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# Turning in the Widening Gyre: History, Corporate Accountability, and Transitional Justice in the Postcolony

Jeffrey Atteberry\*

## Abstract

*This Article argues that transitional justice, by increasing efforts to include corporate accountability within its various mechanisms, may confront the global structures of rule that systematically produce conditions of violence within formerly colonized nation-states. Building on work by Giorgio Agamben and Homi Bhabha, I demonstrate that the very notion of a “transition” around which transitional justice is articulated derives from a nineteenth-century understanding of history that reflects the ideology of development which supported the colonial system. Moments of violent historical discontinuity, legally conceptualized as “states of exception,” provide the paradigmatic bases for models of transitional justice. But, in the history of the postcolony, this state of exception functioned as the generalized rule for governance. Accordingly, following scholars Achille Mbembe, Laurel Fletcher, and Harvey M. Weinstein, transitional justice must adopt an ecological approach that embraces the lived historical experience of the postcolony, including its unique structures of governance. The history of Sierra Leone provides a case study of how the legacy of colonial governmentality persists in the present global order, creating the kinds of atrocities that transitional justice aims to remediate. Specifically, the colonial model of indirect rule has become reconfigured such that the postcolonial government secures legitimacy by mediating between local populations and non-state actors, including transnational corporations. To restructure these relationships effectively, transitional justice must, therefore, engage with the ongoing work toward corporate accountability. By advocating for legally binding mechanisms addressing corporate impunity and incorporating the U.N. Guiding Principles into the work of Truth and Reconciliation Commissions, transitional justice can further advance its core objectives and the movement toward corporate accountability more generally.*

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\* I would like to thank Jamie O’Connell and Alice M. Miller for their insightful instruction and support with the ideas and research behind this Article.

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## I. INTRODUCTION

The field of transitional justice finds itself at a historical crossroads. Not only has it acquired its own place within the interdisciplinary niches of the contemporary academy, but it has become an express component of official U.N. policy concerning “post-conflict societies.”<sup>1</sup> Insofar as the theory and practice of transitional justice are articulated from within the organizational structures of the international governance regime, the framework of transitional justice may become increasingly determined by the same historical and ideological forces that have shaped these institutions. To that extent, the work of transitional justice runs the risk of reproducing, rather than restructuring, the underlying dynamics and forces that have created the various social catastrophes that it would hope to remedy. If, therefore, transitional justice is to fulfill its aspirations of restorative justice and peaceful transition to governance regimes more solicitous of human rights, then both its theory and practice need to reach beyond the constraints imposed by these influences and find ways to engage them rather than be shaped by them.

This Article seeks to open a critical relation within transitional justice to two related conceptual constraints which the field has inherited from the hegemonic discourses on international law, politics, and history. First, and particularly with respect to the field’s engagement with the postcolonial states of sub-Saharan Africa, transitional justice needs to examine the underlying conception of history that shapes its theory and, as a result, its practice. The field of transitional justice remains, like the rest of international law and policy, beholden to what I will call a “historicist” understanding of history that is itself intimately related to the development of colonialist relations which have largely determined the histories of postcolonial Africa. Consequently, insofar as transitional justice is concerned with questions of historical transition, its own conception of history must be decolonized if it hopes to develop a historical understanding of the social processes at work within the postcolony and to develop policies and strategies for interrupting the future operation of those processes. Second, the field of transitional justice needs to maintain its critical distance from the concept of the “failed state,”<sup>2</sup> which is so frequently used to describe these “conflict and post-conflict societies,” especially within the Global South. The very notion of the “failed state” emerges, in fact, as a conceptual symptom of historicist thinking.

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<sup>1</sup> See U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, U.N. Doc. S/2004/616\* (Aug. 23, 2004).

<sup>2</sup> For a critical history of the term “failed state,” see Henry J. Richardson III, “Failed States,” *Self-Determination, and Preventative Diplomacy: Colonialist Nostalgia and Democratic Expectations*, 10 TEMP. INT’L & COMP. L.J. 1 (1996). See also David Caron, *If Afghanistan Has Failed, Then Afghanistan Is Dead: “Failed States” and the Inappropriate Substitution of Legal Conclusion for Political Description*, in THE TORTURE DEBATE IN AMERICA 214 (Karen J. Greenberg ed., 2005).

Whatever limited analytic value the term may have from a sociological perspective, the concept of the “failed state” would pose immense problems were it adopted as legal doctrine, and the limitations it imposes upon critical thinking about the forces behind the contemporary crises in the postcolonial state are no less significant.

While the work of transitional justice stands in need of a critical engagement with the colonialist legacies of the discourses and institutions with which it is necessarily engaged, it must be stressed that this call to decolonize the imagination of transitional justice does not reflect a normative judgment reserved for it alone. As a descriptive matter, the need for decolonizing the world of international legal discourse and practice extends across the board. Rather, directing this decolonizing imperative specifically at transitional justice reflects a recognition and a hope that transitional justice, insofar as its practice is increasingly situated on the ground in the heart of the postcolony, offers a singular point of intervention in the processes that are structuring contemporary global relations. The work of transitional justice in sub-Saharan Africa may be imagined as having a role to play in the ongoing decolonization that, in strict adherence to the historicism that has directed its processes, arguably remains tragically incomplete. In order to assume such a role, however, transitional justice needs to decolonize its own historical imagination<sup>3</sup> insofar as it remains structured by historicism.

Transitional justice can advance its own development in this respect by engaging concretely with the ongoing international movement for the development of legal mechanisms that would hold corporations accountable for human rights violations. From the very beginning, corporations have played a critical role in the exceptional governance regimes that characterize the colonial experience. Following decolonization, however, as the former colonizing nation-states have formally withdrawn from rule, corporate actors have rushed in to fill the void and only assumed more importance in the governance of the postcolony. Accordingly, the Global South has long been engaged in an effort to hold transnational corporations responsible for human rights violations resulting from their activities. Today, these efforts have manifested themselves in efforts to develop a binding international legal instrument for corporate accountability.<sup>4</sup> Transitional justice should actively engage with these ongoing efforts and seek ways to address corporate liability for ongoing human rights violations.

This Article proceeds in six Parts. Part II examines the “historicist” conception of history that has structured the theory and practice of transitional justice as a field. In particular, as the very word “transitional” implies, the field of transitional justice is conceptually predicated upon an understanding of history in

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<sup>3</sup> See NGŪGĪ WA THIONG’O, *DECOLONISING THE MIND* (1986).

<sup>4</sup> See Human Rights Council Res. 26/..., U.N. Doc. A/HRC/26/L.22/Rev.1 (June 25, 2014); Human Rights Council Res. 26/9, U.N. Doc. A/HRC/26/Res/26/9 (June 26, 2014).

which certain periods of instability or chaos are posited as a moment of discontinuity from the normative development of a nation-state. However, this understanding of history does not adequately describe the lived historical experience of postcolonial nations where much of the transitional justice work takes place, because the colonial experience was structured as a permanent state of exception. Building on this recognition, Part III articulates an expanded ecological vision of transitional justice work. Such a vision would reach the various non-state actors that have assumed important governance roles in the postcolonial nation-state, including transnational corporations. Part IV turns to the history of Sierra Leone as a case study in how the themes of Parts II and III have materially manifested themselves in the colonial history of that country, its civil war, and the transitional justice efforts that followed. Finally, Part V outlines the history of the ongoing effort in the international human rights community to develop a legal regime of corporate accountability. The successful articulation of transitional justice work with the corporate accountability movement would further advance the objectives of transitional justice and be an important development in the decolonization of the international human rights regime.

## II. THE EXCEPTIONAL HISTORICISM OF POSTCOLONIAL TRANSITIONS

The field of transitional justice, by virtue of the fact that its practice is situated between temporally distinct political regimes, deeply engages questions of history. The historical dimension of transitional justice finds its strongest institutional expression perhaps in the work of truth commissions, typically charged with the task of archiving and chronicling the events surrounding the transition. For example, the Argentinian National Commission on the Disappearance of Persons (CONADEP) produced *Nunca Más*, which has become the definitive history of the disappearances that occurred during the Dirty War.<sup>5</sup> The South African Truth and Reconciliation Commission was officially charged with a mandate to establish “as complete a picture as possible of the causes, nature and extent of the gross violations of human rights which were committed . . . including the antecedents, circumstances, factors and context of such violations.”<sup>6</sup> Similarly, the Truth and Reconciliation Commission for Sierra Leone (TRCSL) took an especially broad view of its mandate “to investigate and report on the causes, nature and extent of the violations and abuses [related to the 1991 conflict],

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<sup>5</sup> See *NUNCA MAS: THE REPORT OF THE ARGENTINE NATIONAL COMMISSION ON THE DISAPPEARED* (Ernesto Sabato ed., Farrar Strauss & Giroux 1986) (1984). See also LUIS RONIGER & MARIO SZNAJDER, *THE LEGACY OF HUMAN-RIGHTS VIOLATIONS IN THE SOUTHERN CONE: ARGENTINA, CHILE, AND URUGUAY* 62–63 (1999).

<sup>6</sup> Promotion of National Unity and Reconciliation Act 34 of 1995 § 3(1)(a) (S. Afr.).

including their antecedents.”<sup>7</sup> In so doing, the TRCSL’s final report included an account of Sierra Leone’s colonial history that reached back to its founding as the Crown Colony State in 1808.<sup>8</sup> However, the work of memory and history-telling is not limited to truth commissions; criminal tribunals in times of transition also play a part in the process of putting discrete events into a coherent historical narrative. For example, the prosecution of the leaders of Argentina’s military junta became a national spectacle in which the abuses of the prior regime were revealed through testimony from various quarters, including former members of the military.<sup>9</sup> Similarly, the trials in the International Court for the Former Yugoslavia have established a set of historical facts that have effectively narrowed the historical narratives that can plausibly be told about the region and the conflict.<sup>10</sup>

While the production of histories is an integral part of transitional justice, both the theoretical discourse and legal practice of transitional justice take shape against the horizon of a conception of history that the field rarely examines. Vibrant debates about the social effectiveness of history as truth-telling animate the field,<sup>11</sup> but these arguments remain relatively localized inquiries that do not examine the underlying philosophy of history. The immanent but unexamined philosophy of history animating transitional justice not only frames these discrete and localized analyses, but structures the discourse of transitional justice in general. To the extent that any concept of history necessarily imposes constraints on both how the relationship between events are constructed and what constitutes an event in the first place, the discourse and practice of transitional justice remains cabined within the confines of its tacit historicism. While such limitations are unavoidable as an epistemological matter, they become ideological obstacles to a discourse at the point that they impose conceptual restraints which systematically produce misapprehensions in the discourse’s relationship to its object of representation. In the case of transitional justice, this potential problem becomes most acute when transitional justice, which has become increasingly generalized as it has embraced more historically and politically diverse situations, is programmatically applied to the postcolonial context of sub-Saharan Africa.

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<sup>7</sup> The Truth and Reconciliation Commission Act of 2000 § 6(2)(a) (Sierra Leone).

<sup>8</sup> SIERRA LEONE TRUTH AND RECONCILIATION COMMISSION, WITNESS TO TRUTH, vol. 3A, ¶¶ 9–50 (2004).

<sup>9</sup> See RONIGER & SZNAJDER, *supra* note 5, at 66–67.

<sup>10</sup> See DIANE F. ORENTLICHER, SHRINKING THE SPACE FOR DENIAL: THE IMPACT OF ICTY IN SERBIA (2008).

<sup>11</sup> See, for example, THE POLITICS OF MEMORY: TRANSITIONAL JUSTICE IN DEMOCRATIZING SOCIETIES (Alexandra Barahona De Brito et al. eds., 2001); Rosalind Shaw, *Memory Frictions: Localizing the Truth and Reconciliation Commission in Sierra Leone*, 1 INT’L J. TRANSITIONAL JUST. 183–207 (2007). See also David Mendeloff, *Truth-Seeking, Truth-Telling and Postconflict Peacebuilding: Curb the Enthusiasm?*, 6 INT’L STUD. REV. 355–80 (2004).

Confronting the limits of transitional justice's historical imagination requires first teasing out its implicit conception of history. Ruti Teitel's work, insofar as it offers a sustained meditation upon the kinds of historical work that transitional justice performs, offers a useful point of entry.<sup>12</sup> In *Transitional Justice*, Teitel introduces her chapter on "Historical Justice" by writing:

Transitions appear—almost by definition—to imply periods of historical discontinuity. Wars, revolutions, and repressive rule represent gaps in the life of the state that threaten its historical continuity. The questions that arise are: as a descriptive matter, how do societies treat these periods of apparent historical glitch? To what extent is the response to past evil rule historical? And, normatively, in what sense is historical accountability a corrective, ushering in liberalization?<sup>13</sup>

In offering a historical description of transitional periods, Teitel's introduction clearly describes the background history against which such periods are understood. The rhetorical choices of this passage reveal an historicist understanding of history that remains unexamined by Teitel and the field of transitional justice more generally. First, history is understood in terms of the "life of the state."<sup>14</sup> The state is the privileged actor of this history; the historical subject is the nation-state. Furthermore, the life of the state is normatively characterized by "its historical continuity."<sup>15</sup> Aside from the "historical glitches" presented by moments of "[w]ar[], revolutions and repressive rule," the state persists in a historical temporality that is empty and homogenous in the sense that history is understood as a continuum along which individual states appear.<sup>16</sup> Finally, this continuum is one that is structured along an axis of "liberalization"<sup>17</sup> that supports a universalized narrative of progress which the moment of transition paradoxically interrupts and advances.

