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## Doing Justice to Justice? Entanglements with Hegemony and Transitional Justice

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## Abstract

Transitional justice is affected by the moment it emerged in the international system, the post-Cold War era. Its form was distorted by the international context into which it was born: the dissolution of the bipolar Cold War political order, the triumph of the United States as the world's sole hegemon, and the cascading wave of liberalization that crashed across the globe. Transitional justice *was shaped* by this political moment, as it absorbed important tenets of liberal internationalism. Transitional justice also helped *shape* this political moment, as it became a solution to the problem that illiberal non-democratic, conflicted states pose to the success of the liberal internationalist vision. The result is that considerations in transitional justice that should have intrinsic merit, including the 'local,' the 'victim' and indeed, 'justice', become instrumentalized in the service of this overarching liberal social project. Ultimately, transitional justice fails to realize its emancipatory potential.

## Keywords

Transitional Justice; Critical Theory; Liberal Internationalism; Democracy  
Promotion; Hybridity; Victim

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Without the love and support of my family, this thesis would not have been possible. My father raised me to see the world for what it is, but also to yearn for better. My mother taught me that no obstacle was too high to overcome. And my sister, my lifelong confidante, has been there to ground me every step of the way. Thank you, all, for your support.

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## Chapter 1

### 1 Introduction

*“Memory, itself, is a disciplinary mechanism... it selects for what is important (the histories of triumph), it reads a continuous narrative into one full of ruptures and contradictions, and it sets precedents for other ‘memorializations.’”<sup>1</sup>*

The transitional justice moment has truly arrived. From its humble origins as a nameless literature at the margins of disparate fields, transitional justice has become a coherent field of scholarship, policy, and practice. It has made meaningful strides towards inclusion in the normative workings of the international system. Transitional justice has succeeded in creating a vast and expanding academic and practical literature, and marshalled a dedicated following of scholars, practitioners and policymakers to its cause. Counted amongst its adherents is Kofi Annan, the former Secretary General of the United Nations. In a Report of the Secretary-General to the United Nations, Annan established his commitment to the field, as transitional justice is “essential to... the international community’s efforts to enhance human rights.”<sup>2</sup> For Annan, transitional justice is one “mutually reinforcing imperative” alongside long-standing international commitments to peace and democracy.<sup>3</sup> This high level of rhetorical dedication has been matched by an incredible amount of expenditure and practical implementation.<sup>4</sup> No less than thirty-five countries have implemented truth commissions to investigate mass atrocity; the hallmark International Criminal Tribunals of Rwanda and Yugoslavia occurred; and the ratification of the Rome Statute constructing the International Criminal Court (ICC) stands as a crowning achievement of transitional justice discourse and doctrine.<sup>5</sup> Indeed, a veritable transformation has occurred under the auspices of transitional justice.

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<sup>1</sup> Judith Halberstam, *The Queer Art of Failure* (Durham: Duke University Press Books, 2011), 15.

<sup>2</sup> Kofi Annan, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies Report of the Secretary-General*, (New York: United Nations Security Council, 2004), 4.

<sup>3</sup> Ibid.

<sup>4</sup> Vesna Bojicic-Dzelilovic, “World Bank, NGOs and the Private Sector in Post-War Reconstruction,” *International Peacekeeping* 9, no. 2 (2002), 90.

<sup>5</sup> Joanna R. Quinn, “Introduction,” in *Reconciliation(s): Transitional Justice in Post-Conflict Societies*, ed. Joanna R. Quinn (Canada: McGill-Queen’s University Press, 2009), 3.

