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What are Transitions for? Atrocity, International Criminal Justice, and the Political

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WHAT ARE TRANSITIONS FOR? ATROCITY, INTERNATIONAL CRIMINAL JUSTICE, AND THE POLITICAL

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I. THE PROBLEM

Transitional justice is the complex set of practices and processes that is supposed to help societies transition from atrocity into a post-atrocity, better future.[1] It has also been more thinly defined as a transition from one political regime to the next.[2] Transitional justice practices and processes have embraced, in different degrees, the *form* of law.[3] Law in this context has been both generative and generated in fora: for constitutional reform;[4] for demanding and receiving accounts from perpetrators of atrocities; for giving victims an opportunity to name and recount their personal tragedies and receive reparation; for retributive,

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[1] *See What Is Transitional Justice?* INT'L CENTER FOR TRANSITIONAL JUSTICE, http://ictj.org/about/transitional-justice (last visited May 20, 2014).

[2] For foundational and endlessly illuminating analyses of law in political transitions, see generally OTTO KIRCHHEIMER, POLITICAL JUSTICE: THE USE OF LEGAL PROCEDURE FOR POLITICAL ENDS (1961); RUTI G. TEITEL, TRANSITIONAL JUSTICE (2000); JON ELSTER, CLOSING THE BOOKS: TRANSITIONAL JUSTICE IN HISTORICAL PERSPECTIVE (2004); GUILLERMO O'DONNELL & PHILIPPE C. SCHMITTER, TRANSITIONS FROM AUTHORITARIAN RULE: TENTATIVE CONCLUSIONS ABOUT UNCERTAIN DEMOCRACIES (1986). For a recent survey that adopts O'Donnell and Schmitter's definition of "transition" as an "interval" between political regimes, see Kathryn Stoner et al., *Introduction* to TRANSITIONS TO DEMOCRACY: A COMPARATIVE PERSPECTIVE 3, 6 (Kathryn Stoner & Michael McFaul eds., 2013). For helpful analyses of legal transitions, see generally TRANSITIONS: LEGAL CHANGE, LEGAL MEANINGS (Austin Sarat ed., 2012). On the nature of atrocity, see *infra* Section III; CLAUDIA CARD, THE ATROCITY PARADIGM: A THEORY OF EVIL (2002).

[3] *See* Austin Sarat, *Introduction* to TRANSITIONS: LEGAL CHANGE, LEGAL MEANINGS, *supra* note 2, at 1, 1–16.

[4] *See* David Gray, *Transitional Disclosures: What Transitional Justice Reveals About "Law," in* TRANSITIONS: LEGAL CHANGE, LEGAL MEANINGS, *supra* note 2, at 147, 174–77.

consequentialist, and symbolic punishment; for the establishment of a truthful record of the past; and for (re)conciliation.[5]

All of this would be a tall order for any justice mechanism in the best possible social contexts. In societies about to emerge or just emerging from atrocity—with atrocities' usual impact on culture, politics, social fabric, the economy, and the legal system—the use of justice as transition mechanism would seem an almost impossible proposition.[6] Difficult as it may be, though, societies have used transitional justice mechanisms throughout recorded history, from ancient Greece[7] through eighteenth- and nineteenth-century France[8] and the United States,[9] to twentieth-century Spain,[10] Germany,[11] Argentina,[12] Bosnia,[13] Rwanda,[14] and South Africa,[15] to mention just a few. And it has worked, sometimes,[16] and can be perfected to work better in the future. Judging from the countries' immediate outcomes in terms of peace, deterrence, and a sense of (re)conciliation, the success of transitional justice experiences varies significantly.[17] Counterintuitively, a more ideological metric—that of liberal rule of law and democratic politics—tends to find a greater rate of success in transitional justice.[18] The reason

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[5] *See* Christopher K. Lamont, *Dealing with the Past to Repair the Present: Why Transitional Justice Matters in Asia*, ASIA PEACEBUILDING INITIATIVES (Jan. 16, 2014), http://peacebuilding.asia/dealing-with-the-past-to-repair-the-present-why-transitional-justice-matters-in-asia/. *See also supra* note 2 and accompanying text.

[6] *See* CLARA SANDOVAL VILLALBA, TRANSITIONAL JUSTICE: KEY CONCEPTS, PROCESSES AND CHALLENGES 6 (2011), *available at* http://www.idcr.org.uk/wp-content/uploads/2010/09/07_11.pdf.

[7] Adriaan Lanni, *Transitional Justice in Ancient Athens: A Case Study*, 32 U. PA. J. INT'L L. 551, 551–52 (2011).

[8] *See* Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice* 10 (Univ. of Chi., Pub. Law & Legal Theory Working Paper No. 40, 2003).

[9] *See id*.

[10] *See id*.

[11] *See id*.

[12] *See* Posner & Vermeule, *supra* note 8, at 11.

[13] *See* Marissa Wong, *Has Genocide Jurisprudence Ended Impunity? Transitional Justice and the Case of Rwanda*, E-INT'L RELATIONS STUDENTS (Aug. 22, 2013), http://www.e-ir.info/2013/08/22/has-genocide-jurisprudence-ended-impunity-transitional-justice-and-the-case-of-rwanda/.

[14] *See id*.

[15] *See* Posner & Vermeule, *supra* note 8, at 12.

[16] *See* TRANSITIONS TO DEMOCRACY, *supra* note 2, at 25–220 (discussing "successful" transition cases, such as Poland, South Africa, and Chile).

[17] *See* TRICIA D. OLSEN ET AL., TRANSITIONAL JUSTICE IN BALANCE: COMPARING PROCESSES, WEIGHING EFFICACY 131–61 (2010).

[18] *See id*. at 146.

for this is clear enough: deterrence, peace, and (re)conciliation in the long run need more than the diet liberalism[19] of legal predictability and elections. It is not that the prescriptions of diet liberalism are unimportant or insincere—"[a]ll bad poetry springs from genuine feeling[]" as Oscar Wilde once reminded us.[20] At the end of the day, however, and as long as lasting deterrence, peace, and solidarity are concerned, the metric of diet liberalism over-sells success.[21] Often, this metric has proven to be a dangerous distraction.[22] The hope of this essay is that clarity about what societies ought to transition into will better direct the evaluation of previous models and the design of new models of transitional justice.

Into what, then, should transitional justice transition? I argue in this essay that transitional justice should be a transition into *the political*, understood in its robust liberalism version. I further argue that the most significant part of transitions ought to happen in the minds of the members of political communities, precisely where the less tangible and yet most important dimension of *the political* sets root. Both of these points are missing in transitional justice models and debates.[23] In the

[19] The focus on rule of law and elections is a "diet" version of liberalism when compared to more robust versions such as John Rawls's or John Stuart Mill's. *See generally* JOHN RAWLS, A THEORY OF JUSTICE (rev. ed. 1999) (1971); JOHN STUART MILL, *On Liberty*, *in* ON LIBERTY AND OTHER ESSAYS 5 (John Gray ed., 1998); JOHN STUART MILL, ESSAYS ON ECONOMICS AND SOCIETY (1824-1845), *reprinted in* 4 COLLECTED WORKS OF JOHN STUART MILL (J.M. Robson ed., paperback ed., 2006) (1967), *available at* http://www.book2look.de/book/tb4rGeQ9Bf&euid=20303671&ruid=0&clickedby=FW&referurl=www.book2look.com.

[20] *The Critic as Artist: Author: Oscar Wilde*, CELT: THE CORPUS OF ELECTRONIC TEXTS, http://www.ucc.ie/celt/online/E800003-007/ (last visited Oct. 26, 2014).

[21] *See id*.

[22] The literature on transitional justice mechanisms outcomes is growing significantly. This literature tends to use various metrics clustering around democracy and human rights. *See, e.g.*, OLSEN ET AL., *supra* note 17. In this study, the authors found that transitional justice does make a difference. However, the authors only found positive outcomes in all metrics with two combinations of mechanisms: trials and amnesties; and trials, amnesties, and truth commissions. It is of interest for the argument for structural mercy that even a truncated version of traditional mercy such as amnesty has a positive effect on democracy and human rights outcomes, though thinly understood.