As represented in this passage, the implicit theory of history that shapes the field of transitional justice has its own determinate history. Indeed, this particular conception of history has its own historical origins in the emergence of the modern European nation-state from the late eighteenth century to the early nineteenth century.<sup>18</sup> It is an Enlightenment historicism that found its archetypical

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<sup>12</sup> RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 69 (2000).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> See, for example, ROBERT YOUNG, *WHITE MYTHOLOGIES* (2d ed. 2004); see also PRASENJIT DUARA, *RESCUING HISTORY FROM THE NATION-STATE* (1995).



expression in G.W.F. Hegel's *Philosophy of World History*.<sup>19</sup> This historicist narrative provided the newly emergent liberal nation-states in Europe with the ideological appearance of a secure place in the structure of history as the necessary fulfillment of reason.<sup>20</sup> In doing so, historicism imposed an ideological order on the history of the modern nation-state that was, in fact, produced by a series of bourgeois revolutions which were highly contested and uncertain. The ideological work of historicism within Western Europe not only secured the future of the nation-state, but also offered a justification for colonial rule when these nation-states projected their power beyond the confines of Europe.<sup>21</sup> The historicist discourse inscribed the colonial state within its ambit, but it did so through the filter of what Homi Bhabha calls "mimicry . . . one of the most elusive and effective strategies of colonial power and knowledge."<sup>22</sup> The discourse of colonial mimicry represents the colonized subject as "almost the same, but not quite."<sup>23</sup> Consequently, the colonial state was conceived as similar enough to the nation-state to be included within the narrative arc of history, but not sufficiently like the European nation-state to be the subject of history.

The mimetic logic at work in historicism gave rise to the all-too-familiar civilizing mission of the white man's burden.<sup>24</sup> In this regard, international law worked closely with historicism. The operations of colonial mimicry are reflected in the legal status of the colonies in the major international legal instruments of the colonial period.<sup>25</sup> The colonial signatories to the General Act of the Conference at Berlin of 1885, which set the legal groundwork for the scramble for Africa, pledged themselves "to watch over the preservation of the native tribes, and to care for the improvement of the conditions of their moral and material

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<sup>19</sup> See G.W.F. HEGEL, LECTURES ON THE PHILOSOPHY OF WORLD HISTORY (Cambridge Univ. Press, 1975) (1830); see also LOUIS ALTHUSSER & ETIENNE BALIBAR, READING CAPITAL 93–96 (1997) (explaining how the Hegelian conception of historical time functions ideologically).

<sup>20</sup> The persistent ideological force of this narrative found vibrant expression at the end of the Cold War. See FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN 55–70 (1992).

<sup>21</sup> See YOUNG, *supra* note 18, at 41–42. See also Edward Said, *Orientalism Reconsidered*, in ORIENTALISM: A READER 345, 355–56 (A.L. Macfie ed., 2000).

<sup>22</sup> HOMI BHABHA, THE LOCATION OF CULTURE 85 (1994).

<sup>23</sup> *Id.* at 86 (emphasis omitted).

<sup>24</sup> This phrase comes directly from the title of Rudyard Kipling's poem "The White Man's Burden: The United States and the Phillipine Islands," which was written in 1899 to encourage the United States to join Britain and the rest of Europe in the project of empire. See RUDYARD KIPLING, KIPLING: POEMS 96 (Peter Washington ed., 2007).

<sup>25</sup> See generally ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW (2005). For an overview of this international legal history as it touches Africa in particular, see SIBA N'ZATTOULA GROVOGUL, SOVEREIGNS, QUASI SOVEREIGNS, AND AFRICANS: RACE AND SELF-DETERMINATION IN INTERNATIONAL LAW (1996).

well-being.”<sup>26</sup> By suggesting a universal developmental path upon which the colonized peoples had only recently embarked, the use of the word “improvement” here already suggests the way in which the historicist vision of history had begun to structure the colonial imagination. The expressions of humanitarianism remained, however, little more than aspirational. With the end of the First World War, the international legal regime took a more systematic approach to the global colonial order. The underlying concern was to purge the colonial state of its monopolistic tendencies and to integrate a more economically liberalized set of relations.<sup>27</sup> The result was Article XXII of the Covenant of the League of Nations, which constructed a mandate system that seamlessly integrated the historicist narrative into its legal structures.<sup>28</sup> Starting with the proposition that the colonies are “inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world,” the colonial powers committed themselves to “the principle that the well-being and development of such peoples form a sacred trust of civilisation.”<sup>29</sup> In order to best effectuate this principle, the Covenant specified that “the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or geographical position can best undertake this responsibility” and that the “character of the mandate must differ according to the stage of development of the people, the geographical situation of the territory, its economic conditions, and other similar circumstances.”<sup>30</sup> The legal justification for and the basic structures of colonialism clearly rest upon a historicist imagination that could not be more manifest. While the League of Nations was relatively short-lived, the historicist inclination of its colonial policy would live on in Article 73 of the United Nations Charter in which the colonial powers reiterated their self-appointed “sacred trust,” which included the obligation “to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement.”<sup>31</sup>

As a result of this juridical historicism, the law inscribed the colonial state within the international legal and political order, but only as a “partial subject” of

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<sup>26</sup> General Act of the Conference at Berlin art. 6, Feb. 26, 1885. For the history of the scramble for Africa, see GENERAL HISTORY OF AFRICA – VOLUME VII – AFRICA UNDER COLONIAL DOMINATION, 1880–1935 (A. Adu. Boahen ed., 1985).

<sup>27</sup> See, for example, GROVOGUI, *supra* note 25, at 126–30.

<sup>28</sup> League of Nations Covenant art. 22.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> U.N. Charter art. 73.

that order.<sup>32</sup> The international legal order paradoxically asserted the need to deny colonial peoples the sovereign right of self-determination, the foundational principle of the international legal order, in order to advance the progressive legal development of an international regime that would be founded on precisely such a principle. In short, under the protocols of historicism, the rule of law suspended itself with respect to the colonies in the name of ensuring the possibility of the rule of law.

This juridical structure of the law that authorizes its own suspension to preserve the law has been extensively theorized by Carl Schmitt and others as a “state of exception.”<sup>33</sup> As succinctly put by Giorgio Agamben, in the state of exception, “the rule applies to the exception in no longer applying.”<sup>34</sup> The historical basis for Schmitt and Agamben’s analyses, however, remains rooted in Article 48 of the Weimar Constitution in inter-war Germany and Europe’s experience with National Socialism, rather than the colonial mandate system. Under Article 48, the executive power could declare a state of “emergency” or “exception,” which legally permitted the temporary suspension of specifically enumerated constitutional protections. When understood against the horizon of Germany’s particular constitutional framework and national history, the self-suspension of the law where the law remains “in force but without significance” is necessarily understood precisely as an “exception,” for it is a horizon determined by historicism in every possible way.<sup>35</sup> Agamben’s juridical reading of Nazism resonates with Teitel’s description of transitional justice, which has its historical and theoretical origins in the experience of and response to Nazism. Given these origins, theorists like Teitel have routinely conceptualized the “transition” of transitional justice as a “historical discontinuity,” a “gap,” and a “historical glitch.”<sup>36</sup> Transitional justice is the other side of the state of exception.

A difficulty, which is material as well as conceptual, arises when this state of exception, this process of legalized lawless transition, becomes the norm, as it was and continues to be in the colonial and postcolonial state. Unlike Nazi Germany, for example, where the experience of transition marks a violent interruption in the history of the modern democratic state, the colonial and postcolonial state has always been inscribed within a “transitional narrative” that characterized the

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<sup>32</sup> For a discussion of this “partial subject,” see BHABHA, *supra* note 22, at 86–87.

<sup>33</sup> See, for example, CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (2005); GIORGIO AGAMBEN, *STATE OF EXCEPTION* (2005).

<sup>34</sup> GIORGIO AGAMBEN, *POTENTIALITIES* 162 (1999).

<sup>35</sup> *Id.* at 169–71; see also GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* 51–54 (1998).

<sup>36</sup> See TEITEL, *supra* note 12.

colonial state according to its perceived failures and alleged incompleteness.<sup>37</sup> The resulting juridical status of the colonial state has led many scholars to recognize the colonial and postcolonial condition as being one that is formed under the state of exception. Achille Mbembe, for example, writes that “the colonies are the location par excellence where the controls and guarantees of the juridical order can be suspended—the zone where the violence of the state of exception is deemed to operate in the service of ‘civilization.’”<sup>38</sup> The state of exception in the colony, however, was not a temporary interruption as it was in Germany or Argentina; rather, for the colonial state, the state of exception was the juridical norm. The colonial state always emerged in the international legal order as transitional. While ideologically conceived as transitional, the colonial state did not materially appear as only a temporary interruption in the historicist narrative because its arrival as a fully constituted, self-determining subject in the international legal order remained forever deferred. Thus, as transitional justice becomes increasingly engaged with the legal and political difficulties of post-conflict societies in a postcolonial context, it becomes imperative to think the present transitions of so-called “failed states” or “post-conflict societies” as being embedded within the larger arc of this permanently suspended “transition” which has always characterized the colonial state.

Overcoming the ideological narratives concerning decolonization remains a significant obstacle in responding to this task, since the story of decolonization is presented as the fulfillment of this transition toward a global and universal community of sovereign equals.<sup>39</sup> As with all ideologies, this narrative captures a limited truth at the price of obscuring others. While decolonization did lead to a universal juridical equality of self-determining nation-states, the formalism of this equality did not address the substantive inequalities that persisted and which were analyzed according to a developmentalist framework that was little more than a reiteration of the transitional logic of historicism.<sup>40</sup> From this perspective, the transitional state of exception remains as persistent as ever. Such a situation necessarily confronts the limitations of transitional justice’s tendency toward a historicism that inevitably conceives the self-disavowal of the law in terms of an

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<sup>37</sup> See DIPESH CHAKRABARTY, *PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL DIFFERENCE* 30–34 (2000).

<sup>38</sup> Achille Mbembe, *Necropolitics*, 15 *PUBLIC CULTURE* 11 (2003). A diverse range of scholars have also begun to use “the state of exception” as a theoretical basis of examining the war on terror and what some perceive to be its neo-imperial character. See, for example, Christopher L. Kutz, *Torture, Necessity and Existential Politics*, 95 *CAL. L. REV.* 235 (2007); MICHAEL HARDT & ANTONIO NEGRI, *MULTITUDE: WAR AND DEMOCRACY IN THE AGE OF EMPIRE* (2004).

<sup>39</sup> See ANGHIE, *supra* note 25, at 197.

<sup>40</sup> See Sundhya Pahuja, *The Postcoloniality of International Law*, 46 *HARV. INT’L L.J.* 459, 464–65 (2005). See also BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THE THIRD WORLD* (2003).

exception and as a temporary interruption in the historical march of liberalization. As we have seen, this notion of a historical discontinuity in the colonized nation has its own determinate history rooted in the ideology of imperialism. The difficulty, therefore, becomes one of understanding how the historicity of this continual historical discontinuity characteristic of (post)coloniality is experienced by the subjects who live it and what conception of history can take account of this experience. These are serious and fundamental historical questions with which transitional justice must come to terms if it is to do justice to the realities of the historical experience currently being lived in so many different ways across sub-Saharan Africa and elsewhere in the Global South.

### III. EXPANDING THE ECOLOGICAL SCOPE OF TRANSITIONAL JUSTICE

In place of classic historicism then, transitional justice must develop a historical imagination which comprehends, in the words of Achille Mbembe, “the peculiar ‘historicity’ of African societies, their own *raison d’être* and their relation to solely themselves, are rooted in a multiplicity of times, trajectories, and rationalities that, although particular and sometimes local, cannot be conceptualized outside a world that is, so to speak, globalized.”<sup>41</sup> Mbembe’s articulation of a new conception of African historicity resonates with Walter Benjamin’s own project of historical materialism, which recognized that “the ‘state of emergency’ in which we live is not the exception but the rule” and which acknowledged the need to arrive at a concept of history that corresponds to this fact.<sup>42</sup> For Benjamin, the historical object that constitutes the kernel of historical materialism is the “dialectical image”<sup>43</sup> that explodes “the continuum of historical succession.”<sup>44</sup> The dialectical image emerges as the object of historical materialism from the confrontation of the present moment with one from the past.<sup>45</sup> This juxtaposition of moments produces an object of historical inquiry that disrupts, arrests, and stalls the smooth operation of the historicist narrative. The

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<sup>41</sup> ACHILLE MBEMBE, ON THE POSTCOLONY 9 (2001).

<sup>42</sup> WALTER BENJAMIN, ILLUMINATIONS 257 (Hannah Arendt ed., Harry Zohn trans., 1969).

<sup>43</sup> *Id.* at 257.

