s] rationality; neither the cast which governs, nor the groups which control the state apparatus, nor those who make the most important economic decisions direct the entire network of power that functions in a society.”<sup>168</sup> In other words, the dynamics of an omnipresent power mean that the isolation of definite cause and effect relationships and underlying laws will always come up short. Thus, where some observers see fixed essences of the subject and metaphysical finalities, Foucault sees the play of power and a series of unforeseen events that brought us to today.

### 3.4.1 Power and the Political

The idea that human rights function as a vehicle for power, as opposed to against power, does not fit nicely into the traditional liberal conception of human rights. Here, the work of Foucault can provide a useful lens. As mentioned above, Foucault’s work looks to challenge traditional political theory’s focus on power’s observable usage in the political realm in which power is equated with coercion and repression. In terms of the political, this understanding of power—the ability to get others to do things that they would not otherwise have done—locates the source of power with the sovereign. The sovereign has the “right” to create and enforce laws because she has the “consent of those subject to it; the right to exercise power is directly related to the individual rights of those subjects to

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<sup>167</sup> Foucault, “Two Lectures,” 101.

<sup>168</sup> Foucault, *The History of Sexuality*, 95.



its exercise.”<sup>169</sup> Foucault refers to this as juridical power and cautions against limiting our understanding of power to this rather reductionist perspective. Thus, “consent might provide one answer as to the question of the *legitimacy* of the exercise of power, but it provides only a very limited answer to questions about the exercise of power more generally.”<sup>170</sup> In other words, Foucault wants to move beyond the association of power with the “institutions most explicitly associated with rule-giving and enforcement—such as the state and other important social and political actors.”<sup>171</sup> For Foucault, viewing power as merely a “group of institutions and mechanisms that ensure the subservience of the citizens of a given state” is to reduce power to only its most overt form.<sup>172</sup>

Like his concept of power, Foucault conceives of government in broader terms than traditional political theory and views it as the regulation of the conduct of others. This can be achieved in direct terms, for example, through the use of the military or the police, but it can also be achieved in indirect ways “when it acts on the ways in which people regulate their own behaviour.”<sup>173</sup> Emerging from this concept of discipline is the notion of *governmentality*. Combining government and rationality, Foucault argues that governmentality is a form of power “that is addressed to regulating and governing the populations of states, animated by a particular rationality [the accepted regimes of truth of a society].”<sup>174</sup> Whereas the state typically imposed its power through direct forms of

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<sup>169</sup> Duncan Ivison, *Rights* (Montreal & Kingston: McGill-Queen’s University Press, 2008), 187.

<sup>170</sup> Ivison, *Rights*, 187-188.

<sup>171</sup> Ivison, *Rights*, 188.

<sup>172</sup> Foucault, *The History of Sexuality*, 92.

<sup>173</sup> Ivison, *Rights*, 189.

<sup>174</sup> Ivison, *Rights*, 189.

intervention, governmentality directed attention towards the promotion of particular types of conduct—in this way, government was better understood as “the conduct of conduct.”<sup>175</sup> For Dean, conduct could mean “to lead, to direct or to guide, and perhaps implies some sort of calculation as to how this is to be done.”<sup>176</sup> This rather benign understanding starts to take on an ethnical or moral tone when “we consider the reflexive verb ‘to conduct oneself’. Here one is concerned with attention to the form of self-direction appropriate to certain situations, e.g. at work and at home, in business dealings, in relation to clients or friends.”<sup>177</sup> Further, if we consider conduct as a noun, it generally refers to an “articulated set of behaviours,” for example in the case of professional conduct.<sup>178</sup> In these cases, there is a distinct notion of “self-guidance or self-regulation” which must conform to “set of standards or norms.”<sup>179</sup> What this suggests, then, is that conduct is something that prescribes a certain set of behaviours—it is normative—which can be consequently judged by agents responsible for maintaining regulation—it is evaluative.<sup>180</sup> In this light, Government as “Conduct of conduct,” is “any more or less calculated and rational activity, undertaken by a multiplicity of authorities and agencies, employing a variety of techniques and forms of knowledge, that seeks to shape conduct by working through the desires, aspirations, interests and beliefs

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<sup>175</sup> Ivison, *Rights*, 190.

<sup>176</sup> Mitchell Dean, *Governmentality: Power and Rule in Modern Society* 2<sup>nd</sup> Edition (Los Angeles: Sage, 2010), 17.

<sup>177</sup> Dean, *Governmentality*, 17.

<sup>178</sup> Dean, *Governmentality*, 17.

<sup>179</sup> Dean, *Governmentality*, 17.

<sup>180</sup> Dean, *Governmentality*, 17-18.

of various actors, for definite but shifting ends and with a diverse set of relatively unpredictable consequences, effects and outcomes.”<sup>181</sup>

Some key aspects emerge from this definition: First, according to Dean, “from the perspective of those who seek to govern, human conduct is conceived as something that can be regulated, controlled, shaped and turned to specific ends.”<sup>182</sup> Second, governing is a rational activity. Here, Dean notes that “rationality is simply any form of thinking which strives to be relatively clear, systematic, and explicitly about aspects of ‘external’ or ‘internal’ existence, about how things are or how they ought to be.”<sup>183</sup> This links government up with a more normative focus on morality. Dean writes, “if morality is understood as the attempt to make oneself accountable for one’s own actions, or as a practice in which human beings take their own conduct to be subject to self-regulation, then government is an intensely moral activity.”<sup>184</sup> Government is moral in a number of ways: first, “it is moral because policies and practices of government... presume to know, with varying degrees of explicitness and using specific forms of knowledge, what constitutes good, virtuous, appropriate, responsible conduct of individuals and collectivities.”<sup>185</sup> We see this everyday, from tickets for driving without a seatbelt to time spent in jail for the use of illicit drugs. Second, we can think of government as a moral activity if we consider the morality of governors: this refers to our demands that individuals representing the government have “integrity, honesty and impartiality” which

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<sup>181</sup> Dean, *Governmentality*, 18.

<sup>182</sup> Dean, *Governmentality*, 18.

<sup>183</sup> Dean, *Governmentality*, 18-19.

<sup>184</sup> Dean, *Governmentality*, 19.

<sup>185</sup> Dean, *Governmentality*, 119.

can be regulated by codes of conducts, audits, etc. Finally, government as a moral activity can refer to the ways it “seeks to engage with how both the ‘governed’ and ‘governors’ regulate themselves, e.g. a taxpayer can be constituted as an individual capable of honest self-assessment or a judge as someone with a duty to exercise fair, impartial and reasonable judgement and wisdom.”<sup>186</sup> This brings us back to Foucault’s notion of power. To govern is to set and enforce the standards of accepted behaviour, but it is, perhaps more importantly, a process which attempts to engender practices of self-regulation. As Dean notes, “the government of the prison, of the economy and of the unemployed as much as the government of our own bodies, personalities and inclinations, entails an attempt to affect and shape in some way who and what individuals and collectives are and should be.” Therefore,

government is crucially concerned to modify a certain space marked out by entities such as the individual, its selfhood or personage, or the personality, character, capacities, levels of self-esteem and motivation the individual possesses. Government concerns not only practices of government but also practices of the self. To analyze government is to analyze those practices that try to shape, sculpt, mobilize and work through the choices, desires, aspirations, needs, wants and lifestyles of individuals and groups.<sup>187</sup>

The state and its agencies are merely one among various “instruments and rationalities of government (understood in its broad terms) that attempts to regulate our behaviour.”<sup>188</sup>

This is nowhere clearer than in our own daily working lives, which are governed not simply by the obligations we have to our employers, the universities, and our students, but also by general sets of health and safety regulations, school codes of conduct, and so

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<sup>186</sup> Dean, *Governmentality*, 19.

<sup>187</sup> Dean, *Governmentality*, 20.

<sup>188</sup> Ivison, *Rights*, 190.

on. This radical decentering of the state fundamentally challenges our traditional understanding of the sovereign power. As Ivison notes, “once we see how the business of managing populations extends beyond the formal instruments of the state and is dispersed across a wide array of instruments, processes and techniques, it becomes increasingly difficult to see how the discourse of sovereignty can capture either what is occurring or provide a justification for these diverse ‘arts of government’.”<sup>189</sup>

Foucault was particularly interested in liberalism and, more specifically, neo-liberalism, as a rationality of government. Traditional political theorists view liberalism as a “set of arguments and practices that are aimed at criticizing and containing state power” which “obviously include[s] the language of subjective rights.”<sup>190</sup> In this light, the rights associated with liberalism are viewed as a tool against power. Such a conception of rights relies on a particular understanding of humans: as “stable, intentional, effective subject[s] who stand instrumentally before rights, who ontologically pre-exist them, and whose knowable interests or freedom [are] thus protected by them.”<sup>191</sup>

However, if viewed through a Foucauldian lens, liberalism “offers a particular rationality of government, one in which liberty itself becomes a technique of government, along with law.”<sup>192</sup> By viewing humans fundamentally as rational maximizers, the neo-

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<sup>189</sup> Ivison, *Rights*, 191.

<sup>190</sup> Ivison, *Rights*, 191.

<sup>191</sup> Ben Golder, “Foucault, Rights and Freedom,” *International Journal for the Semiotics of Law* 26, no. 1 (2013): 10.

<sup>192</sup> Ivison, *Rights*, 191.

liberal rationality asserts that our well-being is best advanced by “liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade.”<sup>193</sup> The state, in such a view, exists to guarantee the integrity of money and private property through the establishment of a military, police force and, legal structures.<sup>194</sup> However, this reduction of the state does not actually reduce government (understood now as “the conduct of conduct”). Those who do not conform—deviants like welfare recipients, prisoners and other ‘unemployables’—are subjected to alternative forms of government.<sup>195</sup> In contrast to our traditional, liberal understanding of rights, rights for Foucault, by producing the liberal subject, become a conduit for power.<sup>196</sup> What this suggests is that, far from moral certainty, rights have an ambiguous character. As Golder notes,

Rights are both political tools for the contestation and alteration of mechanisms of power and simultaneously mechanism of capture and inscription; both disciplinary and governmental apparatuses, that is, which conduct the behaviour and go to constitute the very identities of those who deploy them. Far from being unproblematic tools for the protection of a subject’s freedom [as traditionally understood in transitional justice], rights emerge in this account as conflicted and ambivalent mechanisms which subjectify and regulate the would-be subject of rights even as they claim to protect that subject or to enlarge the domain within which the subject moves.<sup>197</sup>

By viewing rights through a Foucauldian lens, we can see that rights, like power, in general, *can* “form part of disciplinary and governmental networks which affect, even

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<sup>193</sup> David Harvey, *A Brief History of Neoliberalism* (Oxford: Oxford University Press, 2005), 2.

<sup>194</sup> Harvey, *A Brief History of Neoliberalism*, 2.

<sup>195</sup> Ivison, *Rights*, 192.

<sup>196</sup> Ivison, *Rights*, 186.

<sup>197</sup> Golder, “Foucault, Rights and Freedom,” 7.

constitute, that subject.”<sup>198</sup> Douzinas makes a similar claim, arguing that “recently, rights have mutated from a relative defense against power to a modality of its operations.”<sup>199</sup> Again, to understand the functioning of rights, we must see the individual as not prior to power, nor, in this case, rights. As Foucault claimed, “the individual is not, in other words, power’s opposite number; the individual is one of power’s first effects. The individual is, in fact, a power-effect, and at the same time, and to the extent that he is a power-effect, the individual is a relay: power passes through the individuals it has constituted.”<sup>200</sup> The individual is not a subject of rights, but is, instead, the “subject-effect of rights.”<sup>201</sup> What this suggests is that “a right... is not simply a mechanism that converges with disciplinary power but is *itself*, ‘from the beginning a potentially disciplinary practice’.”<sup>202</sup> Here, the rights regime must be understood as producing a particular kind of subject—the liberal subject.<sup>203</sup>

In order to deal with his particular approach to power (that is, power as productive but not according to any *master plan*) Foucault develops the instrument or tool of genealogy. To start, genealogy must be distinguished from traditional history. As Dreyfus and Rabinow suggest, genealogy is not meant as a tool to capture the “meaning or significance of a past epoch.”<sup>204</sup> Foucault is not interested in getting “the whole

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<sup>198</sup> Golder, “Foucault, Rights, and Freedom,” 10.

<sup>199</sup> Costas Douzinas, “The Paradoxes of Human Rights,” *Constellations* 20, no. 1 (2013): 51.

<sup>200</sup> Michel Foucault, *Society Must be Defended: Lectures at the College de France, 1975-1976* (London, Allen Lane, 2003), 30.

<sup>201</sup> Golder, “Foucault, Rights, and Freedom,” 10.

<sup>202</sup> Golder, “Foucault, Rights, and Freedom,” 11.

<sup>203</sup> Golder, “Foucault, Rights, and Freedom,” 10.

<sup>204</sup> Dreyfus and Rabinow, *Michel Foucault*, 118.

picture of a past age, or person, or institution,” nor is he “trying to find the underlying laws of history.”<sup>205</sup> Perhaps most importantly, Foucault eschews what Dreyfus and Rabinow call finalism: a “history which finds the kernel of the present at some distant point in the past and then shows the finalized necessity of the development from that point to the present.”<sup>206</sup> Such an Hegelian approach views “everything that happened in between [the kernel and the present as] taken up by this march forward, or else left in the backwash as the world historical spirit differentiates and individuates what is central from what is peripheral.”<sup>207</sup> In this type of history, we search the details of our past behind a lens of progress thereby viewing noteworthy events as merely signposts directing us to the present. According to this perspective, “everything has a meaning, a place; everything is situated by the final goal history will attain.”<sup>208</sup>

Central to genealogy is a rejection that the outcome of history is anything *necessary*. The genealogist “recognizes that the deep hidden meanings, the unreachable heights of truth, the murky interiors of consciousness are all shams.”<sup>209</sup> Instead, it was “one possible result of a whole series of complex relations between other events” where no outcome was inevitable.<sup>210</sup> To see humanity as a contingent possibility is to argue that history is not an unfolding of events in some teleological manner, but is, rather, a series of accidents. Indeed, the “story of history” for the genealogist is not the progressive

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<sup>205</sup> Dreyfus and Rabinow, *Michel Foucault*, 118.

<sup>206</sup> Dreyfus and Rabinow, *Michel Foucault*, 118.

<sup>207</sup> Dreyfus and Rabinow, *Michel Foucault*, 118.

<sup>208</sup> Dreyfus and Rabinow, *Michel Foucault*, 118.

<sup>209</sup> Dreyfus and Rabinow, *Michel Foucault*, 108.

<sup>210</sup> Gavin Kendall and Gary Wickham, *Using Foucault's Methods* (Thousand Oaks: SAGE Publication, 1999), 6.



“development of Truth or the concrete embodiment of Freedom, but “is one of accidents, dispersion, chance events, lies.”<sup>211</sup> Such a perspective does not suggest that just about anything could have occurred as there are often very defined forces at work that produce one particular outcome rather than another. Instead, we must recognize how our history structures for us a “narrow range of possibilities.”<sup>212</sup> According to this perspective, our search for origins must be abandoned. As Foucault points out, for Nietzsche, the search for origins is a futile “attempt to capture the exact essence of things,” as it “assumes the existence of immobile forms that precede the external world of accident and succession.”<sup>213</sup> The task of historical analysis for the genealogists is driven by an altogether different logic. As Dreyfus and Rabinow suggest, “Genealogy’s coat of arms might read: oppose depth, finality, and interiority. Its banner: Mistrust identities in history; they are only masks, appeals to unity.”<sup>214</sup> It is contingency that matters, not progress and continuity.

To argue that history is not an unfolding of events, but is, in fact, the result of a series of accidents, is to challenge the belief in human progress. For Foucault, progress implies that we are traveling towards some final end-point like the absolute attainment of freedom. However, such a view requires that humans have an eternal essence that has been denied as a result of some external power. Such a view posits that the individual is

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<sup>211</sup> Dreyfus and Rabinow, *Michel Foucault*, 108.

<sup>212</sup> Dreyfus and Rabinow, *Michel Foucault*, 123.

<sup>213</sup> Michel Foucault, “Nietzsche, Genealogy, History,” in *The Essential Foucault: Selections from The Essential Works of Foucault 1954-1984*, eds. Paul Rabinow and Nikolas Rose (New York: The New Press, 2003), 353.

<sup>214</sup> Dreyfus and Rabinow, *Michel Foucault*, 107.

“ontologically prior to the exercise of power.”<sup>215</sup> This, for Foucault, is not the case. There is no eternal human essence like freedom that must be re-captured in order to advance humanity. For Foucault, if the historian refuses to buy into the ruse of metaphysics, she will find that the only thing behind the thing is not some “primordial truth” or “timeless and essential secret” but, rather, a story of “accidents that accompany every beginning.”<sup>216</sup> This is reason enough as to why the genealogist must poke metaphorical holes in the story of lofty origins and progress by showing what had to be repressed for this veneer of history to maintain its gloss.

Therefore, we must see that the process ahead is not one of writing a whig history, that is, a “a ‘true’ history of the past in the sense of one that is fully adequate to the past, which represents it correctly, which gets the whole picture.”<sup>217</sup> Such an endeavor, for the genealogist, is based on the “false claim of the correspondence theory of reality.”<sup>218</sup> In contrast, the genealogist “accepts the fact that we are nothing but our history, and that therefore we will never get a total and detached picture either of who we are of or our history.”<sup>219</sup> Instead, Foucault calls for a writing of a history of our present: “we must inevitably read our history in terms of our current practices.”<sup>220</sup> In “writing the history of the present,” Foucault’s “approach explicitly and self-reflectively begins with a diagnosis

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<sup>215</sup> Cressida Heyes, “Subjectivity and Power,” in *Foucault: Key Concepts*, ed. Dianna Taylor (Durham: Acumen Press, 2010), 160.

<sup>216</sup> Foucault, “Nietzsche, Genealogy, History,” 353.

<sup>217</sup> Dreyfus and Rabinow, *Michel Foucault*, 120.

<sup>218</sup> Dreyfus and Rabinow, *Michel Foucault*, 120.

<sup>219</sup> Dreyfus and Rabinow, *Michel Foucault* 123.

<sup>220</sup> Dreyfus and Rabinow, *Michel Foucault*, 123.

of the current situation.”<sup>221</sup> We must first “locate the acute manifestations of a particular ‘meticulous ritual of power’... to see where it arose, took shape, gained importance, and so on.”<sup>222</sup> In excavating this “meticulous ritual of power,” one can show that it was not necessary, but rather, very much contingent on practices that preceded it. Thus, instead of attempting to piece together a causal account of history bit by bit, the genealogists look for contingencies. What had to occur for the outcome that we see today?

The purpose of this chapter is to suggest the need for a rupture in the dominant theorizing of transitional justice. The suggestions made here are not merely for the sake of critique alone. They are meant to inspire, to motivate, to re-shape that which may appear as justice in the dominant reading, but which continues to commit violence on those it seeks to help. If we are to see the world as contingent and open, we must be diligent to avoiding closure; to avoid building guardrails that unnecessarily constrain our path. Foucault and Derrida are both interested in the “constraints [that] arise primarily in the categories by means of which we conceptualize ourselves in our world.”<sup>223</sup> In suggesting that the subject is “molded by historical and political forces,” Foucault recognizes that there are “aspects of our world that seem to be immune from change. We must conform to the limits they place before us and order our world with those limits in mind.”<sup>224</sup> Yet, as we have seen, such limits for Foucault “are not merely placed upon us from the outside like barriers but are instead woven into the very fabric of human

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<sup>221</sup> Dreyfus and Rabinow, *Michel Foucault*, 119.

<sup>222</sup> Dreyfus and Rabinow, *Michel Foucault*, 119.

<sup>223</sup> May, *Gilles Deleuze*, 11.

<sup>224</sup> May, *Gilles Deleuze*, 9.

existence.”<sup>225</sup> Foucault’s genealogy shows us that “many of these internal limits arise not from the constitution of our being but from the politics of our relationships.”<sup>226</sup>

Together, these authors challenge the idea that we can approach knowledge of the social world in the same manner as we do the natural world. The message from Foucault is that the social world is better characterized by flux than by eternal essences. History is not the unfolding of events according to some underlying law but is a series of accidents: contingency not causality. For Derrida, we must see that the language we use to make sense of this world builds impenetrable walls around us in a way that always excludes the other (whoever they may be). Thus, we must remain vigilant in opening this world up to those we cannot anticipate. Finally, Rorty encourages us to see that our vocabularies are never final. To believe so is to ignore the fact that our language cannot capture the world-as-it-is. To accept the fragility of our language is to remain open to the use of alternative vocabularies.

### 3.5 Conclusion

The previous section examined the theoretical tools that are used in this project. The theories of Richard Rorty, Jacques Derrida, and Michel Foucault provide answers to three questions: First, what is this project about? It is about identifying and challenging the final vocabulary we use in transitional justice to speak about justice. As Rorty asks us, “Does our use of these words get in the way of our use of those words?” The answer to this, as evidenced by the emerging critique in transitional justice, is, of course, yes: our

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<sup>225</sup> May, *Gilles Deleuze*, 9.

<sup>226</sup> May, *Gilles Deleuze*, 9.

justice vocabulary is limited and exclusive. This leads to the second question: Why is this a problem? While all authors point to why this is a problem for Foucault, we must recognize the way power functions in society. Of central importance in Foucault's work is the notion of governmentality. In transitional justice, we seem to have accepted uncritically that human rights are always opposed to power, and, therefore, immune from its effect. In contrast, human rights and, more broadly, liberalism as a form of governmentality can be viewed as a disciplinary discourse that constructs the liberal subject. The field of transitional justice has, of course, adopted liberalism as its savior. In doing so, we have closed off justice: in the dominant view, justice is always in service of this transition to liberalism.

This leads to the final question: How are we to achieve this? Here, both Foucault and Derrida provide us with ways of approaching this question. The overall framework for this analysis is informed by deconstruction. Deconstruction is not meant to destroy or annihilate the field; quite the opposite. Rather, to deconstruct is to loosen it up, to open it to the other. To do so is to maintain its relevance for those societies emerging from conflict where the site of transition is very much a contested place. Deconstruction proceeds by way of a double reading of a text: the first reading is close to the traditional reading of a text. It remains on the main highway of the text. The second reading, in contrast, veers off the highway in search of tensions in the text that are ignored by the traditional reading. For his part, Foucault urges us to see that our present condition is not by any means necessary. History is not the unfolding of events according to some master plan but is, instead, a series of accidents. Historical events are contingent—that is, they were one possible outcome of a series of complex preceding events. The importance of

Foucault's argument is that we must reconsider the historical events leading up to the normalization of transitional justice at the international level. The field tends to see transitional justice as the result of legal and human rights activists challenging the sovereignty of states, often drawing a line from Nuremberg to the end of the Cold War, to its normalization with the establishment of the ICC. Such a view, I argue, ignores the functioning of power in the emergence of the field. This analysis, therefore, seeks to show the way other interests were integral in the growth of transitional justice. In doing so, I seek to challenge some of the field's central assumptions, including the belief that transitional justice always stands in opposition to power. The purpose of this, of course, relates back to the need to open up and loosen the walls we have drawn around "justice" in transitional justice.

## Chapter 4

### 4 Examining the Paradigms of Transitional Justice

The following chapter explores the dominant paradigms of justice in transitional justice. While the field initially coalesced around a single understanding of justice as criminal prosecution, it has expanded to include restorative justice and, to a lesser degree, reparative justice. Ultimately, while these paradigms of justice emerge from unique philosophical, religion, or cultural traditions, in transitional justice theory, they have been viewed as instruments to assist in the establishment of liberal democracy. While transitional justice mechanisms have always been associated with democratization, Teitel's theory of transitional justice specifically theorized these mechanisms as rituals in societies transitioning from a state of conflict to a state of peace. In this way, the field has approached conflict as a problem or puzzle that can be solved with the right solution: liberal democracy.

To understand the problems this poses, we must recognize that transitional justice mechanisms operate always in societies with deep divisions. It is believed, then, that the introduction of transitional justice mechanisms can assist in finding a path out of this divisiveness. As Teitel suggests, transitional justice should be understood as a bridge connecting the old, rights-abusing regime with the new, rights-respecting one. Its very essence (at least, how it has been theorized) is that it is a fleeting moment. This relationship between transitional justice and time is what I hope to interrogate when I speak of the need to examine the "transition question." How is our theorizing about justice shaped by the transition? First, this periodization between old and new suggests

that each period exhibits relatively stable characteristics. Society in the old regime is defined by divisiveness whereas, in the new regime, it is defined by non-conflict. This leads to the second observation that, as it has been theorized, transitional justice must necessarily entail a teleological account of justice. Justice is working towards some definite end-point—the other side of the bridge. In transitional justice theory, this end-point consistently entails the construction of a liberal democracy. Here, we can see the influence of the Liberal Peace Thesis on transitional justice theories. To begin this analysis, the following section examines the three paradigms of justice in transitional justice.

#### 4.1 Retributive Justice

The retributive justice paradigm has been the central approach for dealing with perpetrators of mass atrocities at the international level. Starting with the International Military Tribunal at Nuremberg (1945) and the International Military Tribunal for the Far East (1946) following the Second World War, retributive justice has been the cornerstone of the international community's approach to mass atrocities, as evidenced by the establishment of the International Criminal Tribunal for the former Yugoslavia (1993), the International Criminal Tribunal for Rwanda (1994), and the permanent International Criminal Court (2002). In addition to these international courts, hybrid courts, which consist of both international and domestic justice actors, have also been established including the Extraordinary Chambers in the Courts of Cambodia (1997) and the Special Court for Sierra Leone (2002).

While some argue that criminal prosecutions following mass atrocities is an imposition of Western justice, the international community, led by the United Nations,



has generally prioritized this response over all other mechanisms. Yet, while there is a general consensus regarding the importance of criminal prosecutions, there is little agreement over the actual value of such proceedings. The following section examines the dominant justifications for using criminal justice.

There are several justifications for using criminal prosecutions. Legal theorists and philosophers have generally distinguished between two categories: consequentialism and retributivism. Consequentialist arguments focus on the way criminal prosecutions can change the behavior of both the individual perpetrator who is on trial as well as other would-be wrongdoers.<sup>1</sup> In contrast retributivist justifications focus purely on the restoration of justice. Retributivist theorists suggest that an offender has “taken an unfair advantage in committing a crime, which can only be corrected by the administering of a punishment.”<sup>2</sup>

A retributivist justification is ‘backward-looking’ because its *raison d'être* is rooted in the past, in the commission of the act.<sup>3</sup> This argument for criminal prosecution seems to tap into a raw emotion of vengeance. Mani captures this sentiment, suggesting that “the basic retributive urge is that wrongdoing must be punished simply because the wrongful act merits condemnation and punishment. But a retributivist justification is more than an urge for vengeance. A retributivist insists that there is a moral obligation to

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<sup>1</sup> Michael Wenzel, Tyler G. Okimoto, Norman T. Feather, Michael J. Platow, “Retributive and Restorative Justice,” *Law and Human Behaviour* 32 (2008): 375.

<sup>2</sup> Declan Roche, “Retribution and restorative justice,” in *The Handbook of Restorative Justice*, ed. Gerry Johnstone and Daniel W. Van Ness (Portland, OR: Willan Publishing, 2007), 78.

<sup>3</sup> Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Cambridge: Polity, 2002), 33-34.

inflict suffering on a wrongdoer. Some of the early literature in transitional justice focused on the writings of Jean Hampton.<sup>4</sup> According to Hampton, punishment is “a commitment to asserting moral truth in the face of its denial.”<sup>5</sup> The perpetration of a crime results in the elevation of a perpetrator over a victim, putting the two in a hierarchical relationship in which the perpetrator asserts his/her superiority. For Hampton, this produces a “false moral claim,” and, as a result, “moral reality has been denied.”<sup>6</sup> By denying the perpetrator’s superiority, the act of retribution is an attempt to correct this false moral status.<sup>7</sup> In doing so, the state, and, where that is not possible, the international community, “reaffirm a victim’s equal worth in the face of a challenge to it.”<sup>8</sup> Similarly, Drumbl argues that “the infliction of punishment rectifies the moral balance insofar as punishment is what the perpetrator deserves. Punishment, therefore, is to be proportionate to the nature and extent of the crime.”<sup>9</sup> According to Elster, retribution as a theory of punishment likely has the most appeal among victims of mass atrocities. He writes, “the idea that wrongdoers deserve to be punished for their acts, irrespective of the consequences of punishing them, is one that probably has a wider appeal in the population at large than among criminal law scholars.”<sup>10</sup>

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<sup>4</sup> Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998), 12.

<sup>5</sup> Jean Hampton, “The Retributive Idea,” in *Forgiveness and Mercy*, eds. Jeffrie Murphy and Jean Hampton (Cambridge: Cambridge University Press, 1988), 125.

<sup>6</sup> Hampton, “The Retributive Idea,” 125

<sup>7</sup> Hampton, “The Retributive Idea,” 130.

<sup>8</sup> Hampton, “The Retributive Idea,” 125-126.

<sup>9</sup> Mark Drumbl, *Atrocity, Punishment, and International Law* (New York: Cambridge University Press, 2007), 61,

<sup>10</sup> Jon Elster, “Retribution,” in *Retribution and Reparations in the Transition to Democracy*, ed. Jon Elster (Cambridge: Cambridge University Press, 2006), 38.

In addition to retribution, Drumbl identifies two consequentialist justifications for criminal prosecutions: general deterrence and expressivism. In terms of general deterrence, by institutionalizing justice the state removes the need for personal vengeance. Blewitt captures this view when he writes that

[a]ll victims expect, and in my view are entitled to see, that the persons most responsible for the crimes against them, their families and loved ones, are brought to justice. If justice is not achieved on their behalf, then their feelings of grievance and their desire for revenge could lead to them taking the law into their own hands to achieve justice, or what they perceive in their eyes as justice – an eye for an eye!”<sup>11</sup>

In terms of mass human rights violations committed by one ethnic group against another, Meernik, Nichols and King suggest that “by pointing the finger of blame squarely at those who conceived, organized, and ordered the commission of War Crimes, Crimes against Humanity, and genocide, criminal prosecution is theorized to contribute to deterrence by lessening the perceived need for one ethnic group to take revenge against another.”<sup>12</sup> This justification is premised on the belief that the threat of punishment will create a hostile world for those who commit human rights violations and, as a result, potential violators will give weight to the threat of judicial accountability when deciding their course of action. Of course, advocates of this theory recognize that enforceable international law will likely not deter *all* potential violators,<sup>13</sup> but suggest that their

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<sup>11</sup> Blewitt, “The Importance of a Retributive Approach to Justice,” 39.

<sup>12</sup> James Meernik, Angela Nichols, Kimi L. King, “The Impact of International Tribunals and Domestic Trials on Peace and Human Rights after Civil War,” *International Studies Perspective* 11, no. 4 (2010): 312.

<sup>13</sup> See Payam Akhavan, “Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?” *The American Journal of International Law* 95, no. 1 (2001): 7-31.

existence in the international community is still better than the alternative—that is to say, complete anarchy.<sup>14</sup>

In support of this argument, Blewitt suggests that the Prosecutor of the ICTY was able to effectively prevent any atrocities from occurring during a build-up of tension between ethnic Albanian rebels and the Macedonian government following the conflict in Kosovo (1998). According to Blewitt, the Prosecutor of the ICTY made it explicitly clear to the Macedonian authorities that the jurisdiction of the ICTY remained in existence and encompassed the entire territory of the former Yugoslavia; a tract of land that included Macedonia. Consequently, Macedonian authorities were made aware of the judicial consequences that would occur if such violations took place. Such a message was also delivered to the ethnic Albanian rebels.<sup>15</sup> This threat was not lost on the military chief in Macedonia:

[F]ollowing a particular incident, where ethnic Albanian rebels were holding a village hostage, the Government ordered the chief of the military to enter the village and to restore law and order. [The Prosecutor] was informed that the military chief responded by saying that if he made a mistake whilst carrying out these order then we would most likely end up in The Hague. He was then informed that he should not make any mistakes and to act within the law.<sup>16</sup>

For Blewitt, this suggests that the laws, at the very minimum, were being factored into the military's overall approach and, therefore, had the potential to alter potentially deadly strategies.

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<sup>14</sup> Blewitt, "The Importance of a Retributive Approach to Justice," 45.

<sup>15</sup> Blewitt, "The Importance of a Retributive Approach to Justice," 46.

<sup>16</sup> Blewitt, "The Importance of a Retributive Approach to Justice," 46.

Elster, too, points to a particular example of deterrence. He cites the case of a man in Norway who, after finding out the consequences for collaborating with the Nazi party, rejected a request to serve on a Nazi special court.<sup>17</sup> In this story, the man risked punishment from his Nazi superiors, believing that “it would be better for his posthumous reputation if he were sentenced by the Nazi Party than by the resistance.”<sup>18</sup> For Elster, much like in Blewitt’s example, there must be an outside actor, like an exiled government or international agent, can publicize credible threats in order to deter potential human rights violators. Today, this task is carried out by the International Criminal Court which provides a permanent mechanism to stand up against human rights violations.

There is, however, a great deal of skepticism surrounding the actual effectiveness of an international court in deterring would-be human rights violators. Drumbl suggests that there is no systematized evidence that definitively demonstrates the effectiveness of criminal trials in deterring international crimes.<sup>19</sup> Furthermore, Drumbl points out that some of the worst human rights violations including the Srebrenica massacre (1995) and the Kosovo ethnic cleansing (1998) took place while the ICTY still had jurisdiction.<sup>20</sup> He suggests that the failure to deter crimes comes, in part, because “deterrence’s assumption of a certain degree of perpetrator rationality, which is grounded in liberalism’s treatment

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<sup>17</sup> Several exiled governments released announcements during World War II asserting that the death penalty would be sought for certain acts of collaboration.

<sup>18</sup> Jon Elster, “Retribution,” 48.

<sup>19</sup> Drumbl, *Atrocity, Punishment, and International Law*, 169. Since the publication of Drumbl’s book, there have been quantitative analyses that support the deterrence effect; see Hun Joon Kim and Katheryn Sikkink, “Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries,” *International Studies Quarterly* 54, no. 4 (2010): 939-963.