[23] This seems to be the case even in extraordinary contributions. *See, e.g.*, TEITEL, *supra* note 2; MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE (1998). This also emerges from typologies such as the helpful one—"'[w]illful ignorance'—to forget and to pardon; . . . .'[h]istorical record'—to establish the truth, but to pardon; . . . . '[p]ragmatic retribution'—to forget, but still punish; . . . . '[n]o peace without justice'—to establish the truth and to punish the perpetrators."—developed in Ivan Šimonović, Comment, *Attitudes and Types of Reaction Toward Past War Crimes and Human Rights Abuses*, 29 YALE J. INT'L L. 343, 345 (2004). Philosophical interventions fare similarly. *See* TRANSITIONAL JUSTICE (NOMOS LI) (Melissa S. Williams et

current scenario of transitional justice models and debates, transitional justice practices and processes, as well as the normative forms of discourse that accompany them, fail to fully take *the political* as an end, thus failing in both *transition* and *justice*.[24]

The political—which, as I argue below, includes, but is certainly not reducible to, electoral and legislative politics[25]—has to count in at least two ways in the context of transitional justice. First, the cognitive, attributive, punitive, and constitutive dimensions of justice in transitions from atrocity ought to make place both for claims from and in the name of victims as an indictment of cruelty, and for the possibility of structural mercy in the present and into the future.[26] Second, consideration of *the political* must lead to the imagination of the conditions under which a robust and equally shared experience of normativity and futurism might be (again or at last) possible for societies emerging from atrocity.[27] The rejection of cruelty, the requirements of structural mercy, and the conditions for *the political* meet at the intersection where societies become aware of what they have done to themselves and to others, and of what they wish to become.[28]

At stake, in what societies have done to themselves and their members, and in what they become, are the habits of mind and institutions that may keep atrocities afar.[29] In transitional justice, at least in our days, international criminal law, human rights, constitutionalism, and the culture of self-government meet.[30] Only when *transitional justice* transitions into *the political* is it able to justify the hope of more lasting peace, justice, and everything else involved in self-governing

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al. eds., 2012).

[24] *See infra* Part II.

[25] One important question that arises from my argument about *the political* is the causal or correlational connection between the political, on one hand, and ordinary politics and rule of law, on the other. In historical terms, for example, which came first? This is, of course, a topic that requires an essay on its own. My only remark here is to suggest that *the political* has at times existed without democracy and rule of law, but that its existence, if ephemeral for *the political*, as I argue in this essay, requires institutional bases if it is to expand to its natural reach and endure. That said, many governments have ordinary politics and rule of law without a significant experience of *the political*. This only reaffirms the fact that *the political* is irreducible to its bases. *See infra* Part II.A–B.

[26] *See infra* Part III.

[27] *See infra* Part III.

[28] *See infra* Part III.

[29] *See infra* Parts II–IV.

[30] *See infra* Parts II–IV.

collective life.[31]

The work of *the political* is, sociologically speaking, that of social cohesion and self-preservation; existentially and morally, and as long as people share their lives and fates, the work of the political is that of self-government and hope.[32]

II. THE POLITICAL

The political is both a forum and a mode of participation within the forum.[33] As a forum, *the political* is ideal, typically characterized by equal shared access, equal recognition of participants, a focus on collective life, and an engagement with the future in normative terms.[34] As a mode of participation, *the political* calls for cognitive, normative, and attitudinal virtues.[35] It lives out of individuals invested in thinking in deliberative, reflective, and solidaristic ways about the present and future of the form of collective life they inhabit; its manifestation is that of a political culture and practice that continuously weaves into the present a society's aspirations for its future.[36]

Thus defined, *the political* has anthropological as well as institutional bases.[37] And yet, *the political* is not reducible to its bases. No matter how many preconditions and component parts into which *the political* is analyzed, there always remains an irreducible normative dimension to it—a dimension which, from the point of view of the present, is aware of the past as it attempts to bind the future to some of its possible configurations. In relation to its bases, *the political* presents a phenomenological surfeit of self-reflectivity, deliberation, normativity, and futurism. Thus, *the political* transmutes the potentials already present in its bases into an irreducible, future-oriented, normative, and ultimately solidarity-enhancing sphere of deliberation and binding

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[31] *See infra* Parts II–IV.

[32] *See infra* Parts III–IV.

[33] For relevant connections to my construction of the notion of *the political*, see generally HANNAH ARENDT, THE HUMAN CONDITION 22–78 (1958); JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY (Thomas Burger trans., paperback ed., 1991) (1989); HENRI LEFEBVRE, THE PRODUCTION OF SPACE (Donald Nicholson-Smith trans., Blackwell Publ'g 1991) (1974); JOHN RAWLS, POLITICAL LIBERALISM (1993).

[34] *See* RAWLS, *supra* note 33, at 15–22.

[35] *See id.* at 95–99.

[36] *See id.* at 35–40.

[37] *See infra* Part II.A–B.

choices predicated upon and advancing equality, liberty, dignity, and justice as guarantees of access to it and as *the political*'s permanently recommitted ends. This is certainly a normative conception of *the political*. There are many examples of *the political* today and in the past, imperfect as they may be.[38]

The political is all too often unseen or profoundly misunderstood. One example of this is found in how Carl Schmitt defined politics as reducible to a friend/enemy relationship based on elective differences construed to pose an existential threat.[39] All Schmitt's phenomenology of *the political* captures is one aspect of the evolutionary transition from kinship-based collective organizations to relatively more inclusive forms of tribalism in the history of humankind. In this transition, the natural drive to protect one's own genetic pool was partially sublimated or incorporated into new criteria of group belonging, such as the sharing of a territorial, linguistic, religious, or phenotypical characteristic. Granted, politics do not fail to have historical roots traceable to such historical origins. Certainly everything has a history, but history is not everything. Especially with regard to *the political*, the future is more important. Another way to miss *the political* is to reduce it to yet another historical manifestation of ordinary politics, as Michel Foucault does:

> It may be that war as strategy is a continuation of politics. But it must not be forgotten that 'politics' has been conceived as a continuation, if not exactly and directly of war, at least of the military model as a fundamental means of preventing civil disorder. Politics, as a technique of internal peace and order, sought to implement the mechanism of the perfect army, of the disciplined mass, of the docile, useful troop . . . .[40]

In this view, politics is concerned primarily with the maintenance

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[38] *See, e.g.*, CARL SCHMITT, THE CONCEPT OF THE POLITICAL 26–27 (George Schwab trans., expanded ed., Univ. of Chi. Press 2007); MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 168 (Alan Sheridan trans., Pantheon Books 1977).

[39] SCHMITT, *supra* note 38, at 26–27. Schmitt's ideas are not simplistic. Quite the opposite: they are a constant reminder of the danger of demonization and the attempt to escape from politics. For a thoughtful and learned engagement with Schmitt's ideas in a context relevant to the themes of this essay, see David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT'L L. 85, 120–24 (2004). Luban's article is also relevant in that it seeks to foreground the political nature of declaring crimes against humanity a universal violation: "I have argued that the aim of declaring crimes against humanity to be universal violations of law is ultimately to reformulate the very idea of politics to exclude these acts." *Id.* at 121.

[40] FOUCAULT, *supra* note 38, at 168.

of what is perceived or conceived either as the continuation of normality or as a return to normality. Whether consciously or unconsciously, it is with this commitment to normality in mind that transitional justice mechanisms usually operate within the paradigm of diet liberalism.

Following Schmitt or Foucault, a critic of *the political*, as I define it here, might say that there is, at the heart of the phenomenological surfeit of self-reflectivity, normativity, and futurism, an inescapable reality that forces societies to simultaneously move forward through the crisis necessitating transitional justice and moving backward to a time, now undoubtedly idealized, of former well-being. The stakeholders in transitional justice are not primarily concerned, the critique goes, with promises of future utopia, but rather with atonement for the events so recently perpetrated and with a return to peaceful social stasis.

And yet, just like individuals would fail to live well should they be unwilling to be invested in actively shaping their own biographical future, societies would also fail to be peaceful and normatively attractive should they be unwilling to proactively conceive of and enact a preferred future for themselves. *The political* is the best way societies have to deal with the inescapable problem of the future in a normative key. In *the political*, as in other things human, there is no refuge possible in the refusal to make choices: inaction counts causally as much as action, for choices are being made all the time, whether or not one takes an active part in them.

A. Anthropological Bases

The political has, of course, deep and complex anthropological bases.[41] In this section, I simply point out some aspects of the ontological and epistemological dimensions of these bases.