<sup>44</sup> WALTER BENJAMIN, THE ARCADES PROJECT 475 (Howard Eiland & Kevin McLaughlin trans., 1999). *See also* Walter Benjamin, *Eduard Fuchs: Collector and Historian*, in THE ESSENTIAL FRANKFURT SCHOOL READER 225, 226–27 (Andrew Arato & Eike Gebhardt eds., Continuum Publ’g. Co. 1982) (1937). The concept of the “dialectical image” has received extensive study in the fields of literary and cultural studies. *See, for example*, SUSAN BUCK-MORSS, THE DIALECTICS OF SEEING: WALTER BENJAMIN AND THE ARCADES PROJECT (1989); MICHAEL W. JENNINGS, DIALECTICAL IMAGES: WALTER BENJAMIN’S THEORY OF LITERARY CRITICISM (1987).

<sup>45</sup> BENJAMIN, THE ARCADES PROJECT, *supra* note 44, at 944–45. *See also* BENJAMIN, ILLUMINATIONS, *supra* note 42, at 256–57.

relationship between the moments is not temporal, but, to use Benjamin's term, *bildlich*, which is to say "figural" in a structural sense.<sup>46</sup> The African "failed state" finds its dialectical image in the colonial state. The material historical connection between the colonial and postcolonial moment is not reducible to the temporal continuum of historicist progress toward democratic self-determination; rather, it is a structural continuity that rests upon a certain (post)colonial configuration of power.

As the case study on Sierra Leone in Part IV will show, the current social conditions in postcolonial Africa are the result of a historical conjuncture of the international political economy, shaped by an uneven distribution of power, the doctrinal strictures of the current international legal regime, and the unregulated character of transnational commerce. Insofar as transitional justice aims to address the underlying social conditions that have led a given country to its current "transitional" moment, the field needs to develop theoretical and practical means of addressing the various forces and actors that lie beyond and beneath the nation-state. However, the current state of international legal doctrine places many such actors beyond the reach of any legal institution. Transitional justice needs to conceive of its project beyond the present doctrinal limitations of law within which it must necessarily operate.

Thinking outside the parameters of historicism is central to this task, as even the most cursory survey of the colonial relation in international law shows that the ideological limits of legal doctrine and historicist thought are mutually constitutive. In the field of law, the historicist limitations of the political unconscious<sup>47</sup> have their material expression in the form of legal doctrines that constrain the legal imagination by focusing attention on the state and local actors and away from various international organizations and other transnational actors. Truth commissions play an important role here, and the Truth and Reconciliation Commission for Sierra Leone (TRCSL) has produced a report that is exemplary in at least two ways. First, as already mentioned, the TRCSL Report included a discussion of the country's colonial history with a view towards marking its continuing legacy in Sierra Leonean society.<sup>48</sup> Second, the TRCSL Report took a broad view of its mandate to investigate "human rights violations and abuses" by considering the possibility that transnational corporations and private security organizations could contravene human rights norms just as well as state actors.<sup>49</sup>

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<sup>46</sup> BENJAMIN, THE ARCADES PROJECT, *supra* note 44, at 463.

<sup>47</sup> *See generally* FREDERIC JAMESON, THE POLITICAL UNCONSCIOUS (1982).

<sup>48</sup> *See* Sierra Leone Truth and Reconciliation Commission, *supra* note 8.

<sup>49</sup> *See* William A. Schabas, *The Sierra Leone Truth and Reconciliation Commission*, in TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE 21, 24 (Naomi Roht-Arriaza & Javier Mariezcurrena eds., 2006).

By drawing attention to various “international” actors in these transitional situations, the intention is not to diminish the responsibility and agency of the more “local” actors involved in the events which have precipitated the transition. First, the dichotomy between “local” and “international,” which tends to shape the analytical imagination, especially as it relates to Africa, in such a way that the African actors are identified with the “local” and the Western actors with the “international,” is itself one of the imaginative effects of historicism that needs to be overcome. Of course, on a certain level, the African parties are deemed “local” simply because they are socially situated on the ground of the relevant events. Nevertheless, this dichotomous view can easily lead to more structural misperceptions of the complexity of the situation. Given the configuration of power in postcolonial Africa, the “local” actors in Africa are still significant players in the various international networks that are informing the region. As Mbembe emphasizes, the local in Africa can no longer be conceptualized in isolation from the international networks within which it has been historically intertwined.<sup>50</sup> While the analytical mapping of the local and the international undoubtedly corresponds to the state of dependency that characterizes postcolonial Africa, there can be no doubt that “Africa may have played an active role throughout this long process of reduction to a state of dependency.”<sup>51</sup>

Recognizing that Africans have been responsible actors in these processes does not broach, however, the profoundly difficult problem of how that agency is to be understood when the larger society operates in a state of domination.<sup>52</sup> The problem becomes even more acute when it arises against the backdrop of questions of criminal justice. Indeed, as Antony Anghie and B.S. Chimni argue, international criminal law individualizes and localizes criminal responsibility in a manner that systematically obscures the global social and economic forces that structure and generate violent conflicts across the Global South.<sup>53</sup> Insofar as this problem has already been resolved by the academic literature and the criminal tribunals against the “local” figures, the present objective is to find ways in which the responsibility of the “international” actors may be conceptualized, as both a historical and a legal matter. Even the most historically informed investigations into the recent civil war in Sierra Leone tend to present an account that merely gestures towards the colonial period and begins in earnest with the various frailties

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<sup>50</sup> See generally MBEMBE, *supra* note 41, 66–101.

<sup>51</sup> Jean-François Bayart, *Africa in the World: A History of Extraversion*, 99 AFR. AFF. 217, 218 (Stephen Ellis trans., 2000).

<sup>52</sup> See MICHEL FOUCAULT, *ETHICS: SUBJECTIVITY & TRUTH* 283 (Paul Rabinow ed., Robert Hurley trans., 1997).

<sup>53</sup> See Antony Anghie & B.S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 CHINESE J. INT'L L. 77 (2003).

of the newly independent state.<sup>54</sup> Such a truncated approach to history, however, inevitably results in a focus on the local actors.<sup>55</sup> In short, the emphasis is on the African actors as the cause of their own problems. Of course, a rigorous examination of more temporally recent causes is needed, and may even be necessary, before the colonial legacy can be addressed. At the same time, however, historicist logic ironically encourages this ahistorical and unifocal concern with the postcolonial state in isolation from the historical international networks of power within which it operates. These international networks would be harder to ignore if the colonial legacy were a more significant feature of these analyses.

The hegemonic discourse of both law and history, therefore, concentrate responsibility upon actors who have been historically sentenced to a situation that is largely not of their own making. Moreover, such narratives downplay the extent to which various Western and non-governmental actors continue to exert a tremendous amount of influence in the region.<sup>56</sup> Similarly, criminal tribunals such as the Special Court for Sierra Leone have managed to exercise jurisdiction over local actors including Charles Taylor, the rebel leaders of the Revolutionary United Front (RUF), as well as leaders of both the Armed Forced Revolutionary Council (AFRC) and the pro-government Civil Defense Force (CDF). On the other hand, largely due to the doctrinal limitations of international law, as well as the realities of international politics, the various international actors which arguably bear some responsibility remain beyond the reach of such tribunals. In the case of Sierra Leone, the point of course is not that Charles Taylor or the RUF should not be tried, but that transitional justice should also begin imagining ways that “international” actors can be held accountable.

This vision of a transitional justice that encompasses actors on all levels extends the movement toward an “ecological model” of transitional justice.<sup>57</sup> The development of an ecological approach to transitional justice articulates a systematic attempt to move beyond the tendency to view criminal tribunals and truth commissions as diametrically opposed mechanisms for overcoming past atrocities and effecting the necessary social repair.<sup>58</sup> At its root, the ecological model stems from the fundamental recognition that societies are complex systems

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<sup>54</sup> See, for example, LANSANA GBERIE, *A DIRTY WAR IN WEST AFRICA: THE RUF AND THE DESTRUCTION OF SIERRA LEONE* (2005).

<sup>55</sup> See, for example, PAUL RICHARDS, *FIGHTING FOR THE RAIN FOREST: WAR, YOUTH & RESOURCES IN SIERRA LEONE* (1998); DAVID KEEN, *CONFLICT & COLLUSION IN SIERRA LEONE* (2005); GBERIE, *supra* note 54 (2004).

<sup>56</sup> See Anghie & Chimni, *supra* note 53.

<sup>57</sup> See Laurel E. Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 *HUM. RTS. Q.* 573, 621–35 (2002).

<sup>58</sup> See Naomi Roht-Arriaza, *The New Landscape of Transitional Justice*, in *TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY*, *supra* note 49, at 1–14.



and that “change in one part of the system causes reaction throughout.”<sup>59</sup> An ecological model of transitional justice, therefore, “considers all the players and social institutions.”<sup>60</sup> When situated within the tribunal versus truth commission debate, for example, an ecological model of social repair demands that organized efforts at transitional justice contend with complex social systems wherein “[p]rosecutions without a forum where a larger narrative could emerge create[] a partial, fortuitous view of history (dependent on evidence and the ability to apprehend defendants) while a truth commission without a tie to judicial actions against perpetrators begs the question of what the consequence of truth should be.”<sup>61</sup> Moreover, this multiplicity of interactions between numerous players extends across the entire process of social breakdown and repair within which transitional justice takes place. In Fletcher and Weinstein’s model, transitional justice work begins at the third stage of a process of social breakdown—the stage of peaceful cessation of violence, which frequently is “when the international community becomes engaged actively.”<sup>62</sup> While it is true that the sector of the international community of which transitional justice is a part becomes involved at this stage of the process, numerous other members of the international community frequently play significant roles at every stage of the process, including the earlier stages of social breakdown and mass violence.<sup>63</sup> Consequently, an ecological approach to transitional justice requires that international interventions in the form of transitional justice take account of the international community’s involvement at earlier stages of the process.

An important realization of the ecological model has been that internationally organized transitional justice efforts are frequently situated “in post-conflict societies where external interventions, such as trials or development schemes or democratization, may be perceived as being imposed by outsiders and not of intrinsic worth.”<sup>64</sup> Such perceptions are fueled both by the colonial history of such external interventions and their continued role in the processes of social breakdown behind the conflict. In refusing to acknowledge these dynamics, “the international community often exaggerates its ability to contribute to stability and a durable peace.”<sup>65</sup> Consequently, the ecological approach to transitional justice work speaks of “the need for post-war communities to define and take ownership

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<sup>59</sup> Fletcher & Weinstein, *supra* note 57, at 622.

<sup>60</sup> HARVEY M. WEINSTEIN & ERIC STOVER, MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY 20 (2004).

<sup>61</sup> Roht-Arriaza, *supra* note 58, at 8.

<sup>62</sup> Fletcher & Weinstein, *supra* note 57, at 620.

<sup>63</sup> *Id.*

<sup>64</sup> WEINSTEIN & STOVER, *supra* note 60, at 20.

<sup>65</sup> *Id.* at 19.

of the processes of justice and reconciliation.”<sup>66</sup> Such a call resonates with the widespread notion that transitional justice mechanisms, whether tribunals or commissions, must eliminate the “culture of impunity” which is seen as characterizing the transitional society.<sup>67</sup>

The concern with eliminating a culture of impunity has permeated a variety of international organizations. The Preamble to the Rome Statute of the International Criminal Court (ICC), for instance, expresses the ICC’s determination “to put an end to impunity for the perpetrators” of “grave crimes [that] threaten the peace, security, and well-being of the world.”<sup>68</sup> Similarly, various organs of the U.N. have adopted a rhetoric that voices the need to end a “culture of impunity” within the national political culture of any given number of states.<sup>69</sup> Given this concern and the need to recognize the limitations of external interventions, one of the most effective steps the international community could take in advancing peace and reconciliation in post-conflict societies may well be a more concerted effort to bring to an end the culture of impunity within the international community at large. An expanded ecological approach to transitional justice, one which conscientiously attends to the role of international organizations and transnational actors in the processes of social breakdown, would promote an international rule of law equal to the transnational networks of power that characterize the contemporary international order.<sup>70</sup>

#### IV. THE DIALECTICAL IMAGE OF SIERRA LEONE AS POSTCOLONY: A BRIEF CASE STUDY

In keeping with an ecological approach, transitional justice in so-called “failed states” must consider not only the internal causes of social breakdown

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<sup>66</sup> *Id.* at 18.

<sup>67</sup> See, for example, David Crocker, *Truth Commissions, Transitional Justice and Civil Society*, in TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS 99–121 (Robert I. Rotberg & Dennis Thompson eds., 2000).

<sup>68</sup> Rome Statute of the International Criminal Court, *opened for signature* 17 July 1998, 2187 U.N.T.S. 38544 (entered into force July 1, 2002).

<sup>69</sup> See, for example, Press Release, Security Council, Security Council Briefed on Urgency of Ending Human Rights Violations, Culture of Impunity in Democratic Republic of Congo, U.N. Press Release SC/7662 (Feb. 13, 2003); General Assembly, System of Impunity Making Mockery of Special Procedures to Address Extrajudicial Killings, Rapporteur Tells Third Committee, U.N. Doc. GA/SHC/3895 (Oct. 26, 2007).