<sup>20</sup> Drumbl, *Atrocity, Punishment, and International Law*, 169.

of the ordinary common criminal seems particularly ill fitting for those who perpetuate atrocity.”<sup>21</sup>

For Drumbl, the effectiveness of an international court to deter crimes is muted, especially against the backdrop of “massive violence, incendiary propaganda, and upended social order that contours atrocity.”<sup>22</sup> The cost-benefit analysis undertaken by an individual carrying out such atrocities is, perhaps, an overly optimistic view of a potential perpetrator’s particular mindset within such circumstances. Drumbl argues that participants in such atrocities are often caught up in the emotional fervor of the moment. Accordingly, “[f]or many participants, violence has meaning and is compelling... many individuals organized as foot soldiers of evil share an affective motivation for discriminatory killing. They are captured by angry social norms or, at least, are captivated by them.”<sup>23</sup> For these participants, their actions, while not legal, are morally justifiable given the particular circumstances. This moral defense is often re-confirmed through the use of propaganda that de-humanizes the “other” and elicits fears of their reprisal.<sup>24</sup> This type of propaganda was used throughout the Rwandan genocide.<sup>25</sup> Megret, too, rejects the view that a would-be human rights violator such as a “crazed nationalist purifier” would be deterred by the existence of some distant court. He suggests that this belief is “a typical case of liberalism’s hegemonious tendency of constructing the other in its own

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<sup>21</sup> Drumbl, *Atrocity, Punishment, and International Law*, 171.

<sup>22</sup> Drumbl, *Atrocity, Punishment, and International Law*, 171.

<sup>23</sup> Drumbl, *Atrocity, Punishment, and International Law*, 171.

<sup>24</sup> See Alison Des Forges, “Call to Genocide: radio in Rwanda,” in *The Media and the Rwanda Genocide*, ed. Allan Thompson (London: Pluto Press, 2007).

<sup>25</sup> Sarah Gendron, “Exploiting the Hutu/Tutsi Divide: The Relationship Between Extremist Propaganda and Genocide in Rwanda,” *European Conference on Information Warfare and Security* (July 2010): 76.

self-image, preferably along the lines of some reductionist form of economic rational choice theory.”<sup>26</sup> In contrast, Elster suggests that rather than conceiving of deterrence as the prevention of crimes via “signals from the outside to the inside,” it is, perhaps, more fruitful to think of deterrence as being effective when the signals are from the “present to the future.”<sup>27</sup> Such was the position taken by Justice Robert Jackson during the Nuremberg trials, who felt that the trials were necessary to “make war less attractive.”<sup>28</sup>

Expressivism is the second consequentialist justification for criminal prosecutions. This justification asserts that punishment provides a necessary signal of change for a newly emerging regime. One of the early human rights activists in the field, Juan Mendez, captures this sentiment when he writes:

[R]edressing the wrongs committed through human rights violations is not only a legal obligation and a moral imperative imposed on governments. It also makes good political sense in the transition from dictatorship to democracy. In fact, the pursuit of retrospective justice is an urgent task of democratization, as it highlights the fundamental character of the new order to be established, an order based on the rule of law and on respect for the dignity and worth of each human person.<sup>29</sup>

Similarly, Teitel, a central theorist in the field, is also a proponent of this perspective. Her transitional jurisprudence argument suggests that by subjecting the old regime to the rigours of criminal law, transitional legal processes “convey publicly and authoritatively” the real differences between illiberal and liberal regimes.<sup>30</sup> For McAdams, “the decision

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<sup>26</sup> Frederic Megret, “Three Dangers for the International Criminal Court: A Critical Look at a Consensual Project,” *The Finnish Yearbook of International Law* 12 (2003): 203.

<sup>27</sup> Elster, “Retribution,” 48.

<sup>28</sup> Elster, “Retribution,” 49.

<sup>29</sup> Juan E. Mendez, “In Defense of Transitional Justice,” in *Transitional Justice and the Rule of Law in New Democracies* ed. A. James McAdams (Notre Dame: University of Notre Dame Press, 1997), 1.

<sup>30</sup> Ruti Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000), 221.

to act upon past abuses will amount to more than simply finalizing the break with authoritarianism. Assuming they [trials] are properly conducted, these proceedings should provide tangible evidence of the guiding principles—equality, fairness, and the rule of law—that are meant to define the new order of things.”<sup>31</sup> McAdams touches on one of the key pieces of expressivism. He writes, “legal prosecution equates to embracing the rule of law—that is, holding violators accountable for their misdeeds demonstrates to all members of society that the law’s authority is superior to that of individuals.”<sup>32</sup> “By bringing the impartiality of the courtroom to adjudicate these crimes,” trials, convictions and punishment can build the status of a new state and increase the respect for law.<sup>33</sup> Similarly, Orentlicher asserts that, “by condemning past crimes through the strongest sanction used by the institutions of government to condemn, exemplary trials could send a message to the future: This will not be tolerated again.”<sup>34</sup> For Osiel, criminal prosecutions can positively contribute to post-conflict society-building through the growth in social solidarity that emerges when parties can rely on institutions to peacefully resolve disputes. In this case, the institution’s effectiveness reaffirms its importance in society.<sup>35</sup>

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<sup>31</sup> A. James McAdams, “Preface,” in *Transitional Justice and the Rule of Law in New Democracies*, ed. A. James McAdams (Notre Dame: University of Notre Dame Press, 1997), x.

<sup>32</sup> Miriam J. Auckerman, “Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice,” *Harvard Human Rights Journal* 15 (2002): 72.

<sup>33</sup> James Meernik, Angela Nichols, Kimi L. King, “The Impact of International Tribunals and Domestic Trials on Peace and Human Rights after Civil War,” 313; Drumbl, *Atrocity, Punishment, and International Law*, 173.

<sup>34</sup> Diane Orentlicher, “Settling Accounts Revisited: Reconciling Global Norms with Local Agency,” *International Journal of Transitional Justice* 1, no. 1 (2007): 15.

<sup>35</sup> Mark Osiel, *Mass Atrocity, Collective Memory, and the Law*, (New Brunswick: Transaction Publishers, 1997), 3.



In addition to rebuilding the status of the rule of law, many of the transitional justice scholars argue that criminal prosecutions can play a vital role in the promotion of reconciliation. While previous trials like the *ad hoc* tribunals for the former Yugoslavia and Rwanda were largely considered ineffective in this respect,<sup>36</sup> scholars like Kerr and Mobekk suggest that with the right approach (for example, locating the trials in the country in which the crimes occurred as well as ensuring community buy-in) judicial courts can “make a contribution to peace and reconciliation.”<sup>37</sup> For example, Akhavan argues that trials like the “ICTY will contribute to interethnic reconciliation by telling the truth about the underlying causes and consequences of the Yugoslav tragedy. The ascertainment and public recognition of indisputable facts before an impartial tribunal will help counter the distortions of demonization and ethnic hatred fomented by certain political élites in the former Yugoslavia.”<sup>38</sup> The purpose of truth here is to “demonstrate that there was nothing inevitable or irreversible about the eruption of ethnic violence and that interethnic harmony is both possible and desirable.”<sup>39</sup>

Yet, Akhavan is clear that an exhaustive truth based on “recital of objective facts” will not lead to reconciliation.<sup>40</sup> Rather, the type of truth necessary for reconciliation is a

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<sup>36</sup> See David Hoogenboom and Stephanie Vieille, “Rebuilding social fabric in failed states: Examining transitional justice in Bosnia.” *Human Rights Review*, 11, no. 2, (2010): 183-198.

<sup>37</sup> Rachel Kerr and Eirin Mobekk, *Peace & Justice: Seeking Accountability after War* (Malden, MA: Polity Press, 2007), 91.

<sup>38</sup> Payam Akhavan, “Justice in The Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal,” *Human Rights Quarterly* 20, no. 4 (1998): 741.

<sup>39</sup> Akhavan, “Justice in The Hague, Peace in the Former Yugoslavia?” 741.

<sup>40</sup> Akhavan, “Justice in The Hague, Peace in the Former Yugoslavia?” 741.

“shared truth—a moral or interpretive account.”<sup>41</sup> Of course, this is where criminal prosecutions are more constructive than other truth-getting procedures. He writes that

through the exercise of prosecutorial discretion, the limited resources at the disposal of the ICTY can be used to construct an optimal shared truth that demonstrates that individuals—primarily leaders—bear liability for crimes, and that there is no justification for the collective attribution of guilt to entire ethnic groups. But such truth-telling is necessarily restrained by the limits of the judicial process, the focus of which is the deeds of the accused and not the suffering of the victims.<sup>42</sup>

Akhavan’s argument is based on the belief that collective blame will result in cycles of violence between community, whereas, the individualization of guilt will show that “specific individuals—not entire ethnic or religious or political groups—committed atrocities.”<sup>43</sup> Similarly, Moghalu argues that trials “establish individual responsibility for the crimes adjudicated, thus negating collective guilt, which can be a significant obstacle to genuine reconciliation.”<sup>44</sup> These views suggest that legal prosecutions can do more than simply express a new future; they can have a transformative effect on the trajectory of this “new” society.

Some scholars, however, challenge the idea that the individualization of guilt will strengthen inter-group relations. For example, Fletcher and Weinstein point out that “in periods of collective violence, the focus on individual crimes has been used by many to

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<sup>41</sup> Akhavan, “Justice in The Hague, Peace in the Former Yugoslavia?” 741.

<sup>42</sup> Akhavan, “Justice in The Hague, Peace in the Former Yugoslavia?” 741-742.

<sup>43</sup> Neil Kritz, “Coming to Terms with Atrocities: A Review of Accountability mechanisms for Mass Violations of Human Rights,” *Law and Contemporary Problems* 59 (1996): 128.

<sup>44</sup> K.C. Moghalu, “Reconciling Fractured Societies: An African Perspective on the Role of Judicial Prosecution,” in *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States*, ed. Ramesh Thakur and P. Malcontent (Tokyo: United Nations Press, 2004), 216.

claim collective innocence.”<sup>45</sup> Similarly, Meister notes that the “individuating project [which] is a necessary component of criminal prosecutions... is also a serious limitation of liberal political analysis. Politics, after all, is not merely about what people do, but also about what they support, wish, and condone.”<sup>46</sup> These scholars suggest that placing the blame squarely on the individual perpetrators fails to capture the wider social context in which these conflict occurred. As Fletcher and Weinstein note, “the assumption that individual agency is the primary determinant of behaviour is open to question.”<sup>47</sup>

Criminal prosecutions grounded in the retributive justice paradigm are the centrepiece of the international community’s response to conflict and authoritarianism. Guided by the dictates of international law, at the heart of which are the civil and political rights related to bodily integrity, criminal prosecutions are rooted in a liberal conception of the world. The focus of the retributive justice paradigm is the prosecution and subsequent incarceration of individual perpetrators of mass atrocities. In the transitional justice community, many still argue that accountability through criminal proceedings remains a vital component in a state’s transition from conflict. Weinstein and Stover recognize this, suggesting that “individuals need some form of justice to acknowledge the wrongs done to them, just as societies need it to establish boundaries within which individuals can be held responsible for their behaviour toward their fellow citizens.”<sup>48</sup>

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<sup>45</sup> Laurel E. Fletcher and Harvey M. Weinstein, “Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation,” *Human Rights Quarterly* 24, no. 3 (2002): 604.

<sup>46</sup> Robert Meister, “Human Rights and the Politics of Victimhood,” *Ethics and International Affairs* 16, no. 2 (2002): 107.

<sup>47</sup> Meister, “Human Rights and the Politics of Victimhood,” 107.

<sup>48</sup> Weinstein and Stover, “Introduction,” 11.

However, Weinstein and Stover argue that “[j]ustice is most effective when it works in consort with other processes of social reconstruction and reflects the needs and wishes of those most affected by violence.”<sup>49</sup> For these authors, “this is perhaps the greatest lesson that has emerged since the international community began its experiment in international criminal justice over ten years ago.”<sup>50</sup> This recognition of the relative unimportance of the victim in the justice process has been the central focus of the restorative justice process. In response, the international community has adopted an array of mechanisms to accompany legal prosecutions. These mechanisms will be discussed in the following sections on truth commissions and the various reparative mechanisms.

## 4.2 Restorative Justice

Central to the field of transitional justice is a belief that the world must take action in cases of gross human rights violations. Criminal prosecutions, rooted in retributive justice, are only one approach that has been legitimated by the field; truth commissions and their underlying philosophy of justice, restorative justice, are another. Whereas in the retributive model, the victim is, for the most part, removed from the process and replaced by the state,<sup>51</sup> in the restorative paradigm, victims as well as the wider community are viewed as integral actors in the justice process.<sup>52</sup> While proponents of restorative justice have identified a number of mechanisms, including healing circles, as

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<sup>49</sup> Weinstein and Stover, “Introduction,” 11.

<sup>50</sup> Weinstein and Stover, “Introduction,” 11.

<sup>51</sup> Priscilla B. Hayner, *Unspeakable Truths: Facing the challenge of truth commissions*, (New York: Routledge, 2002), 28.

<sup>52</sup> Jennifer J. Llewellyn and Robert Howse, “Institutions for Restorative Justice: The South African Truth and Reconciliation Commission,” *The University of Toronto Law Journal* 49, no. 3 (1999): 380.

an alternative to criminal prosecutions, truth commissions have become the mechanism most closely associated with this paradigm.

As Hayner defines it, a truth commission is a body that “(1) focuses on the past; (2) investigates a pattern of abuses over a period of time, rather than a specific event; (3) exists temporarily, typically in operation for six months to two years, and completing its work with the submission of a report; and (4) is officially sanctioned, authorized, or empowered by the state.”<sup>53</sup> Truth commissions were popularized following the wave of military dictatorships in Latin America in the 1970s and 1980s, especially where previous regimes had “insisted upon amnesties or pardons as a precondition for stepping aside.”<sup>54</sup> Because of this, subsequent governments were forced to seek out alternative mechanisms of justice, at least in the immediate period following the transition away from authoritarian rule.<sup>55</sup> In this respect, the truth commission was likely a political compromise more than an imperative; however, the truth commission offered valuable information for families of victims who had disappeared without a trace.<sup>56</sup>

For countries like Argentina, a truth commission was adopted not as an alternative, but, rather, as a first step. After being elected President, Raúl Alfonsín adopted the *National Commission on the Disappearance of People* (CONADEP). However, eighteen months after this transition began, prosecutions were set up to

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<sup>53</sup> Hayner, *Unspeakable Truths*, 14.

<sup>54</sup> Hayner, *Unspeakable Truths*. 14.

<sup>55</sup> Teitel, *Genealogy of Transitional Justice*, 76.

<sup>56</sup> Alexander Laban Hinton, “Introduction,” in *Transitional Justice: Global Mechanisms and Local Realities after Genocide and Mass Violence*, ed. Alexander Laban Hinton (New Brunswick: Rutgers University Press, 2010), 3.

investigate the crimes of the military junta.<sup>57</sup> For Argentina, where criminal prosecutions initially looked unfeasible, the truth commission offered an immediate mechanism to delegitimize the previous regime's human rights violations but, in the end, did not close the door on criminal prosecutions.<sup>58</sup>

The truth commission in Argentina was the first prominent commission of its kind.<sup>59</sup> Since then, approximately 40 such commissions have been appointed to date, but the truth commission has largely become identified with the democratic transition in South Africa. After the fall of the apartheid regime, the new government, under the African National Congress, adopted the Truth and Reconciliation Commission (TRC) to investigate the mass human rights violations under the previous regime.<sup>60</sup> Since the South African TRC, truth commissions have gained considerable legitimacy at the international level,<sup>61</sup> and there are a great number of advocates in the international community, including international human rights non-governmental organizations (NGOs), like the International Center for Transitional Justice; commissioners and staff of previous truth commissions; academics from around the world; and proponents within the

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<sup>57</sup> Aryeh Neier, *The International Human Rights Movement: A History* (Princeton: Princeton University Press, 2013), 259.

<sup>58</sup> Teitel, "Transitional Justice Genealogy," 77.

<sup>59</sup> In 1974, Ugandan President Idi Amin established the "Commission of Inquiry into 'Disappearances' of People in Uganda since the 25<sup>th</sup> of January, 1971," and in 1982, Bolivian President Hernan Siles Zuazo established the "National Commission of Inquiry into Disappearances." Neither commission received tremendous international attention. For more information, see Priscilla Hayner, "Fifteen Truth Commissions—1974 to 1994—A Comparative Study," *Human Rights Quarterly* 16, no. 4 (1994): 597-655.

<sup>60</sup> Teitel, "Transitional Justice Genealogy," 78.

<sup>61</sup> Teitel, "Transitional Justice Genealogy," 78.

United Nations. All of these suggest that truth commissions are a necessary component of the justice process in supporting peaceful transitions.<sup>62</sup>

The restorative justice paradigm has become the guiding moral force behind the development of truth and reconciliation commissions following mass atrocities. Restorative justice emerges from a unique view of wrongdoings in which crime breaks down the very social fabric of a community.<sup>63</sup> In response, restorative justice emphasizes the “transformation of subjective factors that impair a community, such as anger, resentment, and desire for vengeance.”<sup>64</sup> Thus, crime, and the response to it, needs to have a focus beyond the individual perpetrator to include the damaged relationships within community.<sup>65</sup> The retributive paradigm, as discussed above, eliminates this relational aspect by removing all elements of the victim and inserting the state in his or her place. In this sense, the retributive focus on a single criminal offense becomes a contest between the state and the offender, to the exclusion of any outside actors. In one of the early academic pieces that greatly influenced the restorative justice paradigm, Christie described conflict as property and argued that the justice system robs victims of this property. Christie argued that this is a misstep on the part of the modern state, to the detriment of the victim and the wider society. He stated that “modern criminal control systems represent one of the many cases of lost opportunity for involving citizens in tasks

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<sup>62</sup> Eric Wiebelhaus-Brahm, *Truth Commissions and Transitional Societies: The Impact on Human Rights and Democracy* (London: Routledge 2010), 6.

<sup>63</sup> Howard Zehr, *The Little Book of Restorative Justice* (Intercourse, PA.: Good Books, 2002), 22.

<sup>64</sup> Mark R. Amstutz, “Restorative Justice, Political Forgiveness and the Possibility of Political Reconciliation,” in *The Politics of Past Evils: Religion, Reconciliation, and the Dilemmas of Transitional Justice*, ed. Daniel Philpott (Notre Dame: University of Notre Dame Press, 2006), 166-167.

<sup>65</sup> Zehr, *The Little Book of Restorative Justice*, 22.

that are of immediate importance to them.”<sup>66</sup> According to Christie, “the victim is a particularly heavy loser in this situation. Not only has he suffered, lost materially or become hurt, physically or otherwise... but above all he has lost participation in his own case.”<sup>67</sup>

While the replacing of the victim with the state is justified by its goal of avoiding cycles of vengeance, some scholars argue that this exchange actually signals the prioritization of the state’s interest over the victim’s or the wider community’s. Sawin and Zehr assert that

as the ostensible custodian of social order, the state’s duty is to denounce the wrong, ensure that the offender receives the ‘hard treatment’ he or she deserves and take steps to assure that no further harm will be committed. The state carries out this duty by discovering the source of wrongdoing (the offender), condemning the act and extracting assurances that the offenses will desist, either through imprisonment, monitoring, treatment or reform. Much of this is done in the name of the larger or macro-community, but rarely is the community actually consulted or involved in any meaningful way.<sup>68</sup>

This suggests that ensuring social order is paramount to the interests of the victim or those of the community. In many cases, where a retributive approach like the court system is used, the actors most wronged by criminal actions, that is to say the victims, are disconnected from the pursuit of justice.<sup>69</sup> Their private pursuit of justice is not given any assistance from the state, outside of knowing the offender is behind bars. Their needs and

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<sup>66</sup> Nils Christie, “Conflicts as Property,” *The British Journal of Criminology* 17, no. 1 (1977): 7.

<sup>67</sup> Christie, “Conflicts as Property,” 7.

<sup>68</sup> Jennifer Larson Sawin and Howard Zehr, “The ideas of engagement and empowerment,” in *The Handbook of Restorative Justice*, ed. Gerry Johnstone and Daniel W. Van Ness (Portland, OR: Willan Publishing, 2007), 44.

<sup>69</sup> Sawin and Zehr, “The ideas of engagement,” 44.



the needs of the community, if not satiated by the imprisonment of the offender, must be met through other means.

In contrast, restorative justice argues that damaged relationships represent both the effects of a crime, and the cause of that crime. That is, a criminal act further damages the societal fabric of a community but it, perhaps more importantly, also signals an existing brokenness within the community; a crime both implicates the community and contributes to its deterioration. Any response to such collective brokenness must acknowledge the importance of bringing the community, including the victim into the justice process in order to restore the basic fabric of society. Zehr highlights this, suggesting that “restorative justice is a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.”<sup>70</sup>

In contrast to the criminal justice paradigm where “violations create guilt,” the restorative justice paradigm suggests that “violations create obligations.”<sup>71</sup> Whereas guilt necessitates some form of punishment by the state, as evidenced in the criminal paradigm, the restorative paradigm suggests that obligations are owed to both the victim and the wider community “in an effort to put things right.”<sup>72</sup> For example, this could include dialogue between these stakeholders, in which all “share their stories and come to a consensus about what should be done.”<sup>73</sup> The approach of the restorative paradigm

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<sup>70</sup> Zehr, *The Little Book*, 37.

<sup>71</sup> Zehr, *The Little Book*, 21.

<sup>72</sup> Zehr, *The Little Book*, 21.

<sup>73</sup> Zehr, *The Little Book*, 24.

stands in marked contrast to the retributive paradigm for its emphasis on the victim. However, Llewellyn urges us to use caution when viewing restorative justice as a strictly victim-centered lens in which the objective is merely the rebuilding of the relationship between victim and perpetrator. While restorative justice does not reject this view, it is not the ultimate aim of the paradigm. Instead, she argues that the paradigm is

concerned with ensuring equality in social relationships between individuals. Social relationships are those relationships that result from the fact that we all exist in networks of relationships – some personal and intimate but the great majority of which result from the fact that we share the same physical or political space. The basic requirement for equality in these relationships is the satisfaction of each party’s rights to equal concern, respect, and dignity.<sup>74</sup>

Llewellyn urges us to think about restorative justice as “relationship-centred,” rather than “victim-centred” as the goals of restorative justice are broader than individuals.<sup>75</sup> For Llewellyn, the goal of any process of justice is restoring relationships.<sup>76</sup> Ultimately, these theorists remind us that “restorative justice seeks to recover certain neglected dimensions that make for a more complete understanding of justice.”<sup>77</sup> In doing so, restorative justice looks to “prepare the way for victims and perpetrators, their respective families, their communities and the nation as a whole to learn to live together after years of enmity.”<sup>78</sup>

The convoking of the TRC by South Africa forced a reconsideration of the accepted notions of justice. Apartheid was a system of racial oppression established by

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<sup>74</sup> Llewellyn and Howse, “Institutions for Restorative Justice,” 355.

<sup>75</sup> Llewellyn and Howse, “Institutions for Restorative Justice,” 356.

<sup>76</sup> Llewellyn and Howse, “Institutions for Restorative Justice,” 356.

<sup>77</sup> Charles Villa-Vicencio, “Why Perpetrators Should Not Always be Prosecuted: Where the ICC and Truth Commissions Meet,” *Emory Law Journal* 49, no. 1 (2000): 214.

<sup>78</sup> Villa-Vicencio, “Why Perpetrators Should Not Always be Prosecuted,” 215.

the white National Party in 1948 and sustained through brutal “manipulation, coercion, and violence.”<sup>79</sup> Its entrenchment in South Africa created a society “premised on lies, secrecy and the abuse of basic human rights.”<sup>80</sup> Chaired by Archbishop Desmond Tutu, the TRC created a forum for victims to tell their stories and promised perpetrators amnesty or leniency in exchange for confessions.<sup>81</sup> The commission received 21,290 statements in which 19,050 individuals were identified as victims of human rights violations. Another 2975 victims were identified through the amnesty process.<sup>82</sup> The 3,500-page report was released on October 29, 1998. For Tutu, the truth commission offered a “third way” between criminal prosecutions and blanket amnesties and was often justified using alternative concepts derived from Christian or African ethics like reconciliation, forgiveness, and *Ubuntu*.<sup>83</sup>

According to Archbishop Tutu, “retributive justice is largely Western. The African understanding is far more restorative—not so much to punish as to redress or restore a balance that has been knocked askew. The justice we hope for is restorative of

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<sup>79</sup> Llewellyn and Howse, “Institutions for Restorative Justice,” 365.

<sup>80</sup> Llewellyn and Howse, “Institutions for Restorative Justice,” 365.

<sup>81</sup> Roht-Arriaza, “The New Landscape of Transitional Justice,” 5.

<sup>82</sup> *Report of the Truth and Reconciliation Commission of South Africa*, vol. 7, 1

<sup>83</sup> Ubuntu is the African concept “I am because we are” which attempts to capture the importance of community in African life. See Rajeev Bhargava, “Restoring Decency to Barbaric Societies,” in *Truth v. Justice: The Morality of Truth Commissions*, eds. Robert I. Rotberg and Dennis Thompson (Princeton: Princeton University Press, 2000), 61-62; Elizabeth Kiss, “Moral ambitions within and beyond political constraints,” in *Truth v. Justice: The Morality of Truth Commissions*, eds. Robert I. Rotberg and Dennis Thompson, 68-98 (Princeton: Princeton University Press), 81; Alex Boraine, “Truth and Reconciliation in South Africa: The Third Way,” in *Truth v. Justice: The Morality of Truth Commissions*, eds. Robert I. Rotberg and Dennis Thompson (Princeton: Princeton University Press, 2000), 153; Audrey R. Chapman and Hugo van der Merwe, “Introduction: Assessing the South African Transitional Justice Model,” in *Truth and Reconciliation in South Africa: Did the TRC Deliver?* Eds. Audrey R. Chapman and Hugo van der Merwe (Philadelphia: University of Pennsylvania Press, 2008), 2. For more information on amnesties, see Ruti Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000), 53-55.

the dignity of the people.”<sup>84</sup> In addition to restoration, the TRC relied on concepts like reconciliation to characterize its vision. The prioritization of reconciliation over retribution can be “traced both to South African architects of the commission and to the history of truth commissions internationally.”<sup>85</sup> As Kiss notes, the theme of reconciliation was also “evident in the Argentinian truth commission’s report, which disavowed “vindictiveness and vengeance.”<sup>86</sup> The Argentinian report relied on religious language too to justify this approach. The report asserts that, “we are asking for truth and justice, the same way that churches of different denominations have done, in the understanding that there can be no true reconciliation until the guilty repent and we have justice based on truth. If this does not happen, then the transcendent mission which the judicial power fulfills in all civilized countries will prove completely valueless.”<sup>87</sup> For their part, South Africans invoked uniquely African qualities to justify their approach.<sup>88</sup> According to Kiss, “The postamble of the interim constitution set the tone for the TRC’s work when it proclaimed ‘a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *Ubuntu* but not for victimization’.”<sup>89</sup> In this light, Kiss argues that reconciliation should not be viewed as a “policy of forgive and

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<sup>84</sup> Martha Minow, *Between Vengeance and Forgiveness*, 81.

<sup>85</sup> Elizabeth Kiss, “Moral ambitions within and beyond political constraints,” In *Truth v. justice: The Morality of Truth Commissions*, edited by Robert I. Rotberg and Dennis Thompson, 68-98 (Princeton: Princeton University Press), 79.

<sup>86</sup> Kiss, “Moral ambitions within and beyond political constraints,” 79.

<sup>87</sup> Kiss, “Moral ambitions within and beyond political constraints,” 79.

<sup>88</sup> Of course, the South African TRC took on religious tones, as well, suggesting that guilty should ‘repent’ rather than be punished. See Kiss “Moral ambitions within and beyond political constraints,”

<sup>89</sup> Kiss, “Moral ambitions within and beyond political constraints,” 79.

forget,” rather, “what was required was a renunciation of vengeance and violence in favor of a willingness to work together as South Africans.”<sup>90</sup>

Ultimately, however, the decision to adopt a truth commission was an important political compromise as criminal prosecution would have been a significant barrier to the peaceful transition from apartheid to democracy. According to Alex Boraine, a central architect of the South African TRC, interviews with President Mandela revealed that “senior generals of the security forces had personally warned him of the dire consequences if members of those forces had to face compulsory trials and prosecutions.”<sup>91</sup> Despite this conscious political decision, there were certainly many South Africans who opposed the TRC and, specifically, the granting of amnesty. According to the then-Deputy President of South Africa, “within the ANC the cry was to ‘catch the bastards and hang them’ but we realised that you could not simultaneously prepare for a peaceful transition. If we had not taken this route I don’t know where the country would be today. Had there been a threat of Nuremberg-style trials over members of the apartheid security establishment we would never have undergone the peaceful change.”<sup>92</sup>

Similarly, Judge Richard Goldstone stated that “the decision to opt for a Truth and Reconciliation Commission was an important compromise. If the ANC had insisted on

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<sup>90</sup> Kiss, “Moral ambitions within and beyond political constraints,” 81.

<sup>91</sup> Alex Boraine, “Truth and Reconciliation in South Africa: The Third Way,” in *Truth v. Justice: The Morality of Truth Commissions*, eds. Robert I. Rotberg and Dennis Thompson (Princeton: Princeton University Press, 2000), 143.

<sup>92</sup> Thabo Mbeki quoted in Alex Boraine, “Truth and Reconciliation Commission in South Africa Amnesty,” in *Retribution and Reparation in the Transition to Democracy*, ed. Jon Elster (Cambridge: Cambridge University Press, 2006), 301.

Nuremberg-style trials for the leaders of the former apartheid government, there would have been no peaceful transition to democracy, and if the former government had insisted on blanket amnesty, then, similarly, the negotiations would have broken down.”<sup>93</sup> And so Goldstone believes that any other path would no doubt have resulted in incredible violence in the country.<sup>94</sup> Hayner, too, points to this balancing act, writing that “despite the efforts of the Truth and Reconciliation Commission, many South Africans still demanded strict justice and punishment for their perpetrators. Where justice was not possible, the minimal requirement for forgiveness, most insisted, was to be told the full, honest, and unvarnished truth.”<sup>95</sup> The turn towards truth, then, must be viewed, in part, as a policy which recognized and accepted the limits of the particular situation in South Africa. Indeed, Minow suggests that

many in South Africa proudly embrace the TRC’s search for nonviolent responses to violence. From their vantage point, it is an act of restraint not to pursue criminal sanctions, and an act of hope not to strip perpetrators of their political and economic positions. Yet it is also an act of judgement that prosecutions would impose too great a cost to stability, reconciliation, or nation building...when a democratic process selects a truth commission, a people summon the strength and vision to say to one another: Focus on victims and try to restore their dignity; focus on truth and try to tell it whole.”<sup>96</sup>

Yet, this idea of a balance between peace and justice and the will to embrace truth, forgiveness and reconciliation still somehow oversimplifies what was a complex mix of emotions in South Africa. Indeed, as Nagy points out, South African political groups,

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<sup>93</sup> Judge Richard Goldstone’s perspective is found in Boraine, “Truth and Reconciliation Commission,” 302.

<sup>94</sup> Boraine, “Truth and Reconciliation Commission,” 302

<sup>95</sup> Priscilla B. Hayner, *Unspeakable Truths: Facing the challenge of truth commissions* (New York: Routledge, 2002), 3.

<sup>96</sup> Minow, *Between Vengeance and Forgiveness*, 82.

like the Azanian People's Organization rejected the amnesty as it "violated their constitutional right to have 'justiciable disputes settled by a court of law'."<sup>97</sup> What this suggests, then, is that, like the retributive paradigm, restorative justice must be understood as subjective values instead of universal truths about justice. Their justification, including a mixture of Christian and African ethics as well as political compromise, did not go unchallenged within South Africa.

Despite these challenges, truth commissions are increasingly viewed as a vital component in a country's transition from conflict to democracy. While, at its core, a truth commission is a fact-finding body, to fully understand its value, transitional justice scholars suggest that one must broaden their understanding of truth. In the adversarial system of criminal prosecutions, there is a particular focus on the alleged perpetrator's account of the crime: Is his or her account of reality true or false? If the defense is proven false or deemed insufficient, then the accused is found guilty. Here, truth is confined to what may be relevant to the criminal guilt or innocence of the perpetrator. If victims are included, their testimony, similarly, is "only admissible in accordance with strict rules of evidence and may be subject to potentially hostile cross-questioning."<sup>98</sup> This is a very specific understanding of truth as based on evidence beyond a reasonable doubt. According to Du Toit, "truth commissions represent an alternative way of linking

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<sup>97</sup> Rosemary Nagy, "Violence, Amnesty and Transitional Law: 'Private' Acts and 'Public' Truths in South Africa," *African Journal of Legal Studies* 1, no. 1 (2004): online.

<sup>98</sup> Andre du Toit, "The Moral Foundations of the South African TRC: Truth as Acknowledgement and Justice as Recognition," in *Truth v. Justice: The Morality of Truth Commissions*, edited by Robert I. Rotberg and Dennis Thompson (Princeton: Princeton University Press, 2000), 136.

truth and justice that puts victims first.”<sup>99</sup> In truth commission hearings, it is not factual truth alone that contributes to justice, but truth as acknowledgment—that is, viewing victims as “equal sources of truth and bearers of rights.”<sup>100</sup> Thus, in order to understand the value of truth commissions, Du Toit argues that we must draw a distinction between knowledge and acknowledgement.<sup>101</sup>

Some observers argue that truth commissions are needed to establish specific knowledge about crime including its “extent, origin, and nature.”<sup>102</sup> Hayner, however, points out that it is not so much an issue of finding factual truth, but a process of lifting the “veil of denial about widely known but unspoken truths.”<sup>103</sup> For many victims, then, a truth commission does not provide them with new truths, but gives formal acknowledgement of the truths already known.<sup>104</sup> In the case of South Africa, the knowledge surrounding the Apartheid regime was certainly not in short supply, as, unofficially, certain “individuals and sections in the security forces were widely known as notorious torturers and killers.”<sup>105</sup> Instead, it was often the official denial of these occurrences that prompted the need for a truth commission.

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<sup>99</sup> Du Toit, “The Moral Foundations of the South African TRC,” 136.

<sup>100</sup> Du Toit, “The Moral Foundations of the South African TRC,” 136.

<sup>101</sup> This distinction was first made by the philosopher Thomas Nagel at the Aspen Institute Conference. See Lawrence Weschler, “A Miracle, A Universe: Settling Accounts with Torturers,” in *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, ed. Neil Kritz (Washington DC: United States Institute of Peace Press, 1995), 492.

<sup>102</sup> Naomi Roht-Arriaza, “The New Landscapes of Transitional Justice,” in *Transitional Justice in the Twenty-First Century* (Cambridge: Cambridge University Press, 2006).