The fact that this expansion occurred in such a compressed time frame, a mere 25 years, is remarkable. More remarkable, still, is the crossroads at which transitional justice now finds itself. The correct posture of transitional justice in relation to states, institutions and the international community is the topic of heated debate. Granted, the tone of these discussions is not always critical. Often, these debates can take the shape of practical ‘internal’ disagreements, concerning the proper sequencing of mechanisms or the right manner in which to deal with questions of sovereignty. In this case, the terms of the debate are confined to the bounds of transitional justice practice. There are, however, growing concerns about the value and vision of transitional justice as an enterprise. For some, the rapid enlargement of transitional justice has presented a ‘paradox of success,’ whereby the field is left vulnerable to failure, manipulation and critique.<sup>6</sup> In the policy realm, there is reason to believe that the swift acceptance and application of transitional justice has presented practitioners with a dilemma as the paradigms they hope to implement are insufficiently theorized.<sup>7</sup> On the theory side, a growing chorus of critical scholars has begun to challenge the normative aspects of the field, mounting incisive criticisms of the aims, ambitions and assumptions undergirding transitional justice practice.<sup>8</sup> This thesis finds its grounding in this comprehensive critical reflection on the field. In the midst of this ‘premature midlife crisis,’ an examination of the core assumptions and practices of transitional justice is timely.<sup>9</sup> The intended aim of this research is not to discard the theory and practice of transitional justice wholesale, but rather to subject the framework that underlies transitional justice to further scrutiny. Laying bare the problematic assumptions that frame the transitional justice enterprise presents the opportunity for change, and opens a space to imagine transitional anew.

Here, a brief primer on transitional justice is necessary. As the breadth of transitional justice has widened over the course of the past two decades, the meaning

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<sup>6</sup> Lauren Marie Balasco, “The Transitions of Transitional Justice: Mapping the Waves from Promise to Practice,” *Journal of Human Rights* 12, no. 2 (2013).

<sup>7</sup> Moses Okello, “Afterword: Elevating Transitional Local Justice or Crystallizing Global Governance?,” in *Localizing transitional justice: Interventions and priorities after mass violence*, ed. Rosalind Shaw, Lars Waldorf, and Pierre Hazan (United States: Stanford University Press, 2010), 276.

<sup>8</sup> Christine Bell, “Transitional Justice, Interdisciplinarity and the State of the ‘Field’ or ‘Non-Field,’” *International Journal of Transitional Justice* 3, no. 1 (2008), 13.

<sup>9</sup> *Ibid.*

of the term itself has also considerably broadened.<sup>10</sup> What began as a literature primarily concerned with transitions from authoritarianism to democracy now commands a prolific literature on intractable civil conflict, humanitarian crisis and international intervention.<sup>11</sup> As the post-Cold War era presented new challenges to the attainment of transitional justice goals, these issues were woven into the definition of transitional justice itself. What is central to all of these meanings is the concept of ‘transition,’ which implies a linear progression from one state of being to another: usually from war to peace or from authoritarianism to democracy.<sup>12</sup> Joanna R. Quinn identifies four strands of consideration in transitional justice canon, each with its own set of paradigmatic debates: memory and remembering, truth, peacebuilding and the transformation of institutions, and forgiveness.<sup>13</sup> According to Quinn, all four strands of transitional justice analysis coalesce around a desire for reconciliation, which is a dynamic process of rebuilding society after mass atrocity.<sup>14</sup> Transitional justice theory, then, is concerned with the philosophy, politics and pragmatic aspects of ‘transition’, an extended meditation on the question of “how to approach the past.”<sup>15</sup>

But there is more. Chandra Lekha Sriram argues that transitional justice is also an “active domain of policy,” which is practiced by the United Nations, supported by NGOs, and bilateral donors.<sup>16</sup> This is because processes of transition are understood to be traumatic, raising “fundamental issues regarding law, morality and politics,” as societies struggle to “find solutions to legacies of violence.”<sup>17</sup> Undergoing a ‘transition’ produces “resulting questions of justice,” which the

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<sup>10</sup> Christine Bell, “Transitional Justice, Interdisciplinarity and the State of the ‘Field’ or ‘Non-Field,’” 9.

<sup>11</sup> Paige Arthur, “How ‘Transitions’ Reshaped Human Rights: A Conceptual History of Transitional Justice,” *Human Rights Quarterly* 31, no. 2 (2009), 343-345.

<sup>12</sup> For more on the politics of the ‘transitions paradigm,’ see Paige Arthur, “How ‘Transitions’ Reshaped Human Rights: A Conceptual History of Transitional Justice.”

<sup>13</sup> Joanna R. Quinn, “Introduction,” 4.

<sup>14</sup> *Ibid.*

<sup>15</sup> Kora Andrieu, “Civilizing Peacebuilding: Transitional Justice, Civil Society and the Liberal Paradigm,” *Security Dialogue* 41, no. 5 (2010), 537.

<sup>16</sup> *Ibid.*, 583.