<sup>70</sup> Such an approach may also result in a greater sense of legitimacy of the transitional justice project in the local communities. In Sierra Leone, for example, local populations have expressed dissatisfaction with the work of the TRCSL, largely because of the inadequacy of its remedial efforts to address the larger social and economic conditions. See, for example, Gearoid Millar, *Local Evaluations of Justice through Truth Telling in Sierra Leone: Postwar Needs and Transitional Justice*, 12 HUM. RTS. REV. 515 (2011).

within these states, but must also consider how these internal factors are themselves integrated into a set of globalized relations involving a number of international organizations and transnational actors. Far too frequently, academic analyses of “failed states” in Africa focus exclusively on the political culture and economic policies of these states, ignoring the multiple ways in which the international community has failed them.<sup>71</sup> By treating the causes of social breakdown in complete isolation from the international networks within which African states are deeply imbricated, these analyses function as modern iterations of the historicist colonial notion that “Africa has remained cut off from all contacts with the rest of the world.”<sup>72</sup> The neo-colonialist policy implications of such views of the “failed state” appeared quite explicitly in various calls on the political right after 9/11 for the creation of a new “colonial office” or a new mandate system.<sup>73</sup> A brief overview of the structure of colonial rule reveals that such calls do not merely express a revived imperialist fantasy on the part of neo-conservatives, but reflect the ways in which the structures of colonial rule are reproducing and reconfiguring themselves in our contemporary era. The creation of “failed states” and the concomitant need for the international community to intervene are integral parts of this ongoing historical process. Consequently, if transitional justice hopes to reconstruct these societies in ways that will prevent the recurrence of atrocities and human rights violations, then it must search for ways to intercede in this process—which means that the relevant members of the international community need to be held equally accountable for their respective roles.

In the case of Sierra Leone, the legacy of colonial rule established the basic framework for a colonial figure of governmentality that has persisted today in the form of what William Reno has called the “Shadow State.”<sup>74</sup> According to Reno, the basic structures of this Shadow State determined the social, political, and economic dynamics behind the post-independence social breakdown and the ensuing civil war from 1991 to 2002.<sup>75</sup> As with most British colonies in Africa, the British pursued a policy of “indirect rule,” which received its most systematic

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<sup>71</sup> See, for example, ROBERT H. BATES, *WHEN THINGS FELL APART: STATE FAILURE IN LATE-CENTURY AFRICA* (2008).

<sup>72</sup> HEGEL, *supra* note 19, at 174. See also Bayart, *supra* note 51, at 217.

<sup>73</sup> See, for example, Max Boot, *Washington Needs a Colonial Office*, *FIN. TIMES* (July 3, 2003), <http://perma.cc/FD48-YPAL> (arguing that the United States needs “to create a colonial office—fast” modeled on “the British Colonial Office and India Office”); Sebastian Mallaby, *The Reluctant Imperialist: Terrorism, Failed States, and the Case for American Empire*, *FOREIGN AFF.* (Mar.–Apr. 2002), <http://perma.cc/FU4S-LYSX> (calling for the creation of a U.S.-led international organization modeled on mandate system of the League of Nations).

<sup>74</sup> See generally WILLIAM RENO, *CORRUPTION AND STATE POLITICS IN SIERRA LEONE* (1995).

<sup>75</sup> *Id.*

exposition in *The Dual Mandate in Tropical Africa* by John Frederick Lugard, the governor-general of Nigeria from 1914 to 1919. In rough outline, the British system of indirect rule centered colonial administration in the district commissioner who oversaw and directed the implementation of colonial policy by those paramount chiefs whom the British had chosen as their middlemen and who reported directly to the district commissioner.<sup>76</sup> Lugard's express rationale for indirect rule unsurprisingly integrated the kind of historicist logic that underwrote the entirety of the European colonial project. Emphasizing the need for "cooperation between every link in the chain" of colonial command, Lugard explained that:

the task of the administrative officer is to clothe his principles in the garb of evolution, not of revolution; to make it apparent alike to the educated native, the conservative Moslem, and the primitive pagan, each in his own degree, that the policy of the government is not antagonistic but progressive—sympathetic to his aspirations and the guardian of his natural rights.<sup>77</sup>

While Lugard's doctrinal work was not published until 1922, the general outlines of indirect rule had long been an organizing principle of British colonial administration, and its adoption was as much a matter of military, political, and economic pragmatism as it was one of liberal progressivism.<sup>78</sup> Even before the official declaration of the Protectorate in 1896, which brought the territories of Sierra Leone's hinterland under the control of British Administration centered in Freetown, the course of colonial expansion spurred by the scramble for Africa proceeded as a series of proxy wars between the British and the French in which the colonial powers made alliances with indigenous leaders, who in turn played the colonial powers off of each other in a sustained effort to maintain their own power.<sup>79</sup>

One of the more interesting figures of this period—and certainly the most powerful African ruler in the region—was Samori Ture who, with the assistance

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<sup>76</sup> For a general history of indirect government and its historical relationship to the development of the apartheid state in South Africa, see MAHMOOD MAMDANI, *CITIZEN AND SUBJECT: CONTEMPORARY AFRICA AND THE LEGACY OF LATE COLONIALISM* 62–108 (1996). There has long been a tendency among scholars to contrast the British system of "indirect rule" with a French model of direct rule founded on a policy of assimilation, but the tidiness of this opposition has come under increasing scrutiny. An exposition of this debate remains, however, beyond the scope of this paper. For a good point of entry into this debate, see MICHAEL CROWDER, *COLONIAL WEST AFRICA* (1978).

<sup>77</sup> John Frederick Lugard, *Principles of Native Administration*, in *HISTORICAL PROBLEMS OF IMPERIAL AFRICA* 105, 108–09 (James M. Burns et al. eds., 1994).

<sup>78</sup> See CRAWFORD YOUNG, *THE AFRICAN COLONIAL STATE IN COMPARATIVE PERSPECTIVE* 107 (1994); see also RENO, *supra* note 74, at 33.

<sup>79</sup> For a history of this period in Sierra Leone, see CHRISTOPHER FYFE, *A HISTORY OF SIERRA LEONE* 427–557 (1962).

of European arms obtained through trade with Freetown, had created an extensive empire by 1881 that covered parts of modern Sierra Leone, Guinea, Liberia, Mali, and the Ivory Coast.<sup>80</sup> Both the French and the British at various times entered into alliances with Samori in the attempt to secure his cooperation in their respective maneuverings against each other, while Samori deftly played the Europeans against each other. By 1890, the European powers realized the difficulties presented by African rulers armed with modern weapons; so, as part of the Brussels Act of 1890, the colonial powers agreed to restrict the arms trade in Africa.<sup>81</sup> After some initial resistance from the British Colonial Office, since Samori was generally on the side of the British at this time, the terms of the agreement were eventually put into effect in Sierra Leone by an ordinance in 1892.<sup>82</sup> Displeased by this change in policy and fearing the loss of trade access secured by Samori, Alfred Jones, the owner of the Sierra Leone Coaling Company, began to supply arms directly to Samori. In return, Samori granted Jones the right to build roads and railways in the region as well as levy taxes. The arrangement was relatively short-lived, however, as the British Colonial Office soon cracked down on Jones's arms trading, and Samori was eventually captured by the French in 1898.<sup>83</sup>

During the colonial period, most of the local African rulers did not have the unusual military and political might of Samori. Consequently, once the regional disputes between the English and the French over territory settled down, the British strategy of creating alliances with local African rulers created a political culture in which the colonial state relied upon so-called paramount chiefs to locally administer colonial policy, while the chiefs in turn depended upon the British to exercise power. The dynamics of this arrangement were consolidated in the aftermath of the Hut Tax War of 1898.<sup>84</sup> In an effort to secure colonial administration in the Protectorate and raise revenues, the British levied a house tax on the inhabitants. The collection of the tax required the cooperation of the chiefs who, in return for their efforts, would receive a portion of the revenues raised. Many chiefs recognized the new tax for what it was: an organized attempt to integrate them into the colonial administration as subordinate intermediaries who would carry out the colonial policies of the British. Consequently, an alliance of Temne and Mende chiefs rose in rebellion against the British authorities under

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<sup>80</sup> See M'Baye Gueye & A. Adu Boahen, *African Initiatives and Resistance in West Africa, 1880–1914*, in *AFRICA UNDER COLONIAL DOMINATION 1880–1935* 123–127 (A. Adu Boahen ed., 1985).

<sup>81</sup> FYFE, *supra* note 79, at 499.

<sup>82</sup> *Id.* at 500.

<sup>83</sup> *Id.* at 503–4; Gueye & Boahen, *supra* note 80, at 127.

<sup>84</sup> FYFE, *supra* note 79, at 556–95.

the leadership of Bai Bureh.<sup>85</sup> The uprising was eventually quelled, but only after intense and prolonged fighting which required the British to bring in two companies of troops from Lagos when the insurrectionaries had arrived within 40 kilometers of Freetown.<sup>86</sup>

Not all the chiefs had participated in the rebellion, however, and the British rewarded the chiefs who remained loyal while making examples of those who had not. As part of the new arrangements, the loyal chiefs received arms, unobtainable on the free market, in order to keep insurgent groups under control and to maintain open trade routes. The result was an uneasy truce between the British, who relied upon a system of concessions to the chiefs in order to maintain relative stability, and the chiefs, who were increasingly able to translate their military and political concessions into forms of economic activity that increasingly operated outside the state-sanctioned economy. While the British gradually became aware of and concerned about this parallel economic activity, fear of another rebellion and fiscal limitations meant that such activities were tolerated, if not officially sanctioned.<sup>87</sup>

At the end of it all, a new colonial order had emerged within Sierra Leone, one where “[a]ccess to state power translated into private benefit” for the subservient chief and whose basic structures would persist, with various adjustments, until the present day.<sup>88</sup> Numerous academics have developed slightly different formulations of the governmentality that operates in the historical wake of indirect rule.<sup>89</sup> Jean-François Bayart, for example, writes of the “dual structures of power” characteristic of what he calls the “post-colonial rhizome state.”<sup>90</sup> According to Bayart, “African political societies are duplicated between, on the one hand, a *pays légal*, a legal structure which is the focus of attention for multilateral donors and Western states, and on the other hand, a *pays réel* where real power is wielded.”<sup>91</sup> Similarly, Achille Mbembe has elaborated the structures of “Private Indirect Government,” where “functions supposed to be public, and obligations that flow from sovereignty, are increasingly performed by private

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<sup>85</sup> See generally Arthur Abraham, *Bai Bureh, The British and the Hut Tax War*, 7 INT’L J. AFR. HIST. STUD. 99 (1974).

<sup>86</sup> Gueye & Boahen, *supra* note 80, at 141–43.

<sup>87</sup> RENO, *supra* note 74, at 33–38.

<sup>88</sup> *Id.* at 33.

<sup>89</sup> As developed by Michel Foucault, the term “governmentality” reaches beyond the conventional boundaries of the “government” and refers to the ensemble of institutions, techniques, procedures, calculations, and knowledges used to control and manage a given population. See generally MICHEL FOUCAULT, *SECURITY, TERRITORY, POPULATION: LECTURES AT THE COLLEGE DE FRANCE, 1977–1978*, 108 (Graham Burchell trans., 2007).

<sup>90</sup> Bayart, *supra* note 51, at 229.

<sup>91</sup> *Id.* at 229–30.

operators for private ends.”<sup>92</sup> In the specific context of Sierra Leone, William Reno writes of a “Shadow State” where rulers emerge and consolidate power based on the ability to control informal markets and distribute their material benefits.<sup>93</sup> For all their differences, these analyses uniformly present an image of postcolonial governance in Africa where, with the official end of indirect rule and decolonization, the configuration of indirect rule has in effect been displaced to a higher level of the international system. As a formal matter, the postcolonial state apparatus occupies the structural position formerly held by the paramount chiefs, and the centralized authority of the former colonial government has been dispersed among a variety of international organizations and transnational actors. As a practical matter, given the decentralized character of how power is exercised in the contemporary global order, the framework of this neocolonial governmentality has become vastly subtler than its historical counterpart, and the central organizing principle is no longer that of state sovereignty but the exigencies of the market.

The political economy in the African postcolony, however, is rooted in a network of social relations of production and accumulation that remain, paradoxically perhaps, both the product of colonial rule and obscure to the colonialists’ contemporary heirs. The Westphalian system of international governance requires that there be a sovereign state to mediate between the sphere of public international law and the sphere of private financial interest. Colonialism, however, bequeathed to this system a postcolonial state where, as with the paramount chiefs before it, power is exercised through controlling access to markets and distributing its benefits, all in ways which effectively make the boundaries between state and society, public and private, extremely porous. In response, therefore, international financial institutions (IFIs) such as the World Bank and the International Monetary Fund (IMF) impose conditionalities on the postcolonial African state which are intended to bring about a more rigid separation of these spheres. Such measures inevitably weaken the state, however, and only encourage the growth of informal markets that circumvent the state and which become the new channels through which power is distributed. From the perspective of the international community, however, the proliferation of these alternative networks appear precisely as the sign that more such reforms are needed. Thus, the vicious circle is enjoined.