<sup>103</sup> Hayner, *Unspeakable Truths*, 25.

<sup>104</sup> Hayner, *Unspeakable Truths*, 26.

<sup>105</sup> Du Toit, “The Moral Foundations of the South African TRC,” 133.



According to Du Toit, government denial produces a “redoubling of the basic violations: the literal violation consists of the actual pain and suffering, and trauma visited on them; the political violation consists in the refusal (publicly) to acknowledge it.”<sup>106</sup> For Du Toit, it is this second violation that “amounts to a denial of the human and civic dignity of the victims.”<sup>107</sup> Here, truth as acknowledgement stands as the cornerstone for a different conception of justice as *recognition*. He writes, “what is at stake when victims are enabled to tell their own stories is not just the specific factual statements, but the right of framing them from their own perspectives and being recognized as legitimate sources of truth with claims to rights and justice. The relevant sense of truth is of a more holistic *narrative truth*—that involved in the overall framing of the events and experiences that together make up the victim’s own ‘story’.”<sup>108</sup> As Asmal, Asmal, and Roberts claim, such memories are given meaning, where they were once meaningless.<sup>109</sup>

This idea of justice as recognition stands at odds with the traditional understanding of justice in established liberal democracies. There, if a crime like police brutality occurs, justice is doled out through the regular institutional channels. However, in transitional states the regular institutions of law and justice have been perverted by the previous regime and, as a result, their functioning cannot be taken for granted as we do in

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<sup>106</sup> Du Toit, “The Moral Foundations of the South African TRC,” 133.

<sup>107</sup> Du Toit, “The Moral Foundations of the South African TRC,” 133.

<sup>108</sup> Du Toit, “The Moral Foundations of the South African TRC,” 136.

<sup>109</sup> Kader Asmal, Louise Asmal, and Ronald Suresh Roberts, *Reconciliation through truth: a reckoning of apartheid’s criminal governance* (Cape Town: David Philip Publishers, 1997), 6.

more established democracies.<sup>110</sup> Therefore, Du Toit argues that the establishment of a “new culture of rights and equal citizenship”—a critical step in the consolidation of democratic transitions—must be preceded by a special kind of justice, that is recognition.<sup>111</sup> As Gairdner claims, “truth commissions can legitimize the culture, beliefs and values associated with human rights as the new framework for imagining social relations.” Thus, by standing in opposition to arbitrary power the rights legitimized by the truth commission can function to “guarantee the due process of law, the right to participate in the political life of the country, to dissent without fear of physical retribution and they broaden the concept of national security to include the well-being of all persons in society.”<sup>112</sup>

In addition to recognizing the rights and dignity of victims, many advocates have focused on the way truth commissions can contribute to a national dialogue and consequently, national reconciliation through its production of a shared, historical narrative.<sup>113</sup> According to van Zyl, the truth commission can “generate a process of national introspection that requires that everyone examine their role in the conflicts of the past.”<sup>114</sup> He writes that “far from handing down clear cut judgements about guilt or innocence regarding complex conflicts, commissions force people to think critically

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<sup>110</sup> Du Toit, “The Moral Foundations of the South African TRC,” 137.

<sup>111</sup> Du Toit, “The Moral Foundations of the South African TRC,” 137-138.

<sup>112</sup> David Gairdner, *Truth in Transition: The Role of truth Commissions in Political Transition in Chile and El Salvador* (Bergen: Chr. Michelson Institute for Development Studies and Human Rights, 1999), 52; see also Wiebelhaus-Brahm, *Truth Commissions and Transitional Societies*, 20.

<sup>113</sup> Paul van Zyl, “Dilemmas of Transitional Justice: The Case of South Africa’s Truth and Reconciliation Commission,” *Journal of International Affairs* 52, no. 2 (1999): 667; and David Gairdner, *Truth in Transition: The Role of truth Commissions in Political Transition in Chile and El Salvador* (Bergen, Norway: Chr. Michelson Institute Development Studies and Human Rights, 1999), 52.

<sup>114</sup> van Zyl, “Dilemmas of Transitional Justice,” 667.

about the past and in doing so, make it impossible for them to glibly dismiss the suffering of victims.”<sup>115</sup>

Similarly Gibson argues that the value of truth is derived from its ability to show that blame is not a one-way street. He asserts that “the realization that one’s opponents were unfairly victimized and that one’s own side bears some responsibility” is essential for the effective functioning of a truth commission.<sup>116</sup> In South Africa, the TRC’s even-handed message that all sides did horrible things during the struggle” was necessary for encouraging tolerance and, as ultimately, reconciliation.”<sup>117</sup> Thus Gibson concludes that “truth makes an independent contribution to democratic consolidation by changing society, changing how people think about their own side and about their opponents.”<sup>118</sup> Indeed, the truth and reconciliation commission has continued to grow in popularity with commissions has been established in places like Guatemala (1997-1999), East Timor (2002-2005), Sierra Leone (2002-2004), Morocco (2004-2005), Paraguay (2004-2008), Canada (2008-2014), and Solomon Islands (2009-2012) among others.

### 4.3 Reparative Justice

In addition to retributive justice (often equated with prosecutions) and restorative justice (often equated with truth-telling), the field of transitional justice has identified a third paradigm: reparative justice. As Spelman appropriately points out, “we, the world we live

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<sup>115</sup> van Zyl, “Dilemmas of Transitional Justice,” 667.

<sup>116</sup> James L. Gibson, “The Contribution of Truth to Reconciliation: Lessons from South Africa,” *The Journal of Conflict Resolution* 50, no. 3 (2006): 419.

<sup>117</sup> Gibson, “The Contribution of Truth to Reconciliation,” 419.

<sup>118</sup> Gibson, “The Contribution of Truth to Reconciliation,” 428.

in, and the objects and relationships we create are by their very nature things that can break, unravel, fall to pieces.”<sup>119</sup> Following episodes of mass violence, the social fabric of a country is often left in tatters. In response to this, reparative justice attempts to address this brokenness. This is the foundation of the restorative paradigm: that humans and the relationships we build need to be repaired from time to time. Reparative mechanisms have largely been overshadowed by the attention given to retributive justice and restorative justice. However, for some victims, they are the most concrete response to human rights abuses.<sup>120</sup> Indeed, de Greiff suggests that there is an emerging consensus concerning the need for reparations in cases of mass human rights abuses.<sup>121</sup>

Reparative justice is rooted in the concept of reparation, which has historically been understood as monetary compensation intended to counteract any losses as a result of a crime committed.<sup>122</sup> For Weitekamp, the generally accepted rationale behind the concept of reparation is that it is an “act of restoring; restoring to its rightful owner; the act of making good or giving equivalent for any loss, damage or injury; and indemnification.”<sup>123</sup> In post-conflict societies, the concept of reparation is broadened from its historically narrow focus on monetary compensation. As such, in the transitional

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<sup>119</sup> Elizabeth V. Spelman, “Coexistence and Repair,” in *Imagine Coexistence*, eds. Antonia Chayes and Martha Minow (San Francisco: Jossey-Bass, 2003), 236.

<sup>120</sup> Pablo de Greiff, “Repairing the Past: Compensation for Victims of Human Rights Violations,” in *The Handbook of Reparations*, ed. Pablo De Greiff (Oxford: Oxford University Press, 2006), 1-2.

<sup>121</sup> de Greiff, “Justice and Reparations,” 455.

<sup>122</sup> Elmar Weitekamp, “Reparative Justice: Towards a victim oriented system,” *European Journal on Criminal Policy and Research* 1, no. 1 (1993): 70. Prevailing terminology for reparative justice includes restitution, reparative schemes, victim-offender reconciliation, redress, mediation programmes, community service, atonement, indemnification, and compensation. According to the author, such terms are generally used interchangeably, but share this same conceptual basis.

<sup>123</sup> Weitekamp, “Reparative Justice,” 70.

justice literature, the term refers to several legal and social measures, including material reparations like cash payments or provisions for education, health and housing, restitution, or broader symbolic measures like commemorations, memorials, and apologies.<sup>124</sup>

For Minow, “the core idea behind reparations stems from the compensatory theory of justice. Injuries can and must be compensated. Wrongdoers should pay victims for losses. Afterward, the slate can be wiped clean.”<sup>125</sup> According to Mani, reparations can address “two principal kinds of injustices suffered by the victim: first, the legal injustice, such as injury, loss of life, employment or property.”<sup>126</sup> Traditionally, at this level, reparations should, “as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”<sup>127</sup> Second, “reparations should address the moral or psychological injustice, that is, victimization, trauma, and loss of dignity.”<sup>128</sup> Theoretically, at least, reparative programs have the potential to have a transformative effect on post-conflict societies.

In terms of monetary reparation, there is a distinction between restitution and reparations, wherein restitution is defined as the “return of the specific actual belongings that were confiscated, seized, or stolen, such as land, art, ancestral remains, and the

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<sup>124</sup> Pablo de Greiff, “Justice and Reparations,” in *The Handbook of Reparations*, edited by Pablo de Greiff (Oxford: Oxford University Press, 2006), 453.

<sup>125</sup> Minow, *Between Vengeance and Forgiveness*, 104.

<sup>126</sup> Mani, *Beyond Retribution*, 174.

<sup>127</sup> Mani, *Beyond Retribution*, 174.

<sup>128</sup> Mani, *Beyond Retribution*, 174.

like.”<sup>129</sup> Here, the most-cited example in the scholarly literature is compensation for the theft of Jewish property by members of the Nazi party.<sup>130</sup> For a number of reasons, however, complete restitution may not be possible, for example, in the case of loss of life, or a material item gone missing, and so on. In such cases, the term reparation, then, refers to “some form of material recompense for that which cannot be returned, such as human life, a flourishing culture and economy, and identity.”<sup>131</sup> For example, the Chilean Truth and Reconciliation Commission established programs to “provide educational scholarships for children of victims. In addition, victims’ families were granted access to free physical and psychological health services.”<sup>132</sup> While falling short of complete restitution, i.e. a return to a hypothetical state of being as before the abuse, Philpott argues that such reparations programs can provide recognition for victims and can go a long way towards “alleviating or compensating victims for the harm they have suffered, both physical and mental.”<sup>133</sup> Similarly Minow writes that “monetary payments... symbolically substitute for the loss of time, freedom, dignity, privacy, and equality.”<sup>134</sup> Rather than understanding the payments as an attempt to replace what has

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<sup>129</sup> Elazar Barkan, *The Guilt of Nations: restitution and negotiating historical injustices* (Baltimore: The Johns Hopkins University Press, 2000), xix.

<sup>130</sup> See, for example, Ariel Colonomos and Andrea Armstrong, “German Reparations to the Jews after World War II: A turning point in the history of reparations,” in *The Handbook of Reparations*, ed. Pablo de Greiff (Oxford: Oxford University Press, 2006); and John Authers, “Making Good Again: German Compensation for Forced and Slave Laborers,” in *The Handbook of Reparations*, ed. Pablo de Greiff (Oxford: Oxford University Press, 2006) 427.

<sup>131</sup> Barkan, *The Guilt of Nations*, XIX.

<sup>132</sup> Wiebelhaus-Brahm, *Truth Commissions*, 58.

<sup>133</sup> Daniel Philpott, “Reconciliation: An Ethic for Peacebuilding,” in *Strategies of Peace: Transforming Conflict in a Violent World*, eds. Daniel Philpott and Gerard F. Powers (Oxford: Oxford University Press, 2010), 108.

<sup>134</sup> Minow, *Between Vengeance and Forgiveness*, 102.

been lost, such action taken by the government is, perhaps, lauded because it is a symbolic gesture, which finally recognizes a group of victims.<sup>135</sup>

While monetary reparations fulfill a seemingly “straightforward obligation on the part of the political community to compensate for property and goods that were lost due to political injustices,” such actions are far more complex.<sup>136</sup> Some critics suggest that reparations “amount to ‘blood money,’ money that appears to pay off victims so that they drop further demands; they equate the injustice victims’ suffered with financial goods; or even that they buy victims’ silence.”<sup>137</sup>

In the case of South Africa, “large numbers of people asked the [Truth and Reconciliation] Commission to compensate them financially for their losses.”<sup>138</sup> Such calls were initially heeded by the TRC, as “the commission felt that this was appropriate and that, in accordance with the principles of national and international law and practice, financial compensation should be granted to people that the commission found to be victims of gross human rights violations.”<sup>139</sup> In response, “the TRC Act identified the problem of reparations and the rehabilitation of victims as one of its three major concerns.”<sup>140</sup> Of course, this is reflected in the composition of the Commission, which is

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<sup>135</sup> Minow, *Between Vengeance and Forgiveness*, 102-103.

<sup>136</sup> Philpott, “Reconciliation,” 108.

<sup>137</sup> Philpott, “Reconciliation,” 108.

<sup>138</sup> Richard Lyster, “Amnesty: the burden of victims,” in *Looking Back Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa*, eds. Charles Villa-Vicencio and Wilhelm Verwoerd (Cape Town: University of Cape Town Press, 2000), 190.

<sup>139</sup> Lyster, “Amnesty,” 190.

<sup>140</sup> Christopher J. Colvin, “Overview of the Reparations Program in South Africa,” in *The Handbook of Reparations*, ed. Pablo de Greiff (Oxford: Oxford University Press, 2006), 181.

comprised of three committees including the Reparations and Rehabilitation Committee, the Human Rights Violations Committee, and the Amnesty Committee. Ultimately, the TRC recommended “six annual payments of 17,000 to 23,000 [South African] Rand per person.”<sup>141</sup> Yet, the South African government was relatively slow to act and, when it finally did, the amount was much smaller than recommended.

In 2003, it finally provided a one-off payment of 30,000 Rand per person. For Backer, this was an important step and can be “viewed as meaningful progress, building on the TRC, insofar as the compensation acknowledged the harms victims suffered and the hardships they continue to experience as a result.”<sup>142</sup> Yet, he argues that the government’s initial resistance is curious. Of particular concern for this project has been the government’s rhetoric regarding reparations. According to Backer, despite the “enrichment of political elites since the transition,” the “then President Thabo Mbeki, among others” have opposed reparations arguing “that the liberation movement was not fought for money and that reparations are tantamount to putting a price on losses that are fundamentally irreparable.”<sup>143</sup> Colvin, too, suggests that the government has actually been rather “dismissive toward some victims labeling them ‘opportunists’ and ‘unrepresentative’.”<sup>144</sup> The contested issue of reparations in South Africa suggests that caution is needed when approach this issue. While some victims viewed reparations as a necessary component of the justice, it is clear that others in South Africa, including those

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<sup>141</sup> David Backer, “Watching a Bargain Unravel? A Panel Study of Victims’ Attitudes about Transitional Justice in Cape Town, South Africa,” *International Journal of Transitional Justice* 4, no. 3 (2010): 448.

<sup>142</sup> Backer, “Watching a Bargain Unravel?” 447.

<sup>143</sup> Backer, “Watching a Bargain Unravel?” 447.

<sup>144</sup> Colvin, “Overview of the Reparations Program in South Africa,” 200.



in government, had differing opinions. Despite the initial view taken by the South African TRC, the change in tone of the Mbeki regime suggests that reparations is not as straightforward as compensation for losses.

In addition to monetary reparations, the field of transitional justice has also identified *symbolic* reparations including apologies, memorials and commemorations. Symbolic reparations provide a government with the opportunity to “acknowledge the fact of harms, accept some degree of responsibility, avow sincere regret, and promise not to repeat the offense.”<sup>145</sup> Implicit in such symbolic reparations is a desire to move forward; to build a new, rights-respecting state.

Nicholas Tavuchis provides insight into a meaningful apology: “To apologize is to declare voluntarily that one has no excuse, defense, or justification... for an action.”<sup>146</sup> A government apology is an “admission of wrongdoing, a recognition of its effects, and, in some cases, an acceptance of responsibility for those effects and an obligation to its victims. However, these are all different levels of acknowledgement that together create a mosaic of recognition by perpetrators for the need to amend past injustices.”<sup>147</sup> For Eyal Brook and Sharon Warshwsky-Brook, “at the heart of apology lies a genuine display of appeal to sorrow, as opposed to an appeal to reason.”<sup>148</sup> For Brook and Warshwsky-

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<sup>145</sup> Minow, *Between Vengeance and Forgiveness*, 112.

<sup>146</sup> Nicholas Tavuchis, *Mea Culpa: A Sociology of Apology and Reconciliation* (Stanford: Stanford University Press, 1991), 17.

<sup>147</sup> Barkan, *The Guilt of Nations*, XIX.

<sup>148</sup> Eyal Brook and Sharon Warshwsky-Brook, “The healing nature of apology and its contribution toward emotional reparation and closure in restorative justice encounters,” in *International Handbook of Victimology*, eds. Shloma Giora Shoham, Paul Knepper, and Martin Kett (Boca Raton: CRC Press, 2010), 516.

Brook, the key components of an apology include an expression of remorse or regret, acceptance of responsibility, compensation, and a promise to avoid such behaviour in the future.”<sup>149</sup> An apology, then, is an act of role reversal: “the person apologizing relinquishes power and puts him- or herself at the mercy of the offended party, who may or may not accept the apology. This exchange, which is a dramatically powerful encounter, providing the victim with a moral supremacy, is at the heart of the healing process and contributes toward a change in the dynamics between the parties.”<sup>150</sup> Such an authentic act allows the “victim to heal and the offender to take responsibility for the harmful act, be accepted back into society, and therefore have less reason to commit future offenses.”<sup>151</sup>

There are, however, certain hesitations in the literature regarding apologies. For example, Minow suggests some potential problems with apologies, including “insincerity, no clear commitment to change, [or] an incomplete acknowledgement of wrongdoing.”<sup>152</sup> There are concerns regarding the use of apologies in the case of genocide or mass human rights violations. Specifically, an apology might be meaningless for victims if it comes from people who have no actual ability “to accept or assume responsibility, or who have only remote connections with either the wrongdoers or the victims.”<sup>153</sup> For Minow, a vital concern is a government that uses an apology as an easy out; that is, an apology that is “purely symbolic, and carr[ies] no concrete shifts in

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<sup>149</sup> Brook and Warshwski-Brook, “The healing nature,” 516.

<sup>150</sup> Brook and Warshwski-Brook, “The healing nature,” 516.

<sup>151</sup> Brook and Warshwski-Brook, “The healing nature,” 516.

<sup>152</sup> Minow, *Between Vengeance and Forgiveness*, 112.

<sup>153</sup> Minow, *Between Vengeance and Forgiveness*, 112.

resources or practices to alter the current and future lives of survivors of atrocities.”<sup>154</sup> Such a use of apology will only further exacerbate an already difficult situation for victims of mass human rights abuses.

In addition to apologies, governments have also set up memorials in response to mass human rights violations. The process of memorialization “satisfies the desire to honor those who suffered or died during conflict.”<sup>155</sup> Such a process includes both physical memorials, as well as public spaces, days of commemoration, and educational programs. For example, such a process can range from the bodies of the deceased put on display, as has been done in places like Rwanda and Cambodia, to educational programs in South Africa that remind the youth of the pain and suffering that their parents and grandparents had to endure under the apartheid regime.<sup>156</sup> The functions of memorials include, among others:

- (1) Creating a specific place for the immediate family and/or the large society to mourn victims;
- (2) Honouring victims of violence and reinstating their reputation;
- (3) Symbolizing a nation’s commitment to values such as democracy and human rights;
- (4) Encouraging civic engagement and education programs to engage the wider community in a dialogue about the past and promote discussion of a peaceful future based on coexistence; and
- (5) Advancing educational purposes including the retelling of history for future generations.<sup>157</sup>

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<sup>154</sup> Minow, *Between Vengeance and Forgiveness*, 112.

<sup>155</sup> Judy Barsalou and Victoria Baxter, “The Urge to Remember: The role of memorials in social reconstruction and transitional justice,” *Stabilization and Reconstruction Series*, no. 5 (Washington, D.C.: United States Institute of Peace, January 2007): 1.

<sup>156</sup> Barsalou and Baxter, “The Urge to Remember,” 9.

<sup>157</sup> Barsalou and Baxter, “The Urge to Remember,” 4.

Memorials can provide longevity that other transitional justice mechanisms may lack. For this reason, they can be an important symbol for a nation to remember the past. Memorialization, then, can complement the work of tribunals and truth commissions. According to Barsalou and Baxter, once “other transitional justice processes have finished their work, the public is likely to better understand aspects of the conflict that were previously hidden or repressed. For these reasons, memorialization at the national level ideally follows truth-telling and legal accountability processes and is intimately linked to educational efforts to engage the public and school-children in a dialogue about the past.”<sup>158</sup> Memorialization, then, is an integral component in continuing the work of traditional transitional justice mechanisms.

Reparative justice, like the other justice paradigms, attempts to confront some of the injustices resulting from mass human rights violations.<sup>159</sup> However, there are considerable challenges for reparative mechanisms in post-conflict societies that are not present in juridically developed and stable societies. As indicated by de Greiff,

a massive program of reparations cannot reproduce the results which could be obtained in the legal system, because all legal systems work on the assumption that norm-breaking behaviour is more or less exceptional. But this is not the case when programs of reparation [in post-conflict societies] are being designed, for such programs attempt to respond to violations that, far from being infrequent and exceptional, are massive and systematic. The norms of the typical legal system are not devised for this sort of situation.<sup>160</sup>

When crimes no longer are the exception to the rule, the state lacks the capacity to deal with victim redress on a case-by-case basis, as is done in traditional juridical approaches.

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<sup>158</sup> Barsalou and Baxter, “The Urge to Remember,” 9.

<sup>159</sup> Mani, *Beyond Retribution*, 174.

<sup>160</sup> de Greiff, “Justice and Reparations,” 454.

de Greiff takes a sober look at the realistic application of reparation in conditions of mass human rights violations. His assessment is that any program of reparations will fail if “the sole aim of the program [is] victims’ redress in accordance with a legal formula.”<sup>161</sup> This, however, does not take away from the importance of reparations in such conditions. For de Greiff, this only prompts a rethinking of reparative justice in such circumstances. Instead of a case-by-case approach, he argues that a well-designed reparations program can still distribute awards to victims, but can also be used as a way to reinforce the wider political project of democracy building. He states that “although reparations are well-established legal measures in different systems all over the world, in transitional periods reparations seek, as most transitional measures do, to contribute to the reconstitution or the constitution of a new political community. In this sense, also, they are best thought of as part of a political project.”<sup>162</sup>

In other words, reparative mechanisms are not ultimately a mechanism for justice, but can be employed in the construction of a new, democratic state. de Greiff notes that “to assume a political perspective on reparations opens up the possibility of pursuing ends through the reparations program that would be more difficult to pursue if the sole aim of the program could be victims’ redress in accordance with a legal formula.”<sup>163</sup> For example, de Greiff recognizes that a viable democracy must be built on a foundation of equal individuals. After periods of mass violence, this sense of equal moral worth is lost. He asserts that “in a democracy, citizenship is a condition that rests upon the equality of

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<sup>161</sup> de Greiff, “Justice and Reparations,” 455.

<sup>162</sup> de Greiff, “Justice and Reparations,” 454.

<sup>163</sup> de Greiff, “Justice and Reparations,” 454-455.

rights of those who enjoy such states. And this equality of rights determines that those whose rights have been violated deserve special treatment, treatment that tends towards the reestablishment of the conditions of equality.”<sup>164</sup>

For de Greiff, then, transitional justice mechanisms can assist in this process. That is, these mechanisms can work towards institutionalizing the “recognition of individuals as citizens with equal rights.”<sup>165</sup> Criminal justice “can be interpreted as an attempt to reestablish equality between the criminal and his or her victim, after the criminal severed that relationship with an act that suggested his superiority over the victim.”<sup>166</sup> However, without reparations, criminal justice is incomplete. de Greiff notes that “from the standpoint of victims, especially once a possible moment of satisfaction derived from the punishment of perpetrators has passed, the punishment of a few perpetrators without any effective effort to positively redress victims could be easily seen by victims as a form of more or less inconsequential revanchism.”<sup>167</sup> Likewise, de Greiff argues that “truth-telling provides recognition... in acknowledging facts. [This] acknowledgement is important, precisely because it constitutes a form of recognizing the significance and value of persons – again, as individuals, as citizens, and as victims.”<sup>168</sup> Again, de Greiff suggests that truth-telling without reparations could be interpreted as an “empty gesture, as cheap talk.”<sup>169</sup> Finally, de Greiff suggests that reparations are integral in institutional

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<sup>164</sup> de Greiff, “Justice and Reparations,” 460.

<sup>165</sup> de Greiff, “Justice and Reparations,” 460.

<sup>166</sup> de Greiff, “Justice and Reparations,” 460.

<sup>167</sup> de Greiff, “Justice and Reparations,” 461.

<sup>168</sup> de Greiff, “Justice and Reparations,” 460-461.

<sup>169</sup> de Greiff, “Justice and Reparations,” 461.

reform, as any transition to democracy must necessarily implement measures that help to dignify citizens that were once victims of the previous regime's abuse.<sup>170</sup>

There is nothing inherently wrong with what de Greiff is trying to achieve with his justification for a program of reparations rather than them being doled out in a case-by-case basis. Recognition of victims as having equal moral worth is, of course, not a negative goal to strive for in a post-conflict society. The problem arises, however, in the interpretation of the political project. If these mechanisms are no longer rooted solely in established legal traditions, they become much more vulnerable to interpretation and, possibly, exploitation. Reparations are less about repairing the individual and more about repairing the society, but using a pre-defined blueprint of liberal democracy. In other words, whatever achievable results there are, they are harnessed for the constitution of a new political community based on the tenets of Liberal Peacebuilding framework.

Indeed, the theorized impact of criminal justice is not limited to justice, but is put into service to affirm the importance of liberal democracy. Democracy promotion, however, is not an inherent characteristic of trials, beyond the meaning we have given them as a signpost to signal a new beginning. In other words, trials *could* be used to pursue a variety of ends. Similarly, truth commissions have been adopted as a response to mass human rights violations, but their inherent value is as a forum for victims and perpetrators to speak *their* truths and not *the* truth (as if that exists). Yet, as we have seen, any narrative produced by a truth commission is supposed to function first and foremost as a signifier of a new, liberal democratic order. Arthur argues that from early

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<sup>170</sup> de Greiff, "Justice and Reparations," 461.

on, democracy was often assumed to be the ultimate goal of transition. This was, in large part, at least according to Arthur, a result of the role transitology played in the development of the field.<sup>171</sup> Yet, it was Teitel's transitional jurisprudence that provided the necessary theoretical foundation for this claim. Teitel's theory is discussed in the following section.

#### 4.4 Justice as Liberal Democratic "Ritual"

The three paradigms of justice laid out above are now fully entrenched in the transitional justice field. However, in the field's infancy the question of whether or not to even pursue justice following mass atrocities was still up for debate. For example, drawing on realist theories from International Relations, Snyder and Vinjamuri argued that states emerging from conflict needed to factor in questions of power in their decision to pursue justice.<sup>172</sup> They argued that if trials and other accountability mechanisms potentially threatened the stability of a new government they should be avoided. Snyder and Vinjamuri's argument draws on the work of Samuel Huntington, who suggested that the decision to pursue justice depends on the type of transition a country is undergoing. If the transition is the result of a negotiated peace agreement, government officials will continue to hold a great deal of power in society and be able to avoid prosecution. In cases of regime collapse, punishment is more likely as long as the new democratic

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<sup>171</sup> Paige Arthur, "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice," *Human Rights Quarterly* 31, no. 2 (2009): 343

<sup>172</sup> Jack Snyder and Leslie Vinjamuri, "Trials and Errors: Principles and Pragmatism in Strategies of International Justice," *International Security* 28, no. 3 (2003/2004): 12-15.



government is swift to act.<sup>173</sup> He writes, “democratic justice cannot be summary justice... but it also cannot be slow justice. The popular support and indignation necessary to make justice a political reality fade; the discredited groups associated with the authoritarian regime reestablish their legitimacy and influence. In new democratic regimes, justice comes quickly or it does not come at all.”<sup>174</sup> Thus, even in cases of regime collapse, the possibility of punishment is not a certainty. For realists, “justice in transition is epiphenomenal, where transitional responses are the product of political or institutional constraints.”<sup>175</sup> However, this approach is increasingly being challenged by liberal, legal-idealists who argue that justice does not depend on other factors, as the realist would have it. For them, the establishment of the ICTY was proof that, with a little help from an external actor, justice could be meted out even when political strongholds exist.

While there is no *right* way to pursue justice, the international community has coalesced around a series of “preferred options,” including criminal trials, truth and reconciliation commissions, and certain forms of reparations. Whether transitioning from conflict or from authoritarian rule, societies that adopt transitional justice mechanisms are observably undergoing significant societal transformation. These societies become a point of intersection for various forces, both international and national, each with their own contending ideas of what we are transitioning to and the best way to get there. Thus,

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<sup>173</sup> Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman: University of Oklahoma Press, 1991), 228.

<sup>174</sup> Huntington, *The Third Wave*, 228.

<sup>175</sup> Padraig McAuliffe, “The Roots of Transitional Accountability: Interrogating the ‘Justice Cascade’.” *International Journal of Law in Context* 9, no. 1 (2013), 108.

when we speak of transitional justice, we are always referring to a site of deep contestation where the stakes are quite high (e.g. peace).

While each paradigm is rooted in a different principle of justice, in the hands of transitional justice scholars, they have all been theorized in a way that contributes to the goal of the transition to liberal democracy. Indeed, democracy promotion figures prominently in the theorization of the field of transitional justice. This is nowhere clearer than in the writings of Teitel. In the final chapter of her book, *Transitional Justice*, Teitel provides a theory of transitional justice based around the concept of transitional jurisprudence. For Teitel, transitional jurisprudence is characterized by its functioning in a dialectical relationship between law in its established form, where it is “forward-looking and continuous in its directionality,” and in its radical transformative role where it is “both backward-looking and forward-looking, retrospective and prospective, continuous and discontinuous.”<sup>176</sup> Ultimately, what emerges is a state based on liberal identity and built around the notion of political unity across racial, ethnic and religious divides.<sup>177</sup>

Central to Teitel’s theory is her contention that in periods of political change, we cannot idealize a single site of “operative legal action.”<sup>178</sup> While liberal legal theorists assert that criminal prosecutions are necessary for any transformation, Teitel recognizes that this role of radical reconceptualization can be taken up by any number of mechanisms, including new constitutions or even public commissions like truth

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<sup>176</sup> Teitel, *Transitional Justice*, 215.

<sup>177</sup> Teitel, *Transitional Justice*, 225.

<sup>178</sup> Teitel, *Transitional Justice*, 215.

commissions. This challenges the realists' argument that power alone dictates whether or not justice will be meted out.<sup>179</sup>

In this process, while each mechanism (e.g. trials, truths, and reparations) approaches the question of justice in a unique way, they are united in their capacity to bridge this divide between the old and new regime.<sup>180</sup> For example, by subjecting the previous regime's human rights violations to the rigors of criminal law, transitional justice is able to disavow the old regime's ideology, while performing "the signs and rites of a functioning liberal order."<sup>181</sup> Ultimately, Teitel argues that we must think of transitional justice mechanisms as "secular sanctification of the rituals and symbols of political passage,"<sup>182</sup> a passage that sees the society transform from an illiberal regime, where violations took place, to a liberal regime built upon a juridical discourse of rights and responsibilities and the delimiting of state power.<sup>183</sup>

Teitel's theory was able to harmonize the arguments of both realists and liberal idealists. By arguing that transitional justice mechanisms are constitutive of the transition, she recognizes the concerns of realists, while suggesting that incorporating power into the calculus does not automatically equate amnesties, but, rather, impacts the site of transformation. By suggesting that it also constructs the transition, she recognizes the central role that transitional justice mechanisms play in signaling a new, liberal

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<sup>179</sup> Teitel, *Transitional Justice*, 215.

<sup>180</sup> Teitel, *Transitional Justice*, 215.

<sup>181</sup> Teitel, *Transitional Justice*, 221.

<sup>182</sup> Teitel, *Transitional Justice*, 220.

<sup>183</sup> Teitel, *Transitional Justice*, 221.

beginning. Teitel's work on transitional jurisprudence is significant for providing the necessary intellectual space for a consensus on both the possibility of its functioning in transitions as well as the fundamental need for it. In doing so, Teitel's work gives voice to the ultimate consensus that transitional justice can and must construct a final solution to the problem of conflict. Still, this assumes a certain level of closure in conflict. That is, justice can help create a consensus in society. She writes, "[t]hese responses point to a fragmentary but shared vision of justice that is, above all, corrective. What is paramount is the visible pursuit of remedy, of reform, of wholeness, of political unity."<sup>184</sup>

Second, this assumed consensus closes justice around a very particular understanding of justice that is informed by the Liberal Peace Thesis. She writes that "for there to be meaningful change in societies driven by racial, ethnic, and religious conflict, identity politics should be exposed for what it is—political construction. Ethnic politics has no place in the liberal state. What needs construction is the liberal response to injustice."<sup>185</sup> As the previous sections point out, this notion that transitional justice mechanisms can be (and should be) understood as ultimately servicing the transition to liberal democracy is now found everywhere in the field. It is, indeed, taken as common sense that the ultimate endpoint of transitional justice is the establishment of the liberal democracy.

This is increasingly evident as the field starts to incorporate more positivist-styled quantitative analyses. For some, the introduction of more quantitative research signals a

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<sup>184</sup> Teitel, *Transitional Justice*, 225.

<sup>185</sup> Ruti Teitel, "Bringing the Messiah Through the Law," in *Human Rights in Political Transitions: Gettysburg to Bosnia*, eds. Carla Hesse and Robert Post (New York: Zone Books, 1999), 189.

maturing of the field of transitional justice. As Olsen, Payne, and Reiter suggest, the central claims in the field have generally relied on “wishful thinking rather than empirically grounded theory building.”<sup>186</sup> Thoms, Ron, and Paris similarly note that, “reliable empirical knowledge on the state-level impacts of TJ is still limited.”<sup>187</sup> For many scholars, then, this shift towards the employment of statistical techniques will eventually fill the quantitative void in transitional justice and is, according to Wiebelhaus-Brahm, the “natural progression in the development of the field.”<sup>188</sup>

In its infancy, the field of transitional justice was dominated by legal-philosophical writings and small-N case studies. While the wedding of democracy and transitional justice in the early, legal, philosophical and comparative politics literature was largely implicit,<sup>189</sup> recent evaluative projects use democracy and liberal human rights as indicators of success.<sup>190</sup> This, of course, is presented as mere common sense, as “scholars and policymakers share an expectation that transitional justice should strengthen democracy and improve human rights.”<sup>191</sup> In their book, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy*, Olsen, Payne, and Reiter

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<sup>186</sup> Tricia Olsen, Leigh Payne, and Andrew Reiter, *Transitional Justice in Balance* (Washington: United States Institute of Peace, 2010), 25.