<sup>17</sup> Alexandra Barahona de Brito, Carmen Gonzalez-Enriquez, and Paloma Aguilar, “Introduction,” in *The Politics of Memory and Democratization: Transitional Justice in Democratizing Societies*, ed. Alexandra Barahona de Brito, Carmen Gonzalez-Enriquez, and Paloma Aguilar (Oxford: Oxford University Press, 2001), 1.



introduction of transitional justice mechanisms are meant to address.<sup>18</sup> These mechanisms can include any combination of trials, truth commissions, lustration, amnesty and pardon.<sup>19</sup>

These mechanisms are themselves representative of certain paradigmatic debates within the field of transitional justice, about the relative primacy of truth or peace in relation to justice. These paradigmatic differences are the result of the divergent silos of knowledge from which transitional justice emerged. According to Christine Bell, transitional justice is caught in a contest between competing aims, including “an ongoing battle against impunity rooted in human rights discourse; a set of conflict-resolution techniques related to constitution-making; and a tool for international state-building in the aftermath of atrocity.”<sup>20</sup> In order to gain a clear view of the field, I will now consider each of these paradigms in turn.

The three foundational paradigms of transitional justice are retributive, restorative and reparative. The retributive paradigm in transitional justice takes its start from the foundational underpinnings of the criminal justice system in many Western countries. It begins with the assumption that “someone who has done wrong should suffer some penalty *as a result of what he has done* because that suffering is the appropriate consequence to him of the wrongdoing for which he is responsible.”<sup>21</sup> There are varying rationales for the retributive paradigm, but they usually include the public acknowledgement of wrong-doing, the punishment of the perpetrator, a reverberating educative effect for the public, a reinforcement of the ‘rule of law,’ and a restored legitimacy in the legal institutions.<sup>22</sup> Those that follow the retributive paradigm are likely to advocate for the use of trials and tribunals as transitional justice mechanisms, acting in the name of formal, institutional justice.

The restorative justice paradigm takes a rather different approach to the retributive paradigm, rather than punishing the perpetrator it seeks to “restore both the

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<sup>18</sup> Joanna R. Quinn, “Introduction,” 3.

<sup>19</sup> Chandra Lekha Sriram, “Justice as Peace? Liberal Peacebuilding and Strategies of Transitional Justice,” *Global Society* 21, no. 4 (2007), 584.

<sup>20</sup> *Ibid.*, 13.

<sup>21</sup> Trudy Govier, *Forgiveness and Revenge* (New York: Taylor & Francis, 2002), 15.

<sup>22</sup> Joanna R. Quinn, ‘Transitional Justice’, in *Human Rights: Politics and Practice*, by Michael Goodhart, ed. Michael Goodhart (New York: Oxford University Press, 2009), 330

victim and perpetrator of crimes back into harmony with the community.”<sup>23</sup> There are three rationales for restorative justice: a focus on harm, the conception that harm results in obligations to society and victims, and that it promotes engagement or participation.<sup>24</sup> The primary mechanism following from the restorative approach has been one of the most successful, the truth commission. Here, pardon in the name of ‘settling accounts’ of the truth is common. This is because the aim of the restorative paradigm is fundamentally non-retributive; it takes its strength from stitching social ties back together again.

The reparative justice paradigm is centered on the concept of ‘repairing’ that which was broken within the community in order for the mass violation of human rights to have occurred. While also a critique of the retributive paradigm, it is more concerned with “making right what went wrong,” in materially and symbolically ways.<sup>25</sup> There are three rationales for reparative justice: “restoring the rule of law through reforms to prisons, police and judiciary; rectifying human rights violations through trials, reparation and traditional mechanisms; and redressing the inequalities and distributive injustices that underlie war.”<sup>26</sup> This is a more structural approach to transitional justice than the one advocated by either the retributive and restorative paradigms, and as such, is more capable of addressing the grievances that caused and exacerbated conflict in the first instance.

These paradigms may seem quite different at first glance, but I argue that their end goals are indistinguishable. The retributive, restorative and reparative paradigms may offer different diagnoses of the social ills and prescribe divergent mechanisms, but they envision an identical social and political world. This is true whether the scholars are interested in trials or truth commissions as instruments to bring about this political world, or paradigmatically focused on retribution or restoration. Transitional justice scholars see the proper political alignment as one informed by liberal democracy, a liberal citizenry and a social world constituted by the specific civic virtues of toleration, equality and rule of law. Therefore, the distinction between these

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<sup>23</sup> Joanna Quinn, ‘Transitional Justice,’ 333.