The history of Sierra Leone since the days of British rule can be understood as so many turns in this widening gyre, with the Civil War of 1991–2002 being only the latest, if most devastating, turn. Throughout the 1980s, the government of Sierra Leone, like so many others, embarked on a series of “structural

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<sup>92</sup> MBEMBE, *supra* note 41, at 80.

<sup>93</sup> RENO, *supra* note 74, at 3.

adjustment programs” under pressure from a variety of IFIs. These conditionalities secured credit for the government, but they also increased unemployment and inflation, while generating a large amount of political dissatisfaction and instability.<sup>94</sup> In 1987, the World Bank blocked payment of future loans due to Sierra Leone’s failure to make its scheduled payments to the IMF. The government had fallen into arrears after the head of the Israeli mining company, previously given monopoly rights to diamond mining, was extradited from the United States, where he faced charges of fraud, to Israel to face counts of selling state secrets to South Africa.<sup>95</sup> The state economy collapsed.<sup>96</sup> The informal markets, especially in diamonds, flourished. In order to get back into the good graces of the IMF, President Momoh sought once again to privatize the exploitation of diamonds. By 1990 the government entered into an agreement with Sunshine Broulle, a company from Dallas, Texas, which insisted that the government use military force to remove illicit miners from the diamond mines in Kono. The government swiftly obliged, and Operation Clean Slate was soon launched. This maneuver was ultimately a failure, however, as many of the soldiers, who were economically distressed and politically disaffected like the rest of the population, began mining themselves.<sup>97</sup>

Meanwhile, in neighboring Liberia, Charles Taylor, with financial and other material assistance from a number of transnational corporations, was in the midst of creating the parallel state of “Greater Liberia,” which aimed to include the diamond-producing district of Kono in Sierra Leone.<sup>98</sup> While no state had recognized the legitimacy of Charles Taylor’s government, a number of transnational corporations made agreements with him which included tax payments and other concessions in exchange for access to iron ore, timber, and rubber. Firestone Tire and Rubber, for instance, provided Taylor with communications facilities and an operational base on its rubber plantation in exchange for continued rubber production, while the British-owned African Mining Company of Liberia paid Taylor hefty concessions for access to iron ore.<sup>99</sup> With this support, Charles Taylor encouraged and aided Foday Sankoh, the leader

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<sup>94</sup> See Alfred B. Zack-Williams, *Sierra Leone: the Deepening Crisis*, in *BEYOND STRUCTURAL ADJUSTMENT IN AFRICA: THE POLITICAL ECONOMY OF SUSTAINABLE AND DEMOCRATIC DEVELOPMENT* (Julius E. Nyang’oro & Timothy M. Shaw eds., 1990).

<sup>95</sup> See Gueye & Boahen, *supra* note 79.

<sup>96</sup> See RENO, *supra* note 74, at 159–61.

<sup>97</sup> See *id.* at 165–66.

<sup>98</sup> For an extensive discussion of Charles Taylor’s military and political career in Liberia, including its devastating impact on Sierra Leone and other neighboring countries, see generally COLIN W. WAUGH, *CHARLES TAYLOR AND LIBERIA: AMBITION AND ATROCITY IN AFRICA’S LONE STAR STATE* (2011).

<sup>99</sup> See *id.* at 179–81.



of the RUF, who in turn waged an insurgent military campaign against the government of Sierra Leone. The civil war had begun. The RUF had the upper hand throughout much of the fighting and arrived within 20 miles of Freetown by May 1995. However, the tide turned against the RUF when the government hired the South African private military firm Executive Outcomes (EO) to lead its defensive operations. Since the government could not adequately pay for EO's services directly, the government granted mining rights to EO's corporate relatives Branch Energy and Diamond Works—rights which are still the basis for the current mining operations of Koidu Holdings Limited.<sup>100</sup> From this point on, the conflict in Sierra Leone witnessed the emergence of various factions and interests, none of which aligned in a manner consistent with traditional views of civil war. Eventually, however, the retreating RUF and the government would enter into the Lomé Peace Agreement in 1999 with considerable assistance from the international community, including a United Nations peacekeeping operation, although the war would not end until peaceful elections were held in 2002 under the auspices of the international community.<sup>101</sup>

As this brief outline of Sierra Leone's recent history suggests, various sectors of the international community have been intricately involved both in the social processes that have led to the social breakdown behind the war and in the conduct of the war itself. The structural adjustment programs created by the IFIs place increasing pressure on governments to privatize various sectors of social production and organization. As a result, the government hands over power and control over to foreign corporations who end up in charge of everything from the principal economic sectors of the country to its military forces. The result is not simply a "failed state," but "the establishment of a different political economy and the invention of new systems of coercion and exploitation."<sup>102</sup> As new as it might be, however, this new system has profound structural similarities to the colonialism of old. Like the paramount chiefs before them, rulers in the postcolony act as intermediaries who lend various forms of political and legal legitimacy to a system of foreign domination and exploitation whose interests nicely align with those of the governmental leaders. And while today's leaders in

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<sup>100</sup> See Angela McIntyre & Taya Weiss, *Weak Governments in Search of Strength*, in FROM MERCENARIES TO MARKETS: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES 67, 70–75 (Simon Chesterman & Chia Lehnardt eds., 2007). For more on executive outcomes and the use of private military companies, see Herbert M. Howe, *Private Security Forces and African Stability: The Case of Executive Outcomes*, 36 J. MOD. AFR. STUD. 307 (1998); David J. Francis, *Mercenary Intervention in Sierra Leone: Providing National Security or International Exploitation?*, 20 THIRD WORLD Q. 319 (1999).

<sup>101</sup> See KEEN, *supra* note 55, at 208–288.

<sup>102</sup> MBEMBE, *supra* note 41, at 93. See also William Reno, *How Sovereignty Matters: International Markets and the Political Economy of Local Politics in Weak States*, in INTERVENTION AND TRANSNATIONALISM IN AFRICA: GLOBAL-LOCAL NETWORKS OF POWER 197, 199 (Thomas M. Callaghy et al. eds., 2001) (arguing that "a new internal configuration of power in place of formal state bureaucracies" is developing in Africa).

Africa, like the paramount chiefs, are complicit in the development of this system, they do not act alone. Just as the corruption of the colonial system could neither be attributed to the paramount chiefs alone nor be redeemed by the best intentions of its civilizing mission, the corruption at the heart of the new structures of governance in the postcolony can neither be laid solely at the feet of local governments nor rectified by the humanitarian intentions of some within the international community without developing mechanisms for holding non-state actors accountable for their part in the new regime of global control.

## V. TRANSITIONAL JUSTICE AND TRANSNATIONAL CORPORATIONS

The linchpin of this new global order is arguably corporate impunity. An expanded ecological approach to transitional justice that addresses corporate actors can play a strategic part in altering the governance structures of the postcolony. Situated as it is in moments of reflection concerning the fate of post-conflict societies, transitional justice has the chance to promote, if pursued from a properly internationalist perspective, the development of a more acute consciousness within the international community concerning the neocolonialist forces at work within its own structures of governance. As the Sierra Leone case aptly demonstrates, the field of transitional justice directly confronts the governance structures of the postcolony, the role that businesses play in the regime, and the humanitarian consequences of the fundamental lack of accountability for non-state actors. Consequently, transitional justice is well positioned to advance the development of legal mechanisms for corporate accountability, and it should integrate focused attention on corporate accountability into its fundamental framework. Unsurprisingly, from its very inception, the postcolonial world has been acutely aware of the governance role of business in the global order and the need to hold transnational corporations accountable. Formerly colonized and developing nations have taken the lead in creating an international legal regime of corporate accountability. This movement continues and is gathering momentum. Transitional justice can make meaningful contributions to this effort, while simultaneously advancing its core objectives of creating a historical record regarding past atrocities, advancing justice and reparations for victims, and instituting governance reforms.

### A. The Modern History of Corporate Accountability for Human Rights

The role of transnational corporations in postcolonial governance has long been recognized, and modern attempts to find legal mechanisms for holding transnational corporations accountable for human rights violations reach back to the very beginnings of the postcolony. Myriad institutional attempts at

international regulation of transnational corporations have proliferated since the end of the Second World War.<sup>103</sup> Initial efforts, such as the failed International Trade Organization, were concerned primarily with curtailing and regulating restrictive business practices that would adversely affect international markets.<sup>104</sup> During the 1970s, following the initiative of the Group of 77 (G77), which was a coalition of the world's developing nations, most of whom were recently decolonized, the movement toward legally regulating corporate conduct gained new momentum, this time with a view toward curbing behavior that adversely affected developing nations.<sup>105</sup> The G77 found an effective forum within the U.N. Economic and Social Council (ECOSOC), and in December 1974, ECOSOC created the U.N. Centre on Transnational Corporations (UNCTC).<sup>106</sup> This move was just one of the numerous proposals that the G77 put forth as part of the New International Economic Order,<sup>107</sup> which began to bring the newly globalized structures of the international political economy into focus. The scope of the UNCTC's concern was outlined by the study *Multinational Corporations in World Development*, which addressed such issues as host state sovereignty, development, labor, and direct foreign investment.<sup>108</sup> By 1976, the UNCTC had begun work on drafting an international code of conduct that would have been binding on transnational corporations. This effort continued over the course of the next 15 years and draft codes were produced in 1983 and in 1990.<sup>109</sup> The central thrust of

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<sup>103</sup> See Hartwig Hummel, *The United Nations and Transnational Corporations*, 8–10 (Global Governance and the Power of Business, Conference Paper, 2005), <http://perma.cc/D4XC-7BGU>. Throughout this paper, I will most frequently use the term “transnational corporation,” which is the terminology most commonly used within the U.N. The term is roughly interchangeable with the term “multinational corporations” which has gained currency in other discursive networks.

<sup>104</sup> See JOHN BRATHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* 187–88 (2000).

<sup>105</sup> See John Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 *YALE L.J.* 443, 457 (2001). The issue of transnational corporations had initially been put on the Economic and Social Council's agenda by Chile's President Salvador Allende. See VIJAY PRASHAD, *THE DARKER NATIONS: A PEOPLE'S HISTORY OF THE THIRD WORLD* 240–41 (2007).

<sup>106</sup> Economic & Social Council Res. 1913 (LVII), (Dec. 5, 1974).

<sup>107</sup> See G.A. Res. 3201(S-VI), Declaration on the Establishment of a New International Economic Order (May 1, 1974); see also JAGDISH N. BHAGWATI, *THE NEW INTERNATIONAL ECONOMIC ORDER: THE NORTH-SOUTH DEBATE* (1977); MOHAMMED BEDJAOU, *TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER* (1979).

<sup>108</sup> See U.N. Econ. & Soc. Council, *Multinational Corporations in World Development*, U.N. Doc. ST/ECA/190, at 46–57 (1973).

<sup>109</sup> ECOSOC, U.N. Comm'n on Transnational Corps. [UNCTC], *Report on the Special Session*, Supp. No. 7, Annex II, U.N. Doc. E/1983/17/Rev.1 (1983); ECOSOC, UNCTC, *TRANSNATIONAL CORPORATIONS, SERVICES, AND THE URUGUAY ROUND*, Annex IV, *Proposed Text of the Draft Code of Conduct on Transnational Corporations*, 231–43, U.N. Doc. ST/CTC/103 (1990); see also John Ratner, *supra* note 105.

the codes was that corporations were to comply with the domestic regulations of the host country and to not interfere with the host countries' domestic policies.

However, the UNCTC Code of Conduct never went very far. As can easily be imagined, the UNCTC's efforts were fiercely resisted by the developed nations, who were, and continue to be, the home states to the transnational corporations. In addition to opposition within the U.N. itself, the UNCTC faced competition within the quickly growing sphere of global civil society. In 1977, the Organization for Economic Co-Operation and Development (OECD), whose membership represents the majority of the world's developed nations as a historical bloc, had passed the *Declaration and Decisions on International Investment and Multinational Enterprises*, which outlined a voluntary set of principles and standards for business conduct.<sup>110</sup> These voluntary standards would be periodically renewed until 2000, and they would serve as the guiding force behind the development of the Corporate Social Responsibility (CSR) movement.

By 1990, the UNCTC issued a report entitled *The New Code Environment* describing this polarized political environment forged in the geopolitics of the Cold War.<sup>111</sup> In an attempt to overcome the persistent political opposition to the code, the UNCTC abandoned the idea of a legally binding code and suggested that the Code "be adopted as a voluntary instrument."<sup>112</sup> The end of the Cold War, however, also meant the end of the UNCTC, which lost its independent status within the U.N. in 1993 and was turned into the Commission of the United Nations Conference on Trade and Development (UNCTAD).<sup>113</sup>

In keeping with the ideological character of the Cold War, these earlier attempts at regulating transnational corporations were situated primarily on socio-economic terrain. While human rights were an occasional issue within the UNCTC, they became so only insofar as they intersected with the Commission's larger concern with economic growth in developing countries. With the end of the Cold War and the triumph of neoliberal capitalism, the political conditions for a New International Economic Order seemed to have collapsed. The ensuing decade could be characterized as an "interregnum," extending from the end of the Cold War in 1989 to the protests in 1999 at the World Trade Organization's

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<sup>110</sup> *The OECD Declaration and Decisions on International Investment and Multinational Enterprises: Basic Texts*, THE ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (2012), [http://www.oalis.oecd.org/olis/2000doc.nsf/LinkTo/NT00002BE6/\\$FILE/00085743.PDF](http://www.oalis.oecd.org/olis/2000doc.nsf/LinkTo/NT00002BE6/$FILE/00085743.PDF). See also Ratner, *supra* note 105, at 457.