<sup>187</sup> Oskar N.T. Thoms, James Ron, and Roland Paris, “State-Level Effects of Transitional Justice: What Do We Know?” *The International Journal of Transitional Justice* 4, no. 3 (2010): 331.

<sup>188</sup> Wiebelhaus-Brahm, *Truth Commissions and Transitional Societies*, 129.

<sup>189</sup> See, for example, Mark Freeman, “Transitional Justice: Fundamental Goals and Unavoidable Complications,” *Manitoba Law Journal* 28, no. 1 (2000): 113-122.

<sup>190</sup> Olsen, Payne, and Reiter, *Transitional Justice in Balance*, 132.

<sup>191</sup> Olsen, Payne, and Reiter, *Transitional Justice in Balance*, 132.

undertake one of the first large-N studies examining the ability of transitional justice to achieve the goals of strengthening democracy and advancing human rights.<sup>192</sup> When examining the impact of transitional justice on strengthening democracy, Olsen, Payne, and Reiter use two indicators: (1) Polity IV which, according to the authors, scores countries based on “the competitiveness of political participation, the regulation of participation, the openness and competitiveness of executive recruitment, and the constraints on the executive;”<sup>193</sup> and (2) Freedom House which scores countries based on political rights including “the right to vote, compete for public office and elect responsible representatives” and civil liberties including “freedom of expression and belief, associational and organizational rights, rule of law, and personal autonomy.”<sup>194</sup> For human rights, Olsen, Payne, and Reiter use Cingranelli-Richards’ (CIRI) Physical Integrity Rights Index (Physint), which measures government protection against torture, extrajudicial killing, political imprisonment, and disappearance. The authors also use the Political Terror Scale which measures human rights on a five-level “terror scale” measuring citizens’ safety and protection from wrongful imprisonment and torture.<sup>195</sup> Similarly, in her book, *The Justice Cascade*, Sikkink evaluates the impact of human rights prosecutions and truth commissions on a “core set of violations—torture, summary executions, disappearances, and political imprisonment” using the Physint index

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<sup>192</sup> Olsen, Payne, and Reiter, *Transitional Justice in Balance*, 132.

<sup>193</sup> Olsen, Payne, and Reiter, *Transitional Justice in Balance*, 135.

<sup>194</sup> Olsen, Payne, and Reiter, *Transitional Justice in Balance*, 135.

<sup>195</sup> Olsen, Payne, and Reiter, *Transitional Justice in Balance*, 136.

developed by Cingranelli and Richards.<sup>196</sup> In his study on truth commissions, Wiebelhaus-Brahm adopts similar indicators of success.<sup>197</sup>

This type of theory is not simply about evaluating effectiveness, but is also geared towards recommendations that make these institutions function more effectively. For example, Olsen, Payne, and Reiter suggest that a balanced approach to justice best maximizes the two important goals: strengthening democracy and reducing human rights violations. For collapsed regimes, the balanced justice approach suggests a combination of “trials and amnesties, with or without truth commissions.”<sup>198</sup> According to the authors, these countries are generally in poor economic health and are, therefore, more likely to expend resources on development needs rather than legal imperatives. In response, the authors believe that, through a balanced approach, poor countries can still benefit from justice by trying only the “big fish” while saving on costs by offering amnesty to the “small fry” perpetrators.<sup>199</sup>

For negotiated transitions, the authors suggest that new democracies are often fragile due to the existence of spoilers who might threaten the government if they are vulnerable to prosecution. In response, they recommend “combining trials and amnesties, or trials, amnesties, and truth commissions,” but this must be carried out in a

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<sup>196</sup> Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (New York: W.W. Norton & Company, 2011), 180.

<sup>197</sup> Wiebelhaus-Brahm, *Truth Commissions and Transitional Societies*, 23-26.

<sup>198</sup> Olsen, Payne, and Reiter, *Transitional Justice in Balance*, 156.

<sup>199</sup> Olsen, Payne, and Reiter, *Transitional Justice in Balance*, 156.

sequenced approach. They write, “during the risky phase, governments can grant amnesties. As democracy develops, countries may develop strong enough institutions and sufficient security to begin trials.”<sup>200</sup> Overall then, “delayed justice offers new democracies the chance to balance accountability with a practical need for amnesty: security. Truth commissions, for restorative justice purposes, might be used at various points in this scenario.”<sup>201</sup> While these studies provide an important step in clarifying the impact of transitional justice mechanisms, it is important to recognize that their value is dependent on first accepting liberal democracy as the ideal end-point of transitional justice. In fact, these studies rely on two assumptions: first, that we can study transitional justice mechanisms as if they are treatments that can be applied to society like medicine to a sick body. Second, they assume that society is something that is temporarily ill, but, with the right kind of treatment, can be brought to good health. Indeed, these studies are unimaginable without the consensus that societies are transitioning from sickness to health or “transitional” to “transitioned.”

## 4.5 Conclusion

In societies dealing with widespread conflict, the field of transitional justice has identified three paradigms of justice: retributive, restorative, and reparative. Each paradigm is associated with specific mechanisms of justice: criminal prosecution (retributive), truth commission (restorative), and reparations (reparative). While these paradigms and their associated mechanisms are influenced by a mixture of legal,

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<sup>200</sup> Olsen, Payne, and Reiter, *Transitional Justice in Balance*, 158.

<sup>201</sup> Olsen, Payne, and Reiter, *Transitional Justice in Balance*, 158.



philosophical, religious, and cultural traditions, in the field of transitional justice they have all been interpreted as working towards the establishment of a liberal democracy. In this way, the field has approached conflict as a problem or puzzle that can be solved with the right solution. Retributive restorative, and reparative mechanisms of justice are merely instruments or calculations to be made in the establishment of liberal democracy. Here, the purpose of justice is in its ability to solve the problem of conflict; the solution, then, is the attainment of the liberal democracy. The remainder of this dissertation will look to challenge this teleological understanding of justice as a ritual for liberal democracy asking, first, what is the role of power in the development of this understanding and, second, what is the impact on the pursuit of justice.

## Chapter 5

### 5 The Emergence of Transitional Justice

In the previous chapter I argued that the field of transitional justice coalesces around a clear consensus regarding the ultimate goal of transitional justice: the establishment of a liberal democracy. This is apparent in the theorization of the field. The question remaining, then, is where this consensus came from. Teitel has given voice to the consensus, but she did not construct it. Rather, she merely harmonized transitional justice with its critics, the realists. While Sikkink focuses on the actions of human rights activists in bringing about this consensus, Teitel focuses on the emergence of a new set of laws at the international level that have given voice to these ideas, what she calls Humanity's Law, as discussed in chapter two. Both of these historical accounts suggest that the causal factor in the emergence of transitional justice was the end of the Cold War in the newly-opened political space as a result of the victory of liberalism. This chapter challenges these historical accounts of transitional justice by positing that the field's emergence following the end of the Cold War is a myth that, in fact, supports the consensus that societies are transitioning to a final end-point. In contrast, I argue that the myth of the end of the Cold War as the starting point for Transitional Justice is a nice story, which serves to conceal the fact that transitional justice only became useful as a tool in democracy promotion at that time. This also helps explain why the consensus of finality is so important to the field. Without the belief that transitional justice is working towards a final end-point—liberal democracy—its usefulness withers away. Further, what this suggests is that the emergence of the field was neither necessary nor

predictable, but was, instead, the result of a re-interpretation of human rights in American foreign policy, thus making transitional justice a politically useful tool.

In 2003, Teitel published what she called a genealogy of transitional justice in which she organized transitional justice into three distinct phases: Phase I refers to early international justice starting in 1945 and ending soon thereafter; Phase II coincides with Huntington's notion of the "third wave" of democratization starting in the mid-1970s and ending in the early 1990s; and Phase III refers to the normalization of justice, which commenced with the establishment of the International Criminal Tribunal for the former Yugoslavia in 1993 and is, according to Teitel, the current phase we find ourselves in today. The impetus for Phase I, of course, was the Allied decision to prosecute Nazi officials following the end of the Second World War. According to Teitel, "this phase reflects the triumph [or origins] of transitional justice within the scheme of international law."<sup>1</sup> And, while this phase is short-lived with the onset of the Cold War, Teitel argues that "the legacy of the post-war trials that criminalized state wrongdoing as part of a universal rights scheme far exceeds the actual force of historical precedent, and this legacy forms the basis of modern human rights law."<sup>2</sup> According to Teitel's genealogy of transitional justice Phase II corresponds with the "third wave" of democratization, but is particularly associated with the emergence of truth commissions following the military dictatorships in Latin America.<sup>3</sup> While Phase II relies on alternative forms of accountability, Phase III, the current phase, according to the genealogy, is the

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<sup>1</sup> Teitel, "Transitional Justice Genealogy," 70.

<sup>2</sup> Teitel, "Transitional Justice Genealogy," 70.

<sup>3</sup> See Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman: University of Oklahoma Press, 1991).

normalization of transitional justice. This phase, which was preceded by the two *ad hoc* tribunals for the former Yugoslavia and Rwanda, culminated with the establishment of the International Criminal Court (ICC). Teitel writes, “half a century after World War II, the ICC symbolizes the entrenchment of the Nuremberg Model: the creation of a permanent international tribunal appointed to prosecute War Crimes, genocide, and Crimes against Humanity as a routine matter under international law.”<sup>4</sup>

Teitel is one of the leading theorists on transitional justice and her book, *Transitional Justice*, is regarded as one of the seminal works in the field. She has also taken credit for giving the field its name.<sup>5</sup> More importantly, this trajectory of transitional justice seems to be widely accepted in the field. I argue that this genealogy reads more like a straightforward historical account rather than a Foucauldian genealogy as she sets out to do. This is important as it shows the failure to account for the way in which power has functioned in the emergence of transitional justice more than the field is willing to accept. By revisiting this genealogy, I hope to graft on important aspects of history that were whiped away in order for transitional justice to have the appearance of a tool against power, a belief that is central to its legitimacy. By showing that we must take into account the way power has functioned in the field, I hope to destabilize the founding assumptions of transitional justice. This is not meant as an exercise in destruction. Rather, I hope to open the field up, as Derrida might say, to that which may come.

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<sup>4</sup> Teitel, “Transitional Justice Genealogy,” 90.

<sup>5</sup> Padraig McAuliffe, “The Roots of Transitional Accountability: Interrogating the ‘Justice Cascade’,” *International Journal of Law in Context* 9, no. 1 (2013): 107.

There is a general consensus in the field of transitional justice that the Nuremberg Trials following the Second World War represent the genesis of the practice of transitional justice.<sup>6</sup> In her own genealogy of transitional justice, Teitel suggests that the pursuit of individual accountability for Nazi atrocities was actually a critical response to the failed measures taken against Germany following the end of the First World War. Under Article 227 of the Treaty of Versailles, Kaiser Wilhelm II was singled out for his role in starting the war. According to the Treaty, the Kaiser was deemed responsible for “a supreme offense against international morality and the sanctity of treaties.”<sup>7</sup> The Article stated that such an undertaking was to be “guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality.”<sup>8</sup>

In addition to Article 227, the Treaty of Versailles outlined further steps to be taken in order to uphold international law and morality: Article 228 asserted that “the German Government recognizes the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war;” and Article 229 stated that “Persons guilty of criminal acts against the nationals of one of the Allied and Associated Powers will be brought before the military tribunals of that Power.”<sup>9</sup> These proceedings were generally rejected by Germany and, in the end, the German people were unwilling to extradite their own

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<sup>6</sup> Rachel Kerr and Eirin Mobekk, *Peace & Justice: Seeking Accountability after War* (Malden, MA: Polity Press, 2007), 18-29

<sup>7</sup> “Article 227,” *Treaty of Versailles*, (1919).

<sup>8</sup> “Article 227,” *Treaty of Versailles*, (1919).

<sup>9</sup> “Article 228,” *Treaty of Versailles*, (1919); and “Article 229,” *Treaty of Versailles*, (1919).

nationals. In response, Germany was allowed to hold domestic trials before the German Supreme Court in Leipzig. Of the 800 individuals accused, only 12 were ever prosecuted.<sup>10</sup> Kaiser Wilhelm II himself managed to flee to The Netherlands to avoid prosecution.<sup>11</sup> More well-known are the monetary reparations Germany was forced to pay, as well as the acceptance of full responsibility for causing the war. Such measures, however, proved disastrous, as Adolf Hitler subsequently exploited them as a rallying point for Germans under the Third Reich. For Teitel, these “onerous sanctions and their crude undifferentiated impact raised profound normative questions.”<sup>12</sup> And, in response, “this approach gave way to the... liberal focus on individual judgment and responsibility” through the Nuremberg trials.<sup>13</sup>

The establishment of the Nuremberg trials following the end of the Second World War, for many, marks the advent of transitional justice. However, initially, the notion of prosecuting the top Nazi officials was rather contested. In the United States, there was a split between officials over the best strategy to pursue. On the one side, Secretary of the Treasury Henry Morgenthau Jr. advocated for summary execution and, for some time, had the ear of President Roosevelt. The British and Soviets favoured a purge and punish route, which, in all likelihood, would have meant execution without due process.<sup>14</sup> On the other side, Secretary of War, Henry Stimson, argued for more elaborate legal

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<sup>10</sup> Ronald C. Slye and Beth Van Schaack, *International Criminal Law: Essentials* (New York: Aspen Publishers, 2009), 25.

<sup>11</sup> Slye and Van Schaack, *International Criminal Law*, 24.

<sup>12</sup> Teitel, “Transitional Justice Genealogy,” 73.

<sup>13</sup> Teitel, “Transitional Justice Genealogy,” 73.

<sup>14</sup> Slye and Van Schaack, *International Criminal Law*, 28.

proceedings in which the Nazi officials would be prosecuted in a courtroom.<sup>15</sup> Stimson succeeded in convincing the U.S. president of the utility of judicial proceedings.<sup>16</sup> In the end, the U.S. was able to pressure the other victors to adopt a strategy of international criminal justice over summary execution.<sup>17</sup>

The Allies met in London to draft the London Charter of the International Military Tribunal, which established the parameters for the subsequent Nuremberg trials. Issued on August 8, 1945, the Charter outlined the crimes over which the tribunal would have jurisdiction. According to Article 6, this included:

(a) Crimes against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) Crimes against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions of political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plans.<sup>18</sup>

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<sup>15</sup> Norbert Ehrenfreund, *The Nuremberg Legacy: How the Nazi War Crimes Trials Changed the Course of History* (Basingstoke: Palgrave Macmillan, 2007), 7.

<sup>16</sup> Ehrenfreund, *The Nuremberg Legacy*, 7.

<sup>17</sup> Slye and VanSchaack, *International Criminal Law*, 28-29.

<sup>18</sup> "Nuremberg Trial Proceedings Vol. 1, Charter of the International Military Tribunal," (1945).

Other important sections of the Charter included Article 7, which stipulated that “the official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.”<sup>19</sup> Further, Article 8 asserted that “the fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.”<sup>20</sup>

The trials of the major German war criminals before the International Military Tribunal at Nuremberg (hereafter known as the Nuremberg Tribunal) commenced on November 20, 1945. Less than one year later, sentencing was pronounced on October 1, 1946.<sup>21</sup> In comparison to the trials at Leipzig following the First World War, the Nuremberg Tribunal proved much more effective at holding the leaders of the Nazi party accountable with twelve death sentences (one defendant, Hermann Göring—the highest ranking official—consumed cyanide before his execution), three receiving life imprisonment and another four handed fixed terms which ranged from ten to twenty years. Two defendants were unable to be prosecuted, as one committed suicide prior to his trial and another was deemed too ill to stand trial. Finally, one individual, Martin Bormann—an official close to Hitler during the war—was tried *in absentia*.<sup>22</sup> Following this, under Allied Control Council Law No. 10 and Military Government Ordinance No.

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<sup>19</sup> “Nuremberg Trial Proceedings Vol. 1, Charter of the International Military Tribunal,” (1945).

<sup>20</sup> “Nuremberg Trial Proceedings Vol. 1, Charter of the International Military Tribunal,” (1945).

<sup>21</sup> Mark Drumbl, *Atrocity, Punishment, and International Law* (Cambridge: Cambridge University Press, 2007), 47.

<sup>22</sup> Drumbl, *Atrocity, Punishment and International Law*, 47.



7, almost 200 prominent German supporters of the war were tried, including members of the SS (including the Einsatzgruppen), Gestapo, industrialists, doctors, and jurists.<sup>23</sup>

Following the trials at Nuremberg, the International Law Commission of the United Nations drafted the Nuremberg Principles to provide a clear understanding of the legal consequences of the trials. For example, Principle 1 established that an individual can be held responsible for atrocities under international law: “Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.”<sup>24</sup> Principle III established that public officials could no longer protect themselves from prosecution under the ‘head of state’ defense and Principle IV rejected the defense of following orders from a superior “provided a moral choice was in fact possible to him.”<sup>25</sup>

These principles speak to one of the main achievements of Nuremberg: the ability to ascribe individual accountability, as opposed to the collective blame that was leveled against all of Germany following the First World War. The ability to hold the Nazi regime accountable was significant, but as Teitel suggests, the central achievement of Nuremberg was that it gave states the legal responsibility to try individuals for Crimes against Humanity, despite their position within the state apparatus. This marked a critical shift in state sovereignty and, specifically, immunity for state leaders.<sup>26</sup> Teitel writes that

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<sup>23</sup> Drumbl, *Atrocity, Punishment and International Law*, 47.

<sup>24</sup> *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal 1950*.

<sup>25</sup> *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal 1950*.

<sup>26</sup> Ruti Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000), 34.

While the asserted aim of the transitional justice norm in this first phase was accountability, a striking innovation at the time was the turn to international criminal law and the extension of its applicability beyond the state to the individual. Moreover, through changes in the law of war and its principles of criminal responsibility, the international legal regime enabled holding accountable the Reich's higher echelons for the offenses of aggression and persecutory policy.<sup>27</sup>

Despite this (or, in some cases, because of it), the legacy of Nuremberg remains problematic. Plaguing it, of course, is the criticism of retroactivity in which crimes against the Nazi officials were applied *ex post facto*, thereby violating the legal principle *nullum crimen sine lege, nulla poena sine lege* (no crime without a law; no punishment without a law).<sup>28</sup> While there was a firm legal basis for prosecuting War Crimes to be found in the Geneva Conventions, it is generally accepted that the charges of Crimes against Peace and Crimes against Humanity stood on rather shaky legal ground.<sup>29</sup>

The Charge of Crimes against peace comprised two counts, conspiracy and waging aggressive war.<sup>30</sup> To support the first count of conspiracy, the Tribunal relied on the Hossbach Memorandum, a record of a 1937 meeting in the Reich Chancellery, which exposed Hitler's plan to expand the German people's *Lebensraum* (living space).<sup>31</sup> The legal foundation for the second count, waging aggressive war, was based on the 1928 Kellogg-Briand Pact and the Covenant of the League of Nations. Beyond the charge of Crimes against Peace, the charge of Crimes against Humanity also stood on rather shaky

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<sup>27</sup> Teitel, "Transitional Justice Genealogy," 73.

<sup>28</sup> Kerr and Mobekk, *Peace & Justice*, 20.

<sup>29</sup> Kirsten Sellers, "Imperfect Justice at Nuremberg and Tokyo," *The European Journal of International Law* 21 no. 4 (2011): 1089.

<sup>30</sup> Kerr and Mobekk, *Peace & Justice*, 20.

<sup>31</sup> Kerr and Mobekk, *Peace & Justice*, 20.

foundation. In order to prosecute the Nazi officials, the Allies argued that the charge of Crimes against Humanity ought to be punishable in an international court, “because the conduct, by its nature, offended humanity itself.”<sup>32</sup> And, because such conduct was a product of humanity itself, “its legal status and consequence transcended the province of municipal law.”<sup>33</sup> Therefore, a person who committed a Crime against Humanity was not merely accountable to his fellow state citizens, but should be accountable to all human kind. He was, in other words, “an enemy of all mankind.”<sup>34</sup> According to this, “the notion that international judicial enforcement was the only means of genuinely establishing the rule of international law was a central premise of the Allied Powers’ program of prosecution.”<sup>35</sup>

Further, the Allied powers justified the rather novel charge of Crimes against Humanity by linking it to aggression. To achieve this, the Allied powers argued that Crimes against Humanity were hazardous to world peace and, as a result, perpetrators should face punishment. In doing so, however, the Allies restricted the jurisdiction of the Tribunal when it came to Crimes against Humanity, stating that they could only be prosecuted “when committed ‘in execution of or in connection with’ one of the other two crimes subject to International Military Tribunal’s jurisdiction: crimes against peace and

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<sup>32</sup> Diane Orentlicher, “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,” *Yale Law Journal* 100, no. 8 (1991): 2556.

<sup>33</sup> Orentlicher, “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,” 2557.

<sup>34</sup> Orentlicher, “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,” 2557.

<sup>35</sup> Orentlicher, “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,” 2558.

War Crimes.”<sup>36</sup> This created what Drumbl calls a nexus between Crimes against Humanity and armed conflict.<sup>37</sup> While it allowed for the prosecution of some perpetrators, it was, perhaps, a trade-off. As Bishai points out, “the most shocking aspect of Nazi activities, the ‘final solution’, was deemed a matter of internal sovereign exemption except for the fact that it occurred as an integral part of an aggressive war effort.”<sup>38</sup> Consequently, such actions actually protected state sovereignty. For Luban, this was not an accident, but was a calculated decision on the part of the U.S. According to Luban, when a French representative at the drafting of the London Charter of the International Military Tribunal expressed concern that Article 6 (c) would contravene the traditional legal principle protecting state sovereignty, chief US prosecutor at the Nuremberg Tribunal, Robert H. Jackson, responded that, the principle of nonintervention was vital to Americans.<sup>39</sup> This, of course, was in defense of the American’s own policies of racial discrimination. For Luban, connecting Crimes against Humanity to Crimes against Peace effectively was critical as it meant that the charge of Crimes against Humanity could not be used against the US government as a way to address their treatment of African Americans, thus “enclos[ing] American human rights violations within a wall of state sovereignty.”<sup>40</sup>

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<sup>36</sup> Orentlicher, “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,” 2558.

<sup>37</sup> Drumbl, *Atrocity, Punishment, and International Law*, 47.

<sup>38</sup> Linda S. Bishai, “Leaving Nuremberg: America’s love/hate relationship with international law,” *Review of International Studies* 34 (2008): 435-436.

<sup>39</sup> David Luban, *Legal Modernism* (Ann Arbor: The University of Michigan Press, 1997), 342.

<sup>40</sup> Luban, *Legal Modernism*, 342.

The conflicted legacy of Nuremberg suggests that the consensus on the logic driving the trials was never absolute. For some, Nuremberg was merely victor's justice, a view that continues to this day.<sup>41</sup> This realist viewpoint suggests that the decision to focus primarily on aggression is rather telling as it kept the focus on state sovereignty.<sup>42</sup> Despite this, there are still those that argue that with all its apparent flaws, Nuremberg did serve to put human rights on an international stage. This, of course, is an outflow of the idealist element at Nuremberg that, according to Bishai, "insisted on raising the issue of Crimes against Humanity so that the true nature of the Nazi violations would be made a matter of public record and the perpetrators be held accountable even if those charges remained secondary to the larger question of aggressive warfare."<sup>43</sup>

The idealist camp points to the other hallmarks of the international human rights movement following the Second World War, including the adoption of the Universal Declaration of Human Rights (UDHR)<sup>44</sup> and the Genocide Convention in 1948. Yet, despite these developments, as tensions began to grow between the United States and the Soviet Union, criminal accountability and the international protection of human rights faded into history. In the years following Nuremberg, the international community failed to "craft a legal response to the mass murders in Cambodia, South Africa, and Kurdistan,

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<sup>41</sup> Michael P. Scharf, "A Critique of the Yugoslavia War Crimes Tribunals," *Denver Journal of International Law and Policy* 25, no. 2 (1997): 305; and Cohen, *Transitional Justice*, 62.

<sup>42</sup> Bishai, "Leaving Nuremberg," 438.

<sup>43</sup> Bishai, "Leaving Nuremberg," 438.

<sup>44</sup> The Universal Declaration of Human Rights, an example of soft law in international law, was followed up with the establishment of the International Covenant on Civil and Political Rights and the International Covenant on Economic and Social Rights in 1966. As hard law, these treaties were considered binding on signatories.

just to name a few.”<sup>45</sup> According to Falk, the legacy of Nuremberg is further tarnished by the fact that the victorious powers did not just stand idly by as atrocities occurred in the years following the Second World War, but that the once-dispensers of international justice “were each subsequently associated with wars that included a recourse to belligerent tactics of the sort condemned at Nuremberg and Tokyo.”<sup>46</sup> For the United States, the tactics employed in Vietnam caused tremendous uproar in their own country. As Falk points out, Telford Taylor, a member of the team that prosecuted the Nazi officials at Nuremberg as well as a former military officer, suggested that the American policies during the Vietnam War were, in fact, comparable with the crimes prosecuted at Nuremberg.<sup>47</sup> In the end, those who view Nuremberg as the genesis of the international human rights movement emphasize the precedent it set for the prosecution of Crimes against Humanity, while those who are less enthusiastic will maintain its hypocrisy.

Phase II of Teitel’s genealogy picks up with the establishment of truth commissions following the military dictatorships in the Southern Cone of Latin America, particularly in Argentina. The dictatorships established in the 1960s and early 1970s worked towards the common aim of eliminating left-wing opposition groups. Those opposed to the military junta in Argentina, and those elsewhere in the region, were viewed as “enemies of the state, to be physically eliminated or politically and socially

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<sup>45</sup> Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1999), 27-28.

<sup>46</sup> Richard Falk, “Criminal Accountability in Transitional Justice,” *Peace Review* 12, no. 1 (2000): 82.

<sup>47</sup> Richard Falk, “Telford Taylor and the Legacy of Nuremberg,” *Columbia Journal of Transnational Law* 37, no. 3 (1999): 698.

isolated or silenced by imprisonment, torture, enforced disappearances, or exile.”<sup>48</sup> According to Teitel, these conflicts cannot be separated from wider Cold War politics, as many of these regimes were “supported by United States/Soviet bipolarism.”<sup>49</sup> Following the decline and eventual collapse of the Soviet Union, there was an intense growth in new democracies across Latin America and, of course, Eastern Europe, in what has come to be known as the “third wave” of democratization.<sup>50</sup> In the wake of these transitions, the new democratic governments struggled with a series of challenges including how to respond to the violence experienced under the preceding military juntas.

In Argentina, after gaining office in Argentina in 1983, President Raúl Alfonsín opted to establish a commission to investigate the truth about the military actions, known as the National Commission on the Disappearance of People (CONADEP).<sup>51</sup> With 50,000 pages of testimony, the report, entitled “*Nunca Más*” (Never Again) confirmed the disappearance of 8,963 people.<sup>52</sup> It also identified 340 torture centres and provided a list of individuals who had assisted in the repression. The list included doctors, judges, journalists and priests, among other professions.<sup>53</sup> According to Neier, the commission was established, in part, in response to a report written by the Junta itself, called the ‘final

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<sup>48</sup> Alexandra Barahona de Brito, “Truth, Justice, Memory, and Democratization in the Southern Cone,” in *The Politics of Memory: Transitional Justice in Democratizing Societies* eds. Alexandra Barahona de Brito, Carmen Gonzalez-Enriquez, and Paloma Aguilar (Oxford: Oxford University Press, 2001), 119.

<sup>49</sup> Teitel, “Transitional Justice Genealogy,” 75.

<sup>50</sup> See Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman: University of Oklahoma Press, 1991).

<sup>51</sup> Aryeh Neier, *The International Human Rights Movement: A History* (Princeton: Princeton University Press, 2013), 259.

<sup>52</sup> Barahona de Brito, “Truth, Justice, Memory, and Democratization in the Southern Cone,” 121.

<sup>53</sup> Barahona de Brito, “Truth, Justice, Memory, and Democratization in the Southern Cone,” 121.

report'. In it, the Junta denied all responsibility for the disappearances in the country.<sup>54</sup> The *Nunca Más* report paved the way for criminal prosecutions. Following its release, and only 18 months after the military junta left power, nine members of the *Proceso de Reorganización Nacional* were put on trial. Of the nine charged, three were former presidents of Argentina: Eduardo Viola, Jorge Videla, and Leopoldo Galtieri.<sup>55</sup> Viola and Videla as well as Admirals Emilio Eduardo Masera and Armando Lambruschini, and Brigadier General Orlando Ramón Agosti were convicted and sentenced to prison.<sup>56</sup> When the new government turned its attention to prosecuting middle-level officers for these crimes, rebellions broke out, with officers claiming that they were merely following orders. While the rebellions were put down, President Alfonsín eventually abandoned the prosecutions.<sup>57</sup> In 1990, Alfonsín's successor, Carlos Menem, pardoned the previously convicted individuals, a decision that was eventually reversed by a federal court in Argentina in 2007.<sup>58</sup>

In the end, the rebellions in Argentina suggested that criminal prosecutions were perhaps, too risky to pursue in some transitions to democracy and, partly as a result of this, there was a rapid diffusion of the truth commission model throughout Latin America including in Chile, Uruguay, Bolivia, Paraguay, Suriname, Peru, Colombia, El Salvador

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<sup>54</sup> Neier, *The International Human Rights Movement*, 259.

<sup>55</sup> International Center for Transitional Justice, "Criminal Prosecutions for Human Rights Violations in Argentina," (November 2009), available from <http://ictj.org/sites/default/files/ICTJ-Argentina-Prosecutions-Briefing-2009-English.pdf>; accessed, April 29, 2013.

<sup>56</sup> Neier, *The International Human Rights Movement*, 259.

<sup>57</sup> Neier, *The International Human Rights Movement*, 259-260.

<sup>58</sup> Neier, *The International Human Rights Movement*, 259-260; "Argentine court overturns 'Dirty War' pardon," *Reuters*, April 25, 2007.



and so on.<sup>59</sup> Beyond Latin America, truth commissions have been established in countries around the world including, among other places, Colombia, Liberia, Morocco, Peru, Solomon Islands, and South Korea.<sup>60</sup> By far the most prominent of these was the South African Truth and Reconciliation Commission established by the African National Congress (ANC) following the end of Apartheid.<sup>61</sup>

Truth commissions have remained a viable option for countries transitioning from conflict and/or authoritarian rule. Yet, in the wake of the worst violence in Europe since the Second World War, the UN Security Council opted to return to the Nuremberg model of international justice when it established the ICTY, thus marking the start of Teitel's third phase of transitional justice. Prior to the establishment of the court, the Security Council had expressed concerns regarding the "widespread violations of international humanitarian law and in particular reports of the imprisonment and abuse of civilians in these camps."<sup>62</sup> As the evidence mounted, the Security Council passed Resolution 771 which "demanded the immediate cessation of all breaches of international humanitarian law, including those involved in the practice of 'ethnic cleansing', and unimpeded access for relevant international humanitarian organizations to camps, prisons and detention centres."<sup>63</sup> This was followed by Resolution 780, which established a Commission of

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<sup>59</sup> Naomi Roht-Arriaza, "The New Landscape of Transitional Justice," in *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice*, eds. Naomi Roht-Arriaza and Javier Mariezcurrena (Cambridge: Cambridge University Press, 2006), 5.

<sup>60</sup> For more information, see Priscilla Hayner, "Fifteen Truth Commissions – 1974-1994 A Comparative Study," *Human Rights Quarterly* 16, no. 4 (1994): 597-655.

<sup>61</sup> Roht-Arriaza, "The New Landscape of Transitional Justice," 5; The Chileans not only leant their name but also provided the South Africans with advise on implementing the commission.

<sup>62</sup> Kerr and Mobekk, *Peace & Justice*, 32.

<sup>63</sup> Kerr and Mobekk, *Peace & Justice*, 32.

Experts to investigate “grave breaches of the Geneva Convention and other violations of international humanitarian law.”<sup>64</sup> This eventually culminated in the establishment of Resolution 808 on 22 February 1993, to create the ICTY. The Statute for the court (Resolution 827) was later adopted on 25 May 1993.<sup>65</sup> The Security Council invoked Chapter VII of the UN Charter to establish the Court, thereby justifying the court as a measure for international peace and security. The Court’s jurisdiction included individuals who committed Crimes against Humanity, War Crimes and Genocide during the Yugoslav wars (Serb-Croat War, Serb-Bosnia War and the Kosovo War). The court’s statute was relatively conservative, as its definition of Crimes against Humanity required a connection between the act and armed conflict, though not international armed conflict.<sup>66</sup> The ICTY began its work in The Hague, Netherlands, in 1995, and by 2002, over 90 persons had been indicted for War Crimes and several had already been tried.<sup>67</sup>

In terms of its goals, accountability for human rights violations was the most obvious, but many believed that that the Court would contribute to the promotion of reconciliation through the creation of an irrefutable historical record of the war in order to prevent a hijacking of history by revisionists.<sup>68</sup> These expectations were inflated by

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<sup>64</sup> M. Cherif Bassiouni, “Former Yugoslavia: Investigating Violations of International Humanitarian Law and Establishing an International Criminal Tribunal,” *Security Dialogue* 25, no. 4 (1994): 413

<sup>65</sup> Bassiouni, “Former Yugoslavia,” 414-416.

<sup>66</sup> Margaret McAullife de Guzman, “The Road from Rome: The Developing Law of Crimes against Humanity,” *Human Rights Quarterly* 22, no. 2 (2000): 351 (335-403). The subsequent International Criminal Tribunal for Rwanda did not require this nexus between Crimes against Humanity and armed conflict.

<sup>67</sup> Howard Ball, *War Crimes and Justice: A Reference Handbook* (Santa Barbara: ABC- CLIO, Inc., 2002), 25.