<sup>24</sup> Howard Zehr, *Little Book of Restorative Justice* (United States: Good Books, U.S., 2002), 23-24.

<sup>25</sup> Joanna Quinn, ‘Transitional Justice,’ 336.

<sup>26</sup> Rosemary Nagy, “Transitional Justice as Global Project: Critical Reflections,” *Third World Quarterly* 29, no. 2 (2008), 277.

paradigms is a difference of process, or the manner of bringing about the world these scholars envision. The goals of transitional justice include establishing the rule of law, accountability, and democracy, but there are more.<sup>27</sup> Martha Minow outlines several “overlapping aspirations” of transitional justice including the end of violence, overcoming denial, promoting reconciliation and psychological healing, punishing and excluding perpetrators, renouncing atrocity, and building an international order to prevent and respond to atrocity.<sup>28</sup>

I began this study by considering the margins of transitional justice, and the opportunities available for subaltern actors and populations to ‘make’ transitional justice as they see fit. Essentially, I considered the possibility and method of agency in the face of hegemonic constraints presented by transitional justice discourse and its institutions. While Antonio Gramsci coined the word ‘subaltern,’ my consideration of the subaltern subject in transitional justice followed from the assumption and redeployment of the concept from postcolonial scholars such as Gayatri Chakravorty Spivak and Ranajit Guha.<sup>29</sup> In this tradition, the concept of the subaltern retained its emphasis on “people in a particular society suffering under hegemonic domination,” but was considerably widened. Scholars such as Gayatri Chakravorty Spivak included include the racialized international division of labor, and added the critical dimension of ‘voice.’<sup>30</sup> The subaltern is a subject, constituted and created by the hegemonic forces which she endures. The subaltern is characterized by an ‘inability to speak,’ a subordination that subalterns can subvert through acts of resistance or partial acceptance. Scholars of Subaltern Studies emphasize the situational nature of subalternity, which allows for its consideration outside of considerations strictly

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<sup>27</sup> See Padraig McAuliffe, “Transitional Justice and the Rule of Law: The Perfect Couple or Awkward Bedfellows?,” *Hague Journal on the Rule of Law* 2, no. 02 (2010), James A. McAdams, ed., *Transitional Justice and the Rules of Law in New Democracies* (United States: University of Notre Dame Press, 1997).

<sup>28</sup> Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (Boston: Beacon Press, 1998), 88.

<sup>29</sup> El Habib Louai, “Retracing the Concept of the Subaltern from Gramsci to Spivak: Historical Developments and New Applications,” *African Journal of History and Culture* 4, no. 1 (2012), 5.; Ranajit Guha, *The Small Voice of History: Collected Essays*, ed. Partha Chatterjee (India: Permanent Black, 2009); Ranajit Guha and Gayatri Chakravorty Spivak, eds., *Selected Subaltern Studies* (New York: Oxford University Press, 1989).

<sup>30</sup> Ranajit Guha and Gayatri Chakravorty Spivak, eds., *Selected Subaltern Studies*.

related to class struggle.<sup>31</sup> The subaltern intersects with transitional justice at many interfaces, but most importantly, the subaltern is often constituted as a subject: the victim-subject and the ‘local’-subject, are two constructions investigated in this thesis. As the ‘international community’ dictates and bounds the process of ‘transition,’ the study of the subaltern lends itself well to critiquing the undergirding assumptions embedded in transitional justice literature. However, I found that the study of hegemonic constraint in transitional justice is a burgeoning field, full of possibilities for deep inquiry independent of its relation to the figure of the subaltern. Examining the extent, shape and motivations for these specific constraints then became the theoretical focus of this thesis, with the subaltern a strong undertone in my analysis.

Hegemony, here, will be considered in the Gramscian sense, in which a social group gains power through the twin forces of physical force and ‘leadership’. According to Douglas Lidowitz, Gramsci’s model of hegemony involves the “subtle dissemination of the dominant group’s perspective as universal and natural, to the point where the dominant beliefs and practices become an intractable component of common sense.”<sup>32</sup> For our purposes, the assumption of democratization and liberalization as features of ‘common sense’ can be seen as evidence of hegemony.