<sup>111</sup> U.N. Ctr. on Transnational Corp., *The New Code Environment*, U.N. Doc. ST/CTC/Ser.A/16, at 2–5 (Apr. 1990).

<sup>112</sup> *Id.* at 4.

<sup>113</sup> Economic and Social Council Res. 1994/1 (Jul. 14, 1994); G.A. Res. 49/130, U.N. Doc. A/RES/49/130 (Dec. 19, 1994).

Ministerial Conference in Seattle.<sup>114</sup> With the protests in Seattle, globalization emerged as the catalyst for a newly articulated confrontation, and correspondingly new alliances were forged.<sup>115</sup> Globalization now asserted itself as the stage on which the former struggles of decolonization would be recast and reformed. Within this new order, human rights provided a critical discursive terrain on which the politics of international relations would henceforth be engaged.<sup>116</sup>

These changes can be seen in the revival of the debate concerning international legal regulation of transnational corporations. While the UNCTC was dissolved in 1993, and its code abandoned, the political desire to impose some international legal standards on transnational corporations did not dissipate, and the effort to do so was soon revived—this time under the auspices of what would soon become the U.N. Sub-Commission on the Promotion and Protection of Human Rights (the Sub-Commission).<sup>117</sup> In 1998, the Sub-Commission approved a “Transnational Corporations Working Group,” which was to last for three years (the Working Group). The Sub-Commission was given a mandate to “identify and examine the effects of the working methods and activities of transnational corporations on the enjoyment of economic, social and cultural rights and the right to development, as well as civil and political rights.”<sup>118</sup> Quite soon, the Working Group was hearing calls from various non-governmental organizations (NGOs) for the Group to draft “a code of conduct to regulate transnational corporations.”<sup>119</sup> In response, the Sub-Commission renewed the Working

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<sup>114</sup> Here is a history that remains to be written, much less theorized. One good place to start, however, would be the essays collected in *THE INTERREGNUM: CONTROVERSIES IN WORLD POLITICS, 1989–1999* (Michael Cox, et al. eds., 1999). The editors of this volume appropriate the term “interregnum” straight from Gramsci: “The crisis consists precisely in the fact that the old is dying and the new cannot be born; in this interregnum a great variety of morbid symptoms appear.” ANTONIO GRAMSCI, *SELECTIONS FROM THE PRISON NOTEBOOKS* 276 (Quintin Hoare & Geoffrey Nowell Smith eds., 1971). See also Stephen Gill, *Theorizing the Interregnum: The Double Movement and Global Politics in the 1990s*, in *INTERNATIONAL POLITICAL ECONOMY: UNDERSTANDING GLOBAL DISORDER* 65–99 (BJÖRN HETTNE, ED. 1995).

<sup>115</sup> For a theoretically informed analysis of the political significance of the Seattle protests, see Stephen Gill, *Toward a Postmodern Prince? The Battle in Seattle as a Moment in the New Politics of Globalization*, 29 *MILLENNIUM: J. INT’L STUD.* 131–40 (2000). See also HARDT & NEGRI, *supra* note 38, at 285–88.

<sup>116</sup> See, for example, *TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS* (Olivier De Schutter ed., 2006).

<sup>117</sup> In 1999, ECOSOC changed the title of the Sub-Commission on Prevention of Discrimination and Protection of Minorities to the Sub-Commission on the Promotion and Protection of Human Rights.

<sup>118</sup> Office of the High Commissioner for Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities Res. 1998/8, U.N. Doc. E/CN.4/Sub.2/RES/1998/8, at art. 4(a) (Aug. 20, 1998).

<sup>119</sup> Press Release, Sub-Commission on the Protection and Promotion of Human Rights, Sub-Commission on the Promotion and Protection of Human Rights Hears NGOs Call for Code of

Group's mandate in 2001, and this time it was charged with the task of analyzing “the possibility of establishing a monitoring mechanism in order to apply sanctions and obtain compensation for infringements committed and damage caused by transnational corporations, and contribute to the drafting of binding norms for that purpose.”<sup>120</sup> The final result were the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (Draft Norms).<sup>121</sup>

Meanwhile, elsewhere in global civil society, the private sector sensed the shifting political terrain. A new approach was needed, and the opportunity for one presented itself at the World Economic Forum in Davos, Switzerland on January 31, 1999. Addressing himself directly to the “business leaders gathered in Davos,” Secretary-General Kofi Annan proposed that the U.N. and the private sector “initiate a global compact of shared values and principles, which will give a human face to the global market.”<sup>122</sup> A number of different dynamics moved just beneath the surface of Annan's proposal, which clearly took the form of a bargain between the public and private actors of the international community. Such a compact was needed, Annan suggested, because the increasing global resistance to globalization—which would soon climax in Seattle—posed a threat to the stability of international markets. The solution to the problem lay in “a set of core values in the areas of human rights, labour standards, and environmental practices.”<sup>123</sup> Annan asked the business leaders gathered at Davos to “encourage States to give us, the multilateral institutions of which they are all members, the resources and the authority we need to do our job.”<sup>124</sup> When Annan became secretary-general, the U.N. budget was in crisis, in part because the U.S. owed the institution \$1.6 billion dollars and the U.S. Congress had just lowered the American assessment for the U.N. budget from twenty-five to twenty-two percent.<sup>125</sup> In exchange for

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Conduct to Regulate Transnational Corporations, U.N. Press Release (Aug. 9, 2000), <http://perma.cc/WC68-ATQV>.

<sup>120</sup> Office of the High Commissioner for Human Rights, Sub-Commission on the Protection and Promotion of Human Rights Res. 2001/3, U.N. Doc. E/CN.4/Sub.2/RES/2001/3, at art. 4(d) (Aug. 15, 2001).

<sup>121</sup> Comm. on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003) [hereinafter Draft Norms].

<sup>122</sup> Press Release, Secretary-General, Secretary-General Proposes Global Compact on Human Rights, Labour, Environment in Address to World Economic Forum in Davos, U.N. Press Release SG/SM/6881 (Feb. 1, 1999) [hereinafter Davos Speech].

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> See JAMES TRAUB, THE BEST INTENTIONS: KOFI ANNAN AND THE UN IN THE ERA OF AMERICAN WORLD POWER 147 (2007).

businesses' help in persuading governments to support the mission of the U.N., Annan told the business leaders that the U.N., with all of its various institutional capacities, could help "in incorporating these agreed upon values and principles into your mission statements and corporate practices."<sup>126</sup> The business sector took the offer and created the Global Compact.

Officially launched on July 26, 2000 in New York at the U.N. Headquarters by the secretary-general, the Global Compact now has over 13,000 corporate participants.<sup>127</sup> The Global Compact has isolated ten fundamental principles which members of the Compact commit themselves to advancing. Related to human rights, labor, the environment, and anti-corruption, these principles are drawn from international instruments and declarations. The Global Compact is an entirely voluntary program—the principles are in no way binding upon the member corporations. Rather, corporations commit themselves to embedding these principles into their business practices and to filing annual reports with the Global Compact, which outline what steps they have taken toward advancing the principles. While the Compact has no mechanism for auditing or otherwise verifying the information in the reports, it has delisted corporations for failing to file reports.<sup>128</sup> Through these procedures, the Global Compact hopes to meet the U.N.'s stated objective of "embedding the global market in a network of shared values."<sup>129</sup> As such, the theory behind the Global Compact, already legible in Kofi Annan's speech at Davos, stems directly from the work of John Ruggie, whom Annan had appointed as assistant secretary-general and senior adviser for strategic planning in 1997. As Annan's speech makes clear, the guiding principle behind the Global Compact is Ruggie's notion of "embedded liberalism" which he had initially developed in 1982.<sup>130</sup> In short, embedded liberalism describes the social compromise reached after the Second World War in which the insecurities associated with an international and multilateral market regime would be offset by accepting various domestic interventions in the economy.<sup>131</sup> In other words, international market forces would be embedded in a set of domestic social, political, and legal restraints. The idea behind the Global Compact is that a similar social compact is now needed on an international level and that corporate

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<sup>126</sup> Davos Speech, *supra* note 122.

<sup>127</sup> *Our Participants*, UNITED NATIONS GLOBAL COMPACT, <http://perma.cc/G9EM-LYMA>.

<sup>128</sup> In October 2006, for instance, a total of 335 companies were delisted. See *335 Companies Inactive as Part of Quality Drive*, UNITED NATIONS GLOBAL COMPACT (Oct. 6, 2006).

<sup>129</sup> Davos Speech, *supra* note 122.

<sup>130</sup> See John Gerard Ruggie, *International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT'L ORG. 379 (1982). For a discussion of how neo-liberalism is motivated by the political desire to disembed liberalism from this social compact, see DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* 11 (2007).

<sup>131</sup> Ruggie, *supra* note 130, at 393.

engagement with the relevant international institutions is therefore required to make that happen.<sup>132</sup>

When the Draft Norms reached the larger U.N. community in 2003, the political environment had been altered by the advent of the Global Compact. By the time the Draft Norms reached the Commission on Human Rights, opposition to them was intense, with the historically opposed blocs once again engaged.<sup>133</sup> On the one side was the international business community, led by the International Chamber of Commerce (ICC) and the International Organization of Employers (IOE),<sup>134</sup> and the national governments of the U.S., the U.K., and Australia. On the other side were academics, activists and NGOs, who voiced their support of the Draft Norms to the Commission in a joint oral statement with 194 adherents.<sup>135</sup> Sensing the intensity of the impending debate, the Commission distanced itself from the Draft Norms by declaring that they had “not been requested by the Commission” and directed the Office of the High Commissioner for Human Rights (OHCHR) to meet with the relevant stakeholders in the debate and to produce a report of its findings.<sup>136</sup>

Accordingly, the OHCHR, in cooperation with the Global Compact, convened a two-day workshop regarding the Norms in October 2004, which was attended by a number of stakeholders, and published a report detailing the results in February 2005.<sup>137</sup> As before, the salient point of contention was whether the human rights obligations should be directly binding upon corporations.<sup>138</sup> Taking heed of the intense opposition generated by the Draft Norms, especially by the private sector and the U.S., the U.N. Commission on Human Rights requested that the Secretary-General “appoint a special representative on the issue of human

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<sup>132</sup> For an explanation of how the Global Compact fits within a newly internationalized form of embedded liberalism, see John Gerard Ruggie, *Taking Embedded Liberalism Global: The Corporate Connection*, in *EMBEDDING GLOBAL MARKETS: AN ENDURING CHALLENGE* 231–54 (John Gerard Ruggie ed., 2008).

<sup>133</sup> See David Kinley & Rachel Chambers, *The U.N. Human Rights Norms for Corporations: The Private Implications of Public Law*, 6 *HUM RTS. L. REV.* 447, 457–59 (2006).

<sup>134</sup> See *Joint Views of the IOE and ICC on the Draft “Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights”*, INT’L ORG. OF EMP’RS & INT’L CHAMBER OF COMM. (2004), <http://perma.cc/H6YV-F5G7>.

<sup>135</sup> See Kinley & Chambers, *supra* note 133, at 458.

<sup>136</sup> U.N. Off. of the High Comm’r for Hum. Rts., *Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/DEC/2004/116 (Apr. 22, 2004).

<sup>137</sup> See Kinley & Chambers, *supra* note 133, at 459.

<sup>138</sup> See Subcomm. on the Promotion and Protection of Hum. Rts., Rep. of the U.N. High Comm’r on Hum. Rts. on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights, ¶ 50, U.N. Doc. E/CN.4/2005/91 (Feb. 15, 2005) [hereinafter OHCHR Report].



rights and transnational corporations and other business enterprises.”<sup>139</sup> Both the U.S. and Australia voted against the resolution, while South Africa abstained.<sup>140</sup> In explaining the U.S.’s opposition to the resolution, Leonard Leo, the U.S. delegate to the U.N. Commission on Human Rights, stated that “the resolution before us takes a negative tone towards international and national businesses, treating them as potential problems rather than the overwhelmingly positive forces for economic development and human rights that they are.”<sup>141</sup> In a gesture that profoundly underscored the historical weight of the U.S.’s position, Leo went on to bemoan the fact that “[w]e have been down this path many times in the U.N.” and remarked that “it is both sad and undeniable that the anti-business agenda pursued by many in this organization over the years has held back the economic and social advancement of developing countries.”<sup>142</sup> The alliance between multinational business interests and the U.S. in opposition to an international regulatory regime for transnational corporations could not be more clearly manifest.