<sup>68</sup> Laurel E. Fletcher and Harvey M. Weinstein, “A world unto itself? The application of international justice in the Former Yugoslavia,” in *My Neighbour, My Enemy: Justice and Community in the Aftermath*

diplomats, media, and other supporters who “sought to expand its legal mandate beyond the goal of prosecuting alleged perpetrators of War Crimes,” to a “larger, more ill-defined, and unrealistic objective of promoting reconciliation among warring groups.”<sup>69</sup> However, these goals were not completely unwarranted. Security Council records suggest that the goals of the Court included the punishment of those guilty of War Crimes in order to bring justice for victims, to provide a truth about the atrocities of the war, and to deter future war criminals.<sup>70</sup> Further, it was hoped the mere creation of the Court would deter future atrocities in the Yugoslav wars, which, ultimately proved unsuccessful as the largest massacre of the war, the killing of 7,000 Bosniak men and boys at Srebrenica, occurred after it had been established.<sup>71</sup>

Despite this apparent success, the record of the first international judicial body since Nuremberg has been mixed.<sup>72</sup> According to Neier, the ICTY marked the first time in the United Nation’s forty-eight year history that it had put muscle behind its moral authority by “bring[ing] anyone to justice for committing human rights abuses.”<sup>73</sup>

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*of Mass Atrocity*, eds. Eric Stover and Harvey M. Weinstein (Cambridge: Cambridge University Press, 2004), 37.

<sup>69</sup> Fletcher and Weinstein, “A world unto itself?” 30.

<sup>70</sup> Fletcher and Weinstein, “A world unto itself?” 30.

<sup>71</sup> In July 1995 the United Nations-declared “safe area” of Srebrenica in Bosnia-Herzegovina was allowed to fall to besieging nationalist Serbs who rounded up and killed the men and boys from the town of Srebrenica in Eastern Bosnia-Herzegovina. See: Payam Akhavan, “Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism,” *Human Rights Quarterly* 31, no. 3 (2009): 632 and 637.

<sup>72</sup> For more information, see David Hoogenboom and Stephanie Vieille, “Rebuilding social fabric in failed states: Examining transitional justice in Bosnia.” *Human Rights Review*, 11, no. 2, (2010): 183-198.

<sup>73</sup> Aryeh Neier, *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice* (New York: Times Books, 1998), 21.

According to Sikkink, the ICTY was a major development for the *Justice Cascade* and, in addition to the end of the Cold War, points to Bill Clinton's appointment of Madeleine Albright as the U.S. ambassador to the United Nations. Albright, a committed human rights supporter, became a staunch supporter of the court.<sup>74</sup> Others, like David Forsythe, saw Clinton's decision to pursue the ICTY as merely a tactic to appear to be doing something about the human rights violations the Balkans. Such an approach views the ICTY as a mere "fig leaf" to conceal the fact that little was actually being done to put an end to the atrocities being committed.<sup>75</sup> According to Forsythe, the U.S. wanted to "appear to be concerned about atrocities in the Balkans and Rwanda, while seeking to avoid decisive military intervention—by putting Western military personnel in harm's way to protect the rights of others."<sup>76</sup> In response, Forsythe suggests that, "in the greater political space for international criminal justice opened up by the end of the Cold War at the UN Security Council, renewed interest in international criminal courts in the 1990s occurred partially for the wrong reasons."<sup>77</sup>

One the fact, these explanations seem to contradict one another, but, they in fact, share the same primary explanatory variable. In terms of the first argument, the U.S. and, especially Albright, was influenced by human rights discourse especially after the end of the Cold War. Here, the ICTY served as a tool to reinforce these principles at the

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<sup>74</sup> Sikkink, *The Justice Cascade*, 112.

<sup>75</sup> David Forsythe, "Human Rights and Mass Atrocities: Revisiting Transitional Justice," *International Studies Review* 13, no. 1 (2011): 87. See also: Michael P. Scharf, *Balkan Justice* (Durham, NC: Carolina Academic Press, 1997).

<sup>76</sup> Forsythe, "Human Rights and Mass Atrocities," 87.

<sup>77</sup> Forsythe, "Human Rights and Mass Atrocities," 87.

international level. As for the second argument, the U.S. were looking to avoid military action in the Balkans and, instead, opted for a human rights-centred policy given the increased political capital that this discourse had acquired at the international level. In other words, both explanations rely on the growing importance of the human rights movement. The difference then was in whether or not the Americans were acting genuine. However, what both of these explanations suggest is the passive nature in which the Americans supported the court. It was either them being influenced by the Human Rights discourse or it was them relying on the discourse as a way to avoid military intervention.

Either way, the ICTY paved the way for the International Criminal Tribunal for Rwanda (ICTR) to be established in response to the 1994 genocide. The ICTR was established in response to a request by the Rwandan government. According to Kerr and Mobekk, the hope of the Rwandan government was that the tribunal would give the appearance of legitimate justice, as opposed to merely vengeful justice, as well as “promote national reconciliation and [the] construction of a new society through equitable justice.”<sup>78</sup> Despite this, it too suffered from several challenges, not least of which was the sheer volume of perpetrators. Further, despite the Rwandan government’s request for the Court, once it became clear that they would not have the type of control they had anticipated, they withdrew their support. For example, the Rwandan government felt that, temporally, the jurisdiction being restricted to only 1994 did not

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<sup>78</sup> Kerr and Mobekk, *Peace & Justice*, 33.

adequately reflect the history of crimes in Rwanda.<sup>79</sup> Further, questions arose over the selection of judges from countries who had supposedly been involved in the war, as well as the fact that the trials and imprisonment of convicted criminals took place outside of Rwanda meant that there would be a “disparity in sentencing between the ICTR and national courts, [which] would lead to inequality of justice.”<sup>80</sup>

The turn back to criminal prosecutions marks the beginning of the third and current phase of transitional justice—its normalization in the international system—but this turn posed several challenges to the international community. Ultimately, this latest phase has been marked by considerable confusion over the objective of transitional justice. While the first phase of transitional justice sought accountability in the face of overwhelming violence, the second phase looked to alternative measures that highlighted reconciliation and peace. As the experiences of the ICTY and ICTR suggest, the third phase is marked by a desire to see justice, but with the additional goal of helping to build a new society. In part, this reflects a greater role that the international community, led by the United Nations Security Council, has taken in helping to rebuild societies after conflict.<sup>81</sup> Increasingly, then, we are seeing transitional justice as a component of wider peacebuilding efforts in societies emerging from conflict.

These challenges aside, for transitional justice scholars, the most significant development in the third phase has been the formation of the ICC. Established by the

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<sup>79</sup> Kerr and Mobekk, *Peace & Justice*, 33

<sup>80</sup> Kerr and Mobekk, *Peace & Justice*, 34.

<sup>81</sup> Richard Caplan, *International Governance of War-Torn Territories: Rule and Reconstruction* (Oxford: Oxford University Press, 2005).

Rome Statute in 1998, the court came into existence in 2002. For legal advocates, “the ICC symbolizes the entrenchment of the Nuremberg Model.”<sup>82</sup> The Court can prosecute individual perpetrators for crimes of genocide, Crimes against Humanity, War Crimes, and Crimes of Aggression.<sup>83</sup> At the time of writing, the court had presided over 18 cases from 8 situations including Democratic Republic of the Congo, Central African Republic, Uganda, Sudan, Kenya, Libya, Côte d’Ivoire, and Mali.<sup>84</sup> In addition to the ICC and the *ad hoc* tribunals, several hybrid courts, which straddle the domestic and international realm, have been set up in Cambodia (the Extraordinary Chambers in the Courts of Cambodia), East Timor (Special Panels of the Dili District Court), Kosovo (“Regulation 64” Panels in the Courts of Kosovo), and Sierra Leone (Special Court for Sierra Leone).<sup>85</sup> Composed of both national and international elements, the hybrid model is believed to fill the gap between principles of international justice and local priorities. In doing so, it is argued that hybrid courts are able to deal with problems that arise from purely international courts, such as, for example, lack of ownership, while resolving some of the challenges posed by domestic courts, for example, lack of infrastructure or procedures for fair trials.<sup>86</sup> By the time the *Report of the Secretary-General on the Rule of Law and*

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<sup>82</sup> Teitel, “Transitional Justice Genealogy,” 90.

<sup>83</sup> Claire de Than and Edwin Shorts, *International Criminal Law and Human Rights* (London: Sweet & Maxwell Limited, 2003), 319-322.

<sup>84</sup> For more information see: “Situations and Cases,” *International Criminal Court*, available from [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx), accessed 16 June 2013.

<sup>85</sup> For information on Cambodia see: Kathleen Claussen, “Up to the bar? Designing the hybrid Khmer Rouge Tribunal in Cambodia,” *The Yale Journal of International Law* 33, no. 1 (2008): 253-258. For information on East Timor, Kosovo, and Sierra Leone see: Laura A. Dickinson, “The Promise of Hybrid Courts,” *The American Journal of International Law* 97, no. 2 (2003): 295-310. For information on all four courts, see *Project on International Courts and Tribunals*, available from <http://www.pict-pecti.org/courts/hybrid.html>, accessed 16 June 2013.

<sup>86</sup> Dickinson, “The Promise of Hybrid Courts,” 300-305.

*Transitional Justice in Conflict and Post-Conflict Societies* was released in 2004, recognition of the importance of transitional justice was firmly entrenched at the international level.<sup>87</sup>

## 5.1 Cold War Thesis in the Transitional Justice Narrative

The opening of the third and current period of transitional justice, what Teitel calls the normalization of transitional justice, coincided with the end of the Cold War. This period has been marked by a new phase in international politics following the end of the Cold War. The ideological victory of democracy over communism has renewed a faith in liberal democracies. According to liberal scholars, taken together, the Liberal/Democratic Peace serves as a compass for post-Cold War relations. The normative argument inferred from these liberal theorists is rather straightforward, whether stated or not: to promote democracy abroad is to pursue peace within and between nations. According to these scholars, this shift towards liberalism resulted in a significant expansion of the realm of possibilities envisioned by agents of democratic promotion. During the Cold War, the gridlock created by the veto power of the United States and the Soviet Union meant that the UN was severely handicapped in its ability to intervene in the domestic affairs of many conflict-ridden countries. As Paris points out,

Both the Soviets and Americans were concerned with maintaining the integrity of their own spheres of influence and did so partly by insulating these spheres from outside meddling. Achieving Security Council agreement for the deployment of a

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<sup>87</sup> In his outgoing article as editor of the *International Journal of Transitional Justice*, Weinstein suggested that, since the early 1990s, well over a billion dollars have been spent on mechanisms of transitional justice. See Harvey Weinstein, "Editorial Note: The Myth of Closure, the Illusion of Reconciliation: Final Thoughts on Five Years as Co-Editor-in-Chief," *International Journal of Transitional Justice* 5 no. 1 (2011): 1-2.



new peacekeeping mission was therefore possible only when both veto-wielding superpowers believed that their strategic interests were not threatened.<sup>88</sup>

After the Cold War, liberalism's victory was consequently accompanied by supposed opening in the international community for the exportation of democracy and liberal values. No longer under threat of nuclear war, Western powers could go out and spread the ideals of democracy.

This ideal was soon embedded in the rhetoric of Western powers. For example, the 2003 European Security Strategy, drafted under Javier Solana and adopted by the heads of state of the European Union asserted that: "The quality of international society depends on the quality of the governments that are its foundations, the best protection for our society is a world of well-governed democratic states. Spreading good governance, supporting social and political reform, dealing with corruption and abuse of power, establishing the rule of law, and protecting human rights are the best means of strengthening the international order."<sup>89</sup> According to Magen and McFaul,

European governments have—since the end of the Cold War, but particularly after 9/11—gradually elevated the promotion of good governance and democracy abroad on their lists of foreign policy priorities... From practically no organized government spending in the 1980s, the countries of the European Union now dedicate some \$1.3 billion per year directly to programs promoting good governance and democracy around the globe.<sup>90</sup>

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<sup>88</sup> Roland Paris, *At War's End* (Cambridge: Cambridge University Press, 2004), 15.

<sup>89</sup> "A Secure Europe in a Better World," *European Security Strategy*, (12 December 2003), available from <http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf>, accessed 20 January 2012.

<sup>90</sup> Amichai Magen and Michael A. McFaul, "Introduction," in *Promoting Democracy and the Rule of Law: American and European Strategies*, eds. Amichai Magen, Thomas Risse, and Michael A. McFaul (Basingstoke: Palgrave Macmillan, 2009), 3-4.

For the United States, similar trends have been observed in their support for democracy abroad: “resources for democracy programs... increased 538 percent between 1990 and 2003, as opposed to total USAID assistance, which increased only 19 percent.”<sup>91</sup>

This Cold War Thesis has had a tremendous impact on the transitional justice narrative. Barahona de Brito gives voice to this argument writing that “modern international and national human rights law and practice stem from 1945, but the development of international human rights regime was stalemated by the onset of the Cold War.”<sup>92</sup> For Barahona de Brito, while the 1970s saw a rise in human rights activities, “the continued hegemony of Cold War thinking counteracted the universalizing pretensions of the human rights revolution.”<sup>93</sup> However, “by the late 1980s and early 1990s, when the majority of transitions examined in this book took place, the scenario had changed significantly. Human rights had become a universal language, even if not a universally cherished concept.”<sup>94</sup> The growing acceptance of human rights standards was “empowered by the progressive ratification by nation states of the various human rights conventions, and was complemented in aid and trade relations. At the same time, powerful transnational networks focusing on normative issues created in the 1970s were by then well developed regional, and international institutions, as well as boosting the influence of national HRO.”<sup>95</sup> Accordingly, “these networks” writes de Brito, “have

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<sup>91</sup> Steven G. Finkel, Anibal S. Perez Linan, and Mitchell A. Seligson, “The Effects of U.S. Foreign Assistance on Democracy Building, 1990–2003,” *World Politics* 59, no. 3 (2007): 415.

<sup>92</sup> Barahona de Brito, *The Politics of Memory*, 21-22.

<sup>93</sup> Barahona de Brito, *The Politics of Memory*, 22.

<sup>94</sup> Barahona de Brito, *The Politics of Memory*, 22.

<sup>95</sup> Barahona de Brito, *The Politics of Memory*, 22-23.

contributed to a lowering of sovereign barriers and to legitimating the intervention of external actors in national processes of democratization and in the promotion of respect for human rights. Concomitantly, the spread of the values of democratic governance boosted the notion of rights and made universality seem possible for the first time.”<sup>96</sup> For many transitional justice scholars, the end of the Cold War signaled the ideological victory of liberalism in the international community. Certainly, such a view legitimizes the work done by both transitional justice practitioners as well as many of its scholars who have taken a very supportive stance on the importance of these mechanisms. I contend, however, that the universalization of the human rights language in the space opened up by the end of the Cold War should not be understood as merely the result of a groundswell of support for liberal democracy by human rights advocates, as Sikkink, de Brito and others propose. Instead, we must understand it as a contingent outcome of the growth of American power in the international system.

To understand this point, we must rewind back to the internationalist turn taken by the US at the start of the 20<sup>th</sup> century.<sup>97</sup> The presidency of Woodrow Wilson is often pointed to as a significant shift in the foreign policy of the United States, as Wilson took a decisively internationalist stance.<sup>98</sup> In his Fourteen Point Plan speech delivered to

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<sup>96</sup> Barahona de Brito, *The Politics of Memory*, 23.

<sup>97</sup> Adam Quinn and Michael Cox, “For Better, for Worse: How America’s Foreign Policy became Wedded to Liberal Universalism,” *Global Society* 21. 4 (2007): 500.

<sup>98</sup> The debate over what drives American foreign policy is a lively debate in American academia. For a good introduction, see Donald Abelson, *American Think-Tanks and Their Role in US Foreign Policy* (London: Macmillan Press, 1996). However, American foreign policy has exhibited behaviour, which suggests its desire to see democracy grow outside of its borders. Whether strategic interests, cultural values, or both drove this behaviour, this will likely remain a topic of intense debate for the foreseeable future. The belief that values such as liberty and democracy could be exported is nothing new to American policymakers. Such sentiments were already central to the United States efforts in the Philippines

Congress on 8 January 1918, Wilson outlined his vision of an interdependent international community with a League of Nations at its centre point. For Wilson, the democratic nation-state lay at the foundation of this vision. Above this sat an international order in which states were held together through economic, military, and moral interdependence.<sup>99</sup> Such a vision saw “nationalism wed to democracy; democracies wed in peace, prosperity, and mutual respect embodied in international law and institutions.”<sup>100</sup> According to Wilson, this type of international superstructure based on a core commitment to liberalism best guaranteed American security.<sup>101</sup>

In her book, *Paris 1919*, historian Margaret Macmillan summarized Wilson’s position at the Paris Peace Conference:

When governments were chosen by their people, they would not, indeed they could not, fight each other. ‘These are American principles,’ he [Woodrow Wilson] told the Senate in 1917. ‘We could stand for no others. And they are also the principles and policies of forward looking men and women everywhere, of every modern nation, of every enlightened community. They are the principles of mankind and they must prevail.’ He was speaking, he thought for humanity. Americans tended to see their values as universal ones, and their government and society as a model for all others...American democracy, the American constitution, even America ways of doing business, were examples that others should follow for their own good.<sup>102</sup>

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following the defeat of Spain during the Spanish-American war in 1898 and the subsequent transfer of the territory to US hands. For more information see Tony Smith, *America’s Mission: The United States and the Worldwide Struggle for Democracy in the Twentieth Century* (Princeton: Princeton University Press, 1994).

<sup>99</sup> Smith, *America’s Mission*, 87.

<sup>100</sup> Smith, *America’s Mission*, 87.

<sup>101</sup> Smith, *America’s Mission*, 87. According to Smith, Wilson’s primary concern was political (providing collective military security) and his secondary concern was economic.

<sup>102</sup> Margaret MacMillan, *Paris 1919* (New York: Random House, 2003), 14.

Such a view was not entirely novel, even in Wilson's time, and was fueled by the notion of American exceptionalism: a theory which states that the United States is different from other nations. They are the "apostles of openness, moral precepts, and honor."<sup>103</sup> Despite the apparent failure of the U.S. Congress to deliver on such a vision for the international community following the First World War, this position gained tremendous value again with the onslaught of the Second World War. Such views manifested themselves in U.S. foreign policy under Franklin Delano Roosevelt with the creation of the United Nations and the promotion of the Bretton Woods system.<sup>104</sup> Truman continued in the Wilsonian tradition with the democratization of Japan and Germany, as well as supporting European economies through the Marshall plan.<sup>105</sup>

The desire to see liberal democracies grow around the world became a common theme in American foreign policy during the second half of the twentieth century. It was generally believed that the growth of liberal values in non-democratic countries was best secured through economic development. As tensions rose between the United States and the Soviet Union, the spread of American values through development was not simply seen as valuable for the recipient societies, as an exercise in humanitarianism, but became a strategy for containing the spread of communism.<sup>106</sup> The identification of the so called

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<sup>103</sup> Howard J. Wiarda, *Cracks in the consensus: debating the democracy agenda in U.S. foreign policy* (Westport, Connecticut: Greenwood Publishing Group, 1997), 1. Some scholars suggest that the United States has always exhibited a desire to spread democracy and western values. For more information, see: Robert Kagan, "Neocon nation: neoconservatism, c. 1776," *World Affairs* 170, no. 4 (2008): 13-35.

<sup>104</sup> Tony Smith, "National Security Liberalism and American Foreign Policy," in *American Democracy Promotion: Impulses, Strategies, and Impacts*, eds. Michael Cox, G. John Ikenberry, and Takashi Inoguchi (Oxford: Oxford University Press, 2000), 94.

<sup>105</sup> Smith, "National Security Liberalism," 94.

<sup>106</sup> P.W. Preston, *Theories of Development* (London: Routledge & Kegan Paul, 1982). 72.

“Third World” countries, especially following the wave of decolonization in the 1960s, was generally viewed through this Cold War lens; each country that adopted the liberal democratic model expanded the sphere of influence of the United States, and vice versa for the Soviet model. As a result, the real battleground for their Cold War was not the sky, sea or land between the two superpowers, but the developing countries that were looking for models of development.

Accordingly, both sides in the Cold War had a set of prescriptions for how to organize the political, social, cultural, and economic life of a country. Of course, the United States was committed to a model of governance based on liberal democracy and free market economics, and the Soviet Union was committed to a “people’s democracy which embraced public ownership of the means of production and a state led by a communist vanguard on behalf of the working class.”<sup>107</sup> The desire to prove the superiority of their “respective ideologies was a necessity and drove each side to intervene across the globe... both sides sought transformation in the new states as a way to demonstrate that their ideologies were best suited to deliver the benefits of modern life.”<sup>108</sup>

The American brand of development was premised on the belief that economic growth was the primary engine of modernization. Economists like Walt Rostow were generally relied upon to form the United States’ development strategy. His 1960 book, *The Stages of Economic Growth*, played an integral role in the founding of modernization

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<sup>107</sup> Paris, *At War’s End*, 15.

<sup>108</sup> David Ekbladh, *The Great American Mission: Modernization and the Construction of an American World Order, 1914 to the Present* (Princeton University Press, 2010), 2.

theory. This early scholarship, however, generally ignored the social, political, and cultural aspects of development. In response to these gaps in knowledge, development studies eventually developed into a burgeoning field for all social scientists.

In sociological terms, development was understood using Modernization Theory, an approach that drew heavily on the notion of evolutionism applied to human societies. Relying on the experience of the Western world, or some simplified version of it, theorists suggested that the pattern of development was a linear movement towards modernization. Societies, it was believed, passed through various stages when moving from a traditional to a modern society.<sup>109</sup> The end-point of this path, of course, was a society that resembled those in the West. Modernization became synonymous with Westernization.

When a country moved from traditional to modern ways of life, scholars like Karl Deutsch suggested that a substantial part of the population would undergo social mobilization.<sup>110</sup> This was a “process in which major clusters of old social, economic, and psychological commitments are eroded or broken and people become available for new patterns of socialization and behaviour.”<sup>111</sup> Often, this process can have a significant impact on the political behaviour of a population as it is often accompanied by a growth of the “politically relevant strata of the population.”<sup>112</sup> According to Seymour Martin

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<sup>109</sup> The work of Talcott Parsons greatly influenced the work on Modernization theory. See Sandro Segre, *Talcott Parsons: An Introduction* (Lanham, MD.: University Press of America, 2012), 38,

<sup>110</sup> Karl Deutsch, “Social Mobilization and Political Development,” *The American Political Science Review* 55, no. 3 (1961): 493.

<sup>111</sup> Deutsch, *Social Mobilization*, 494.

<sup>112</sup> Deutsch, *Social Mobilization*, 498.

Lipset, “increased wealth and education also serve[d] democracy by increasing the extent to which the lower strata [were] exposed to cross-pressures which will reduce the intensity of the commitment to given ideologies (i.e. class struggles) and make them less receptive to supporting extremists ones.”<sup>113</sup> In this respect, as Wiarda argues, “economic growth... would eventually produce social modernization and differentiation that would lead to democracy. All the United States needed to do, the argument ran, was to provide economic aid, aid to education, new communications media, aid to new social groups, and so on; democracy [instead of communism] would presumably inevitably follow.”<sup>114</sup>

While the primary subject was often the developed nations of the Western world, “economic development outside of Europe and the United States was lent urgency by the political context of decolonization, the Cold War, and competition for the adherence of Third World countries to either capitalism or communism.”<sup>115</sup> Modernization theory, then, was not merely a technical strategy for countries to follow, but was politically charged. With much of Europe demobilized following the Second World War, the United States was in a position to lead the construction of a new worldwide order. Ekbladh argues that

[t]he creation of liberal hegemony that relied upon the permeation of values and understanding throughout the global system also rested on development aid and the institutions that could provide it. Modernization was a preexisting means to assist this permeation and to establish the stability required for a functioning

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<sup>113</sup> Seymour Martin Lipset, “Some Social Requisites of Democracy: Economic Development and Political Legitimacy,” *The American Political Science Review* 53, No. 1 (March, 1959): 83.

<sup>114</sup> Howard J. Wiarda, *Comparative Politics: Approaches and Issues* (Lanham, Maryland: Rowman & Littlefield Publishers, 2006), 54.

<sup>115</sup> Richard Peet, *Theories of Development*, (New York: The Guilford Press, 1999), 41.



international system on liberal lines. It also served to contain communism with its own enticing brand of modernization.<sup>116</sup>

Such a struggle over the proper vision of development shaped the United States' engagement with the developing world throughout the Cold War and "modernization [was] deeply implicated in what has more aptly been described as the establishment of American global hegemony. The project that modernization served in the twentieth century was not always humanitarian, but strategic."<sup>117</sup> According to Latham,

[a]s an American ideology, modernization fit squarely within the larger history of liberal, internationalist visions of an open, integrated world in which ideals and values as well as capital and commerce would flow across borders and markets. Its assumptions about the universal validity of U.S. institutions and the malleability of foreign societies were also tempered by long-standing reservations about the nature of foreign peoples and the need for their transformation to be carefully channeled and controlled.<sup>118</sup>

By the end of the 1960s and the start of the 1970s, the failure of modernization was evident. Modernization came to be seen as too paternalistic, relying on Western notions of development, and had become the handmaiden of the Cold War. A host of forces factored into the demise of modernization:

The imperative of promulgating a liberal version of development against 'totalitarian' opponents had dissipated when the rigidities of the Cold War buckled as questions of the legitimacy of the superpowers and the systems they advocated became common. Assumptions about the importance of the central state came to be doubted in many quarters, as had faith in large-scale programs guided by the concept of planning. These were tied to profound questions about the nature of modern, high-tech, industrialized society.<sup>119</sup>

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<sup>116</sup> Ekbladh, *The Great American Mission*, 79.

<sup>117</sup> Ekbladh, *The Great American Mission*, 2.

<sup>118</sup> Michael Latham, *The Right Kind of Revolution: Modernization, Development and U.S. Foreign Policy From the Cold War to the Present* (Ithaca, New York: Cornell University Press, 2011), 11-12.

<sup>119</sup> Ekbladh, *The Great American Mission*, 255.

In development circles, modernization was being replaced by sustainability, the idea that development should be directed towards poverty and focusing on basic needs like food and health.<sup>120</sup> Though the idea of promoting democracy never ceased to exist in American policy circles, the justification for use of modernization theory as the intellectual base of this policy had collapsed. After entering office in 1969, U.S. President Richard Nixon officially altered the course of American foreign aid with the introduction of the Nixon Doctrine, which reflected the general discontent with modernization and the faith in economic assistance to counter the communist threat.<sup>121</sup> Central to this was a fading willingness on the part of the U.S. to shoulder the large-scale projects that had come to be associated with development à la modernization. This change in course reflected the disillusionment surrounding the ability of the current course of U.S. foreign aid to effectively influence the developing world.<sup>122</sup> Accordingly, the Nixon administration looked to alternative avenues for development assistance:

The president turned to old standards, as technical assistance was again deputed as a way to reassert the primacy of the United States. There were also bows to the cultivation of private enterprise in developing nations. The real departure was a call for greater emphasis on multilateral aid through the United Nations, particularly the World Bank.<sup>123</sup>

The larger goal of strengthening American hegemony within the international community via the promotion of liberalism was not abandoned for long. Reagan's administration, with the support of neoconservatives, once again adopted a crusade for democracy as a means to check the power of the Soviet Union and strengthen American influence. Such

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<sup>120</sup> Ekbladh, *The Great American Mission*, 250.

<sup>121</sup> Ekbladh, *The Great American Mission*, 221.

<sup>122</sup> Ekbladh, *The Great American Mission*, 221.

<sup>123</sup> Ekbladh, *The Great American Mission*, 221.

a strategy was “essentially picked up from where it had been set down in the mid-1960s.”<sup>124</sup> This time, however, American foreign policy was aided by the newly emerging concept of human rights. But to properly situate these developments, it is important to examine how human rights became a central concept in rallying support around America’s promotion of liberal democracy.

Immediately following the defeat of the Nazi regime in 1945, the Allied forces established the Nuremberg trials to prosecute the top echelon of the defeated German state. For observers like Norbert Ehrenfreund, a correspondent for *The Stars and Stripes* during the trials, Nuremberg represented a turning point for human kind. He asserts that,

Before Nuremberg, people living in totalitarian states had no protection against torture, murder and enslavement by their governments... Repressive heads of state could breach human rights on a massive scale and get away with it because they were shielded by the tradition of sovereign immunity. There was no international recognition of human rights. Within a nation’s borders, human rights could be extensively violated and there was no recourse. No worldwide collective effort with teeth, no international court with powers of enforcement was in place to respond to the injustices inflicted by a sovereign government upon its own citizens... whether Robert Jackson realized it or not, what he did by winning his fight for such a trial was for the first time to give authority and force to the concept of international human rights.”<sup>125</sup>

Ehrenfreund’s observations regarding the significance of Nuremberg represent a common understanding in the human rights community. The newly established United Nations General Assembly (UNGA) followed up the trials with the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide and the Universal Declaration

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<sup>124</sup> Nicolas Guilhot, *The Democracy Makers: Human Rights and International Order* (New York: Columbia University Press, 2005), 69.

<sup>125</sup> Norbert Ehrenfreund, *The Nuremberg Legacy: How the Nazi War Crimes Trials Changed the Course of History* (Hampshire: Palgrave Macmillan, 2007), 122-123. *The Stars and Stripes* is an independent news source that operates from within the United States Department of Defense. Ehrenfreund would later go on to serve as a judge in the Superior Court of California.

of Human Rights in 1948. However, Chandler, among others, warns that we should not interpret the UDHR and Genocide Convention or any other major human rights covenants (i.e. International Covenant of Economic, Social, and Cultural Rights, and the International Covenant of Civil and Political Rights, adopted in 1966) as expressing a desire to build an enforceable framework for the protection of human rights in the international sphere.<sup>126</sup> Indeed, soon after the end of the Second War, the U.S. found itself in a new struggle with the Soviet Union. The Cold War would structure the relations between these two superpowers for much of the remainder of the twentieth century.

Similarly, historian Samuel Moyn suggests that we have falsely interpreted the Nuremberg Trials and the subsequent legal innovations as a real framework for the protection of human rights. In drafting the blueprint for the postwar era, the Allied powers were interested more in balancing powers than protecting universal rights. Such a reality was all too evident when preparatory documents regarding this postwar order were leaked in the lead-up to the establishment of the United Nations. The documents spelled out the actual intentions of the Allied powers and “those with eyes to see understood immediately that the true goal of the prospective UN was to balance great powers, not to moralize (let alone legalize) the world.”<sup>127</sup> The concept of human rights was recognized in the newly-established UN, but it was a “negligible line [in the final blueprint], buried

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<sup>126</sup> David Chandler, “Ideological (Mis)Use of Human Rights,” in *Human Rights: Politics and Practice*, ed. Michael Goodhart (Oxford: Oxford University Press, 2009), 117-118.

<sup>127</sup> Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, Massachusetts: Belknap Press, 2010), 56.

in the proposal for an Economic and Social Council and without any serious meaning.”<sup>128</sup> Moyn proposes that the inclusion of human rights “reflected a need for public acceptance and legitimacy, as part of the rhetorical drive to distinguish the organization from prior instances of great power balance.”<sup>129</sup> Such offerings by the Allied powers were a “far cry from a utopian multilateralism based on human rights.”<sup>130</sup> Despite their introduction into the language of the international community, the accepted understanding of human rights never deviated from the “older tradition of the domestic rights of man.”<sup>131</sup> As relations between the U.S. and the Union of Socialist Soviet Republics (USSR) soured, the West “captured the language of human rights” to use as a tool in the emerging Cold War.<sup>132</sup>

According to Moyn’s analysis, human rights discourse actually gained real momentum in the 1970s, especially under U.S. president Jimmy Carter. A pivotal year was 1977 particularly due to Carter’s inaugural speech, which “put ‘human rights’ in front of the viewing public for the first time in American history.”<sup>133</sup> Under Carter, human rights were introduced as a guiding principle of U.S. foreign policy. However, the importance of Carter’s use of the term is, perhaps, best understood symbolically, as “he

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<sup>128</sup> Moyn, *The Last Utopia*, 56.

<sup>129</sup> Moyn, *The Last Utopia*, 59.

<sup>130</sup> Moyn, *The Last Utopia*, 59. Moyn suggests that the Universal Declaration needs to be understood within this context. Accordingly, the UDHR reflected an understanding similar to the rights of man and citizen and not something like a utopian supranational governance based on law. He states, “though surely proclaimed by an international organization, the Universal Declaration retains, rather than supersedes, the sanctity of nationhood, as its text makes clear.” (p.81)

<sup>131</sup> Moyn, *The Last Utopia*, 81.

<sup>132</sup> Moyn, *The Last Utopia*, 45.

<sup>133</sup> Moyn, *The Last Utopia*, 155.

embedded it for the first time in popular consciousness and ordinary language.”<sup>134</sup> By acknowledging the concept of human rights on the global stage, Moyn argues that Carter transformed the concept into a “publicly acknowledged buzzword.”<sup>135</sup>

In terms of actual U.S. foreign policy, Carothers proposes that the surfacing of human rights as a goal manifested itself in some “diplomatic initiatives that could be interpreted as pro-democratic – although they were not generally put in those terms – but little change on the assistance front.”<sup>136</sup> The authorization of funds for human rights projects was promoted in 1978 when Congress enacted Section 116(e) of the Foreign Assistance Act; however, according to Carothers, this only led to the funding of minor projects like legal aid centres in Latin America. Overall, these were relatively insignificant “footnote[s] to the overall portfolio of U.S. aid.”<sup>137</sup> Johansen’s analysis similarly finds that Carter’s adoption of human rights did little to lift them beyond anything more than empty rhetoric:

The Carter administration has used human rights advocacy to recapture the spirit of a highly moral foreign policy—a spirit lost during the long years of the Vietnamese war and Watergate... on the other hand, Carter has not moved far enough to make substantial or comprehensive policy changes. Consistent with the posture of his predecessors, Carter has frequently subordinated the promotion of human rights to economic and strategic advantages for the United States. The public support for human rights, especially as evidenced in congressional action to compel the president to curtail aid to brutal regimes, is a sign of a more enlightened world order struggling to be born. Resisting this new potential is a

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<sup>134</sup> Moyn, *The Last Utopia*, 155.

<sup>135</sup> Moyn, *The Last Utopia*, 155.

<sup>136</sup> Thomas Carothers, “Taking Stock of Democracy Assistance,” in *American Democracy Promotion: Impulses, Strategies, and Impacts*, eds. Michael Cox, G. John Ikenberry, and Takashi Inoguchi (Oxford: Oxford University Press, 2000), 183.

<sup>137</sup> Carothers, “Taking Stock of Democracy Assistance,” 183.

deep governmental reluctance to apply its lofty rhetoric in cases where U.S. security benefits are jeopardized.<sup>138</sup>

Johansen does note, however, that the use of human rights under the Carter administration was not intended as an empty promise, but “powerful vested interests and the apparent requirement for functioning effectively within the international system force human rights into a subordinate position.”<sup>139</sup> Carter’s recognition of the importance of human rights gave the concept significant clout and it has found a home in American foreign policy, at least rhetorically, ever since.