I argue that the shape of transitional justice is molded by the moment it emerged in the international system, the post-Cold War era. Its form was distorted by the international context into which it was born: the dissolution of the bipolar Cold War political order, the triumph of the United States as the world’s remaining world hegemon, and the cascading wave of liberalization that crashed across the globe. Transitional justice *was shaped* by this political moment, as it absorbed important tenets of liberal internationalism and the need for liberal democratic states. Transitional justice also helped to *shape* this political moment, as it became a solution to the problem that illiberal non-democratic, conflicted states pose to the success of the liberal internationalist vision. Transitional justice adopts a particular posture, here, as a social project. It becomes hegemonic, because it is tooled in service to an

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<sup>31</sup> Ibid.

<sup>32</sup> Douglas Litowitz, “Gramsci, Hegemony, and the Law,” *Brigham Young University Law Review* 2, no. 1 (2000), 515.

“interlocking system of ideas which persuades people of the rightness of any given set of often contradictory ideas and perspectives.”<sup>33</sup> It becomes a radical project of social reshaping, to suit the ends specified by its assumptions. The result is that considerations in transitional justice that should have merit on their own terms, including the ‘local,’ the ‘victim’ and indeed, justice, become instrumentalized in the service of this overarching liberal social project.

The first chapter of this thesis, “Locating Transitional Justice in Historical Perspective,” evaluates the orthodox narrative of the emergence of transitional justice onto the international stage. The orthodox transitional justice origin story begins with the post-World War II era, and particularly focuses on the Nuremberg trials. The story goes that from this auspicious start, transitional justice was mired in its tracks by the Cold War bifurcation of the international system. By the end of the Cold War, there was a normative ‘justice cascade’ which was then allowed for the renewal of transitional justice on the world stage. This narrative, however, falls prey to several challenges.

My main challenge to the transitional justice origin story is the assumption that the imputed significance of Nuremberg for transitional justice scholars aligns with the actual experience of the Nuremberg trials for contemporary actors and states. The ‘Nuremberg legacy’ ascribes to the Nuremberg trials an interest in diminishing the power of state sovereignty, when I argue the *opposite* was the case. I demonstrate that the Nuremberg trials and the Allied occupation of Germany post-WWII was legitimized through the active exercise of sovereignty. My critique has two consequences: first, it casts doubt on the veracity of the transitional justice origin story. But, second, it allows for the relocation of the ‘emergence’ of transitional justice to a more fitting place: the post-cold War moment. This places transitional justice discourse in dialogue with the geopolitical and ideational changes that were occurring at this time, and permits analysis of transitional justice alongside democracy promotion and liberal peacebuilding.

“Transitional Justice: Fashioning the Liberal Democratic Polity?” is the second chapter of this thesis. I take “who is transitional justice meant to serve?” as the

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<sup>33</sup> Judith Halberstam, *The Queer Art of Failure*, 17.

guiding question of this chapter, and from this perspective I consider the implications of embedding the objective of liberal democracy in the core of the transitional justice enterprise. The dominance of the democratic peace thesis in considerations of transitional justice is clear, there is an assumption that democratic states are inherently peaceful and therefore the construction of liberal democratic states in transitional societies is of paramount importance. I argue that this claim is unsubstantiated, as the democratic peace thesis makes a contested claim on the likelihood of violence between democratic states, rather than the intrastate conflict that is most likely to wrack transitional states. As a result, I argue that the democratic peace thesis is a faulty basis from which to begin transitional justice initiatives.

I also consider, here, the reasons for the centrality of the democratic peace thesis to transitional justice. First, I argue that transitional justice's democracy imperative shares troubling resonances with modernization theory, with liberal democracy taking the mold as the unitary form of modernity to which non-democracies must conform. Second, I posit that the construction and expansion of liberal spaces is taken as a security prerogative for liberal democratic states in the liberal internationalist paradigm, as "liberals do not merely distrust what [non-democracies] do; [they] dislike what they are."<sup>34</sup> This security dilemma is combined with the particular features of the moment of transitional justice's emergence onto the world stage, which provided an unprecedented amount of intervention for the United States, the world's premier liberal internationalist hegemon. The advent of transitional justice coincided with unipolar American hegemony, the ideological triumph of liberal internationalism in the world system, and the proliferation of liberal peacebuilding theory and practice. Together, this indicates that transitional justice practice lays a foundation for the creation and maintenance of liberal spaces across the world. By defining-in democracy to transitional justice enterprise, the possibility of alternative forms of governance is barred from the start. And yet, the rationale behind this democratizing imperative is fundamentally about the ontological threat that non-democracies pose to liberal democratic states, not the transitional states

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<sup>34</sup> Christopher Hobson, "Democracy as Civilisation," *Global Society* 22, no. 1 (2008), 85.

themselves. This tension, if left unresolved, points to the entanglements of transitional justice with hegemonic forces in the globe.