Ontologically, *the political* is founded on the phenomena of plurality and proximity in the life of the species.[42] Plurality speaks to the fact that we are many and sufficiently diverse to allow each person to believe that he or she experiences and participates in the world in at least some unique ways.[43] Factually, proximity means that contact, interaction, and intercourse are inevitable for almost everyone almost all

[41] *See* ARENDT, *supra* note 33, at 22–78.
[42] *Id*. at 50–58.
[43] *See* RAWLS, *supra* note 33, at 50.

the time.[44] At both the intuitive and reflective levels, proximity allows individuals to develop a sense of shared destiny, that in some fundamental way their fates are knotted together.[45] The sense of solidarity finds its origin precisely in this experience.[46] Articulating the philosophical anthropology of the public realm, Hannah Arendt wrote:

> [T]he public realm relies on the simultaneous presence of innumerable perspectives and aspects in which the common world presents itself and for which no common measurement or denominator can ever be devised. For though the common world is the common meeting ground of all, those who are present have different locations in it . . . .[47]

Epistemologically, *the political* is dependent on human capacities for transtemporal cognition, language, judgment, and practical reason. Transtemporal cognition refers to knowledge and remembrance of the past, to an understanding of the present predicament of self and others,[48] and to the ability to imagine possible futures and establish a hierarchical preference among them.[49] Humanity, as a whole, and individuals have evolved to live virtually "spread out" over the temporal arc from the past through the present to the future.[50]

Language and the ability to engage in complex symbolic communication transformed the natural life of the species into a true meaningdom.[51] Language's limitless naming and adjectivizing

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[44] *See* ARENDT, *supra* note 33, at 50.

[45] *See id*.

[46] *See id*.

[47] *Id*. at 57.

[48] Think here, for example, of the idea developed by C. Wright Mills of sociological imagination as the self's understanding of how history and biography meet. *See* C. WRIGHT MILLS, THE SOCIOLOGICAL IMAGINATION 143–64 (2000). A similar point, now from a Marxist perspective, is made by Henri Lefebvre. *See* 1 HENRI LEFEBVRE, CRITIQUE OF EVERYDAY LIFE 145 (John Moore trans., 2d ed. 2008) (1991).

[49] *See* 1 ERNST BLOCH, THE PRINCIPLE OF HOPE 229–30 (Neville Plaice et al. trans., 3d prtg., paperback ed., The MIT Press 1996) (1986); Paulo Barrozo, *The Great Alliance: History, Reason, and Will in Modern Law*, 78 LAW & CONTEMP. PROBS. 1 (2014).

[50] *See* Barrozo, *supra* note 49.

[51] *See* 1 THE POLITICS OF ARISTOTLE 4 (B. Jowett trans., Oxford: Clarendon Press 1885) ("[That] man is more of a political animal than bees or any other gregarious animals is evident. Nature, as we often say, makes nothing in vain, and man is the only animal whom she has endowed with the gift of speech. And whereas mere sound is but an indication of pleasure or pain, and is therefore found in other animals . . . the power of speech is intended to set forth the expedient and inexpedient, and likewise the just and the unjust. And it is a characteristic of man that he alone has any sense of good and evil, of just and unjust, and the association of living beings who have this sense makes a family and a state." (footnotes omitted)).

capabilities routinely transform fact into value, behavior into ethics, and gregariousness into politics.[52] Language is responsible for turning evolutionary mechanisms and institutions of social coordination, like families, groups, and states, into spaces where conceptions of the good life fight for ascendance.[53] "If we are alive," writes J. B. White, "we look at the world . . . around us, and say, 'How am I to live in such a place, speak such a language?'"[54] Language is the means and stuff of both cognition—*episteme*—and opinion—*doxa*.[55] Because of this combination of hard truth and softer perspectivism, language creates the conditions for contestation within the confines of meaningdom. With language's potential to allow presentation of opinion as truth came the ever-present potential for escalating conflicts beyond their practical stakes, leaving human associations often just a few steps away from disintegration.[56] For good or ill, we now inhabit language; with it, we weave the open expanses and limits of our world, and without it, we would never have become a *zoon politikon*.[57]

Connected to the capacities for transtemporal cognition and language are the twin capacities of judgment and practical reason. Judgment includes the capacity to see the world from the perspective of others—"enlarged mentality"—before one feels ready to evaluate courses of action, characters, and states of affairs.[58] One of the mysteries of the faculty of judgment is that it can never be fully subsumed under

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[52] *See id*. at 4.

[53] *See id*. at 3 ("When several villages are united in a single complete community, perfect and large enough to be nearly or quite self-sufficing, the state comes into existence, originating in the bare needs of life, and continuing in existence for the sake of a good life.").

[54] JAMES BOYD WHITE, LIVING SPEECH: RESISTING THE EMPIRE OF FORCE 204 (2006).

[55] *See* Louis E. Wolcher, *Senseless Kindness: The Politics of Cost-Benefit Analysis*, 25 LAW & INEQ. 147, 148–49 (2007).

[56] It was to this potential inherent in language that Thomas Hobbes responded with the prescription of a privileged nominalist speaker and a final nominalist arbiter. *See* THOMAS HOBBES, LEVIATHAN 24–31 (Richard Tuck ed., 1991).

[57] *Zoon politikon* translates in English to "political animal." *Zoon Politikon*, REVERSO DICTIONARY, http://dictionary.reverso.net/german-english/Zoon%20politikon (last visited May 22, 2014).

[58] *See generally* ADAM SMITH, THE THEORY OF MORAL SENTIMENTS (MobileReference.com 2009); IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS (Jens Timmermann rev. ed., Mary Gregor trans., 2011); IMMANUEL KANT, CRITIQUE OF THE POWER OF JUDGMENT (Paul Guyer ed., Paul Guyer & Eric Matthews trans., paperback ed., 2001); HANNAH ARENDT, LECTURES ON KANT'S POLITICAL PHILOSOPHY (Ronald Beiner ed., 1982). For an approach to the question of reconciliation inspired in an interpretation of the notion of "sympathy" in Adam Smith, see NIR EISIKOVITS, SYMPATHIZING WITH THE ENEMY: RECONCILIATION, TRANSITIONAL JUSTICE, NEGOTIATION 59–133 (2010).

instrumental know-how or scientific knowledge.[59] Judgment takes the experience and claims of others seriously, while insisting that thoughtful and impartial assessment of others' actions and the state of affairs they create are both possible and legitimate.[60]

Practical reason is a call and guide to action on the basis of a judgment about the affairs of the world.[61] Ordinarily, individuals are not insensitive or neutral toward actions they believe victimize themselves or others.[62] Neither are individuals, in normal circumstances, oblivious or neglectful about what they are called upon to do as a duty to themselves or others.[63] As they move from judgment to action, practical reason is the guide if they aspire to act and react in ways that show integrity, coherence, understanding, and responsibility for themselves and the world around them.[64]

In their synergy, the anthropological bases described above make the experience of *the political*—rooted in and at the same time reflectively orientated toward our humanity—possible, though there are no guarantees.

B. Institutional Bases

Modern thought and experience, though a complex phenomenon, can be characterized as a series of frontal challenges to many of the traditional claims to authority in the realms of belief, knowledge, politics, imagination, morality, intimate relationships, productive practices, and institutions. One of the unifying aspirations of the normative force behind this confrontational posture was the

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[59] This, of course, does not mean that judgment is "mindless." *See generally* Linda Meyer, Essay, *Is Practical Reason Mindless?* 86 GEO. L.J. 647 (1998).

[60] *See id.* at 662–63.

[61] On practical reason, see generally ARISTOTLE, NICOMACHEAN ETHICS (Roger Crisp ed., trans., Cambridge Univ. Press 2000); DAVID HUME, A TREATISE OF HUMAN NATURE (L. A. Selby-Bigge & P. H. Niditch eds., 2d ed. 1978); IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON (Mary Gregor ed., trans., Cambridge Univ. Press 1997); CHRISTINE M. KORSGAARD, CREATING THE KINGDOM OF ENDS (1996); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980); ROBERT NOZICK, THE NATURE OF RATIONALITY (1993); Martha Nussbaum, *Skepticism About Practical Reason in Literature and the Law*, 107 HARV. L. REV. 714 (1994); Meyer, *supra* note 59; JOSEPH RAZ, PRACTICAL REASON AND NORMS (Oxford Univ. Press 1999) (1975); J. DAVID VELLEMAN, (1989); ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? (1988).

[62] *See supra* note 61.

[63] *See supra* note 61.

[64] *See supra* note 61.

emancipation of humankind: emancipation from subjugation to the pressing urgencies and relentless cycles of nature, from political and social oppression, from economic exploitation and misery, from encompassing modes of elusive consciousness, from the scourge of discrimination, from unjustifiable suffering and vulnerability, and from cruelty. At this late point in time, the emancipatory aspirations articulated in modern thought have become universal, a true possession of humankind. These aspirations are crafted in the language of mutual promises of goodness, freedom, equality, and recognition of each other's fundamental dignity. The fora and language of these promises are substratum and matter of *the political*.