Following the Commission's recommendation, the Secretary-General designated a Special Representative (SRSG) to further investigate the issue. The man appointed to the job was none other than John Ruggie. On February 22, 2006, Ruggie submitted his Interim Report.<sup>143</sup> After reviewing the relevant issues, the Interim Report turned to the subject of the Draft Norms and flatly declared that “the Norms exercise became engulfed in its own doctrinal excesses.”<sup>144</sup> In particular, the Interim Report focused on two doctrinal issues. First, the Interim Report questioned the legal ground on which the Draft Norms suggested that human rights norms could be directly binding upon corporations.<sup>145</sup> Second, the Interim Report suggested that, in making some human rights binding upon corporations, the Draft Norms articulated no sound legal principle according to which responsibilities for human violations would be allocated between states and corporations.<sup>146</sup> With this assessment, the Draft Norms were dead. In charting the way forward, the Interim Report advocated a “principled pragmatism” and

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<sup>139</sup> Comm’n on Hum. Rts., Res. 2005/69, Human Rights and Transnational Corporations and Other Business Enterprises (Apr. 20, 2005).

<sup>140</sup> Kinley & Chambers, *supra* note 133.

<sup>141</sup> Statement of US Delegate Leonard Leo at the Commission on Human Rights on item 17 “Transnational Corporations” (Apr. 20, 2005).

<sup>142</sup> *Id.*

<sup>143</sup> Special Representative of the Secretary-General, *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006) [hereinafter Interim Report].

<sup>144</sup> *Id.* at ¶ 59.

<sup>145</sup> *Id.* at ¶ 60.

<sup>146</sup> *Id.* at ¶ 66.

suggested that “one critical area of legal standards that merits close attention is the possible extension in the extraterritorial application of some home countries’ jurisdiction for the worst human rights abuses committed by their firms abroad.”<sup>147</sup>

In June 2008, John Ruggie presented his final report, entitled *Protect, Respect & Remedy: a Framework for Business and Human Rights* (the “Ruggie Report”), to the U.N. Human Rights Council (UNHRC).<sup>148</sup> The Ruggie Report proposed a “policy framework to anchor the business and human rights debate,” which was organized around three basic pillars: “the State duty to protect against human rights abuses by third parties; the corporate responsibility to respect human rights; and the need for more effective access to remedies.”<sup>149</sup> This tripartite structure of “protect, respect, and remedy” clearly returns the debate back to the traditional view of international human rights law which “rests upon the bedrock role of States.”<sup>150</sup> The Ruggie Report not only follows the existing legal doctrine, but echoes the historicist ideology that views the nation-state as the privileged subject of historical development. In doing so, the Ruggie Report emphasizes that the “root cause of the business and human rights predicament today lies in the governance gaps created by globalization.”<sup>151</sup> These governance gaps are created by various political dynamics and economic pressures which leave state governments either unwilling or unable to effectively regulate corporate actors. In uncovering the systemic causes for these governance gaps, the Ruggie Report introduces a fundamental distinction between “home states” and “host states” that runs throughout the Report and structures its presentation of both the state duty to protect and the need for more effective remedies in two important respects.<sup>152</sup> In the end, given the political volatility created by the issuance of the Draft Norms, however, the Ruggie Report did not offer any concrete policy proposals. Rather, the Report limited itself to effectively analyzing the global economic and political causes behind the governance gaps which result in human right violations by transnational corporations and proposing a very general framework for developing “a more systemic response” to the problem.<sup>153</sup>

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<sup>147</sup> *Id.* at ¶ 71.

<sup>148</sup> John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises), *Protect, Respect & Remedy: a Framework for Business and Human Rights*, U.N. Doc A/HRC/8/5 (Apr. 7, 2008) [hereinafter Ruggie Report].

<sup>149</sup> *Id.* at ¶ 1.

<sup>150</sup> *Id.* at ¶ 50.

<sup>151</sup> *Id.* at ¶ 3.

<sup>152</sup> *See id.* at ¶ 14.

<sup>153</sup> *Id.* at ¶ 106.

The Ruggie Report was, on the whole, favorably received within the U.N. On June 18, 2008, the UNHRC extended the SRSG's mandate for another three years, directing John Ruggie to begin the necessary work of operationalizing the Ruggie Report's framework.<sup>154</sup> At the end of its second term, the SRSG issued its Guiding Principles, which provide guidance to states and business for implementing the “protect, respect, and remedy” framework.<sup>155</sup> The Guiding Principles center on the notion that the responsibility of businesses to respect human rights “exists independently of States’ abilities and/or willingness to fulfill their own human rights obligations” and that this responsibility “exists over and above compliance with national laws and regulations protecting human rights.”<sup>156</sup> This independent responsibility requires businesses to “[a]void causing or contributing to adverse human rights impacts through their own activities” and to “prevent or mitigate adverse human rights impacts that are directly linked to their operations.”<sup>157</sup>

The Guiding Principles set forth three different “policies and processes” for businesses in order to meet these responsibilities.<sup>158</sup> First, businesses should have a “policy commitment to meet their responsibility to respect human rights.”<sup>159</sup> This policy should be expressed in a formal statement that is approved at the most senior levels of management, made publicly available, and reflected in the business operations and procedures.<sup>160</sup> Second, businesses should institute a “human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights.”<sup>161</sup> This due diligence process should be sufficiently robust to reflect the scope of the enterprises’ operations, be conducted on a periodic and on-going basis, and entail consultation with groups whose human rights are likely to be affected by the business activities.<sup>162</sup> Third, businesses should establish processes “to enable the remediation of any adverse human rights impacts they cause or to which they contribute.”<sup>163</sup> In doing so businesses should

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<sup>154</sup> Human Rights Council Res. 8/7, U.N. Doc. A/HRC/Res/8/7 (June 18, 2008).

<sup>155</sup> John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises), *Guiding Principles on Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011).

<sup>156</sup> *Id.* at 13 (Principle 11).

<sup>157</sup> *Id.* at 14 (Principle 13).

<sup>158</sup> *Id.* at 15 (Principle 15).

<sup>159</sup> *Id.* at 15 (Principle 15).

<sup>160</sup> *Id.* at 15 (Principle 16).

<sup>161</sup> *Id.* at 15 (Principle 15).

<sup>162</sup> *Id.* at 15–16 (Principles 17 and 18); *see also id.* 16–20 (Principles 19–21) (setting forth further detailed guidelines regarding the due diligence process).

<sup>163</sup> *Id.* at 15 (Principle 15).

“cooperate” in the remediation of human rights violations by participating in established “legitimate processes,” including “cooperation with judicial mechanism[s]” where appropriate.<sup>164</sup>

The Guiding Principles were adopted by the UNHRC, which promptly set up a five-member Working Group to “promote the effective and comprehensive dissemination and implementation of the Guiding Principles.”<sup>165</sup> However, in promoting the Guiding Principles, the Working Group has been restrained by the fundamental fact that “the Guiding Principles are not in themselves legally binding,” but merely act to “clarify the existing State obligations.”<sup>166</sup> Consequently, effective implementation of the Guiding Principles remains constrained, especially as it concerns the third pillar of ensuring access to an effective remedy. Indeed, in the absence of any legally binding obligations, access to judicial remedies remains elusive. Consequently, the Working Group has focused at times on access to “non-judicial grievance mechanisms.”<sup>167</sup>

Dissatisfied with the non-binding character of the Guiding Principles and the resulting limitations on the Working Group, the Republic of Ecuador issued a call to the UNHRC for the adoption of “an international legally binding instrument, included within the U.N. system, which would clarify the obligations of transnational corporations in the field of human rights, as well as of corporations in relation to States.”<sup>168</sup> It was not surprising that Ecuador would take the lead on finding a legally binding instrument, for Ecuador had been at the center of a high-profile and lengthy litigation against Chevron related to the dumping of toxic waste in the Amazon from 1964 to 1992.<sup>169</sup> According to Ecuador’s proposal, the Guiding Principles are an “important first step, but without a legally binding instrument, it will remain only as such: a ‘first step’ without further consequence.”<sup>170</sup> A few months later, the UNHRC considered a

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<sup>164</sup> *Id.* at 20–21 (Principle 21).

<sup>165</sup> Human Rights Council Res. 17/4, U.N. Doc. A/HRC/RES/17/4 (June 7, 2011). The Working Group’s mandate has since been renewed on two separate occasions. *See* Human Rights Council Res. 26/22, U.N. Doc. A/HRC/RES/26/22 (July 15, 2014); Human Rights Council Res. 35/7, U.N. Doc. A/HRC/RES/35/7 (July 14, 2017).

<sup>166</sup> Rep. of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, ¶ 6, U.N. Doc. A/HRC/26/25/Add.3 (April 28, 2014).

<sup>167</sup> *See id.*, passim.

<sup>168</sup> U.N. Hum. Rts. Council, Statement of the Republic of Ecuador on Behalf of a Group of Countries at the 24rd [sic] Session of the Human Rights Council (Sept. 2013), <http://perma.cc/7RMA-DJCQ>.

<sup>169</sup> For an overview of this litigation and its relevance to the core issues of corporate accountability and human rights, see Pablo Fajardo & George Byrne, *Corporate Accountability, Human Rights and Pursuing Justice in the Ecuadorian Amazon: Attorney Pablo Fajardo’s Perspective on Aguinda v. Chevron*, 51 HARV. INT’L L. J. ONLINE 181 (2011).

<sup>170</sup> UNHRC, *supra* note 168.

resolution submitted by Ecuador, South Africa, Bolivia, Cuba, and Venezuela for the establishment of “an open-ended intergovernmental working group on a legally binding instrument on transnational corporations and other business enterprises with respect to human rights.”<sup>171</sup> The resolution passed by a vote of 20 to 14, with 13 countries abstaining, and the Intergovernmental Working Group (IGWG) was established.<sup>172</sup>

In the years since, the IGWG has conducted three sessions for collecting input from a variety of state governmental agencies, national human rights institutions, and NGOs. Following these efforts, the IGWG has prepared and published on July 20, 2018, a so-called “Zero Draft” of a “Legally Binding Instrument to Regulate, In International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises.”<sup>173</sup> The Zero Draft vests jurisdiction for enforcement of the instrument’s provisions with either the state where the alleged violations occurred or the home state where the corporation is domiciled.<sup>174</sup> The proposed instrument expressly recognizes the right of victims to present claims and seek remedies, as well as the obligation of states party to investigate claims and provide legal appropriate judicial mechanisms for vindicating victims’ rights.<sup>175</sup> Developing the Guiding Principles’ emphasis on corporate due diligence, the Zero Draft mandates that states party ensure that their domestic corporations undertake a due diligence process regarding the potential effects of their business operations on human rights.<sup>176</sup> Finally, at the heart of the proposed instrument, states party must ensure that their domestic laws hold businesses civilly and criminally liable for human rights violations.<sup>177</sup>

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<sup>171</sup> See UNHRC Res. 26/..., *supra* note 4.

<sup>172</sup> See UNHRC Res. 26/9, *supra* note 4. The countries voting in favor were: Algeria, Benin, Burkina Faso, China, Congo, Cote d’Ivoire, Cuba, Ethiopia, India, Indonesia, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Philippines, Russian Federation, South Africa, Venezuela, and Vietnam. The countries voting against the resolution were: Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Montenegro, Republic of Korea, Romania, Macedonia, United Kingdom, and the United States.

<sup>173</sup> Off. of the U.N. High Comm’r for Hum. Rts., Legally Binding Instrument to Regulate, In International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, <http://perma.cc/WZ85-RYW2> [hereinafter Zero Draft].

<sup>174</sup> *Id.* at art. 5.

<sup>175</sup> *Id.* at art. 8.

<sup>176</sup> *Id.* at art. 9.

<sup>177</sup> *Id.* at art. 10.

In addition to the Zero Draft, the IGWG has also proposed a Draft Optional Protocol,<sup>178</sup> which is “centered on mechanisms of access to remedy for victims of abuses committed in the context of business activities.”<sup>179</sup> The Draft Optional Protocol outlines the minimum discovery that state courts must make available.<sup>180</sup> Courts of states party shall have the competence to review the due diligence obligations of corporations within their jurisdictions.<sup>181</sup> Furthermore, states party are to provide procedural mechanisms for vindicating claims “brought by victims or a group of victims.”<sup>182</sup> The IGWG recently held a fourth session on October 15–19, 2018, to discuss the Zero Draft and the Optional Protocol.

## B. Integrating Corporate Accountability into Transitional Justice

Given this history and the most recent developments since the adoption of the Guiding Principles, the field of transitional justice has an opportunity to take a more active role in both holding transnational corporations accountable for their part in human rights violations and advancing the development of international legal mechanisms for corporate accountability.<sup>183</sup> By proactively addressing the role of corporate actors in human rights violations, transitional justice regimes are more likely to intervene in the structures of global postcolonial governance that have systematically produced human rights violations.<sup>184</sup> Doing so will also advance transitional justice’s more immediate goals of promoting institutional reform, establishing a truthful account of the past, and securing justice for victims. In Sierra Leone, for example, the failure to address the underlying economic structures and actors has resulted in transitional justice efforts being perceived as incomplete.<sup>185</sup>

<sup>178</sup> Off. of the U.N. Comm’r for Hum. Rts., Draft Optional Protocol to the Legally Binding Instrument to Regulate, In International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, <http://perma.cc/2NYM-3BQU> [hereinafter Draft Optional Protocol].

<sup>179</sup> Letter from the Permanent Mission of Ecuador to the U.N. and other International Organizations in Geneva (Sept. 4, 2018), <http://perma.cc/K5QK-ZNLU>.

<sup>180</sup> Draft Optional Protocol, *supra* note 178, at art. 4.