The third chapter, “Hybridity to the Rescue?” considers transitional justice in relation to the rise and crisis of liberal peacebuilding and the turn to local and hybrid forms of peace. Transitional justice rode on the coattails of the liberal peacebuilding agenda, which in the early 1990s saw a rapid enlargement in funding, implementation and optimism. In the name of a liberal peace that would envelop the globe, international organizations waded into the murky waters of intrastate conflict. In the face of repeated failure, it seemed the hope for a liberal peace was dashed.

After the ‘crisis’ that plagued liberal peacebuilding, to which transitional justice was intimately tied, there was a turn towards the ‘local’ which had a marked impact on transitional justice thought and practice. I argue that the turn towards the local was affected by two problems: the problem of knowing the local and the problem of local knowledge. The problem of knowing the local is the essentialized portrait of the ‘local’ that emerges from the instrumentalist approach that peacebuilding and transitional justice scholars used in relation to ‘transitional’ societies. Here, a binary opposition is drawn between the ‘local’ and the ‘international,’ with problematic results. This leads to the problem of local knowledge, which is the process by which an artificial script and understanding of the ‘local’ is produced that can be translated into the language of technocratic solutions. From this grounding, I then analyze the ways that these problematic assumptions can impact the interfaces at which the ‘local’ and the ‘international’ interact in transitional justice: hybrid tribunals and customary justice mechanisms. Ultimately, I argue that hybrid attempts at transitional justice fails to escape the problematic logic of the liberal peace. In the name of hybridity, I argue, transitional justice assumed a new and more ‘legitimate’ shape.

“Constructing the Victim, Settling Accounts” is the final chapter of this thesis. Finally, I consider the construction of victimhood in transitional justice, the manner in which the ‘victim’ is instrumentalized, and the neutralization of contesting narratives of victimhood through truth commissions. I attempt to deconstruct the sanitized dichotomy between ‘victim’ and perpetrator’ in order to understand how these

narratives can obscure the messy realities of protracted conflict and depoliticize actors who navigate conflicted spaces. I also challenge the politics of ‘invoking the victim,’ or claiming the best interest of the victim to pursue certain ends.

The process of ‘settling accounts’ through the transitional justice mechanisms of truth commissions can have a silencing effect on victim narratives that are left out of the fold. Although transitional justice aims to deal with the past, the realities of conflict can produce multiple, contradictory narratives of war time. The processing of these truths to create a singular Truth is ultimately a hegemonic act. Here, I consider the importance of this process to the state and nation-building project, even as it can come at the expense of victims. Ultimately, through authoritative appeals to the Truth, truth commissions can cement in place the same unjust political dynamics that propagated the conflict that made them necessary.

The current shape of transitional justice is an attempt to distill diverse political forms into the liberal mode, to produce ready-made toolkits in response to atrocity, and to tacitly accept hegemonic circumstances to shape and define the transitional justice project. This cannot be allowed to stand. It is clear that foreclosing the search for justice to those options manicured and preferred by the international community is a sorry answer to the challenges presented after conflict ends. In this single-minded pursuit, transitional justice fails its emancipatory potential, which is among the most important assets it possesses. Critical examinations of the field, such as this one, can allow transitional justice to imagine itself anew.

The methodology employed by this thesis is a discourse analytic methodology. Inherent to this enterprise is an understanding of the way that knowledge production, and its historical legacy, shapes and reshapes political landscapes. In this respect, I concur with the conclusion of Phillips and Hardy that “[w]ithout discourse, there is no social reality, and without understanding discourse, we cannot understand our reality, our experiences, or ourselves.”<sup>35</sup> Indeed, this understanding is crucial to our understanding of political dynamics. The creation of meaning, Murray Edelman argues, is “[t]he critical element in political maneuver for

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<sup>35</sup> Nelson Phillips and Cynthia Hardy, *Discourse Analysis: Investigating Processes of Social Construction* (London: Sage Publications, 2002), 2.



advantage...”<sup>36</sup> As meaning is construction, our understanding of the precise contours of amorphous concepts such as ‘peace,’ ‘conflict,’ and ‘justice’ become instrumentalized and deployed through policy. Any attempt to understand these dynamics, then, must begin with the deconstruction of the concepts themselves.