Modern law and legal form, a similarly complex and multi-causal phenomenon, can never completely escape the wide and deep grip of modern emancipatory aspirations. More specifically, the basic legal institutions of a polity are not the outcome of a social algorithm, the mere product of the causal synergy between co-evolving social forces: forces that variedly favor instrumental rationalization and intra-systemic logics,[65] transformations of forms of collective consciousness as means of social cohesion,[66] increased capillarity of power as managerial technology,[67] endless strategic compromising of powerful elites facing distributive demands from the masses in electoral democracies,[68] and the incidental stabilization of clusters of public opinion in the open market of copied ideas.[69] The basic institutions of a society may well be all of that, but they are also much more. At their best, they become the greenhouse in which *the political* grows as a continuous and profoundly reflective social and cultural process that operates the translation of our mutual promises of emancipation into normative views about the future. Through *the political*, promises of emancipation are kept updated and real through future-orientated imagination and reinvention.

In this ideal sense, *the political* is the continuous reflective process

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[65] *See generally* MAX WEBER, ECONOMY AND SOCIETY (Guenther Roth & Claus Wittich eds., Ephraim Fischoff et al. trans., Univ. of Cal. Press 1978) (1968).

[66] *See* EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (George Simpson trans., Free Press 1933) (1893).

[67] *See* FOUCAULT, *supra* note 38, at 170–77.

[68] *See, e.g.*, KARL MARX, '*On the Jewish Question*,' *in* EARLY POLITICAL WRITINGS (Joseph O'Malley ed. & trans., 1994). *See also* THE MARX-ENGELS READER 3–6, 12–15, 146–202, 525–41 (Robert C. Tucker ed., 2d ed. 1978); 1 KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY (Ben Fowkes trans., Vintage Books 1977) (1976) [hereinafter MARX, CAPITAL].

[69] *See* MILL, *On Liberty*, *supra* note 19, at 5–19.

of imagination, articulation, contestation, refinement, enactment, and then imagination again of fundamental aspects of collective life on the basis of ideals of liberty, equality, dignity, justice, and mutual promises of goodness.[70] This process finds its home in constitutionalism as a legal/cultural process and in the constitutions that it creates over time.[71] When constitutionalism and its constitutions emerge from *the political*, societies become and remain self-reflective.[72] As Philip Allott once wrote,

> Constitutionalism is a *theory*; that is to say, a mental ordering of the reality within which a particular society constitutes itself. It is an explanatory and justificatory theory of a society's self-constituting. The defining characteristic of constitutionalism as a theory is that society makes an *idea* of its own self-constituting into an *ideal* of its self-constituting, and incorporates that *ideal* into the *theory* of its self-constituting. The idea is projected from the actual to form an ideal and, as an ideal, is reintroduced into the actual. For a society which adopts constitutionalism as its theory, constitutionalism enables and requires the society to organize and direct its own self-constituting in accordance with its transcendental idea of itself.[73]

This reflective sense of self as a political association—including an awareness of what it does to itself and to others, and a vision of what it wishes to become—is the gift of *the political* to societies fortunate enough to host and protect it. In reciprocity, constitutionalism and its constitutions provide *the political* with the institutional means to see the normativity arising from it potentially achieve universalizability, enforceability, and durability with revisability.[74]

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[70] Reflectivity as ennoia, in the Platonic school's sense of reflective and intense thinking. *See* FRIEDRICH NIETZSCHE, THE PRE-PLATONIC PHILOSOPHERS 5–6 (Greg Whitlock trans., Univ. of Ill. Press, 1st paperback ed., 2006) (2001) (speaking of "an excess of intellect that [people or individuals] no longer direct . . . only for personal, individual purposes but rather arrives at a pure intuition with it"). Although an extensive treatment of the question of reflectivity cannot be accommodated in this essay, I am convinced that some form of intellectual exuberance of this sort is inextricably involved in reflectivity as a weighty causal factor in social processes. For an articulation of the ideal of a "Socratic citizenship" as a form of reflective agency, see DANA VILLA, SOCRATIC CITIZENSHIP 299–309 (2001).

[71] *See* Philip Allott, *Intergovernmental Societies and the Idea of Constitutionalism*, *in* THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS 69, 70–72 (Jean-Marc Coicaud & Veijo Heiskanen eds., 2001).

[72] *See id*.

[73] *Id*. at 69, 70 (footnotes omitted).

[74] *See id*. at 70–72.

III. ATROCITY AND MERCY

Traditionally, atrocity and mercy are considered fringe phenomena, exceptions in the quotidian routine of societies.[75] This may be so, but instantiations of the cruelty that atrocities are made of are not rare enough even in well-functioning societies. To the extent that cruelty sticks around, the antidote of mercy ought to be mainstreamed and routinized until it enters the bloodstream of political culture. Therefore, transitional justice must be simultaneously an expression of the rejection of cruelty and of a commitment to mercy.

In this Section, I make a converging argument about cruelty and mercy. After offering a typology of cruelty, I argue that, as a normative argument about the requirements of a just and decent society,[76] structural mercy—as distinguished from mercy in the more common use of the term—occupies a central place in the theory and practice of transitional justice. Structural mercy would be one of the best ways to inoculate habits of power, restraint, and frugality in the anthropological, institutional, cultural, and practical elements of *the political*.

Turning to the typology, four distinct types of cruelty usually seem to be present in mass atrocities.[77] In previous and ongoing work, I explain and evaluate four analytically distinct conceptions of cruelty: namely, agent-objective, agent-subjective, victim-subjective, and victim-objective/agent-independent.[78] For purposes of the argument of this essay, the first two conceptions are encapsulated in the cruelty-as-agency type of cruelty.[79] The remaining conceptions appear in the cruelty-as-suffering and cruelty-as-predicament types.[80]

Cruelty-as-agency, cruelty-as-suffering, and cruelty-as-predicament are distinguishable along two axes.[81] In the first, the typological element of cruelty is found in the continuum of the perpetrator/victim

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[75] *See* STEVEN PINKER, THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED (2011).

[76] On the notion of "decent society" and that it is not subsumable to the notion of "just society," see AVISHAI MARGALIT, THE DECENT SOCIETY 1–6 (Naomi Goldblum trans., 1st paperback ed., 1998).

[77] I first developed this typology in Paulo D. Barrozo, *Punishing Cruelly: Punishment, Cruelty, and Mercy*, 2 CRIM. L. & PHIL. 67, 70 (2008).

[78] *Id*.

[79] *Id*. at 69–70.

[80] *Id*. at 67, 69–70.

[81] Barrozo, *supra* note 77, at 70.

relationship.[82] The second axis uses the objective/subjective continuum to build the typology.[83] The first axis is more obvious and does not require further explanation.[84] Coming from the objective end of the objective/subjective continuum, the second axis of the typology contemplates the objective predicament of the victim or the behavior of agents of cruelty in relation to objective norms of behavior.[85] Coming from the opposite end, the typology focuses on the subjective experience of victims—requiring some minimum degree of actual feeling or awareness—whereas, on the part of agents of cruelty, it focuses on some element of mens rea or hedonistic gratification in suffering.[86] The conceptual plane configured by these two axes captures all types of cruelty as an instrument of atrocity.[87]

In the cruelty-as-agency type, the agent causes physical or mental suffering on the part of the victim by engaging in brutality (agent-objective) or sadism (agent-subjective) that violates legal or ethical norms of behavior toward others.[88] In the cruelty-as-suffering type, the victim's physical or mental suffering is a result more of personal vulnerabilities to suffering (victim subjective) than of the nature of the perpetrator's behavior.[89] In normal circumstances the perpetrator's behavior may even fall well within the boundaries of the legally and ethically acceptable.[90] However, because of the victim's personal circumstance, idiosyncratically, or as a function in part of the larger context of mass atrocities, that behavior causes physical or mental suffering that amounts to cruelty.[91]

Finally, in the context of mass atrocities, cruelty-as-predicament tends also to be prevalent.[92] In the context of mass atrocities, either or both individualized agency and sentient victimhood is absent or at least insufficiently present.[93] I argue that once the cruelness of cruelty is well

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[82] *Id*.
[83] *Id*.
[84] *Id*.
[85] *See* Barrozo, *supra* note 77, at 70.
[86] *See id*.
[87] Barrozo, *supra* note 77, at 69–70.
[88] *See* Paulo Barrozo, *Reconstructing Constitutional Punishment*, 6 WASH. U. JUR. REV. 175 (2014).
[89] *See id*.
[90] *See id*.
[91] *See id*.
[92] *See* Barrozo, *supra* note 88.
[93] *See id*.