<sup>181</sup> *Id.* at art. 5.

<sup>182</sup> *Id.* at art. 6.

<sup>183</sup> The academic literature is beginning to explore the possibilities of linking transitional justice to corporate accountability. *See, for example*, CORPORATE ACCOUNTABILITY IN THE CONTEXT OF TRANSITIONAL JUSTICE (Sabine Michalowski ed., 2013); *see also* THE ECONOMIC ACCOMPLICES TO THE ARGENTINE DICTATORSHIP: OUTSTANDING DEBTS (H. Verbitsky and J. Bohoslavsky eds. 2015); JUSTICE AND ECONOMIC VIOLENCE IN TRANSITION (D. Sharp ed., 2014).

<sup>184</sup> *Id.*

<sup>185</sup> The transitional justice program in Sierra Leone has been criticized for failing to address the larger economic and developmental issues leading up to the conflict. *See, for example*, Rosalind Shaw,

Efforts to integrate corporate accountability into mechanisms of transitional justice should be located in three primary areas: promoting and developing a binding instrument for corporate accountability, designing truth and reconciliation committees that expressly consider the part played by corporate actors, and setting up tribunals with jurisdiction to hold businesses accountable. Given the multilateral character of transitional justice, successful efforts in any one of these areas will have positive effects on each of the others. Of course, political dynamics and considerations will inevitably thwart many of these efforts, but the objective of corporate accountability, even if achieved only partially and piecemeal, will still generally advance the work of transitional justice.<sup>186</sup>

On the level of advocacy, the transitional justice community can and should play a more active role in the work of the IGWG. A legally binding instrument for corporate accountability would greatly advance the objectives and work of transitional justice.<sup>187</sup> Conversely, the international human rights community, including the IGWG, should more actively seek input from those who are directly engaged in the work of transitional justice. Indeed, those involved in transitional justice efforts, particularly in post-conflict societies, have firsthand experience and understanding of the role that corporations can play in human rights violations.

While the scholarship in recent years has begun to recognize that the objectives of corporate accountability and transitional justice have much in common and should mutually support each other, this recognition has yet to inform the work of the IGWG in any consistent manner. In this regard, the work of the Center for the Study of Law, Justice, and Society—Dejusticia—has been at the forefront.<sup>188</sup> In one of the few express interventions in the IGWG’s work from the vantage point of transitional justice, Dejusticia issued a statement during the Second Session explaining that a binding mechanism for closing the “impunity gap” is paramount “if we want to guarantee the success of any transitional justice process.”<sup>189</sup> A strong international regime of corporate accountability with clear norms and binding mechanisms would further support transitional justice efforts

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*Linking Justice with Reintegration? Ex-Combatants and the Sierra Leone Experiment*, in LOCALIZING TRANSITIONAL JUSTICE: INTERVENTIONS AND PRIORITIES AFTER MASS VIOLENCE (Rosalind Shaw & Lars Waldorf eds., 2013); see also Shaw, *supra* note 11; see also EVALUATING TRANSITIONAL JUSTICE: ACCOUNTABILITY AND PEACE BUILDING IN POST-CONFLICT SIERRA LEONE (Kirsten Ainley et al. eds., 2015).

<sup>186</sup> See generally Ruti Teitel, *The Law and Politics of Contemporary Transitional Justice*, 38 CORNELL INT’L L.J. 837 (2005); see also THE POLITICS OF MEMORY, *supra* note 11; Leslie Vinjamuri & Jack Snyder, *Law and Politics in Transitional Justice*, 18 ANN. R. L. & POL. 303 (2015).

<sup>187</sup> See generally Leigh A. Payne et al., *Can a Treaty on Business and Human Rights Help Achieve Transitional Justice Goals?*, 1 HOMA PUBLICA: INT’L J. ON HUM. RTS. & BUS. 96 (2017).

<sup>188</sup> See generally Letter from Dejusticia to U.N. Hum. Rts. Council, *Transitional Justice Architecture and Corporate Accountability*, <http://perma.cc/7HCT-K6KY>.

<sup>189</sup> *Id.*

to “satisfy the right to justice of victims of grave human rights and to achieve non-repetition of violence and social development.”<sup>190</sup> A sanctioned international regime of corporate accountability would potentially counterbalance the ever-present political and economic resistance put up by corporations to being involved in the transitional justice process. Corporations often raise the specter of disinvestment when confronted with the transitional justice regimes.<sup>191</sup> Such tactics are particularly effective in the context of post-conflict societies that are often underdeveloped and constantly in need of reliable foreign financial investment. This intervention by Dejusticia should lead the way for more involvement with the work of the IGWG as discussions of the Zero Draft get underway.

Truth Commissions have a particularly important role to play in integrating corporate accountability into transitional justice regimes, and there are a number of systemic ways that truth commissions can become more effective in this regard. Where possible, the mandate of any newly constituted Truth and Reconciliation Commission (TRC) should expressly include the investigation of corporate actors. Similarly, expanding the subpoena power of the TRC where possible to reach corporate actors would compel corporations to comply, where they otherwise would not do so voluntarily.<sup>192</sup> The investigative work of a TRC should be expressly guided by the Guiding Principles, and any reports issued by the TRC should similarly expressly focus on them. For example, a robust investigation should include explicit consideration of how the relevant states have failed in their duty to protect individuals from human rights abuses by corporate actors. Such an inquiry would focus not only on the host state where the corporation conducted its operations, but also the home state where the corporation is domiciled. Furthermore, when investigating the involvement of corporate actors, the TRC should examine and detail the ways in which the corporate actors have not met the responsibilities outlined in the Guiding Principles. In this respect, specific attention should be paid to not only the actual human rights violations attributable to the business’s operations, but also to more specific corporate

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<sup>190</sup> *Id.*

<sup>191</sup> *See id.* (highlighting corporate claims that “private property was in danger” in the lead-up to the plebiscite on the peace accord).

<sup>192</sup> The South African Truth and Reconciliation Commission was one of the few to expressly incorporate corporate actors into its work. However, it failed to use its subpoena powers to compel corporate participation. Accordingly, many corporate actors who sponsored the apartheid regime simply refused to participate, seriously hindering a thorough accounting of their complicity. *See* Transcript of Business Sector Hearings, Truth and Reconciliation Commission (S. Afr.) (Nov. 11, 1997), <http://perma.cc/6G4C-CSH8>. *See generally* Nicoli Nattrass, *The Truth and Reconciliation Commission on Business and Apartheid: A Critical Evaluation*, 98 AFR. AFF. 373 (1999) (discussing the South African Truth and Reconciliation Commission’s investigation of business complicity in apartheid regime).



management issues including its human rights policies and due diligence. Finally, TRCs should make every effort to involve corporations in the reconciliation process and pressure businesses to provide remediation mechanisms consistent with the Guiding Principles.

Explicit examination of corporate actors by TRCs can have consequential effects for judicial enforcement. The Truth and Reconciliation Commission of Liberia, for example, expressly considered the role that businesses played in the extended civil conflict and detailed the role played by a number of corporate actors.<sup>193</sup> Arms dealer Guus Kouwenhoven was among the individuals mentioned. Kouwenhoven used his timber business to cover his weapons smuggling operation, which supplied arms to Charles Taylor.<sup>194</sup> Kouwenhoven's activities were explicitly detailed in the work of the Liberian TRC, which also recommended that foreign jurisdictions prosecute individuals such as Kouwenhoven.<sup>195</sup> Heeding the TRC's recommendation, a court in the Netherlands sentenced Kouwenhoven to 19 years in prison for his participation in war crimes in Liberia.<sup>196</sup> The Kouwenhoven case highlights the international pressure that TRCs can potentially place on home states to honor their responsibilities with respect to human rights violations by corporate actors. The implementation of a binding instrument would only increase such leverage.

Finally, corporate accountability should factor into the design and structure of criminal tribunals.<sup>197</sup> Jurisdiction over corporate entities remains the biggest obstacle to effective legal accountability for corporate actors. For example, when the ICC was being established there was considerable debate about whether the jurisdiction of the ICC should include legal persons, in addition to natural persons.<sup>198</sup> After weeks of intense debate, the proposal was withdrawn, however, over irresolvable political disagreements about how such jurisdiction would be implemented.<sup>199</sup> Furthermore, the lack of uniformity or consensus among

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<sup>193</sup> TRUTH AND RECONCILIATION COMMISSION OF LIBERIA, VOLUME 3, TITLE III: ECONOMIC CRIMES AND THE CONFLICT, EXPLOITATION AND ABUSE (2009).

<sup>194</sup> See Ruben Carranza, *Dutch Court Convicts Arms Dealer for Role in Liberian Atrocities. What Does it Say about Justice for Economic Crime?*, INT'L CENTER FOR TRANSITIONAL JUST. (May 4, 2017).

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> See generally STEVEN D. ROPER AND LILIAN A. BARRIA, DESIGNING CRIMINAL TRIBUNALS: SOVEREIGNTY AND INTERNATIONAL CONCERNS IN THE PROTECTION OF HUMAN RIGHTS (2006) for a general overview of design issues in setting up transitional justice tribunals.

<sup>198</sup> See Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court*, in LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 139–95 (M.T. Kamminga & S. Zia-Zarifi eds., 2000) (detailing the historical debate surrounding the scope of the ICC's jurisdiction).

<sup>199</sup> *Id.* at 146–158.

signatory states regarding the extent of criminal liability for corporations and the lack, within some states, of any legal codification for such liability presented complementarity challenges that ultimately doomed the proposal.<sup>200</sup> Nevertheless, the issue was put front and center for all future tribunals whose mandate includes the enforcement of international human rights laws.

In the wake of the original ICC proposal, a number of tribunals have been contemplated that would have jurisdiction over legal persons, including corporations, committing human rights violations. The Liberian TRC, for instance, recommended “prosecution for economic crimes, as gross human rights violations, all those persons, natural and artificial it finds responsible for the commission of economic crimes during the period of the Liberian conflict.”<sup>201</sup> In pursuit of such prosecutions, the Liberian TRC further recommended that an Extraordinary Criminal Tribunal for Liberia be established for the prosecution of specifically identified human rights violations.<sup>202</sup> Similarly, the African Union has proposed the institution of a criminal law section of the African Court of Justice and Human Rights (ACJHR) that would include jurisdiction over international and transnational crimes and the ability to adjudicate claims against corporations.<sup>203</sup> The protocol will go into effect once fifteen member states sign the Protocol; to date, eleven member states have done so.<sup>204</sup> Relatedly, the Special Tribunal for Lebanon (STL) has also recently asserted its jurisdiction over a Lebanese broadcasting company for allegedly interfering in the administration of justice.<sup>205</sup> All of these instances represent incremental steps in a growing international recognition that corporate actors are liable for criminal activity and should, accordingly, be subject to the jurisdiction of the relevant courts. Both current and future tribunals engaged in the work of transitional justice should

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<sup>200</sup> See Caroline Kaeb, *The Shifting Sands of Corporate Liability Under International Criminal Law*, 49 GEO. WASH. INT’L L. REV. 351–403 (2016) (discussing how the international legal terrain has changed since the adoption of the Rome statutes in such a way that undermines the rationale for not including jurisdiction over legal persons).

<sup>201</sup> TRUTH AND RECONCILIATION COMMISSION OF LIBERIA, VOLUME 2: CONSOLIDATED REPORT 274 (2009).

<sup>202</sup> *Id.* at 268. The proposed Extraordinary Criminal Tribunal has yet to be established. However, the political pressure to establish one remains. As recently as September 7, 2018, a resolution was introduced into the United States House of Representatives urging “the Government and people of Liberia to support the truth and reconciliation process through full implementation of the recommendations of the Truth and Reconciliation Commission, including the establishment of an Extraordinary Criminal Tribunal.” H.R. Res. 1055, 115th Cong. (2018) (enacted).

<sup>203</sup> Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, May 14, 2014, AU Doc. No. STC/Legal/Min. 7(1) Rev. 1, at art. 46C; see also Matiangai Sirleaf, *The African Justice Cascade and the Malabo Protocol*, 11 INT’L J. TRANSITIONAL JUST. 71 (2017).

<sup>204</sup> See *Status List*, AFRICAN UNION, <http://perma.cc/DCS5-6AXN>.

<sup>205</sup> See generally Nadia Bernaz, *Corporate Criminal Liability Under International Law: The New TV S.A.L. and Akhbar Beirut S.A.L. Cases at the Special Tribunal for Lebanon*, 13 J. INT’L CRIM. JUST. 313 (2015).

promote the further development of this international norm by including corporate actors within their jurisdiction.

## VI. CONCLUSION

The historical legacies of colonial rule permeate the global postcolonial governance structures that systematically produce social instability, political violence, and human rights violations. Transitional justice rightfully aims to intervene in such situations in an effort to achieve restorative justice. To be lasting, however, the work of transitional justice must address the social, political, and economic conditions underlying these humanitarian crises. Recent developments in the movement for corporate accountability present transitional justice with an opportunity to confront and challenge the neocolonial structures of global order. Through effective integration of the Guiding Principles within its practices, as well as sustained engagement with the corporate accountability movement within the international legal community, transitional justice may advance its own objectives and contribute to the general decolonization of the existing global order.