However, his successor, Ronald Reagan, altered the meaning of this concept, once again, to fit his agenda.<sup>140</sup> Under the conservative presidency of Reagan, the human rights concept was fully integrated as a tool in American Foreign policy, but the concept’s adoption came at the expense of any substantive interpretation that challenged the sanctity of the state. Its use actually served as a legitimating force for Reagan’s anti-communist platform.

Reagan came to power backed by an anti-communist platform built on a concern for the ever-growing Soviet influence around the world, especially during the period of Détente.<sup>141</sup> This perspective was based on three observations: (1) In the post-World War II period, the United States was engaged in a battle between forces of good (liberal

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<sup>138</sup> Robert C. Johansen, *The National Interest and the Human Interest: An Analysis of U.S. Foreign Policy* (Princeton: Princeton University Press, 1980), 269.

<sup>139</sup> Johansen, *The National Interest*, 269.

<sup>140</sup> Barry Gills and Joel Rocamora, “Low Intensity Democracy,” *Third World Quarterly* 13, no. 3 (1992): 504-505.

<sup>141</sup> Ronald Reagan, *Reagan, In His Own Hand: The Writings of Ronald Reagan*, ed. Kiron K. Skiner, Annelise Anderson, and Martin Anderson (New York: Touchstone, 2002), 485.

democracy) and evil (Marxist-Leninist state socialism); (2) This struggle between good and evil took place on every continent and in almost every country; and (3) The U.S. has a critical interest in aiding and assisting governments and anti-government forces that subscribe to the ideals of democratic capitalism and undermining any governments and anti-government forces that are committed to Marxist-Leninist doctrines.<sup>142</sup> Once in power, Reagan set out to undermine Soviet power anywhere possible. According to Brown, “it was time to leave behind the Vietnam-era squeamishness about the decisive application of U.S. military force. Economic power and the attractiveness of the American way of life would also be exploited with confidence and pride, not with the equivocation and apologetics of the Carter years, in a worldwide assault on the false prophets of socialism.”<sup>143</sup> In reflecting on the decisions made during this period, former British Prime Minister, Margaret Thatcher, wrote that, “the west... would regard no area of the world as destined to forego its liberty simply because the Soviets claimed it to be within their sphere of influence. We would fight a battle of ideas against communism and we would give material support to those who fought to recover their nations from tyranny.”<sup>144</sup>

Reagan’s administration had “correctly reasoned that the Achilles heel of the USSR was its economic base. After decades of stagnation, the Soviet economy could not

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<sup>142</sup> Seyom Brown, *The Faces of Power: Constancy and Change in United States Foreign Policy from Truman to Clinton* (New York: Columbia University Press, 1994), 402.

<sup>143</sup> Brown, *The Faces of Power*, 391.

<sup>144</sup> Margaret Thatcher, “Did the Reagan Doctrine cause the Fall of the Soviet Union?” *Insight on the News* 14, no. 3 (26 January 1998): 26.



stand the strain of increased military competition at home and abroad.”<sup>145</sup> Economically, the U.S. sought to “restrict Soviet cash flow and revenues by depriving the USSR of vital trade and technology.”<sup>146</sup> As well, “there was an attempt to spend the USSR into a corner—if not into oblivion—by challenging it to a costly arms race and technological competition that Reagan felt it could not match and would die trying.”<sup>147</sup>

In addition to the economic warfare, the Reagan administration resorted to old tactics of promoting American ideals across the world. This time, however, the U.S. used the rhetorical force of human rights to legitimate its actions. As one observer worded it, this was “a program designed to place freedom on the offensive.”<sup>148</sup> The neoconservatives, influential in Reagan’s administration, had been rather critical of Carter’s human rights policy. They suggested that an interpretation of human rights that bound the United States to international law “placed severe constraints and self-limitations on American power, while facilitating attacks on U.S. foreign policy in the name of human rights.”<sup>149</sup> In response to this attack, the neoconservatives set out to re-interpret the meaning behind human rights. Centrally, they saw human rights, not as international standards which they considered “ineffective and deprived of enforcement mechanisms,” but as “values embedded in existing national political institutions and legal structures, of which the United States were at once the best historical example and

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<sup>145</sup> Gills and Rocamora, *Low Intensity Democracy*, 505.

<sup>146</sup> Paul Kengor, *The Crusader: Ronald Reagan and the Fall of Communism* (New York: Regan Books, 2006), 121.

<sup>147</sup> Kengor, *The Crusader*, 121.

<sup>148</sup> Kengor, *The Crusader*, 156.

<sup>149</sup> Guilhot, *The Democracy Makers*, 75.

model.”<sup>150</sup> Accordingly, human rights did not exist in any sense in the international realm, but needed to be rooted in “democratic political regimes and legal systems.”<sup>151</sup> Substantively, such an interpretation of rights was best protected through the establishment of democracy, the foremost protector of individual rights. In contradiction to earlier understandings dominant under Carter, the neoconservative position on rights eschewed any desire to limit state power through a supranational structure for the protection of rights. Instead, they viewed human rights as existing only in the “principled foundation and the moral substance of a state.”<sup>152</sup> Thus, promoting and protecting national institutions committed to the ideals of democracy would be the best way to promote human rights internationally. Despite the administration’s initial reluctance to take up the cause of human rights, this specific interpretation of the concept was soon embedded in Reagan’s foreign policy to the detriment of any real protection of universal human rights. This co-option of human rights effectively eliminated the use of human rights as a language to challenge state sovereignty.

In support of these policies, the U.S. once again employed its military might to assert its dominance. This translated into the provision of equipment and training for American allies, backed up by a threat to use force where necessary.<sup>153</sup> There was, however, a unique twist to Reagan’s foreign policy. The chief intellect behind Reagan’s

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<sup>150</sup> Guilhot, *The Democracy Makers*, 75-76.

<sup>151</sup> Guilhot, *The Democracy Makers*, 76.

<sup>152</sup> Guilhot, *The Democracy Makers*, 76.

<sup>153</sup> Brown, *The Faces of Power*, 391.

plan was UN Ambassador Jeane Kirkpatrick,<sup>154</sup> a vigorous anti-Marxist, who believed that American foreign policy needed to make a distinction between ‘traditional autocracies’ and ‘revolutionary autocracies’. To Kirkpatrick, in contrast to revolutionary autocracies, traditional autocracies were generally less repressive and, perhaps, more inclined to liberalize their states.<sup>155</sup> Thus, Reagan adopted a double standard for his human rights policies, as “unrelenting opposition to communist regimes that would never reform[...]had to be balanced with a friendly attitude towards rightist dictators supposedly on a path to liberalism.”<sup>156</sup> Forsythe notes that “the president was not inclined to pressure friendly tyrants and the Reagan team knew it.”<sup>157</sup> Reagan, as well as others in his administration, believed that “in places such as El Salvador nothing could be worse than a leftist rebel victory, and therefore gross violations of human rights in association with the government should be played down—even if that meant lying to Congress.”<sup>158</sup> As a consequence, Reagan’s crusade for democracy focused on places like Cuba and other communist states, while trying to “block diplomatic pressure on friendly authoritarians in El Salvador and Guatemala.”<sup>159</sup>

Aside from the apparent double standard, Guilhot points out two major implications of the neoconservative discourse on human rights, used to pursue Reagan’s

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<sup>154</sup> Brown, *The Faces of Power*, 404.

<sup>155</sup> Brown, *The Faces of Power*, 405.

<sup>156</sup> Moyn, *The Last Utopia*, 217; and David P. Forsythe, “Human Rights Policy: Change and Continuity,” in *U.S. Foreign Policy after the Cold War*, eds. Randall B. Ripley and James M. Lindsay (Pittsburgh: University of Pittsburgh Press, 1997), 264.

<sup>157</sup> Forsythe, *Human Rights Policy*, 265.

<sup>158</sup> Forsythe, *Human Rights Policy*, 265.

<sup>159</sup> Forsythe, *Human Rights Policy*, 265.

agenda: (1) If human rights were entrenched in the legal foundations of a “national political system,” then the “pursuit of the national interest of ‘democratic’ countries was entirely consistent, if not equivalent, with the international promotion of human rights.”<sup>160</sup> Such an interpretation of the relationship between democracy promotion as U.S. foreign policy and the protection of international human rights “provided a strong moral legitimation for a policy of foreign intervention and confrontation with the Soviet Union.”<sup>161</sup> Human rights were swiftly domesticated under the Reagan administration and put to use as a tool to challenge Soviet influence and, by extension, proliferate American hegemony; and (2) An interpretation that saw human rights as existing only within national government institutions meant that regime change was effectively within the realm of a human rights policy. In other words, to pursue democracy promotion was to have a human rights-centred foreign policy.<sup>162</sup> In this light, Guilhot notes that the “‘nation-building’ programs, which would subsequently proliferate in the wake of post-conflict situations in the course of the 1990s, should also be viewed in this perspective, as an instrumentalization of human rights for the direct imperial control of foreign regimes.”<sup>163</sup> The absorption of human rights within the policy of democracy promotion under Reagan effectively nullified any robust understanding of the concept by situating it within national governing institutions. Furthermore, it placed American values and specifically civil and political rights, at the forefront of human rights, a concept that is

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<sup>160</sup> Guilhot, *The Democracy Makers*, 78.

<sup>161</sup> Guilhot, *The Democracy Makers*, 79.

<sup>162</sup> Guilhot, *The Democracy Makers*, 79.

<sup>163</sup> Guilhot, *The Democracy Makers*, 79.

supposedly universal in nature. Such an interpretation was to be carried forward into the 1990s in the form of the liberal peacebuilding framework.

The end of the Cold War signaled a new period in international relations. The policy of containing communism was replaced by a focus on democratization. Between 1990 and 1996, the number of electoral democracies around the world—at least in name—grew from 76 to 118.<sup>164</sup> Larry Diamond argues that this trend established democracy as the typical form of government. With the official failure of planned economies through communist vanguards, the international discourse was no longer centred on the need for democracy to counter the perils of communism. Rather, the elimination of the Iron Curtain and the disintegration of the Soviet Union meant that the international community led, of course, by the United States could set a new agenda to promote democracy. The normative perspective underlying this agenda was that Western-style democracy was generally good, and that peace in the world would be secured through democratization.<sup>165</sup> While there was a great deal of optimism during this period, this was certainly overshadowed by the surge of internal conflicts around the world. Of particular concern for the United States and Europe was the intense fighting in the Balkans—Europe’s backyard. Yet, this conflict provided an opportunity to advance the democratization trend that started with the fall of the Soviet Union.

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<sup>164</sup> Larry Diamond, “Introduction: In Search of Consolidation,” in *Consolidating the Third Wave Democracies* ed. Larry Diamond, Marc F. Plattner, Yun-Han Chu, and Hung-Mao Tien (Baltimore: The Johns Hopkins University Press, 1997), xiv.

<sup>165</sup> Bruce Russett, “How Democracy, Interdependence, and International Organizations Create a System of Peace,” in *The Democracy Sourcebook*, eds.) Robert A. Dahl, Ian Shapiro, and Jose Antonio Cheibub (Cambridge: The MIT Press, 2003), 492.

The expansion of democracy around the world was not simply driven by an idealistic agenda, but also served more strategic ends. In response to significant changes in the international system, President Clinton, along with his Secretary of State, Warren Christopher, National Security Advisor, Anthony Lake, and Ambassador to the UN, Madeleine Albright, set out a broad vision for U.S. foreign policy through a series of speeches in September 1993. The speeches by Clinton,<sup>166</sup> Christopher,<sup>167</sup> Lake,<sup>168</sup> and Albright<sup>169</sup> outlined the administration's "strategy of enlargement of the world's free community of market democracies."<sup>170</sup> First, Clinton and his advisors heralded the importance of promoting democracy and free market capitalism, which they believed were universal values. This sentiment is evident in Lake's speech:

We see individuals as equally created, with a God-given right to life, liberty, and the pursuit of happiness. So we trust in the equal wisdom of free individuals to protect those rights: through democracy--as the process for best meeting shared needs in the face of competing desires--and through markets--as the process for best meeting private needs in a way that expands opportunity. Both processes strengthen each other: Democracy alone can produce justice but not the material goods necessary for individuals to thrive; markets alone can expand wealth but not that sense of justice without which civilized societies perish.<sup>171</sup>

Second, given its military might, economic strength and multi-ethnic society, Clinton

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<sup>166</sup> Bill Clinton, "Confronting the Challenges of a Broader World: Address to the UN General Assembly, New York City, September 27, 1993," *U.S. Department of State Dispatch* 4, no. 39 (1993).

<sup>167</sup> Warren Christopher, "Building Peace in the Middle East: Address at Columbia University, co-sponsored by the Council on Foreign Relations, New York City, September 20, 1993," *U.S. Department of State Dispatch* 4, no. 39 (1993).

<sup>168</sup> Anthony Lake, "From Containment to Enlargement: Address at the School of Advanced International Studies, Johns Hopkins University, Washington, D.C., September 21, 1993," *U.S. Department of State Dispatch* 4, no. 39 (1993).

<sup>169</sup> Madeleine Albright, "Use of Force in a Post-Cold War World: Address at the National War College, National Defense University, Fort McNair, Washington, D.C., Sept 23, 1993," *U.S. Department of State Dispatch* 4, no. 39 (1993).

<sup>170</sup> Lake, "From Containment to Enlargement."

<sup>171</sup> Lake, "From Containment to Enlargement."

envisioned the U.S. taking a leadership role in this new, post-Cold War world. Of course, this role is made possible by the absence of the Soviet Union as a global superpower. Strategically, this foreign policy accepts the security logic of the Democratic Peace Theory. According to Lake,

To the extent democracy and market economics hold sway in other nations, our own nation will be more secure, prosperous, and influential, while the broader world will be more humane and peaceful. The expansion of market-based economics abroad helps expand our exports and create American jobs, while it also improves living conditions and fuels demands for political liberalization abroad. The addition of new democracies makes us more secure, because democracies tend not to wage war on each other or sponsor terrorism. They are more trustworthy in diplomacy and do a better job of respecting the human rights of their people.<sup>172</sup>

Similarly, in his speech, Clinton argued that

Democracies rarely wage war on one another. They make more reliable partners in trade, in diplomacy, and in the stewardship of our global environment. In democracies with the rule of law and respect for political, religious, and cultural minorities are more responsive to their own people and to the protection of human rights.”<sup>173</sup>

While the political landscape of the post-Cold War was new, this idea of connecting security with democracy was not. As Lake goes on to say:

These dynamics lay at the heart of Woodrow Wilson's most profound insights; although his moralism sometimes weakened his argument, he understood that our own security is shaped by the character of foreign regimes. Indeed, most Presidents who followed, Republicans and Democrats alike, understood we must promote democracy and market economics in the world--because it protects our interests and security and because it reflects values that are both American and universal.

In response to this, Clinton and his advisors outlined four components of their strategy of enlargement:

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<sup>172</sup> Lake, “From Containment to Enlargement.”

<sup>173</sup> Clinton, “Confronting the Challenges of a Broader World.”

- (1) Strengthen the community of major market democracies which constitutes the core from which enlargement was proceeding;
- (2) Foster and consolidate new democracies and market economies, where possible, especially in states of special significance and opportunity;
- (3) Counter the aggression—and support the liberalization—of states hostile to democracy and markets; and
- (4) Pursue a humanitarian agenda not only by providing aid but also by working to help democracy and market economics take root in regions of greatest humanitarian concern.<sup>174</sup>

This strategy was important for shaping America's response to the violence in the Balkans, particularly in Bosnia.<sup>175</sup> There, the international community took a top-down and heavy-handed approach to democratization and marketization.<sup>176</sup> As Guzina notes,

[t]he Western principles of liberalism have certainly served as a template that guided the actions of the international community in Bosnia. In the political realm, this meant the international imposition of democratization (promotion of regular elections, imposition of constitutional limits on governmental powers, and respect for basic civil and political rights). In the economic realm, liberalisation was equated with marketization (stabilisation and economic restructuring according to free market principles).<sup>177</sup>

Of particular importance in this process was the establishment of the International

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<sup>174</sup> Lake, "From Containment to Enlargement."

<sup>175</sup> In addition to the role of the President, Congress can also play a key role in shaping foreign policy. This is especially the case when an opposing party dominates Congress. When Clinton took office in 1993, both houses of the 103<sup>rd</sup> United States Congress were controlled by the Democrats. Despite this, Peceny suggests that Congress still managed to shape Clinton's foreign policy but did not derail it in any significant manner. For more information, see Mark Peceny, *Democracy at the Point of Bayonets*, (University Park, PA: The Pennsylvania State University Press, 1999), 162-168.

<sup>176</sup> Richard Caplan, *International Governance of War-Torn Territories: Rules and Reconstruction* (Oxford: Oxford University Press, 2005): 20-21.

<sup>177</sup> Dejan Guzina, "Dilemmas of Nation-building and Citizenship in Dayton Bosnia," *National Identities* 9, no. 3 (2007): 217-234. Recognizing the challenge of enduring ethnic identities, the Dayton Peace Accord sought to provide additional security for ethnic groups by "fine-tuning" the constitution through the introduction of consociational institutional arrangements. For more information, see: Florian Bieber, *Post-War Bosnia: Ethnicity, Inequality and Public Sector Governance* (New York: Palgrave Macmillan, 2006); Roberto Belloni, "Peacebuilding and Consociational Electoral Engineering in Bosnia and Herzegovina," *International Peacekeeping* 11, no. 2 (Summer 2004): 334-353; Sumantra Bose, *Bosnia after Dayton*, (New York: Oxford University Press, 2002); and Elizabeth M. Cousens, "From Missed Opportunities to Overcompensation: Implementing the Dayton Agreement on Bosnia," in *Ending Civil Wars: The Implementation of Peace Agreements*, eds. Stephen John Stedman, Donald Rothchild and Elizabeth M. Cousens, (Boulder: Lynne Rienner Publishers, 2002).



Criminal Tribunal for the former Yugoslavia (ICTY).

## 5.2 Situating Transitional Justice

It is in this light, that we must situate the emergence of the normalization phase of transitional justice. The international community responded to the outbreak of ethnic conflict in the Balkans with the creation of the ICTY. As examined above, in the field of transitional justice, there are two dominant explanations for the ICTY's establishment: First, that it was a fig-leaf for inaction; or second, that it was the result of a concerted effort on the part of human rights activists which forced the international community to finally respond to international human rights abuses. These views, however, fail to account for the importance Clinton and his foreign policy advisors placed on the first *ad hoc* tribunal, the International Criminal Tribunal for the former Yugoslavia. In the debates leading up to the establishment of the ICTY, Albright provided two possible reasons why the U.S. supported the tribunal. First, Albright claimed that

we cannot ignore the human toll. Serbian ethnic cleansing has been pursued through mass murder; systematic beatings and the rapes of Muslims and others; prolonged shellings of innocents in Sarajevo and elsewhere; forced displacement of entire villages; inhumane treatment of prisoners in the detention camps' and the blockading of relief to the sick and starving civilians... our conscience revolts at the idea of passively accepting such brutality.<sup>178</sup>

While this was a passionate plea, it resembled a standard response to human rights abuses. However, she followed this up with a second reason:

[t]here is a broader imperative here. The world's response to the violence in the former Yugoslavia is an early and concrete test of how we will address the concerns of the ethnic and religious minorities in the post-cold-war period [*sic*]... the events in the former Yugoslavia raise the question of whether a State may address the rights of its minorities by eradicating those minorities to achieve

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<sup>178</sup> UN Document S/PV.3175 (February 22, 1993).

ethnic purity. Bold tyrants and fearful minorities are watching to see whether ethnic cleansing is a policy the world will tolerate. If we hope to promote the spread of freedom, or if we hope to encourage the emergence of peaceful, multi-ethnic democracies, our answer must be a resounding ‘no’.”<sup>179</sup>

Here, Albright focused on the use of justice to promote western ideals. This suggests that Clinton and his advisors were already well aware of the strategic importance that these prosecutions had for their goals of democratization and marketization. Of course, this justification is more in line with the eventual policy of enlargement articulated by Clinton and his advisors in the months following the establishment of the tribunal. Indeed, democratization was already a prominent theme in Clinton’s 1993 inaugural speech in which he stated that “our greatest strength is the power of our ideas, which are still new in many lands. Across the world we see them embraced, and we rejoice. Our hopes, our hearts, our hands are with those on every continent who are building democracy and freedom. Their cause is America's cause.”<sup>180</sup> In response, I suggest that we cannot fully understand the creation of the ICTY and, by extension, the commencement of Teitel’s third phase of transitional justice—the normalization of justice—without addressing Clinton’s strategy of democracy enlargement. Certainly, Clinton’s belief in the security logic of the democratic peace must be understood as shaping his response to the events in the Balkans and, subsequently, his support for the criminal tribunal.

### 5.3 Neoliberalism

To fully understand the impact of Clinton’s strategy of enlargement which included the promotion of democracy and free market capitalism, it is critical to explore the dominant

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<sup>179</sup> UN Document S/PV.3175 (February 22, 1993).

<sup>180</sup> William J. Clinton, *First Inaugural Address, January 20, 1993*.

ideology at the time: neoliberalism. Neoliberalism first became dominant in the United States and Great Britain during the governments of Reagan and Thatcher, respectively.<sup>181</sup> In time, these ideas gained a foothold in the major international development agencies, including the International Monetary Fund (IMF) and the World Bank. Embedded in neoliberal discourse is the belief that the political ideals of human dignity and individual freedom are universally central to human civilization.<sup>182</sup> Such ideals, according to Harvey, are both compelling and seductive. For neoliberals, these ideals lead to the normative theory that human well-being is best advanced by “liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade.”<sup>183</sup> In this ideological view of dignity and freedom, the state exists to guarantee the integrity of money and private property through the establishment of a military, police force, and legal structures.<sup>184</sup>

The development of neoliberalism is based on a specific premise regarding the nature of society: “the notion that, however complex social relations might be, there exists an immanent market-like essence to each individual, regardless of a society’s culture or history.”<sup>185</sup> Neoliberals believe that the economic sphere functions according to a basic rationality whereas the political sphere is assumed to be inherently irrational. A basic assumption of neoliberalism, then, is the institutional separation of society into

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<sup>181</sup> For a good summary of the neoliberal theory see: David Harvey, *A Brief History of Neoliberalism* (Oxford: Oxford University Press, 2005).

<sup>182</sup> Harvey, *A Brief History of Neoliberalism*, 5.

<sup>183</sup> Harvey, *A Brief History of Neoliberalism*, 2.

<sup>184</sup> Harvey, *A Brief History of Neoliberalism*, 2.

<sup>185</sup> Harrison, “Economic Faith, Social Project and a Misreading of African Society,” 1311.

an economic and political sphere, as neoliberals claim that all problems of the economy can be resolved by socially-neutral experts using technical rationality. Derived from this belief, neoliberal policy prescriptions emphasize market solutions to relieve the problems of (re)distribution. At the core of this is that “long-term harmony of interest is implicit in economic activity within the framework of a free market.”<sup>186</sup>

With this, the rolling back of the state is identified as an integral process in order to unleash market forces. The state’s role, in this light, is to provide a “conducive environment for the private accumulation of capital by the bourgeoisies—both international and local... the redesigned pro-capitalist state is expected to protect the capitalists and their physical assets from destruction by the possible actions of the exploited and marginalized subaltern classes.”<sup>187</sup> Such a neoliberal view, is, according to Harvey, “threatened not only by fascism, dictatorship, and communism [the old political battles], but by all forms of state intervention that substituted collective judgments for those of individuals free to choose.”<sup>188</sup>

As a result of this “rolling back” of the state, there is often a retrenchment of the social safety net forcing states that adopt these policies to end various programs in areas such as public education, public housing, and public transportation. In many African states, the World Bank and IMF have pressured governments to stop investing in public higher education and, instead, allow private ownership to assume control over these vital

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<sup>186</sup> Paul Williams and Ian Taylor, “Neoliberalism and the Political Economy of the ‘New’ South Africa,” *New Political Economy* 5, no. 1 (2000): 23.

<sup>187</sup> George Klay Kieh, Jr. “The New Globalization: Scope, Nature and Dimensions,” in *Africa and the New Globalization*, edited by George Klay Kieh, Jr. (Hampshire: Ashgate Publishing Limited, 2008), 14.

<sup>188</sup> Havey, *A Brief History of Neoliberalism*, 5.

services. In response, Kieh argues that “ultimately, the overarching contour is the facilitation of the rapacious process of capital accumulation by metropolitan-based multinational corporations and other businesses. That is, the capitalist doctrine dictates that all ‘barriers’ to profit-making are to be removed, and the possibilities for the unbridled and unfettered accumulation of wealth be expanded and protected.”<sup>189</sup> What we see is that the principle of profit-making trumps the condition of basic human needs. Vulnerable groups including women and children are, no doubt disproportionately affected. According to Joseph Stiglitz, former vice president and chief economist of the World Bank, the economic solutions subscribed by the IMF and the World Bank have “the feel of the colonial rulers... they help to create a dual economy in which there are pockets of wealth... But a dual economy is not a developed economy.”<sup>190</sup> The roles of the IMF and World Bank have steadily increased throughout the world. Today, these institutions are not merely loan providers. As seen in by the Structural Adjustment Programs required and promoted by the World Bank and IMF, they have become heavily involved in institutional reforms and governance in developing countries.<sup>191</sup> While neoliberalism emerged to enact a specific new economic doctrine, it, no doubt, entails to a “broader ideological norm—neoliberalism—concerning the nature of society.”<sup>192</sup> A richer understanding of neoliberalism is as a “*project to expand and universalize free-*

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<sup>189</sup> Kieh, Jr. “The New Globalization,” 15.

<sup>190</sup> Joseph Stiglitz, *Globalization and its Discontents* (New York: W.W. Norton, 2003), 40.

<sup>191</sup> John Makum Mbaku, “The African Debt Crisis and the New Globalization,” in *Africa and the New Globalization*, ed. George Klay Kieh, Jr. (Hampshire: Ashgate Publishing Limited, 2008), 31. □

<sup>192</sup> Harrison, “Economic Faith, Social Project and a Misreading of African Society,” 1304.

*market social relations.*”<sup>193</sup> The incorporation of the phrase, “free market social relations” alludes to the fact that, much of the work being done by the IMF and World Bank goes beyond a “rolling back of the state.” To Harrison, neoliberalism is an attempt to shape the economy, the state, and society.<sup>194</sup>

Indeed, the faith in the removing of the state, ever present in the 1980s, has given way to a realization that “reducing the state’s unproductive involvement in society was not a sufficient condition to ensure the development of properly functioning markets.”<sup>195</sup> The provision of social infrastructure was needed to ensure the conditions for individuals to act socially in a market-conforming fashion; “education provides the cognitive ability to balance utilities; roads create mobility, and bring markets to more remote areas. A stronger state ability to establish a regime of property in rural areas is seen as a key part of agricultural development, allowing land to be used more efficiently, productively and as collateral for loans.”<sup>196</sup> The states expansion into society did not fit nicely into the neoliberal framework; however, according to Harrison, it “represents the fuller ambition of neoliberalism and its champions—social engineering to create a market society that involves the state (under the auspices of external agencies) as the principal engineer.”<sup>197</sup> Such social engineering sought to bring the wisdom of the free market into both public institutions as well as into broader society, more generally.<sup>198</sup>

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<sup>193</sup> Harrison, “Economic Faith, Social Project and a Misreading of African Society,” 1306.

<sup>194</sup> Harrison, “Economic Faith, Social Project and a Misreading of African Society,” 1306.

<sup>195</sup> Harrison, “Economic Faith, Social Project and a Misreading of African Society,” 1310.

<sup>196</sup> Harrison, “Economic Faith, Social Project and a Misreading of African Society,” 1310.

<sup>197</sup> Harrison, “Economic Faith, Social Project and a Misreading of African Society,” 1310.

<sup>198</sup> Harrison, “Economic Faith, Social Project and a Misreading of African Society,” 1310.

It is in this context that transitional justice can contribute to the construction of the liberal state. Increasingly, institutionalization has been argued as necessary prior to the liberalization of a state. The building of a strong and effective political and legal institutions, including a written constitution, a functioning judiciary, and a police force able to enforce the new rules, are all critical for a functioning state.<sup>199</sup> In response, international community has sought to promote the development of “functioning (and indeed democratic) political institutions, public administrations that can deliver basic goods and services, and a legal framework which is sufficiently robust to encourage investment, trade and industry as well as more general public confidence in the state.”<sup>200</sup> According to McEvoy “developing the state’s institutional capacity to deliver justice is thus viewed as a core element in the process of re-building structures of governance more generally. It is both a practical and symbolic necessity as well as a way of seeing reconstruction.”<sup>201</sup> Indeed, the power of transitional justice was not fully realized until the international community came to the consensus that significant investment into liberal institutions was necessary for societies emerging from conflict. McEvoy writes,

[i]n such a context, law becomes an important practical and symbolic break with the past; an effort to publicly demonstrate a new found legitimacy and accountability. In some such circumstances, the signing up to and implementing of international human rights agreements are integral to seeking international respectability. A professed respect for the rule of law demonstrates a ‘fitness of

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<sup>199</sup> Kieran McEvoy, “Letting Go of Legalism: Developing a ‘Thicker’ Version of Transitional Justice in *Transitional Justice from Below: Grassroots Activism and the Struggle for Change*, eds. by Kieran McEvoy and Lorna McGregor (Oxford: Hart Publishing, 2008), 27.

<sup>200</sup> McEvoy, “Letting Go of Legalism,” 25.

<sup>201</sup> McEvoy, “Letting Go of Legalism,” 27-28.

purpose' for countries to take a proper place amongst the community of nations, or even the recovery of a sense of national self-confidence and pride.<sup>202</sup>

The value placed on transitional justice mechanisms as tools for establishing liberal democracy forces a re-thinking of the role of power in transitional justice. Indeed, in this light, they are more than just mechanisms of justice but are “meticulous rituals of power” which reaffirm the importance of a liberal democratic state and the accompanying capitalist relations.

## 5.4 Conclusion

Understanding the normalization of transitional justice at the international level requires an examination of the value placed on these mechanisms as tools in the establishment of liberal democracy around the world. The ascendancy of transitional justice is not the result of a blossoming of international human rights or even *humanity's law*, but is the result of its political usefulness for democracy promotion. In other words, it has become a “meticulous ritual of power” confirming the importance of liberal democracy. Further, we can see that the consensus that has emerged in the field is fundamental. Without the belief that these mechanisms would assist in the transition to a final, end-point, their value and, therefore, the viability of the field itself, would be in jeopardy. What this suggests is that transitional justice not only accepts these liberal values without question, but also receives considerable legitimacy as a field because of these ideas. It is only by viewing rights as a form of governmentality that we can begin to pry open this consensus and interrogate it for what it really is—a necessary myth. The Liberal Peacebuilding project initiated in large part by Clinton provided the context for the re-emergence of

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<sup>202</sup> McEvoy, “Letting Go of Legalism,” 20-21.



transitional justice. This argument can also shed light on the prioritization of civil and political rights over economic and social rights given the dictates of neoliberal economics which calls for a more limited role for the state in the economic realm.

## Chapter 6

### 6 Theorizing Transitional Justice

The dominant theories in transitional justice view justice as working towards the achievement of liberal democracy and human rights, specifically civil and political rights. Establishing democracy and respect for human rights could be viewed as a way to challenge the traditional sovereignty of the state—as the dominant reading in the field of transitional justice suggests—but they could also be viewed as disciplinary discourse, which produce the liberal subject and justify actions of the west. Scholars in the field of transitional justice, however, have failed to interrogate these concepts choosing instead to treat them as universal ideals. The failure to adopt a critical perspective has been supported by the Cold War Thesis, which asserts that the “victory” of liberalism following the dissolution of the Soviet Union provided the necessary space for activists to impose human rights at the international level. Yet, as I argue in the previous chapter, what this fails to account for is, first, the importance placed on transitional justice by the United States in affirming liberal democracy and, second, the way merchandising democracy and human rights as the United States has done supports their strategic goals according to the security logic of the Democratic Peace Theory. Viewed in this light, the end of the Cold War symbolizes the *closing* of the international system around a single model: liberal democracy.

Drawing first on the work of Wittgenstein and Rorty, I argue that we must resist viewing these paradigms as expressing a universal truth about justice. They are, instead, vocabularies which express particular beliefs about the world. In response to this, I draw

on the work of Derrida, Hampshire, and Agamben, in order to transgress these boundaries in transitional justice theory. Central to this transgressive reading is the argument that transitional justice theory relies on a Platonic understanding of justice and conflict in which justice is the attainment of some ideal endpoint: liberal democracy. This teleological thinking treats conflict like a mathematical problem that can be solved with a single solution. Yet, according to Derrida and Agamben, by presupposing a single purpose or vocation for justice—the attainment of liberal democracy—our theories actually eliminate the possibility of justice, which fundamentally requires choice. Rather than creating the space for justice to emerge, the paradigms of justice are little more than rules to be followed in the construction of a liberal democracy.

In contrast to this Platonic view, if we see the world in Heracleitean terms, we must understand that conflict is never-ending and cannot be resolved like a mathematical problem. Justice, therefore, is not the attainment of some ideal endpoint—like a mathematical proof—but must also be understood as interminable process. Such a reading is meant to open transitional justice theory to allow in those voices that do not conform to the dominant vocabulary of justice in the field.

## 6.1 Vocabularies of Justice

The work of Wittgenstein and Rorty is critical for deconstructing the theories of transitional justice. As these philosophers remind us, language is bound up in human life and practices, and is not a means to discover eternal truths about the world. Instead, we carry around with us a set of words—a vocabulary—that we use to make sense of our actions and beliefs. While we view these vocabularies as final, there are merely one set

of words among many. We must treat alternative vocabularies not as pieces of a large jigsaw puzzle that somehow fits together but instead, as “alternative tools.”<sup>1</sup>

In response to this, theorists in the field of transitional justice must resist a “truth as correspondence” epistemology that assumes the possibility of a search for eternal truths about justice. Rather, as Rorty argues, truth is a “property of sentences, since sentences are dependent for their existence upon vocabularies, since vocabularies are made by human beings, so are truths.”<sup>2</sup> In this way, the paradigms of justice are not bits and pieces of a puzzle called “justice” but are, instead, vocabularies which express particular ethical beliefs about the world. While Rorty is not a common theorist used in transitional justice, this idea is not novel in the field. For example, scholars like Nagy have been critical of retributive justice for being an individual-centric approach “steeped in Western liberalism.”<sup>3</sup> Indeed, views like Nagy’s sparked a great deal of debate between advocates of retributive and restorative justice in what was known as the truth v. justice debate.<sup>4</sup> According to advocates of restorative justice, retributive justice privileges the liberal individual, which, to them, is an artifact of western philosophy. Yet, restorative justice itself privileges certain discourse over others including Christian ideals which emphasize forgiveness and reconciliation and African concepts like *Ubuntu*. Indeed, a cursory examination of any conflict will reveal fragmented views on justice.