understood and the phenomenon is taken seriously, we will find that instantiations of cruelty obtain whether the victim is conscious, and whether there is an agent whose brutal or sadistic behavior is the proximate cause of the cruelty.[94] In other words, the third type of cruelty occurs even in the absence of conscious physical or psychological suffering, and even if it is structurally impersonally caused.[95] Cruelty-as-predicament thus departs from the requirements of agency, victimization, and causality found in the other types.[96] It is able to do so as we now understand that the cruel-ness of cruelty lies in grave violations of human dignity and is as preoccupied with impersonal structural causation as it is with agent causation.[97]

Of great relevance in the context of transitional justice is the consideration of time as a third dimension of the space formed by the agent/victim and objective/subjective axes of the typology of cruelty.[98] Indeed, conceptions and types of cruelty implicate differentially the influence of time over action and causation.[99] While cruelty-as-agency and cruelty-as-suffering involve discrete units of action and feeling concentrated in time, cruelty-as-predicament implicates causation dispersed in incidence and protracted in time, often with long-term and harder-to-stop effects.[100] If we are serious about addressing the cruelty that atrocities are made of, transitional justice must pay much greater attention to the search for solutions to problems of social vulnerability and unequal protection by the law.[101] These solutions, I argue, necessarily include the (re)creation of *the political*, for only *the political* can match in the long term the challenge of understanding, unveiling, and confronting all types of cruelty, particularly the most stealthy of them, cruelty-as-predicament.

The political, however, perishes whenever societies fail to adopt and practice a culture of power that demands restraint and frugality in the form and amount of violence that power routinely inflicts. By definition, one phenomenon is universally implicated in social orders of any kind: violence. Even the best constitutional orders repress some

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[94] *See id.*
[95] *See id.*
[96] *See* Barrozo, *supra* note 88.
[97] *See id.*
[98] *See id.*
[99] *See id.*
[100] *See* Barrozo, *supra* note 88.
[101] *See id.*

forms of violence while creating others—war and punishment, primarily—whose expression and deployment they regulate.[102] Constitutional orders, however, are not all the same.[103] If they are to make meaningful room for *the political*, the violence they dispense must be minimal and legitimate, for violence is the negation *par excellence* of *the political*.[104]

Historically, no type of social order has raised the bar of legitimate war and punishment higher than the liberal democratic ones of a self-governing citizenry.[105] And yet, liberal democratic polities wage war and punish abundantly. In light of these realities, what the anthropological and institutional bases of *the political* require is a culture and practice of structural mercy as a counterpart to ordinary and extraordinary violence. Institutionally, structural mercy simultaneously reflects and encourages a restrained and frugal use of violence by states and other political sub-units. In terms of political culture—including what Avishai Margalit means by both civilization and decency[106]—structural mercy plays a role in forging in the members of society a sensibility toward power and violence that supports and deepens the possibility and experience of *the political* in the long term. Ultimately, this is the best chance for lasting peace, deterrence, and (re)conciliation.

The idea of structural mercy is different from the more usual notion

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[102] That violence is implicated in the constitution and reproduction of social orders has been recognized throughout the ages. For examples across different intellectual traditions, see THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR (Richard Crawley trans., E.P. Dutton & Co., 1926) (1910)); HOBBES, *supra* note 56, at 23–27. *See also* Alice Ristroph, *Respect and Resistance in Punishment Theory*, 97 CALIF. L. REV. 601 (2009); Walter Benjamin, *Critique of Violence*, in REFLECTIONS 277, 277–300 (Peter Demetz trans., Schoken Books 1978) (1955); HANNAH ARENDT, ON VIOLENCE 3–31 (1970); Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority,"* 11 CARDOZO L. REV. 920 (Mary Quaintance trans., 1990); DOUGLASS C. NORTH ET AL., VIOLENCE AND SOCIAL ORDERS: A CONCEPTUAL FRAMEWORK FOR INTERPRETING RECORDED HUMAN HISTORY (2009). With regard to punishment, no one fully understood this phenomenon before Hegel. *See* G. W. F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 130–31 (Allen W. Wood ed., H.B. Nisbet trans., Cambridge Univ. Press 1991). Alan Norrie does justice to this aspect of Hegel's philosophy of law in his book, ALAN W. NORRIE, LAW, IDEOLOGY AND PUNISHMENT: RETRIEVAL AND CRITIQUE OF THE LIBERAL IDEAL OF CRIMINAL JUSTICE (1991). For analysis and normative argument in the context of punishment, see Barrozo, *supra* note 88.

[103] *See* Luban, *supra* note 39, at 90–91.

[104] *See id.*

[105] For a sophisticated and illuminating study of self-governance through cosmopolitan constitutionalism, see Vlad Perju, *Cosmopolitanism and Constitutional Self-Government* 8 INT'L J. CONST. L. 326, 326–33 (2010).

[106] *See* MARGALIT, *supra* note 76, at 113.

of mercy.[107] Ordinarily, mercy is an act of individual (private or by an office holder, usually the chief executive) pardon or withholding of the violence which the beneficiary is thought and been legally found to deserve.[108] In comparison, structural mercy is not primarily about or defined in terms of isolated acts. It is an aspect of the character of a society's dealings in power and violence.

The argument here is similar to the one John Rawls advanced in relation to the role and subject of justice.[109] He wrote:

> Justice is the first virtue of social institutions . . . .
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> . . . .
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> Many different kinds of things are said to be just and unjust . . . . Our topic, however, is that of social justice. For us the primary subject of justice is the basic structure of society, or more exactly, the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation. . . . The basic structure is the primary subject of justice because its effects are so profound and present from the start.[110]

Similarly, the subjects of structural mercy are the institutions and forms of consciousness of a society implicated in warring and punitive violence. Structural mercy's forward-looking role is to foster a culture of

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[107] On the topic of mercy, see generally LINDA ROSS MEYER, THE JUSTICE OF MERCY (2010); Claudia Card, *On Mercy*, 81 PHIL. REV. 182 (1972); Ross Harrison, *The Equality of Mercy*, *in* JURISPRUDENCE: CAMBRIDGE ESSAYS 107, 107–25 (Hyman Gross & Ross Harrison eds. 1992); Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFFAIRS 83 (1993); Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421 (2004); FORGIVENESS, MERCY, AND CLEMENCY (Austin Sarat & Nasser Hussain eds., 2007); AUSTIN SARAT, MERCY ON TRIAL: WHAT IT MEANS TO STOP AN EXECUTION (2005).

[108] It is of interest to see how mercy—at least that of the case-by-case type, such as that of the executive prerogative to pardon—is a multicultural value expressed as abandonment of the *lex talionis* model of retribution: "If any harm follows, then you shall give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe." *Exodus* 21:23–27. One is tempted to think here of the influence of the Christian dissidence from old Hebrew law: "You have heard that it was said, 'An eye for an eye and a tooth for a tooth.' But I say to you, Do not resist an evildoer. But if anyone strikes you on the right cheek, turn the other also." *Matthew* 5:38–39. Whereas in *Matthew*, Jesus preaches a universalizable principle of forgiveness, in the *Quran* we already detect the case-by-case approach that prevails in current executive mercy: "And we decreed for them in it that: the life for the life, the eye for the eye, the nose for the nose, the ear for the ear, the tooth for the tooth, and an equivalent injury for any injury. If one forfeits what is due to him as a charity, it will atone for his sins. Those who do not rule in accordance with GOD's revelations are the unjust." *Quran* 5:45.

[109] *See* RAWLS, *supra* note 19, at 3, 6–7.

[110] *Id.*

anti-violence and the cultivation of *the political* as a realm for binding deliberation among individuals who share society under conditions of plurality and proximity. In the context of transitional justice, it is especially important to start by punishing atrocities less violently than warranted.

On a more general point, if we look for the structure of values of advanced criminal justice systems, at least two layers emerge. In the first layer, the one closer to the ground, we see the constitutionalization of criminal law and procedure in the name of fairness, equal protection, and promotion of cognitively-reliable and epistemically-just evidentiary gathering. But historical and structural analyses reveal a second, more abstract layer of values that exerts a constant, if more subtle and largely unrecognized, shaping force over criminal justice systems. In this second layer, the rejection of cruelty and structural mercy occupy a prominent place. This ought to be the case for transitional justice as well.