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<sup>36</sup> Murray Edelman, “Political Language and Political Reality,” *American Political Science Association* 18.1 (1985): 10.

## Chapter 2

### 2 Locating Transitional Justice in Historical Perspective

An issue of central concern in the transitional justice literature is the problem of ‘the past,’ and how it might best be ‘reconciled,’ ‘acknowledged,’ or ‘dealt with.’ And yet, efforts to historicize transitional justice itself, as a coherent and bounded discipline, have been rather scant. There is a transitional justice ‘origin story,’ that is often taken at face value. As this orthodox narrative of the emergence of transitional justice is intimately tied to its normative aims, it is incredibly important to subject this origin story to scrutiny. Transitional justice literature anchors itself in seminal moments in the evolution of the modern state system, such as the Nuremberg trials. This origin story serves an important legitimizing function for the discipline, as it can then refer to the creation of the contemporary international system for its precedent. With further analysis, this orthodox narrative proves to be ahistorical in nature, as it relies on a revisionist interpretation of the motives and actions of states and policymakers in the post-World War II era. Rather than relying on this interpretation of transitional justice history, this chapter argues that transitional justice as a field is a much more recent invention, becoming a concretized field only in the immediate post-Cold War era. Situating transitional justice in the post-Cold War era offers the opportunity to analyze its emergence in conjunction with other concurrent hegemonic discourses that captured the international spotlight at the same moment.

#### 2.1 Evaluating the Transitional Justice Origin Story

The exact historical moment that scholars determine to be the ‘start’ of transitional justice is largely a function of whether they view transitional justice as a distinct product of the modern era, or a regularly occurring process that spans the expanse of time. This illuminates key differences in definitional criteria, as some definitions allow for transitional justice processes to be read backwards into history, while others root themselves in specific historical moments.

The boundaries of the ‘Universe of Transitional Justice’ are considerably broader for John Elster than for other scholars, as he defines transitional justice as “[t]he processes of trials, purges, and reparations that take place after the transition from one political regime to another.”<sup>1</sup> Rather than understanding transitional justice as ‘emerging’ in a certain historically situated context, then, this definition allows Elster understand transitional justice as a regularly occurring fixture of moments of social transformation. Elster sets out to examine the ‘process of transitional justice’ at work in the restoration of Athenian democracy in 411 B.C. and 403 B.C., as well as the two French resurrections of monarchy in the 19<sup>th</sup> century.<sup>2</sup> In doing so, Elster attempts to explain the ways that processes of transitional justice are different in transitions from one form of governance to another, largely by containing the normative aspects of transitional justice to the understandings of justice offered by incoming elites.<sup>3</sup>

While Elster’s intended aim is to prove that “transitional justice is not limited to modern regimes nor to democratic regimes,” he inadvertently demonstrates one of the greatest challenges of the transitional justice literature: definitional ambiguity. Where most transitional justice scholars would contain the bounds of transitional justice to the latter part of the twentieth century, Elster achieves this extension of transitional justice by removing some of the key assumptions of much of the current field. By way of example, Elster does not assume that democracy is the inevitable end of transitional justice processes. Certainly, the coherent identification of transitional justice principles backwards into time forces one to reconsider the remarkability of our present moment.

While Elster is a notable exception, there is an identifiable orthodox narrative of the emergence of transitional justice in the international arena. This origin story tells of a steadily evolving normative acceptance of transitional justice principles, occurring in successive waves over the course of the twentieth century. Ruti Teitel’s seminal “Transitional Justice Genealogy” is quite essential in outlining this position.

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<sup>1</sup> Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (United Kingdom: Cambridge University Press, 2004), i.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid., 79-80.

Understanding this orthodox narrative of the emergence of transitional justice is critical to apprehending how the field of transitional justice legitimizes and historicizes itself and its place in the international system. This section unpacks this origin story, determines the reasons that this particular narrative is important to the field, and considers the implications of marking a new ‘start’ to the transitional justice project.