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<sup>1</sup> Rorty, *Contingency, Irony, and Solidarity*, 11.

<sup>2</sup> Richard Rorty, *Contingency, Irony, and Solidarity* (Cambridge: Cambridge University Press, 1989), 21.

<sup>3</sup> Rosemary Nagy, “Transitional Justice as Global Projects: Critical Reflections,” *Third World Quarterly* 29, no. 2 (2008): 276.

<sup>4</sup> See, for example, Robert I. Rotberg and Dennis Thompson, eds., *Truth v. Justice: The Morality of Truth Commissions*, Princeton: Princeton University Press, 2000);

For example, in the case of South Africa, instead of focusing on punishment, the African National Congress adopted a Truth and Reconciliation Commission inspired by restorative justice principles. However, as I suggest in chapter four, this was not a welcomed decision by all South Africans.<sup>5</sup> The South African case also sheds light on the highly contested nature of reparative justice as well. While some victims of the Apartheid regime view reparations as integral to their concept of justice, this has increasingly been attacked as opportunistic or greedy.<sup>6</sup> These examples only confirm what is known in the field: that justice is a contested concept. Yet, despite this awareness, the field has continued to hold onto the possibility of a universal language on justice.

Central to Rorty's argument is the contingency of these vocabularies. As he wrote, "if doubt is cast on the worth of these words, their user has no noncircular argumentative recourse. Those words are as far as he can go with language; beyond them there is only helpless passivity or a resort to force."<sup>7</sup> Indeed, there is no meta-theory to determine the *right* form of justice. A liberal, for example, cannot appeal to any universal measure that exists outside human action to verify the Truthfulness of their claims. As John Gray suggests,

For the liberal, a liberal society is not merely one of the options open to human beings, but a moral necessity. All non-liberal societies stand condemned, together with the excellence and virtues which they harboured. Because of its

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<sup>5</sup> Rosemary Nagy, "Violence, Amnesty and Transitional Law: 'Private' Acts and 'Public' Truths in South Africa," *African Journal of Legal Studies* 1, no. 1 (2004): online.

<sup>6</sup> David Backer, "Watching a Bargain Unravel? A Panel Study of Victims' Attitudes about Transitional Justice in Cape Town, South Africa," *International Journal of Transitional Justice* 4, no. 3 (2010): 448.

<sup>7</sup> Rorty, *Contingency, Irony, and Solidarity*, 73.

universalizing doctrinal zeal, liberal thought has always sought to elevate liberal practices into a set of principles and then to demonstrate the unique claim on reason of those principles.<sup>8</sup>

Yet, while the contested nature of justice is recognized in the field, the theories of transitional justice continue to privilege certain vocabularies over others. Even the call for a more holistic approach is merely a buzzword for adopting a range of mechanisms that are still derived from the dominant theories.<sup>9</sup> Thus, while the content of the field has been broadened to include alternative paradigms of justice, the field's theory remains bounded by a consensus regarding the importance of liberal democracy. As I argued in chapter three, transitional justice scholars have provided theories that support the usefulness of transitional justice mechanisms in the establishment of a liberal democratic state.

Understood in this light, transitional justice theory is better thought of as rules to be followed in order to establish a liberal democracy. One of the preeminent theorists in the field, Ruti Teitel, illustrates this treatment of transitional justice when she writes that “the justice-seeking phenomena discussed here are intimately tied to the fashioning of a liberal political identity.”<sup>10</sup>

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<sup>8</sup> John Gray, *Liberalism: Essays in Political Philosophy* (London: Routledge, 1989), 239.

<sup>9</sup> Lars Waldorf, “Anticipating the Past: Transitional Justice and Socio-Economic Wrongs,” *Social & Legal Studies* 21, no. 2 (2012): 171-186; Alex Boraine, “Transitional justice: A holistic interpretation,” *Journal of International Affairs* 60 (2006): 17–27; and *United Nations Secretary General, Report of the Secretary General: The rule of law and transitional justice in conflict and post-conflict situations, 2004, S/2004/616*.

<sup>10</sup> Teitel, *Transitional Justice*, 225.

In fact, Teitel's understanding of transitional justice has played a central role in forming the theoretical foundation of the field. In her book, *Transitional Justice*, Teitel offers a theory of transitional justice built on a synthesis of two competing arguments that dominated early debates in the field. On the one hand, realists argued that the question of whether to pursue justice after conflict was decided by the political and institutional constraints of any given regime. The pursuit of justice as criminal accountability was possible only when the outgoing regime was weak. In contrast, idealists argued that regime strength should not be factored into the calculus of whether or not to pursue justice. The pursuit of justice should be universal, regardless of the prior regime's existing power. In response, Teitel argued that the question of whether or not to pursue justice failed to capture the actual process of justice in the face of authoritarianism or conflict. She argued, instead, that the question was not whether to pursue justice, but *through what mechanism* would justice be pursued. In other words, realists were correct that the old regime's continued strength changed the calculus but it did not necessarily have to mean no justice at all. Instead, where the old regime was still strong, the pursuit of justice could take alternative forms like truth commissions. Thus, the site of justice shifted from criminal prosecutions to non-criminal mechanisms.

Teitel's work is critical for several reasons. First, Teitel's synthesis of these diverging opinions gave transitional justice scholars the theoretical space in which to operate insulated from this realist/idealist debate otherwise known as the "peace versus

justice” debate.<sup>11</sup> Second, Teitel’s argument provided support for non-criminal mechanisms like truth commission, thus paving the way for this eventual shift towards holism as embodied in such documents like the UN Secretary-General’s Report of 2004, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*.<sup>12</sup>

Most importantly for this project, Teitel articulated what has become the dominant expression of justice in transitional justice. In the wake of this synthesis between realists and idealists, justice (retributive, restorative or reparative) was not only possible regardless of regime strength, but according to Teitel, justice plays a critical role in the transition from authoritarianism and/or conflict to liberal democracy. In this way, she viewed transitional justice as a bridge connecting the two sides. While the notion that transitional justice could be important for democratization was certainly not novel,<sup>13</sup> she made explicit what was largely implicit in the field: justice in transitional justice acts as a ritual symbolizing the achievement of a liberal democracy. Teitel certainly recognized that the process of transforming an authoritarian and/or conflict-ridden regime into a liberal democracy was not an overnight matter. However, she argued that, at the very least, transitional justice mechanisms can emulate the same characteristics of a liberal democracy thereby embedding these practices like a seed that grows over time. In this way, transitional justice can act as a drama depicting a functioning liberal democracy.

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<sup>11</sup> The “peace versus justice” debate between realists and idealists suggested that justice could possibly destabilize a transitional state. This debate should be distinguished from the “truth versus justice” debate between advocates of restorative justice and retributive justice.

<sup>12</sup> *United Nations Secretary General, Report of the Secretary General: The rule of law and transitional justice in conflict and post-conflict situations, 2004, S/2004/616: 17.*

<sup>13</sup> See, for example, Kritz, ed. *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*.



This notion of embedding liberal democracy in post-conflict societies has become the dominant goal of transitional justice theory. In response, this project attempts to cast doubt on the linkage of *transition to liberal democracy* and *justice*. The transition to democracy cannot be treated as a neutral or benign thing, but is fundamentally entangled in the play of power. Indeed, it is clear that the field operates with a certain degree of moral certainty about the inherent goodness of the liberal democratic state. However, as the previous chapter suggests, the field must recognize the ambiguous character of human rights and, by extension, liberal democracy. While they could be used to challenge state sovereignty, as traditional liberals would argue, human rights can also be understood as a disciplinary discourse that sets specific standards of behaviour.<sup>14</sup> Therefore, by attempting to embed liberal democratic values in post-conflict societies, transitional justice mechanisms operate as a meticulous ritual of power, which produces a liberal democratic subject.

To be clear, I do not outright reject the potential benefits of human rights and liberal democracy. Yet, to see value in it is not the same as suggesting that our theories of justice should be defined by its realization. What is at issue here is how we theorize about justice as *necessarily* working towards the ideal endpoint of liberal democracy. This is especially important given that the mechanisms, of which our theory speaks, operate at a site of deep contestation. Before examining the impact this has on our theories, we first need to ask: why is the field defined by this teleological thinking about justice? And is this a necessary feature of the field? As is by now clear, theorizing in the

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<sup>14</sup> For example, neoliberalism assumes all humans function as the rational utility maximizers.

field is carried out in a top-down manner in which the goal of justice has already been assumed. However, transitional justice scholars argue that this is not merely the result of over-zealous liberals in the field, but is, instead, a necessary condition of the field.

The term “transitional justice” did not exist twenty-five years ago. While scholars in the field generally point to the Nuremberg trials as the genesis of the field, what we identify today as transitional justice emerged in the 1990s.<sup>15</sup> As a new field, transitional justice needed to distinguish itself from ordinary justice. One way scholars in the field have achieved this is by focusing on the periodization of conflict in society. Here, societies are understood as moving from *states in conflict* to *states at peace*. Transitional justice has traditionally been defined as operating somewhere in this liminal state between conflict and peace. Here, Teitel’s theory of transitional justice envisioned a unique justice that bridges the old, authoritarian and conflict-ridden regime to the new, liberal democratic one.<sup>16</sup> There are, however, scholars who call into question this distinction between transitional justice and ordinary justice is overblown. For example, Posner and Vermeule argue that scholars in the field of transitional justice have over-emphasized the distinctiveness of a “transitional” justice. They argue that many of the abnormalities when pursuing justice following mass atrocities (e.g. retroactivity), used by transitional justice scholars to justify their unique approach, are present in ordinary times as well. Instead, they argue that we must see legal and political transitions as existing on a continuum where regime transitions, the subject of transitional justice, are simply one

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<sup>15</sup> Elster’s work locates examples of transitional justice as far back as Ancient Greece. For more information, see: Jon Elster, *Closing the Books: transitional justice in historical perspective* (Cambridge: Cambridge University Press, 2004), 4.

<sup>16</sup> Teitel, *Transitional Justice*, 215.

endpoint.<sup>17</sup> For transitional justice scholars, then, emphasizing the uniqueness of transitional justice is central to the field's identity. Transitional justice must be understood as something separate from ordinary justice or else it loses its purpose. Viewing the goal of transitional justice as the achievement of a liberal democracy is important as it provides this distinction. As Boraine argues, in contrast to ordinary justice, "transitional justice offers a deeper, richer, and broader vision of justice which seeks to confront perpetrators, address the needs of victims and assist in the start of a process of reconciliation and transformation."<sup>18</sup>

This treatment of transitional justice as a unique justice operating in the space between two regimes, however, depends on a particular understanding of conflict and justice. Stuart Hampshire's work in *Justice is Conflict* clarifies this point. Hampshire's work is significantly influenced by the work of the pre-Socratic philosopher, Heraclitus. In Heraclitus' Fragment 80, he wrote: "One should know that war is common, and that justice is conflict, and that everything comes about in accordance with conflict and necessity."<sup>19</sup> The Heracleitean world, then, is "always the scene of conflicting tendencies and of divided aims and ambivalences [and] ... our political enmities in the city or state will never come to an end while we have diverse life stories and diverse imaginations."<sup>20</sup>

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<sup>17</sup> Eric E. Posner and Adrian Vermeule, "Transitional Justice as Ordinary Justice," *Public Law and Legal Theory Working Paper No. 40* (March 2003), available from [http://www.law.uchicago.edu/files/files/40.eap-av.transitional.both\\_.pdf](http://www.law.uchicago.edu/files/files/40.eap-av.transitional.both_.pdf).

<sup>18</sup> Alex Boraine, "Transitional justice: A holistic interpretation," *Journal of International Affairs* 60, no. 1 (2006): 18.

<sup>19</sup> Heraclitus, Fragment 80.

<sup>20</sup> Stuart Hampshire, *Justice is Conflict* (Princeton: Princeton University Press, 2000), 5.

To see the significance of this, Hampshire contrasts the Heraclitean world with the Platonic one.

In Plato's *Republic*, Socrates explains to Glaucon that the components of the mind (i.e. our desires or wants; the passionate, assertive, brave side; and the rational or intellect) are analogous to the three classes of society (the Producers, the Auxiliaries, and the Guardians).<sup>21</sup> For Plato, in the city as in the soul, justice is achieved through reason's imposition of a harmony subsuming these conflicting elements. Here, reason operates as mathematical proof by imposing an indisputable conclusion.

In contrast, for Heraclitus, the soul and the state is "always the scene of conflicting tendencies and of divided aims and ambivalences."<sup>22</sup> In such a world, "our political enmities in the city or state will never come to an end while we have diverse life stories and diverse imaginations."<sup>23</sup> Instead of moving towards harmony, the world we live in is best characterized by its flux. This is captured in Heraclitus' most famous claim that, "all things are in process and nothing stays still, and [comparing all things to flowing waters, he says] we cannot step twice in the same river."<sup>24</sup>

Here, we can see that there is an essential tension in Being for Heraclitus. In his Fragment 10, he wrote, "Everything taken together is whole but also not whole, what is being brought together and taken apart, what is in tune and out of tune; out of diversity

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<sup>21</sup> Plato, *Republic* trans. by Robin Waterfield (Oxford: Oxford University Press, 1998), 441c 10 - 444a 10.

<sup>22</sup> Hampshire, *Justice is Conflict*, 5.

<sup>23</sup> Hampshire, *Justice is Conflict*, 5.

<sup>24</sup> Heraclitus, "The Essential Fragments," in Richard Geldard, *Remembering Heraclitus: The Philosopher of Riddles* (Edinburgh: Floris Books, 2000), 158.

there comes unity, and out of unity diversity.”<sup>25</sup> The tension is that existence is never static, but is in a constant flux. According to Geldard, this Heraclitean tension is a “fact of existence,” and Heraclitus “derides those who naively wish for peace in the world in the sense of a release of tensions as not understanding the necessity of conflict in the creation.”<sup>26</sup> Anyone who plays a guitar can understand the basic necessity of tension: strings that are too loose cannot properly vibrate and, therefore barely make a noise; strings that are too tight will either be off in pitch or, with enough turns of the machine head will break under the increased tension. Thus, it is through the proper tuning of this tension that the guitar strings produce perfect harmony. Yet, as any guitar player knows, the tuning of a guitar is an ongoing process (it is never final), as it always requires re-adjustments from time to time. To a non-musician, the melody played on a guitar perhaps masks the fundamental tension that must exist for it to be produced. Thus, Heraclitus tells us that our Being should not blind us to this same kind of flux that exists in the world. Instead, we must live with it and the tension it produces, as it can never be overcome.

According to Hampshire, the tension in our current society is a product of the differences that arise over activities of the imagination. He writes, “it is difficult to envision all of humanity agreeing on activities like storytelling, poetry, music, drama, visual art, public celebration, the description of ideal societies and ideal persons and ideal ways of life, and moral imagination.”<sup>27</sup> For our purposes, an emphasis must be put on

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<sup>25</sup> Heraclitus, “The Essential Fragments,” 157.

<sup>26</sup> Geldard, *Remembering Heraclitus*, 40.

<sup>27</sup> Hampshire, *Justice is Conflict*, 20.

the moral conflict that arises in society. As Hampshire suggests, there is no “universal criterion of evaluation” when it comes to moral and ethical ideals; “rather, they help to distinguish different ways of life.”<sup>28</sup>

This inevitability of moral conflict suggests the impossibility of a harmony in matters of substantive justice. Hampshire writes, “the imaginative and radical critics of established conceptions of substantial justice repeatedly widen the debate and open up cases of injustice that had hitherto been beyond the range of discussion.”<sup>29</sup> Indeed, this opening and re-opening of substantial justice is clearly visible in our own past “with criticism of unregulated factory labor, labor of inequality between the sexes, of limited voting rights, of unequal access to health care, of unequal access to education, unequal access to legal aid.”<sup>30</sup> The “moral imagination engenders new conflicts with new conceptions of the good, when it coincides with some social unrest.”<sup>31</sup>

In contrast to Plato’s understanding of reason as mathematical proof, Hampshire proposes an alternative understanding of rationality based on how states actually resolve conflict: through an adversary model. In most societies, when conflicts arise they are often dealt with through “procedures and institutions that all involve the fair weighing and balancing of contrary arguments bearing on an unavoidable and disputable issue.”<sup>32</sup> Continuing with Plato’s analogy of the city and the soul, Hampshire argues that this

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<sup>28</sup> Hampshire, *Justice is Conflict*, 21.

<sup>29</sup> Hampshire, *Justice is Conflict*, 31.

<sup>30</sup> Hampshire, *Justice is Conflict*, 31.

<sup>31</sup> Hampshire, *Justice is Conflict*, 31.

<sup>32</sup> Hampshire, *Justice is Conflict*, 8.

process better captures the way our inner deliberation functions as well. He writes, “the adversary principle of hearing both sides is imposed by the individual on himself as the principle of rationality ‘Hearing’ here becomes a metaphor.”<sup>33</sup> Hampshire’s approach sees reason as “deliberating,” “judging,” “adjudicating,” and “examining.” These are all ways to weigh the evidence to determine an outcome, putting the focus on the procedures to achieve an outcome rather than the outcome itself.<sup>34</sup> Such a process is subject to one basic prescription: hear the other side.<sup>35</sup> This approach, for Hampshire, is necessary if we recognize that we live in a Heraclitean world where conflict is eternal.

Whereas Plato and his student, Aristotle, believed that conflict was resolved when each class (i.e. Guardian, Auxiliary, and the Producers) “performs its proper (i.e. natural) function and does its own job in the community,”<sup>36</sup> Hampshire argues that all we can expect is compromise. A “smart compromise” however, “is one where the tension between contrary forces and impulses, pulling against each other, is perceptible and vivid, and both forces and impulses have been kept at full strength.”<sup>37</sup> Harmony merely conceals tension and it is only achieved through domination and the use of force.

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<sup>33</sup> Hampshire, *Justice is Conflict*, 9-10.

<sup>34</sup> Hampshire, *Justice is Conflict*, 7.

<sup>35</sup> Hampshire, *Justice is Conflict*, 11.

<sup>36</sup> Plato, *Republic*, 434c 10-12. Proper functions are defined by Robin Waterfield as “the thought and resourcefulness of the guardians, as they take care of the community as a whole, are its wisdom; the lawful bravery of the auxiliaries is its courage; the lower orders tolerating the control of the rulers is its self-discipline; the members of the three classes doing what they are best equipped to do, without usurping the functions of others, is its (the community’s) morality. See page 133.

<sup>37</sup> Hampshire, *Justice is Conflict*, 32.

The field of transitional justice operates with the assumption that harmony can subsume the conflicting elements in a post-conflict society. The rational solution offered by transitional justice scholars (as well as the wider liberal peacebuilding framework) is the introduction of liberal democratic institutions and free-market capitalism known as the Liberal Peace Thesis. Based on a belief that humans are essentially rational utility-maximizers, the Liberal Peace Thesis states that if the basic institutions of a liberal democracy can become embedded in a society, then “the sources of its internal conflict will be ameliorated, or at least suppressed until ultimately forgotten amid other priorities,” allowing peace to take root.<sup>38</sup> Yet, such a view is fundamentally premised on a Platonic worldview.

To sum up the argument so far: there is a consensus in transitional justice that the ultimate goal of justice is the establishment of the liberal democracy. Such thinking, it is argued, is critical for it distinguishes transitional justice from ordinary justice. However, this perspective is based on a Platonic reading of justice and conflict. While I doubt transitional justice scholars believe that conflict will be eradicated once and for all, they must theorize *as if* this is a possibility. Indeed, the field’s very existence depends on a view that conflict in society can be ameliorated otherwise it loses its purpose. While the solution could conceivably be any one of a number of possibilities, the field draws on the Liberal Peace Thesis for its answer; transitional justice theorists, therefore, must “live” in a Platonic world for the field to have meaning. Yet, what all this suggests is that the current boundaries of the field are not necessary: the teleological thinking is based on a

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<sup>38</sup> Adam Quinn and Michael Cox, “For Better, for Worse: How America’s Foreign Policy became Wedded to Liberal Universalism,” *Global Society* 21. 4 (2007): 501.



need to distinguish the field from ordinary justice yet, this distinction is based on a particular Platonic understanding of justice and conflict. By adopting a Heracleitean understanding of the world, we can conceivably pull the rug out from under the feet of the dominant theorizing in transitional justice. Such actions, however, require some further theoretical justification before being carried out. Here, Derrida's work on justice is critical for understanding the consequences of this teleological thinking.

In his essay, "Forces of Law," Derrida draws an important distinction between the law and justice in order to show that, despite their common association, their relationship is quite unstable.<sup>39</sup> For Derrida, the law—as in the legal system—is constructed. Laws do not exist outside of humanity, waiting to be discovered. Instead, their origins lie in human actions; their authority is what we have given to them in the originating act, which established them. And so law must presuppose the legitimacy of its origin. Derrida writes, "[s]ince the origin of authority, the founding or grounding, the positing of the law cannot by definition rest on anything but themselves, they are themselves a violence without ground."<sup>40</sup> Derrida is clear that this violence does not mean that laws are unjust as in illegitimate or illegal. Rather, because the act of establishing law necessarily occurs prior to law, those laws "are neither legal nor illegal in their founding moment."<sup>41</sup> For Derrida, the importance of this is the recognition that, as a product of human action, laws are fundamentally deconstructable. Such an orientation to the law recognizes that what is

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<sup>39</sup> Derrida, "Forces of Law," 231.

<sup>40</sup> Derrida, "Forces of Law," 242.

<sup>41</sup> Derrida, "Forces of Law," 242.

constructed must necessarily be susceptible to deconstruction.<sup>42</sup> On the other hand, justice, as it exists outside law, is not deconstructable. For Derrida, “justice is what the deconstruction of law means to bring about... it gives deconstruction meaning and momentum.”<sup>43</sup> Thus, deconstruction exists between the deconstructability of law and the undeconstructability of justice “watching out for the flowers of justice that grow up in the cracks of law.”<sup>44</sup>

If justice is distinguished from law, then following law is not justice. Instead, for Derrida, the opportunity for justice exists only when the way is blocked—an aporia. But he complicates this in two ways: First, when one comes up against an aporia but navigates it in a way that helps him to find passage, then one has not fully experienced an aporia.<sup>45</sup> Yet, Derrida writes that “there is no justice without the experience, however impossible it may be, of aporia.”<sup>46</sup> In this way, “justice is an experience of the impossible.”<sup>47</sup> Therefore, “a will, a desire, a demand for justice the structure of which would not be an experience of aporia, would have no chance to be what it is—namely, a just *call* for justice.”<sup>48</sup> For Derrida, if we successfully navigate a passage then we have not experienced justice. He writes that “[e]very time that something comes to pass or turns out well, every time that we placidly apply a good rule to a particular case, to a

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<sup>42</sup> Derrida, “Forces of Law,” 243.

<sup>43</sup> Caputo, *Deconstruction in a Nutshell*, 131.

<sup>44</sup> Caputo, *Deconstruction in a Nutshell*, 132.

<sup>45</sup> Derrida, “Forces of Law,” 244.

<sup>46</sup> Derrida, “Forces of Law,” 244.

<sup>47</sup> Derrida, “Forces of Law,” 244.

<sup>48</sup> Derrida, “Forces of Law,” 244.

correctly subsumed example, according to a determinant judgment, law perhaps and sometimes finds itself account for, but one can be sure that justice does not.”<sup>49</sup> It is clear that, for Derrida, “law isn’t justice. Law is the element of calculation, and it is right that there be law, but justice is incalculable, it requires one to calculate with the incalculable, and aporetic experiences are the experiences, as improbable as they are necessary, of justice, that is to say of the moments when the decision between the just and the unjust isn’t assured by a rule.”<sup>50</sup>

So, for Derrida, law is distinguished from justice in the sense that the following of law does not produce a just result. Law is the application of a rule; it is the “foreseeable” result of this rule’s application. On the other hand, justice is the opening of law to the other. Justice is about addressing the singular demands of each situation, a task for which a general law is unsuitable. Yet, Derrida argues that justice must continue to operate within the law. That is, it can’t operate outside of the law and so must operate in its name. He writes, “this decision of the just, if it is to be and to be said such, to be recognized as such, must follow a law.”<sup>51</sup> But, in doing so, the judge must approach the law in a “fresh” way. He writes, “[t]o be just, the decision of a judge must not only follow a rule of law or a general law but must also assume it, approve it, confirm its value, by a reinstating act of interpretation, as if, at the limit, the law did not exist previously—as if the judge himself invented it in each case.”<sup>52</sup> So, for a decision to be

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<sup>49</sup> Derrida, “Forces of Law,” 244.

<sup>50</sup> Derrida, “Forces of Law,” 244.

<sup>51</sup> Derrida, “Forces of Law,” 251.

<sup>52</sup> Derrida, “Forces of Law,” 251.

just, it must be responsible and follow the law, but, at the same time, it must suspend the law in order to rule in a novel way “improvis[ing] outside of all rules, all principles.”<sup>53</sup> A just decision must function within the universal law while maintaining an eye on the singularity of the situation. That is, justice demands “each decision is different and requires an absolutely unique interpretation, which no existing, coded rule can or ought to guarantee absolutely.”<sup>54</sup>

A just decision, then, is one that freely passes through the “ordeal of the undecidable.”<sup>55</sup> That is, “[n]o justice is exercised, no justice is rendered, no justice becomes effective nor does it determine itself in the form of law, without a decision that cuts and divides.”<sup>56</sup> Undecidable, here, is not the opposite of decisiveness, but that, which is programmable and calculable.<sup>57</sup> Derrida writes, “the undecidable is not merely the oscillation or the tension between two decisions. Undecidable—this is the experience of that which foreign and heterogeneous to the order of the calculable and the rule, must nonetheless—it is of duty that one must speak—deliver itself over to the impossible decision while taking account of law and rules.”<sup>58</sup> Yet, justice is not something we can freeze in place: “once the test and ordeal of the undecidable has passed, the decision has again followed a rule, a given, invented or reinvented, and reaffirmed rule: it is no longer

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<sup>53</sup> Derrida, “Forces of Law,” 252.

<sup>54</sup> Derrida, “Forces of Law,” 251.

<sup>55</sup> Derrida, “Forces of Law,” 252.

<sup>56</sup> Derrida, “Forces of Law,” 252.

<sup>57</sup> Derrida, “Forces of Law,” 252. Derrida acknowledges that one must calculate in a just decision but draws a distinction between that which is calculable.

<sup>58</sup> Derrida, “Forces of Law,” 252.

*presently* just, *fully* just.”<sup>59</sup> Finally, Derrida argues that the just decision must be made without delay. It is not a decision that has taken in all possible information and evaluated from all perspectives as is expected with the cost/benefit analysis of modern rationality. But, “even if it did give itself the time, all the time and all the necessary knowledge about the matter, well then, the moment of *decision as such*, what must be just, *must* always remain a finite moment of urgency and precipitation; it must not be the consequence or the effect of this theoretical or historical knowledge, of this reflection or this deliberation, since the decision always marks the interruption of the juridico-, ethico-, or politico-cognitive deliberation that precedes it, that *must* precede it.”<sup>60</sup> Indeed, it was the urgency of Rosa Parks’ decision to remain seated on her bus which released “justice upon Montgomery Alabama...[where] it was legal, legitimate, and authorized to force African-Americans to the back of the bus.”<sup>61</sup>

What this suggests is the difference between the possible and impossible. The possible is that which is foreseeable, and, with sufficient planning, effort and resources, is attainable. For justice, the possible is located in procedural law: the regular application of due process. This possible future is “already present as an ideal before it rolls around in actuality, which it can do—it is possible—at least in principle.”<sup>62</sup> In contrast, the impossible exists outside of this future: it is more than what we foresee and plan for. Yet, as Caputo writes, “the impossible is not a simple logical contradiction, like  $x$  and

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<sup>59</sup> Derrida, “Forces of Law,” 253, author’s emphasis.

<sup>60</sup> Derrida, “Forces of Law,” 255.

<sup>61</sup> Caputo, *Deconstruction in a Nutshell*, 130.

<sup>62</sup> Caputo, *Deconstruction in a Nutshell*, 133.

not-x, but the tension, the paralysis, the aporia, of having to push against and beyond the limits of the horizon... to desire the impossible is to strain against the constraints of the foreseeable and possible, to open the horizon of possibility to what it cannot foresee or foretell.”<sup>63</sup> If the possible is a slamming of a door, then deconstruction is the prying of such doors open so that that which remains outside the horizon of possibility might come speeding in.<sup>64</sup> To deconstruct, then, is not about destroying, but is meant to “loosen up, to open something up so that it is flexible, internally amenable, and revisable, which is what the law should be.”<sup>65</sup> Thus, deconstruction “exposes the contingency and deconstructability of the present,” and, in doing so, illustrates the changeability of the present “powers that be.”<sup>66</sup>

The impossible is best illustrated in Derrida’s notion of a gift. For Derrida, a pure gift cannot exist, because as soon as we give a gift, we impose an obligation on the recipient to return the gesture in kind. A gift, therefore, is an example of an aporia. The activity of giving and receiving a gift forms a circle of exchange, a circular economy, that cancels the act of giving. Even if it is given unconditionally, the recognition of it as a gift draws it into the circle, thus transforming a gift into an obligation.<sup>67</sup> Derrida notes, “[a]s soon as I say ‘thank you’ for a gift, I start canceling the gift, I start destroying the gift, by proposing an equivalence, that is, a circle which encircles the gift in a movement of

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<sup>63</sup> Caputo, *Deconstruction in a Nutshell*, 133-134.

<sup>64</sup> Derrida, “Forces of Law,” 256.

<sup>65</sup> Caputo, *Deconstruction in a Nutshell*, 130.

<sup>66</sup> Caputo, *Deconstruction in a Nutshell*, 162.

<sup>67</sup> Dooley and Kavanagh, *The Philosophy of Derrida*, 9.

reappropriation.”<sup>68</sup> Thus, Derrida draws a distinction between a gift and economy. Economy refers to the “the circle of exchange, of reciprocation and reappropriation, a ring of generosity and gratitude, which links or binds the donee to the donor by means of the donatum.”<sup>69</sup> It is what is familiar to us in our daily lives: it “denotes the domain of presences, of presents, of the commercial transactions, the reasonable rules, the lawful and customary exchanges, the plans and projects, the rites and rituals, of ordinary life and time.”<sup>70</sup> A gift is the impossible. It is what is most desired but will never appear, will never be present as long as it is drawn into the circle of exchange. Paradoxically, a genuine gift must be completely disassociated from this cycle of giving and taking. It must exist outside of this circle. According to Derrida, a gift cannot be recognized as such. It cannot appear as a gift to the one who gives or to the one who receives. This paradoxical condition is the only way for a gift to be given without it getting caught up in the circular movement of economy.<sup>71</sup>

Yet, the decision to be made is not one between a gift and the circle of economy. Instead, we must realize that “each depends upon, invades, and interweaves with the other.”<sup>72</sup> We must continue to desire the gift however impossible it is, but this does not mean that we give up on economy; in the end, economies of various types are all that

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<sup>68</sup> Jacques Derrida, “The Villanova Roundtable: A Conversation with Jacques Derrida” in *Deconstruction in a Nutshell: A Conversation with Jacques Derrida* (New York: Fordham University Press, 1997), 18.

<sup>69</sup> Caputo, *Deconstruction in a Nutshell*, 142.

<sup>70</sup> Caputo, *Deconstruction in a Nutshell*, 145.

<sup>71</sup> Derrida, “The Villanova Roundtable,” in *Deconstruction in a Nutshell*, 19.

<sup>72</sup> Caputo, *Deconstruction in a Nutshell*, 146.

exist and we can never remove ourselves from them *in toto*.<sup>73</sup> So we continue to give, to go around this circle, but we do so knowing the limits and recognizing that a gift is impossible. That is, we “give economy a chance” but we continue to strive for a gift—for what we most desire—so that we may at the very least interrupt the circle and loosen it up.

For Derrida, a gift and justice share the same movement. Justice that is calculated, that follows the rules and regulations of procedural law, is not justice.<sup>74</sup> Justice, like a gift, must go beyond calculation. We must continue to calculate, but know that there is always a limit beyond which “calculation must fail.”<sup>75</sup> Deconstruction, as a gift or justice, is about transgressing these limits, even if only for a moment.<sup>76</sup> The desire of the impossible, whether it is justice or a gift, is what impels us; it sets us in motion by soliciting us from afar. That which remains within the realm of foreseeable possibilities, that is “all the determinate presences,” fails to disturb us in the same way.<sup>77</sup>

As it is currently theorized, transitional justice mechanisms are merely rules to be followed in the construction of a liberal democracy. As Simon Robins’ fieldwork suggests, in the eyes of the international community, transitional justice has become a box needing to be checked. The work of Giorgio Agamben clarifies this concern. In his book, *The Coming Community*, Agamben argues that any discussion on the topic of

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<sup>73</sup> Caputo, *Deconstruction in a Nutshell*, 146.

<sup>74</sup> Derrida, “The Villanova Roundtable,” in *Deconstruction in a Nutshell*, 19.

<sup>75</sup> Derrida, “The Villanova Roundtable,” in *Deconstruction in a Nutshell*, 19.

<sup>76</sup> Derrida, “The Villanova Roundtable,” in *Deconstruction in a Nutshell*, 19.

<sup>77</sup> Caputo, *Deconstruction in a Nutshell*, 144-145.



ethics must start with recognizing that there is “no biological destiny that human must enact or realize.”<sup>78</sup> To believe otherwise would be to fail to see that what is necessary for a discussion on ethics is the possibility of choice, something that a biological destiny based on some master plan would eliminate. He writes, “this is the only reason why something like an ethics can exist, because it is clear that if humans were or had to be this or that substance this or that destiny, no ethical experience would be possible—there would only be tasks to be done.”<sup>79</sup> He continues, “this does not mean, however, that humans are not, and do not have to be, something, that they are simply consigned to nothingness and therefore can freely decide whether to be or not to be, to adopt or not to adopt this or that destiny.”<sup>80</sup> Agamben is not taking a nihilistic stance here. He recognizes that humans “have to be, but this something is not an essence nor properly a thing: *it is the simple fact of one’s own existence as possibility or potentiality.*”<sup>81</sup> Central to Agamben’s understanding of potentiality, then, is the potentiality to not-be. For ethics to exist, humans must be confronted with a choice—what Derrida might call the ordeal of the undecidable. If their destiny is already set, then no choice can be made, thereby eliminating the possibility of ethics.