IV. INTERNATIONAL CRIMINAL LAW IN TRANSITIONAL JUSTICE

Several transitional justice models incorporate some dimension of amnesty or pardon to perpetrators as part of punctual or general negotiations to end conflict. Since the end of World War II, international criminal law and claims of universal jurisdiction have increasingly narrowed the scope of amnesty negotiations.[111] In transitional justice debates, the clash between, on one side, national and international criminal justice and, on the other side, amnesty has been framed as a choice between justice or peace.[112] To frame the impact of criminal justice on negotiated transitions in terms of justice or peace, however, misses the larger point. Whether the matter is seen from a rational choice perspective, institutionally, symbolically, or normatively, the futures of transitional justice and international criminal law will be in better hands when the latter is constructively woven into the former. An attempt to construct criminal justice as an integral part of transitional justice has

[111] I focus on international criminal law. For a theoretically sophisticated, analytically helpful, and prescriptively attractive work on the international criminal law and universal jurisdiction, see Maximo Langer, *The Archipelago and the Wheel: Universal Jurisdiction and the International Criminal Court*, *in* THE FIRST GLOBAL PROSECUTOR: CONSTRAINTS AND PROMISE (Martha Minow et al. eds., forthcoming 2014).

[112] *See* Lisa J. Laplante, *Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes*, 49 VA. J. INT'L L. 915 (2009); Elizabeth B. Ludwin King, *Amnesties in a Time of Transition*, 41 GEO. WASH. INT'L L. REV. 577 (2010).

already been underway, at least since the Nuremberg Trials. We are now in a much improved cognitive and normative position to understand the required constructive process and to evaluate the stakes in it. The explanatory and constructive challenge of weaving international criminal law into transitional justice is best confronted from a constructivist approach to international criminal law, to which I now turn in two subparts.

A. Limitations of "Realist" Models of Legal and Political Thought

State-based models of jurisprudence are premised on an ontology that asserts that law (i) is the product of a centralized, (ii) sovereign power that (iii) has on its base a large enough cultural consensus or a functionally equivalent cultural hegemony expressed as a nation and (iv) that relies on sufficiently effective mechanisms—particularly material or physical means—of enforcement. Domestic and international *realpolitik* share this ontology. In this section, I argue that this ontological paradigm is seriously defective, especially in the context of transitional justice.

A place to see the ideas of centralization and sovereignty at work is in the Hobbesian-Austinian idea of law as a command emanating from a form of social power that has the attributes of centralization and sovereignty.[113] In the middle of the nineteenth century, Austin wrote that "[t]he matter of jurisprudence is positive law: law, simply and strictly so called: or law set by political superiors to political inferiors."[114] In this phrase, we see how an ontological premise became intertwined with an epistemological project in a way that continues to command influence today in all brands of "realism."

The ontological premise in question is characterized by the belief that, in society, power is predicated by scarcity. Scarcity then generates a competition that, in well-functioning domestic societies, is channeled to an impersonal institution—the modern state—which then becomes the crystallized locus of social power, thereby transmuted into political power. As a consequence, those competing for political power are in fact competing for positions in the top of the structure of the state. Once those positions are occupied, the exercise of political power by the state equals the decisions made by the winners in the competition for power.

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[113] *See* HOBBES, *supra* note 56.

[114] JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE 9 (Isaiah Berlin et al. eds., Noonday Press 1954) (1832).

At the end of this process is law, which is the form *par excellence* whereby modern states express their decisions. Epistemologically, a theory of law, so the paradigm claims, should be concerned with the identification of the locus of social power and with a conceptual systematization of its (legal) decisions.

The international counterpart of this state-based model of legal and political theory is found in the so-called realist international relations theory. According to international relations realism, once the process of power concentration and will formation in each state is sufficiently advanced, states enter the international stage as agents who maximize utility—in particular, power and survival, the intentions of which remain opaque to the other states. This state of affairs generates a Hobbesian scenario of security uncertainty, the response to which is an ever-expanding spiral of preventative security measures and counter-measures dressed up as raw power, soft rhetoric, instrumental bargaining, and legal and institutional compliance when strategically sound.[115]

The problems with the ontological premises and the epistemological corollary of state-based realism are well known, and I will not expand on them here other than to mention three of them briefly. First, power is both scarce and abundant. It is scarce when predicated on finite instrumentalities, special positions of authority, or delimited jurisdiction. But there are instantiations of power which are abundant, ubiquitous, and capillary in their reach, for good or ill.[116] Second, the phenomenon of political will-formation and decision-making in complex societies is such that one cannot say that the will and decisions of those officially in power are really what becomes ultimately posited as law or as international behavior. The dynamics of domestic and international contemporary societies are such that even the much more moderate claim that what the state posits is filtered by the will of those in power seems problematic. Third, domestic and international regulatory activity is all but centralized. It is decentralized in two distinct but complementary senses: the political institutions in charge of regulation are numerous, relatively independent of one another, and hardly

[115] *See* KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS (1979).

[116] *See, e.g.*, FOUCAULT, *supra* note 38 (critiquing the limitations of the classical (jurisdictional) conceptions of power and analyzing other forms and means of power); MICHEL FOUCAULT, THE HISTORY OF SEXUALITY, VOL. 1: AN INTRODUCTION (Vintage Books ed., 1990).

completely or at all domestic; and—again for good and ill—an increasing part of social regulation is carried out by private, semi-private, and transnational non-state actors.

The ontological commitments of state-based models of law and politics may also be challenged for their reliance on a locus of power that is sovereign, both internally and externally. Internally, the exercise of political power has been consistently pulverized from neighborhood commissions to the markets and non-governmental organizations. Externally, the combination of all the globalizing processes in course makes the Westphalian and Bodinian[117] conceptions of sovereignty irremediably inadequate. Indeed, any absolute claim to grab absolute sovereignty and insularity in the present international context is both prescriptively naïve and descriptively wrong.

The fate of the ontological premises of state-based models of law and politics does not look any more promising when the next two components of the ontology come into question. Neither a large enough cultural consensus (or a functionally equivalent cultural hegemony) nor the availability of sufficiently effective means of enforcement are straightforwardly available. In the most favorable circumstances, the thick cultural consensus has long been replaced by a combination of thin meta-consensus on procedures and procedural principles of how to regulate thick cultural differences, and punctuated consensus such as that currently existing against the atrocity of cruelty in large scale. This situation is only deeper in societies emerging from atrocities that impact social cohesion and social reproduction. In relation to centralized enforcement mechanisms, the assumption that they will obtain is mistaken even in normal circumstances, and much more so in the context of transitional justice.[118]

In normal circumstances, and to add just one element of complexity to the equation here, it is noteworthy that legal sociology has exhaustively shown, in many legal domains, that centralized coercion or the potential for such coercion actually has only a marginal impact on the effort to contain anomie. Overall, obedience to law comes not from

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[117] *See, e.g.*, JEAN BODIN, ON SOVEREIGNTY 3 (Julian H. Franklin ed. & trans., 1992).

[118] To offer just one counter-example to the international relations realist's explicit and implicit reliance on states' ability to enforce the sovereign will domestically, consider the free ride transnational corporations and powerful national corporations enjoy—in areas such as tax, environment, food and drug safety, etc.—in the face of states' enforcement mechanisms even when the social harms caused by those corporate entities are devastating to entire nations—even the most powerful ones—and the globe.

the threat of compulsory enforcement but rather from ideational factors that bear on the notion and practice of legal and political obligation. It is conditioning and social agents' understandings of their identities, of their overlapping roles in society, of their interests, and of society's identity and well-being in general that drive compliance.[119] The coercion obsession that characterizes much of state-based models of legal and political discourse can, in good part, be explained by positivistic sensibility which relentlessly searches—in law, politics, science, and philosophy—for an element able to draw a clear line of separation between is and ought: empirically testable facts and mentalist factors. There is no reason that such a clear border should be desired or thought possible.

In conclusion, any legal and political theory built on an ontology premised on centralization, sovereignty, overarching cultural consensus (or hegemony of a culturally cohesive elite), and on physical enforcement mechanisms is bound to fail, particularly so in transitional justice environments. The promise of a constructivist approach to the problems of international criminal law in transitional justice comes exactly from the fact that it dispenses with all four ontological commitments of the traditional state-based jurisprudence and politics. It is to constructivist insights on international criminal law and politics that I now turn.

B. International Criminal Law Constructivism

What does international criminal law and politics look like from a constructivist perspective? Is legal and political thought, when approaching phenomena from this perspective, better able to overcome the causal, ontological, epistemological, and moral limitations of state-based models of law and politics? Does it matter for transitional justice?

As a descriptive theory of reality, constructivism offers a sound starting point for a unified theory of international criminal law and politics. This section starts with the general postulates of constructivism in international relations theory and then moves on to a constructivist explanation of the place and role of international criminal law in transitions to *the political*.

International relations constructivism's most basic postulate, as

[119] I will return to causal force of ideational factors when discussing legal and political constructivism *infra*, pp. 701–04.

formulated by John Ruggie, is that "[s]ocial constructivism rests on an irreducibly intersubjective dimension of human action."[120] The background against which this postulate's significance is to be evaluated is that of modern social theories. These theories have, for the last three-hundred years, contested one another from two ends of the spectrum of social causation and ontology: structure over agency, and agency over structure.

One end asserts the causal and ontological preeminence of social structure over individual agency.[121] This view rests on two basic assumptions: first, that agency is ultimately constrained (and in some cases even determined) by its structural context; and second, that the structural context of action is the result of natural and/or historical evolutionary processes which largely fall beyond the reach of human action that aims at structural transformation. Social theories of this kind insist on a final and rigid ontological divide between agency and structure. Epistemologically, however, social causality in the micro-level of agency can be fully explained by an appeal to the structures that agents inhabit.

On the opposite end are social theories that assert the causal and ontological preeminence of individual agency over social structure.[122] The basic assumption here is also twofold: first, structural features of the social world are said to be no more than the aggregate, congealed outcome of self-motivated individual agency over time; and second (and relatedly), individual behavior can be explained by a combination of instrumental reasoning and preference hierarchies that are self-determined by each individual. Now it is individual agency that lies sufficiently beyond the causal reach of social structures, which is the densest point of a complex net of individual acts in conflict, competition, cooperation, or overlap with each other. As a result, structures are epistemologically explainable as the outcome of the encounter of a multitude of isolated individual acts.

What social theories have in common, at the two ends of the causal and ontological spectrum, is the centrality of the "subjective" in social explanation. Social action is the name of the game, and what people

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[120] John Gerard Ruggie, *What Makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge*, 52 INT'L ORG. 855, 856 (1998).

[121] *See, e.g.*, MARX, CAPITAL, *supra* note 68; WEBER, *supra* note 65; DURKHEIM, *supra* note 66; ALEXANDER WENDT, SOCIAL THEORY OF INTERNATIONAL POLITICS (Press Syndicate of the Univ. of Cambridge ed., 2003).

[122] *See, e.g.*, MILL, *supra* note 19.

think and do is either the result of a solipsist process or a consequence of structural contexts. Any intersubjective contact has to take one of two very limited forms: it is either mediated by structures which pre-establish the script of interaction, or it is merely the consideration by individuals in their instrumental reasoning of others' instrumental reasoning to the extent that the latter is relevant to the strategic aims of the former.

Social constructivism, in general,[123] and international relations theory, in particular, affirm the "intersubjective" nature of the social world. In so doing, constructivism ignores the causal and ontological divide and its epistemological consequences between structure and agency-oriented traditions of social theory. Constructivism advances the explanatory thesis that social structures and individual identities and preferences are a function of the interaction and construction of meaning between relevant social agents. In dialectical and irreducible ways, social structure, agency, and shared meaning are mutually causational. The social ontology and cognition that result from this reciprocal and irreducible system of causation is thus intersubjectively formed. One consequence of this turn to intersubjectivity comes in the form of an epistemological requirement that social theories must meet if they are to adequately discharge their explanatory tasks, namely that their explanatory endeavors must consider the intersubjectively constructed nature of social reality. International relations constructivism is an attempt to meet this epistemological requirement, and much can be gained from it to achieve a richer understanding of the place and role of international criminal law.

Many, including Ruggie, trace constructivism's basic postulate to Emile Durkheim's repudiation of metaphysics and agent-instrumentalism or utilitarianism in social sciences explanations, and to Max Weber's concern with the appropriate methodology to deal with the question of meaning.[124] Durkheim posits that morality, as a collective consciousness phenomenon, plays a central role in social causality; Weber utilizes a sophisticate interpretive methodology—*Verstehen*—for the study of intentionality and shared meaning in society.[125] In

[123] *See generally* EMILE DURKHEIM, THE ELEMENTARY FORMS OF RELIGIOUS LIFE (Karen E. Fields trans., 1995); PETER L. BERGER & THOMAS LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE (Anchor Books ed. 1967) (1966).

[124] *See* Ruggie, *supra* note 120, at 856.

[125] Utilitarianism is better understood as a moral outlook that assesses conduct and states

international politics, utilitarianism and a disinterest in the origins of shared meaning find their theoretical home in realist theory.

International relations realism explains international actors' behavior by reference to their instrumental judgment of how best to advance the actors' preferences in context. In addition, realism argues that international actors' preferences are said to be related to their identities. But identities and interests or preferences are considered exogenous to the system of international relations and therefore have no need to be accounted for in the theory. When international actors, such as nation-states, meet in the international arena, they come with firmly established identities and hierarchies of preferences. Realism contends that the international system does not have any important role in defining or transforming those identities and preferences.[126]

In reaction, constructivism claims that international actors' identities and preferences are formed or influenced in interactions between individuals, institutions, states, and cultures. In short, identities and preferences are constructed in the very process of international socialization. According to this view, explanations of the structural constraints and of actors' identities and preferences cannot be properly carried out *a priori* to the very social interaction thanks to which constraints, identities, and preferences become relevant and meaningful.

In order to explain constraints as well as identity and preference-formation processes, constructivism focuses on the idea of constitutive rules.[127] Constitutive rules are those rules that create the possibility of giving to certain deeds or situations a meaning they would otherwise lack.[128] Constitutive rules operate by establishing frameworks of meaning and by allocating roles in a script or structure. Once in place, these frameworks and roles enable us to see and describe forms of

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of affairs from their consequences. John Ruggie uses the term to refer to any theory that sees social agents as acting on the basis of a kind of rationality common to the process of accessing utility, that is, instrumental rationality. *See* Ruggie, *supra* note 120, at 857–61.

[126] *See* WALTZ, *supra* note 115.

[127] "Constitutive rules define the set of practices that make up a particular class of consciously organized social activity—that is to say, they specify *what counts as* that activity." Ruggie, *supra* note 120, at 871. Ronald Dworkin makes a similar point in relation to domestic legal systems in his *Law's Empire*. *See generally* RONALD DWORKIN, LAW'S EMPIRE (1986).

[128] With this definition, I avoid the flaw in John Searle's definition, which Ruggie appropriates. *See* JOHN SEARLE, THE CONSTRUCTION OF SOCIAL REALITY (1995). For a critique of Searle's conception of constitutive rules which can be applied to both Rawls's seminal idea and to Ruggie's use of Searle, see JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM 108–11 (1970).

interaction that would otherwise be invisible or unintelligible. Take, for example, the European Union: without the treaties that created the Union, all the interactions at the institutional, agency, and cultural levels currently taking place in Europe would be impossible, meaningless, or unintelligible under the view of Europe as a collection of sovereign states engaged in "realist" international relations.[129] As Joseph Raz wrote, "[n]ormative act descriptions are those of which a complete explanation must include reference to a rule."[130] There would be no complete description of the European Union as a reality with a strong, if contested, aspirational pull without reference to its constitutive norms and rules.

Thus, to the extent that international politics is irreducibly intersubjective, as posited by an international relations constructivist account of it, constitutive rules are essential to the social construction of global reality.[131] But from where do constitutive rules emerge? Remember here that the intersubjectivity that social constructivism sees in the world is that of human action. And human action is, by definition, ordinarily carried out as intentional action. Therefore, constitutive rules emerge from and are backed by collective intentionality. In this sense, constitutive rules have, in addition to their constitutive function, a

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[129] *See* MIREILLE DELMAS-MARTY, TOWARDS A TRULY COMMON LAW: EUROPE AS A LABORATORY FOR LEGAL PLURALISM 61 *(*Naomi Norberg trans., 2002) (discussing the constitutive idea of the European Union). Centrally important is that, without constitutive rules, no normative project of social and institutional change is intelligible. For a sophisticated version of a normative project of this kind that operates at the level of institutions in order to shape constitutive rules and practices themselves, see Vlad Perju, *Reason and Authority in the European Court of Justice*, 49 VA. J. INT'L L. 307 (2009).

[130] RAZ, *supra* note 61, at 110.

[131] Analyzing the progressive constitutionalization of international organizations, Philip Allott expressed a conception of constitutionalism that provides a good illustration of my point. He wrote:

> Constitutionalism is a *theory*; that is to say, a mental ordering of the reality within which a particular society constitutes itself. It is an explanatory and justificatory theory of a society's self-constituting. The defining characteristic of constitutionalism as a theory is that society makes an *idea* of its own self-constituting into an *ideal* of its self-constituting, and incorporates that *ideal* into the *theory* of its self-constituting. The idea is projected from the actual to form an ideal and, as an ideal, is reintroduced into the actual. For a society which adopts constitutionalism as its theory, constitutionalism enables and requires the society to organize and direct its own self-constituting in accordance with its transcendental idea of itself.