This lesson can most certainly be applied to justice in transitional justice. By theorizing the establishment of a liberal democracy as a messianic task to be completed by transitional justice, the field eliminates the ordeal of the undecidable. For one to

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<sup>78</sup> Giorgio Agamben, *The Coming Community*, trans. Michael Hardt (Minneapolis: University of Minnesota Press, 2007), 42.

<sup>79</sup> Agamben, *The Coming Community*, 42.

<sup>80</sup> Agamben, *The Coming Community*, 42.

<sup>81</sup> Agamben, *The Coming Community*, 42, author’s emphasis.

experience justice, they must run up against a wall—an aporia. If the pathway is already cleared, as it is when transitional justice theory connects the *transition to liberal democracy to justice* itself, then we have already assigned to a society its destiny. Conventional transitional justice theory, though, leaves no room for choice; all that exists are rules to be followed.<sup>82</sup>

Derrida and Agamben provide persuasive arguments for a reconceptualization of transitional justice that transgresses the current boundaries of the field. Following conventional logic, to view transitional justice as distinct from ordinary justice requires the theorization of definite end-point, after which ordinary justice takes over. A definite end-point requires a belief that conflict can be ameliorated once and for all with the right kind of justice. However, by imposing a definite end-point and eliminating the experience of undecidability (i.e. choice), the possibility of justice is destroyed and replaced by a set of rules to be followed. These rules will always have a silencing effect on those whose ideals do not conform. In a site of such deep contestation as exists in all post-conflict societies, to impose such a destiny is to silence all voices that do not conform to such an ideal. Hampshire aptly captures this violence when he writes that “all determination is negation.”<sup>83</sup> If transitional justice scholars want to embrace justice, they must abandon the teleological thinking that has served as the defining characteristic of the field. In fact, it is Hampshire who provides an alternative to the type of thinking dominant in transitional justice theory. For Hampshire, the only alternative is a set of

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<sup>82</sup> Setting rules always freezes dominant conceptions of destiny.

<sup>83</sup> Hampshire, *Justice is Conflict*, 34.

practices that ensure that “contrary claims are heard.”<sup>84</sup> An institutionalized argument is the “universally acceptable restraint and the only alternative to tyranny.”<sup>85</sup> Here, we see a re-imagining of justice, one that is focused not on the ideal-end-point of liberalism, but, rather, on the procedures for hearing all sides. It is clear that this must start with how scholars theorize about transitional justice. To theorize according to Hampshire’s dictum would be to eschew the identification of liberal democracy as destiny. This argument is not about destroying transitional justice as some might view it. Rather, given that conflict is ongoing, transitional justice must maintain fluid concepts so that it can be open to that which it cannot “foresee or foretell.”

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<sup>84</sup> Hampshire, *Justice is Conflict*, 17.

<sup>85</sup> Hampshire, *Justice is Conflict*, 17.

## Chapter 7

### 7 Conclusion

This chapter provides a concluding analysis by way of an examination of Lars Waldorf's article, "Transitional Justice and Socio-Economic Wrongs." This chapter should not be read as a summary of his work, but, rather, as a road map for the overall argument of this project. I chose Waldorf's article for two reasons: first, because it points to the emerging criticism in the field—the prioritization of civil and political rights over economic and social rights—which was an impetus for this research; and, second, despite recognizing this the field's tendency to favour of certain definitions of justice, Waldorf continues to perpetuate the assumptions in the field that have led to this criticism in the first place.

#### 7.1 Preamble

At the heart of most debates in the field of transitional justice is the basic, though impossible question: after mass atrocity, what does justice look like? This question was at the centre of the early debates between advocates of retributive justice and advocates of restorative justice. Practitioners in the field, for the most part, came to a consensus that justice does not have to be the result of criminal prosecutions and can, in fact, take many forms. This led to the legitimization of alternative justice mechanisms including truth commissions. The debate over justice continues today with increasing attention paid to traditional or customary mechanisms of justice.<sup>1</sup> Rather than thinking about these as different debates, it is more useful to think of them as a series of battles in the war over

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<sup>1</sup> See, for example, Joanna R. Quinn, "Social Reconstruction in Uganda: The Role of Customary Mechanisms in Transitional Justice," *Human Rights Review* 8, no. 4 (2007): 389-407.

justice. The *justice question*, as I call it, has resulted in a great deal of literature in the field of transitional justice, but is, fundamentally, a discourse with no end. The concept of justice is fundamentally a contested concept. To reiterate Stover and Weinstein's argument, "justice, like beauty, is in the eye of the beholder and can be interpreted in a variety of ways."<sup>2</sup> We are reminded of this every time a survivor expresses discontent over a process of justice. Even in a country like South Africa, where the Truth and Reconciliation Commission garnered considerable international attention for the tone of reconciliation and forgiveness set by both moral and political leaders, survivors expressed dissatisfaction when it ignored their calls for greater accountability through courts. Yet, we continue to theorize in transitional justice in a way that fails to fully take this into account.

## 7.2 Waldorf's Fundamental Question

Over the last few years, there has been a surge of reports, articles and, more recently, books, that outline the various ways justice in the transitional justice discourse is "out of touch" with survivors.<sup>3</sup> In particular, scholars in the field are starting to criticize the way transitional justice mechanisms have neglected economic and social injustice and,

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<sup>2</sup> Harvey M. Weinstein and Eric Stover, "Introduction: conflict, justice and reclamation," in *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, ed. Eric Stover and Harvey M. Weinstein (Cambridge: Cambridge University Press, 2004), 4.

<sup>3</sup> See, for example, Roger Duthie, "Toward a development-sensitive approach to transitional justice," *International Journal of Transitional Justice* 2, no. 3 (2008): 292–309; Lisa Laplante, "Transitional justice and peace building: Diagnosing and addressing the socioeconomic roots of violence through a human rights framework," *International Journal of Transitional Justice* 2, no. 3 (2008): 331–355; Ismael Muvungi, "Sitting on powder kegs: Socioeconomic rights in transitional societies," *International Journal of Transitional Justice* 3, no. 2 (2009): 163–182; and Rosalind Shaw, "Rethinking Truth and Reconciliation Commissions Lessons from Sierra Leone," *United States Institute of Peace Special Report* 130 (February 2005), available from [http://www.usip.org/sites/default/files/sr13\\_0.pdf](http://www.usip.org/sites/default/files/sr13_0.pdf), accessed 23 February 2013.

instead, have focused on addressing “civil and political rights linked to bodily integrity.”<sup>4</sup> In his article, “Transitional Justice and Socio-Economic Wrongs,” Waldorf suggests four possible reasons for this: (1) transitional justice is heavily influenced by human rights discourse, which has traditionally prioritized civil and political rights over economic and social rights; (2) transitional justice was “profoundly shaped by criminal justice, particularly the concomitant development of international criminal law,” which, of course, has focused on the criminal responsibility of individuals rather than structures;<sup>5</sup> (3) transitional justice has “often played the handmaiden to Liberal Peacebuilding” which has been heavily influenced by neo-liberal economics and, specifically, the structural adjustment programs of the IMF and the World Bank;<sup>6</sup> and (4) the intellectual history of the field: Waldorf argues that transitional justice theory has been heavily influenced by the wave of states transitioning from authoritarianism to democracy at the end of the of the 20<sup>th</sup> century often referred to as the third wave of democracy, in which “transitions were conceptualized as relatively short-term affairs.”<sup>7</sup> These transitions viewed economic change, including the quest for more equitable conditions, as “something for successor regimes to tackle after the transition period had produced new constituting laws, and institutions.”<sup>8</sup> Furthermore, this period in history viewed re-distributive politics, which seek to address economic and social rights, as reflecting more communist-

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<sup>4</sup> Lars Waldorf, “Transitional Justice and Socio-economic Wrongs,” *Social & Legal Studies* 21, no. 2 (2012): 173.

<sup>5</sup> Waldorf, “Transitional Justice and Socio-Economic Wrongs,” 173.

<sup>6</sup> Waldorf, “Transitional Justice and Socio-Economic Wrongs,” 173.

<sup>7</sup> Waldorf, “Transitional Justice and Socio-Economic Wrongs,” 173.

<sup>8</sup> Waldorf, “Transitional Justice and Socio-Economic Wrongs,” 173.

like approaches and was, therefore, largely discredited.<sup>9</sup>

For Waldorf, along with Robins, Laplante, Miller, and others, the strategic choice not to address socio-economic injustices has meant that transitional justice has failed to meet the needs of survivors in post-conflict societies. However, while Waldorf recognizes this, he suggests that there are some practical difficulties in expanding transitional justice to meet these needs: (1) transitional justice mechanisms are usually already over-stretched and under-funded; (2) expanding transitional justice mechanisms to meet the demands of social and economic injustices will risk “raising already inflated expectations;”<sup>10</sup> (3) “transitional scholars and practitioners have no expertise in designing and implementing programs to reduce socio-economic inequalities;”<sup>11</sup> and (4) transitional justice refers to a “relatively short time-span during periods of political transition.”<sup>12</sup> In contrast, Waldorf argues that “remediating socio-economic injustices is a long-term political project.”<sup>13</sup> Therefore, he suggests that countries need to address the concerns of long-standing inequality in the “post-transitional” period.<sup>14</sup> For Waldorf, these are “essentially political questions [which] merit deliberation, sensitivity to local political factors, and democratic accountability.”<sup>15</sup>

Waldorf aptly points to one of the critical issues in transitional justice today. As

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<sup>9</sup> Waldorf, “Transitional Justice and Socio-Economic Wrongs,” 174.

<sup>10</sup> Waldorf, “Transitional Justice and Socio-Economic Wrongs,” 179.

<sup>11</sup> Waldorf, “Transitional Justice and Socio-Economic Wrongs,” 179.

<sup>12</sup> Waldorf, “Transitional Justice and Socio-Economic Wrongs,” 179.

<sup>13</sup> Waldorf, “Transitional Justice and Socio-Economic Wrongs,” 179.

<sup>14</sup> Waldorf, “Transitional Justice and Socio-Economic Wrongs,” 179.

<sup>15</sup> Waldorf, “Transitional Justice and Socio-Economic Wrongs,” 179.

I suggested in the literature review in chapter one above, the criticism that transitional justice fails to recognize socio-economic justice is starting to dominate discussions around the *justice question*. Further, Waldorf points to some of the accepted reasons that transitional justice has, in general, failed to formulate an adequate response to these concerns, not least of which is the way transitional justice has uncritically accepted the dominant perspectives of human rights discourse, as well as the connection between transitional justice and the Liberal Peace. It is evident that Waldorf is sympathetic to the demands for social and economic rights, but is resistant to fundamentally altering transitional justice in any way. Instead, he recommends a plan in which governments issue reparations in the form of shares in micro-finance institutions (MFIs). He cites Seibel and Armstrong who propose that,

governments could issue smaller collective grants to villages or sub-districts as the start-up capital for local MFIs, but also individual cash payments, with which beneficiaries may choose to buy shares or open accounts in the newly created microfinance institution... This option does recognize individual suffering, but also provides a neutral space where, finances permitting, other members of the community may also participate. Low-level perpetrators would indeed be allowed to participate, but their cash contribution to an organization that at least initially would be owned by victims could contribute to restoring the inequalities of power within the community. Particularly for victims that have suffered abuse which led to their subsequent ostracism... these types of institutions can promote social inclusion and participation by facilitating interpersonal contact.<sup>16</sup>

For Waldorf, this allows governments to address questions of social and economic injustice and puts reparations to use in a way that “increases the likelihood ... [they] will contribute to sustainable income-generating activities.”<sup>17</sup> Further, he suggests that this approach will provide “safe savings for the poor, enhancement of agency, expansion of

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<sup>16</sup> Hans Dieter Seibel with Andrea Armstrong, “Reparations and Micro-finance Schemes,” in *The Handbook of Reparations*, ed. Pablo de Greiff (Oxford: Oxford University Press, 2006), 687.

<sup>17</sup> Waldorf, “Transitional Justice and Socio-Economic Wrongs,” 180-181.



services, and civic repair through the building of financial institutions.”<sup>18</sup> And, finally, this approach provides a more attractive reparations project in which international donors can invest.<sup>19</sup>

In terms of this project, Waldorf’s analysis and conclusions are important for three reasons. First, Waldorf highlights the debate regarding socio-economic injustice within the field of transitional justice and some of the accepted explanations for this gap between the goals of transitional justice and the needs of survivors on the ground, including the impact of human rights discourse, criminal law, the Liberal Peace Thesis, and the intellectual history of the field. The recognition that the field of transitional justice has largely prioritized civil and political rights over economic and social rights actually served as the impetus for this project.

Second, even as a critic of transitional justice, Waldorf continues to expound a basic consensus in the field, that transitional justice is about reaching the final endpoint—liberal democracy. As an example of problem-solving theory, then, the question Waldorf seeks to answer is not *why* are we doing this, but, rather, *how* can we do it better? Waldorf, of course, is in good company. As chapter four of this thesis examines, the field has coalesced around a consensus regarding the role and goals of transitional justice mechanisms. Being both backward- and forward-looking, transitional justice mechanisms address conflict in the past but always with an eye to a future in which conflict has been resolved through the establishment of a liberal democracy. This, of

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<sup>18</sup> Waldorf, “Transitional Justice and Socio-Economic Wrongs,” 181.

<sup>19</sup> Waldorf, “Transitional Justice and Socio-Economic Wrongs,” 181.

course, assumes two things: normatively, that all states *should* transition to a liberal democracy and, ontologically, that there is a state of being in which conflict is resolved. These two assumptions are important as they have effectively close down discussion of justice in transitional justice. This poses a problem if we are to maintain justice as a contested concept. Fortunately, this understanding is not a Truth about conflict, but merely a perspective that has gained dominance *as if* it was the Truth. Therefore, in order to deconstruct transitional justice, we must break down the assumptions that we hold when analyzing the site of transitional justice.

Hampshire's discussion is critical for understanding the importance of this project. In order to recognize the fundamental flux that exists in this world, we need to avoid closure around any particular conception of justice. However, this requires that we, first, call into question the array of basic assumptions, or, to recall Rorty, the final vocabulary that has embedded itself in the field of transitional justice. This project initially set out to further interrogate and problematize the *justice question*. However, that lasted only until I discovered that the debates surrounding the question of justice are interminable. They are, in other words, irresolvable. This is not a result of a lack of trying but rather, because of the multitude of perspectives that make up, in this case, a conflict. The challenge for this project was not to replace the dominant conception of justice—which prioritizes civil and political rights—with a conception that incorporated social and economic rights as well, for, as Hampshire suggests, there can be no consensus on the substantive meaning of justice. Such an act will merely be met with another alternative conception of justice, based on alternative principles. For Hampshire, the most we can do is to help create the conditions for all sides to be heard. Hampshire's

argument is evocative of Derrida's discussion of justice. For Derrida, the im-possibility of justice is to recognize that we must strive for justice, but know that justice will never be in our hands. It will never be something we can touch and hold onto. Instead, justice is something that we cannot foresee because to do so is to reduce it to a finite object. Central to Derrida's argument is that justice requires one to pass through an "ordeal of the undecidable." Agamben, too, captures this in his discussion of ethics. Ethics requires one to make a choice. Transitional justice theory as it is currently formulated has removed this choice: Justice implies the transition to liberal democracy. To desire the im-possible then is, to repeat Caputo, to "strain against the constraints of the foreseeable and possible, to open horizons of possibility to what it cannot foresee or foretell."<sup>20</sup> We must eschew the moral certainty that has settled into the field of transitional justice. We must, instead, live with the tension that conflict is interminable. But, just as the guitar can produce the melodies of a song so can the melodies of justice be heard from time to time. And, that is all we can ask for: there is no Messiah at the end of the tunnel.

### 7.3 Concluding Thoughts

Given that the site of transition at which the language of transitional justice is used is a place of continued deep contestation, it seems necessary for the field to be centred on more fluid and flexible concepts in order for theorization to avoid closure around any single vision of society. To open up transitional justice, then, is call into question the ontological certainty around *the transition*. The transition exists as a line demarcating a condition of conflict from one of no conflict. It is premised on a belief that conflict can

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<sup>20</sup> Caputo, *Deconstruction in Nutshell*, 133-134.

be overcome and justice can be achieved. This, of course, relies on a belief that there is a fundamental truth that can be stated about justice: justice is X (however defined). To see justice as transitional in this sense suggests that the form of justice that is being presented in transitional justice is a justice that is terminal or final. Transitions are generally marked by end-points, which bring a particular phase to a close. It can be reasoned that, if transitions were not characterized by this finality, they would cease to be transitions and, instead, be understood as ongoing or perpetual. This leads to two critical questions: why is conflict understood as final; and how, if this closes justice, has this been sustained in the field. The answers to these two questions, I believe, are fundamentally connected.

To view conflict as final, we have to understand transitional justice as preparing for something new; in this way, justice is preparatory. Transitional justice is viewed as a fleeting moment in time; as a chapter or, perhaps, as a preamble to a new book. The justice envisioned in transitional justice is not justice for its own sake, but a justice that leads to new things. Justice, here, is instrumental in that it helps to initiate a new phase for society, as well as individuals. Thus, while prominent scholars have argued that justice is fundamentally a contested concept, we must recognize that the consensus has continued to shape justice as definite, final, beyond contestation. Justice *is* the achievement of liberal democracy and human rights. If scholars were to view conflict as ongoing it would force them to accept that either the Liberal Peace is false, or that the justice offered by this emerging field is not suitable to the needs of liberal democracy promotion. This, of course, has not been the case. Instead, transitional justice scholars continue to represent the field as contributing to the establishment of liberal democracy.

By serving the needs of Liberal Peacebuilding the field's theories have sacrificed an open justice to the needs of the transition.

The follow-up question, of course, is how this conception has been sustained in the field. Indeed, the field of transitional justice has remained largely insulated from the criticism leveled against Liberal Peacebuilding for its imperial-like tendencies of imposing liberal democracy.<sup>21</sup> Waldorf's analysis and conclusion provides a clue to this question. Waldorf's analysis exemplifies a fundamental problem in the theorizing of the field: the rather narrow understanding of power. As he suggests that transitional justice has been *influenced* by a number of factors, including human rights discourse and the Liberal Peace. His understanding is that transitional justice discourse stands outside of power, and is only externally impacted by it. This is a common sentiment in the field. As chapter five examines, power is conceived in its most reductive form. The field has largely coalesced around the belief that the emergence of transitional justice is the result the activities of human rights activists in the open political space created by the end of the Cold War. Indeed, Sikkink is unapologetic about the liberal bias in the field, in part because she views its existence not as a product of an external imposition, for example, by the dominant forces behind Liberal Peacebuilding, but, rather, as the result of a groundswell of support for such values by individuals in countries emerging from conflict.<sup>22</sup> Therefore, when transitional justice does seem to falter, as it has with the

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<sup>21</sup> See, for example, David Chandler, *Empire in Denial: The Politics of Statebuilding* (London: Pluto Press, 2006). For an example of criticism of the field of transitional justice, see Chandra Lekha Sriram, "Transitional Justice and the Liberal Peace," in *New Perspectives on Liberal Peacebuilding*, eds. Edward Newman, Roland Paris, and Oliver P. Richmond (New York: United Nations University Press, 2009).

<sup>22</sup> Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (W.W. Norton and Company, 2011), 232.

prioritization of civil and political rights over economic and social rights, the common explanation seems to be the negative impact of external factors and not an internal contradiction.

In response, chapter five of this project looks to challenge the myth that human rights activists are entirely responsible for the emergence of the field's normalization phase. Why is this myth central to the field? Because it allows us to believe that transitional justice is above politics; to believe that transitional justice speaks truth (embodied in universal human rights) to power. Instead, I argue that the end of the Cold War did not create a space for liberalization, but allowed for the universalization of a particular model of the state, the liberal democracy. In doing so, it actually closed the international system. As Žižek writes, "it is easy to make fun of Fukuyama's notion of the End of History, but the dominant ethos today *is* 'Fukuyamaian': liberal-democratic capitalism is accepted as the finally found formula of the best possible society, all that one can do is render it more just, tolerant, and so forth. The only *true* question today is: do we endorse this 'naturalization' of capitalism, or does contemporary global capitalism contain antagonisms which are sufficiently strong to prevent its indefinite reproduction."<sup>23</sup> While I am not denying the value of the work of human rights activists, we cannot ignore that it was within these conditions that the usefulness of transitional justice became apparent for the merchandising of liberal democracy. To understand this argument, this project suggests that transitional justice theory requires a fuller understanding of power as offered by Foucault.

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<sup>23</sup> Slavoj Žižek, *In Defense of Lost Causes* (London: Verso, 2008), 421.

In the field of transitional justice scholars have largely failed to consider the operation of power as anything but a repressive force. Of course, the idea of challenging power is at the centre of the transitional justice discourse: the field is built on the notion that certain mechanisms, including legal prosecutions and truth commissions, can curtail the power of state leaders (as well as rebel leaders) when they act against international norms of behaviour. As Bassiouni writes, there is a “growing discontent with the practice of granting impunity, particularly for the leaders who have ordered the commission of atrocities and the senior commanders who executed these unlawful orders... the *realpolitik* of reaching political settlements without regard to a post-conflict justice component is no longer acceptable.”<sup>24</sup> Here, the literature is clear on the relations of power. Transitional justice can provide once powerless victims with the necessary tools (human rights) to challenge the seemingly untouchable power of state leaders.

In response to this, then, this project draws on the work of Ivison, Golder, and Douzinas to suggest that human rights may be better understood as a conduit for power rather than a challenge to power. Central to Foucault’s later work is moving us beyond this reductionist understanding of power. Power, for Foucault, must be understood as something that is diffuse and never in the possession of a single agent.<sup>25</sup> In other words, individuals do not wield power like a stick; rather, they mediate power by regulating behaviour. Such an understanding, therefore, recognizes that power is not simply an

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<sup>24</sup> M. Cherif Bassiouni, “Accountability for violations of International Humanitarian Law and other Serious Violations of Human Rights,” in *Post-Conflict Justice* ed. by M. Cherif Bassiouni (Ardsley, NY: Transnational Publishers, Inc., 2002), 3.

<sup>25</sup> Michel Foucault, “Two Lectures,” in *Power/Knowledge: Selected Interviews & Other Writings 1972-1977*, ed. Colin Gordon (New York: Pantheon Books, 1980), 98.

aspect of the political arena but is “produced from one moment to the next, at every point, or rather in every relation from one point to another.”<sup>26</sup> Thus, power is indeterminate and omnipresent because it is “exercised from innumerable points.”<sup>27</sup> Accordingly, power is diffused and embodied in the dominant discursive structure “that sets the standards of accepted or expected behaviour.”<sup>28</sup> As the rite of passage for the transformation of societies from conflict to peace and authoritarianism to liberal democracy as elucidated by Teitel, transitional justice is fully enmeshed in this manifold of power. Further, it is not simply the practice of transitional justice that needs to be challenged, but the academic field itself. Per Foucault, we cannot fully grasp his understanding of power in isolation from his understanding of discourse and knowledge generation:<sup>29</sup> “there can be no possible exercise of power without a certain economy of discourses of truth which operates through and on the power and we cannot exercise power except through the production of truth.”<sup>30</sup> This is what Foucault means by power/knowledge. Power is fixed (at least temporarily) in the accepted forms of knowledge, scientific understandings, and ‘truth’. Therefore, Foucault writes,

we should abandon the belief that... the renunciation of power is one of the conditions of knowledge. We should admit... that power and knowledge directly imply one another; that there is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations. These power/knowledge

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<sup>26</sup> Michel Foucault, *The History of Sexuality*, vol. 1, *An Introduction*, trans. Robert Hurley (New York: Vintage Books, 1990), 93.

<sup>27</sup> Foucault, *The History of Sexuality*, 92.

<sup>28</sup> Ivan Manokha, “Foucault’s Concept of Power and the Global Discourse of Human Rights,” *Global Society* 23, no. 4 (2009): 430.

<sup>29</sup> Manokha, “Foucault’s Concept of Power and the Global Discourse of Human Rights,” 430.

<sup>30</sup> Michel Foucault, “Two Lectures,” in *Power/Knowledge: Selected Interviews & Other Writings 1972-1977*, ed. Colin Gordon (New York: Pantheon Books, 1980), 93.



relations are to be analyzed, therefore, not on the basis of a subject of knowledge who is or is not free in relation to the power system, but, on the contrary, the subject who knows, the object to be known and the modalities of knowledge must be regarded as so many effects of these fundamental implications of power/knowledge and their historical transformations. In short, it is not the activity of the subject of knowledge that produces a corpus of knowledge, useful or resistant to power, but power/knowledge, the processes and struggles that traverse it and of which it is made up, that determines the forms and possible domains of knowledge.<sup>31</sup>

Indeed, the knowledge that transitional justice produces further entrenches these practices. It is important to draw attention to this relationship between power and knowledge, especially with the surge of large-N quantitative studies that seek to evaluate the success of transitional justice. These studies rely on the established theory to formulate and test hypothesis in hopes of generating new knowledge about transitional justice mechanisms. Here, success and failure is determined by how well transitional justice impacts the achievement of liberal democracy and levels of repression (the commonly used variable used for measuring human rights),<sup>32</sup> thus further closing our understanding of justice.

However, it must be clear that I am not drawing on Foucault and Foucauldian scholars as a justification for rejecting transitional justice altogether. Central to Foucault's analysis is that "power is exercised over those who are in a position to choose, and it aims to influence what their choices will be."<sup>33</sup> Accordingly, where the subject has

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<sup>31</sup> Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Pantheon Books, 1977), 27-28.

<sup>32</sup> See, for example, David L. Cingranelli, David L. Richards, and K. Chad Clay, *The Cingranelli-Richards (CIRI) Human Rights Dataset*, 01 August 2013; available from <http://www.humanrightsdata.org/index.asp>; 18 August 2013.

<sup>33</sup> Barry Hindess, *Discourse of Power: From Hobbes to Foucault* (Blackwell Publishers, 1996), 99-100.

no freedom or capacity to resist “there can be no relations of power.”<sup>34</sup> Thus, Foucault makes a distinction between power and domination where domination refers to “those asymmetrical relationships of power in which the subordinated person has little room for maneuver because their margin of liberty is extremely limited by the effects of power.”<sup>35</sup> In Foucault’s conception of power, as in much of critical theory, domination is “something that must be avoided whenever possible.”<sup>36</sup> According to Ivison, “relations of domination could, and certainly do, exist that could be masked by the discourse of rights and sovereignty. But not all modern institutions are dominating in the specific sense of the term.”<sup>37</sup>

So, this distinction between power and domination must be made if we are to see that power is not entirely problematic (or avoidable, for that matter). The work of Foucault challenges the sanctity of liberalism and reminds us that no single vocabulary will best express “human essence” as such a thing does not exist. Yet, the recognition that power is everywhere should not lead to nihilism. Instead, we must recognize that the problem we face is not one of avoiding “relationships of power, but, rather, one of establishing conditions which would allow these games of power to be played with a *minimum of domination*.”<sup>38</sup> In terms of transitional justice, the task at hand is not about putting forward another expression of justice. Rather, it calls attention to the way justice has had to conform or mold itself to fit the transition narrative in order to caution against

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<sup>34</sup> Hindess, *Discourse of Power*, 101.

<sup>35</sup> Hindess, *Discourse of Power*, 102.

<sup>36</sup> Hindess, *Discourse of Power*, 104.

<sup>37</sup> Duncan Ivison, *Rights* (Montreal & Kingston: McGill-Queen’s University Press, 2008), 193.

<sup>38</sup> Hindess, *Discourse of Power*, 104.

the closure of justice around any single vocabulary. For, as soon as we identify the Messiah of justice, things like democracy and liberal human rights, we enclose it in walls and define what is and what is not worthy of its saving grace thereby perpetuating domination through definition. In order to maintain openness, I argue that we must have the intellectual space to challenge the canonization of any single theory. Postmodern theory offers a way of understanding the world that resists such certainty.

In conclusion, to ensure that there is a minimum of domination in our theories, we must guard against the closing of justice around *any* particular conception. The work of Derrida, Hampshire and Agamben are central for challenging liberalism—the dominant vocabulary in the theory of field. Indeed, this is important especially given the way marginal voices have traditionally been silenced by transitional justice theory. As Lyotard suggests, such theory “refines our sensitivity to differences and reinforces our ability to tolerate the incommensurable.”<sup>39</sup> As a deconstructive project, the goal is not about destroying, but, rather, is an exercise in opening up justice to that which may come. As a rite of passage, transitional justice understands conflict as something that can be overcome. Why? Because, it holds the answer to how we can achieve this state. Currently, this answer is tied to the Liberal Peace. In other words, the transitional justice discourse is not a passive actor that has been manipulated by the Liberal Peace. Instead, it has benefited tremendously from this relationship; transitional justice not only accepts these liberal values without question, but also receives considerable legitimacy as a field

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<sup>39</sup> Lyotard, Jean-Francois. *The Postmodern Condition* (Minneapolis: University of Minnesota Press, 1984), xxv.

because of these ideas.<sup>40</sup> To deconstruct transitional justice theory, then, is to think of the relationship between conflict and justice not as something that is final, but ongoing. At the very least, we must heed the words of Rorty and be cognizant of what we are saying and, perhaps more importantly, what we are not saying, when we speak of justice.

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<sup>40</sup> Further, transitional justice is reliant on international funding, largely from Western powers who, themselves, have bought into the Liberal Peace Thesis. See Stina Petersen, Ingrid Samset, Vibeka Wang, “Foreign Aid to Transitional Justice: The Cases of Rwanda and Guatemala, 1995-2005,” in *Building A Future on Peace and Justice: Studies in Transitional Justice, Peace and Development The Nuremberg Declaration on Peace and Justice*, eds. Kai Ambos, Judith Large, and Marieke Wierda, 439-467 (Berlin: Springer, 2009).

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### EDUCATION

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- 2007 – Present**      **PhD Candidate, Political Science**  
 Western University • Canada, London, ON  
 Thesis Title: Theorizing 'Transitional Justice'
- 2005 – 2006**      **Master of Arts, Political Science**  
 Wilfrid Laurier University, Waterloo, ON  
 Major Research Paper Title: The Role of the International  
 Community in Democracy-Building: A Case study of Bosnia-  
 Herzegovina
- 2001 – 2005**      **Bachelor of Arts (with distinction), Political Science**  
 King's University College at Western University • Canada, London,  
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### PUBLICATIONS & PRESENTATIONS

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#### Publications

Hoogenboom, D., & Vieille, S. "Rebuilding social fabric in failed states: Examining transitional justice in Bosnia." *Human Rights Review*, 11.2 (2009): 183-198.

#### Presentations

Hoogenboom, D. "Who Wields Power? A Preliminary Examination of the Treatment of Power in the Field of Transitional Justice," *International Studies Association Annual Convention*, Toronto, ON (March 2014), *forthcoming*.

Hoogenboom, D. "The Field of Transitional Justice: Towards an Open or Closed Society?" *International Studies Association Annual Convention*, San Francisco, CA (April 2013).

Hoogenboom, D. "Moving ideas: Examining the normative vision of international actors in the field of transitional justice." *International Studies Association Annual Convention*, San Diego, CA (April 2012).

Hoogenboom, D. "Examining the Visions of Transitional Justice." *Canadian Political Science Association Annual Conference*, Waterloo, ON (May 2011).

Hoogenboom, D., & Quinn, J. "Transitional justice and the Diaspora: Examining the impact of the Haitian Diaspora on the Haitian Truth Commission." *International Studies Association Annual Convention*, Montreal, ON (March 2011).

Hoogenboom, D. "Moving ideas." *Canadian Political Science Association Annual Conference*, Montreal, ON (June 2010).

Hoogenboom, D., & Vieille, S. "Transitional justice and the neoliberal discourse." *Canadian Political Science Association Annual Conference*, Ottawa, ON (May 2009).

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## **AWARDS & SCHOLARSHIPS**

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- 2010 Western Graduate Research Scholarship (\$8000)
- 2009 Gracey Family Graduate Scholarship, Western University • Canada (\$7600)
- 2009 Western Graduate Research Scholarship (\$8000)
- 2008 Western Graduate Research Scholarship (\$8000)
- 2007 Collaborative Graduate Program in Migration and Ethnic Relations Scholarship (\$1000)
- 2007 Western Graduate Research Scholarship (\$8000)
- 2005 Master of Arts Entrance Scholarship from Wilfrid Laurier University (\$1700)
- 2005 Dean's Honour Certificate Recipient (\$1000)
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- 2001 Bachelor of Arts Entrance Scholarship from King's University College (\$1000)

## **EMPLOYMENT**

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### **Lecturer**

#### **King's University College at Western University • Canada, London, ON**

2013 (Fall/Winter) POL 3325E: Ethnic Conflict and Resolution

#### **Western University • Canada, London, ON**

2013 (Fall/Winter) POL 3388E: International Human Rights

- 2013 (Fall) TJ 2001F: Problems in Transitional Justice and Post-Conflict Reconstruction  
 2013 (Summer) POL 3388E: International Human Rights  
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 2012 (Fall) TJ 2001F: Problems in Transitional Justice and Post-Conflict Reconstruction  
 2012 (Summer) POL 3388E: International Human Rights  
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 2010 – 2011 (Fall/Winter) POL 3388E: International Human Rights  
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### **Teaching Assistant**

#### **Western University • Canada, London, ON**

- 2009 – 2010 (Fall/Winter) POL 3323F/G: Politics of Latin America, Professor Andres Perez  
 2008 – 2009 (Fall/Winter) POL 3388E: International Human Rights, Professor Joanna Quinn  
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#### **King's University College at Western University • Canada, London, ON**

- 2006 – 2007 (Fall/Winter) POL 2231: International Politics, Professor Jonathan Paquin

#### **Wilfrid Laurier University, Waterloo, ON**

- 2006 (Fall/Winter) POL110: Introduction to Political Science, Professor Brian Tanguay  
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### **Research Assistant**

#### **King's University College at Western University • Canada, London, ON**

- 2007 Project: American Foreign Policy and Secessionist Movements,  
 Professor Jonathan Paquin

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 Professor Brian Tanguay