Philip Allott, *Intergovernmental Societies and the Idea of Constitutionalism*, *in* THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS 69, 70 (Jean-Marc Coicaud & Veijo Heiskanen eds., 2001) (footnote omitted).

deontic function, creating new rights and responsibilities[132] that reflect, in their turn, how international actors see themselves. That is precisely how ideational factors enter the system of social causation and influence not only what social reality is, but also how it is to be interpreted and understood by social agents. As a result, there is no higher or firmer reality, as natural lawyers and positivists long for, beyond that constructed by collective intentionality. The fluidity, so to speak, that social reality appears to have, according to the constructivist theory, is compensated by the liberating understanding that the world is ours to make and remake[133] with the powers and limits of our own instrumental and moral imaginations. According to this view, the relationship between agency and structure embodies both constraint and opportunity, which in turn reflects the constructivist bridging of the ontological divide between structure-oriented and agency-oriented social theories.[134]

But how does a collectively-constructed society express itself normatively? How is a shared, normative project on the global social reality launched, as a moral shell, into the global future? Two complementary forms of normative expression predominate: social norms and institutional law. Norms are standards of behavior collectively expected from a class of actors in a domain of circumstances.[135] As collective expectations, norms are best explained as shared beliefs about what would be appropriate for actors to do and to expect from other actors.[136] In constructivist terms, law's distinction from social norms is found in its institutionalization, a process at once of relative specification of content and of generalization of jurisdiction.[137]

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[132] *See* Ruggie, *supra* note 120, at 871.

[133] This is well captured by Anne-Marie Slaughter:

> Constructivists are so named, or rather so name themselves, because of their emphasis on the way interests and identities are construed, rather than fixed or given. Constructed identities and interests, in turn, are contingent—on ideas, culture, norms, law—a host of factors that humans, including scholars, activists, leaders, can influence.

ANNE-MARIE SLAUGHTER, INTERNATIONAL LAW AND INTERNATIONAL RELATIONS THEORY: MILLENNIAL LECTURES 23 (Academy of Int'l Law ed., 2000).

[134] *See* WENDT, *supra* note 121, at 184.

[135] "There is general agreement on the definition of a norm as a standard of appropriate behavior for actors with a given identity . . . ." Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change,* 52 INT'L ORG. 887, 891 (1998) (footnote omitted).

[136] *See* WENDT, *supra* note 121, at 185.

[137] *See generally* ROBERTO MANGABEIRA UNGER, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY (Free Press 1976) (discussing the nature and emergence of modern law).

Important to stress at this point is that the difference between social norms and institutional law is one of degree of precision, generality, and institutionalization, and not one of kind. Both emanate from the same source: the collective intentionality of a society that, over time, constructs itself and sets patterns and expectations of conduct for its members and for those who come in contact with it.

The constructivist explanation of law and norms makes them neither good nor immutable.[138] Constructivism accounts for the phenomena of international norms and laws as products of a collective intentionality that, through constitutive rules, created the institutional platform and the framework of meaning within which international actors relate to one another and cultures interface. Norms, laws, and shared values and meaning further provide the discursive stuff that the actors use in their intersubjective construction of international society.[139] Importantly, as they engage in international relations or in conduct that attract the international regard, individual and collective actors potentially open their identities to reform.

I started the previous section by pointing out fours aspects of the causality and ontology of state-based models of legal and political thought, namely that law (i) is the product of a centralized, (ii) sovereign power (iii) that relies on a large enough cultural consensus or a functionally equivalent cultural hegemony expressed as a nation (iv) that counts on sufficiently effective material means of enforcement. This ontology and its ancillary epistemology fail in the context of global and

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[138] Once again, Ruggie well articulates the constraints and possibilities represented by a normative system seen through the lenses of constructivism:

> "[M]aking history" in the new era is a matter not merely of defending the national interest but of defining it, nor merely enacting stable preferences but constructing them. These processes are constrained by forces in the object world, and instrumental rationality is ever present. But they also deeply implicate such ideational factors as identities and aspirations as well as leaders seeking to persuade their publics and one another through reasoned discourse while learning, or not, by trial and error. As a result, nothing makes it clearer than the question of agency at times such as ours why the constructivist approach needs to be part of the theoretical tools of the international relations field.

Ruggie, *supra* note 120, at 878.

[139] *See generally* Martti Koskenniemi, *General Principles: Reflections on Constructivist Thinking in International Law*, 18 OIKEUSTIEDE JURISPRUDENTIA 117–63 (1985); MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (Cambridge Univ. Press ed., 2005) (1989); DAVID KENNEDY, INTERNATIONAL LEGAL STRUCTURES (1987); PHILIP ALLOTT, EUNOMIA: NEW ORDER FOR A NEW WORLD (1990).

domestic societies. Their explanatory traction is even less in societies emerging from atrocities. To the extent that international criminal law is best comprehended as part of the constitutive rules of an emerging socially constructed global society, as a discursive practice with a current institutional focus in the International Criminal Court, international criminal law theory lets go of the above ontological commitments, especially those of sovereignty, consensus bound by borders, and material or physical enforcement mechanisms.

Of course, international law constructivism does not entail a disregard for the roles of material factors, instrumental rationality, power, and the like in global society. On the contrary, constructivist legal epistemology captures more and not less of reality. Constructivism is just a better theory of society to look at those factors: their origin, their reliance on some types of identity, their weight in the contextual judgment of actors, and so forth. Constructivism reveals that a great part of the social cohesion and cultural reproduction of the global (as well as of domestic) societies is the work of the use of utilitarian "regulative rules" that aim at specific goals.[140] It does a much better job of explaining goals and the corresponding strategies adopted to achieve them, being the product of a set of perceptions, identities, and preferences that are socially constructed and therefore transformable in principle. Well understanding the process of the making and unmaking of the social world allows us to start to do justice to the richer ontological and causal complexities of the world. It does justice also to our moral imagination, hinging as it does on the ultimate transformability of both agency and structures.

Rid of untenable ontological premises and their epistemological corollaries, analysis of international criminal justice reveals it as capable of being highly responsive to transitional justice situations. Rather than withdrawing points for bargain from the table of negotiations in a choice between peace or justice, international criminal law is part of an architecture of global constitutive rules designed to allow perpetrators, victims, and citizens in general to recast their own identities and preferences, and the nature of their societies as they move forward to found *the political*.

One important normative takeaway from an improved

[140] SLAUGHTER, *supra* note 133, at 26 ("There is nothing wrong with 'rules as tools'; instrumental rationality celebrates the human capacity to escape the constraints of structure and the weight of collective expectations.").

understanding on international criminal law and politics is that international criminal law ought to be woven into the very fabric of transitional justice as long as transitional justice aspires to be a transition into *the political*.[141] When societies succeed in transitioning into *the political*, those emerging from atrocity contribute back to the fabric of a plural global consensus that rejects cruelty and increasingly deposits trust in international criminal law as part of a constitutive normative framework that will assist individual and collective actors to reject atrocity as part of their identities and of the identities of the societies they create and inhabit.

V. TRANSITIONAL JUSTICE AS TRANSITION INTO THE POLITICAL

Individuals and societies are permanently stuck between past and future, fear and hope, remembrance and aspiration, history and utopia. While the backward orientation is central to a person's sense of self-identity over time, as well as to societies' cohesion and cultural reproduction, an orientation toward the future is ultimately the most important to both individuals and societies. A common experience for individuals and the societies they inhabit is one of increasing meaninglessness and decline once the pull of the future is overcome by the drag of the past. For good or ill, the dependence of meaning and vitality on the future is part of the human predicament. Indeed, individuals who are unable to weave imagination of their personal futures into their choices and actions in the present seem to be missing something essential about living well. Similarly, societies that fail to make room in their current culture and institutions for constructive visions of their future are flirting dangerously with violence and destruction. Societies who succeed in making their future central to their current culture and institutions in a way that is deliberative and equally open to all have created *the political*.

I have argued in this essay that the sociological work of *the political* is that of social cohesion and political self-preservation over time. Existentially and morally, for both the polity and each of its members, the work of *the political*, at least as long as we live in plurality

[141] Luban, *supra* note 39 (offering a wealth of insights into the connection between criminalization of atrocity and the protection of politics). *See also* Laplante, *supra* note 112 (presenting compelling argument about how to think well about amnesties, bringing human rights and international criminal law closer together).

and proximity, is that of self-government and hope. If transitional justice will really be a transition under justice into a lasting future of peace, (re)conciliation, and solidarity that rejects atrocity in the life of the polity, it ought to be a transition into *the political*.