Teitel describes the emergence of transitional justice as occurring in three distinct phases: post-World War II transitional justice, post-Cold War transitional justice, and steady-state transitional justice.<sup>4</sup> Each of these distinct ‘phases’ is understood to be self-contained, historically situated, and most-importantly, *progressing*. The understanding of progression implies two things: first, that transitional justice thought existed in a coherent way in previous iterations; and, second, that the most recent forms of transitional justice are the result of continuous and conscious assessment. Teitel repeatedly depicts each of these phases as constituting a critical re-appraisal of the benefits and costs of earlier models. For example, Teitel writes on the political transitions that occurred as a result of the dissolution of the Soviet Union in the 1980s, “the question confronted by successor regimes was whether and to what extent to adhere to the Phase I model of transitional justice,” demonstrating that she sees an educative effect emerging from successive waves of transitional justice.<sup>5</sup> Perhaps the most significant of these legacies, for Teitel, is the Nuremberg trials.

Teitel ascribes an incredible amount of significance to the Nuremberg trials after the end of the Second World War. For Teitel, the particular combination of attributes in the immediate postwar era served as a catalyst for the emergence of transitional justice thought and practice. From this standpoint, the postwar global arena was ripe for the emergence of transitional justice as it was characterized by the triumph of international law, the concurrent codification of human rights frameworks, and a willingness to appropriately ‘deal’ with the horrors of the Nazi regime. This first wave of transitional justice, post-WWII transitional justice under Teitel’s model,

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<sup>4</sup> Ruti Teitel, “Transitional Justice Genealogy,” *Harvard Human Rights Journal* 16 (2003), 70.

<sup>5</sup> *Ibid.*, 75.

was itself a repudiation of interwar justice. National justice of the interwar years was “displaced by international justice” in order to guarantee the rule of law.<sup>6</sup> Collective sanctions, such as those imposed under the auspices of the Treaty of Versailles, were viewed as onerous, resulting in a “crude, undifferentiated impact” and were subsequently abandoned.<sup>7</sup> This made way for the “liberal focus on individual judgment and responsibility.”<sup>8</sup>

Ultimately, and perhaps most significantly, Teitel understands the Nuremberg legacy to represent the emergence of an ethos of conflict resolution, a commitment to liberal principles in matters of justice. As Teitel writes, “[t]he postwar turn to international law... reflected the sense that the relevant subject of transitional justice was an international legal response governed by the law of conflict.”<sup>9</sup> The international community was charged with the protection of the rule of law, the rights of individuals, and the duty to seek justice after atrocity. This implied a limit to national sovereignty, and a strengthening of the role of the international in domestic affairs. The importance of this legacy to the orthodox transitional justice origin story cannot be overstated. Here, the Nuremberg trials are meant to demonstrate the international system curtailing the power and hegemony of the state over its citizens, providing the first check against state power.<sup>10</sup> As a result, Nuremberg is seen to form the foundation from which transitional justice theory and practice emerged. According to Teitel, “by defining the rule of law in universalizing terms, it has become the standard by which all subsequent transitional justice debates are framed.”<sup>11</sup>

Teitel is not the only scholar to ascribe a “permanent and profound significance” to the Nuremberg legacy.<sup>12</sup> Minow couches her criticisms of the trials in the observation that “once established, the Nuremberg tribunal and even the ‘somewhat nebulous’ notion of crimes against humanity no longer could be viewed as

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<sup>6</sup> Ibid., 72.

<sup>7</sup> Ibid., 73.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid., 74.

<sup>10</sup> Ibid., 72.

<sup>11</sup> Ibid., 76.

<sup>12</sup> Ibid.

unprecedented.”<sup>13</sup> Minow cites a Nuremberg prosecutor in saying that “the most important contribution of Nuremberg is the development of a kind of international law that grows, and is always in the process of becoming.”<sup>14</sup> And Neil Kritz, in his important “Transitional Justice” volumes, also subscribes to this understanding of Nuremberg-as-start—although by omission. Kritz provides a chronological examination of transitions, yet no cases are selected for consideration that occur before the end of the Second World War. Of the many cases selected to represent the immediate postwar era, it is post-Nazism Germany that is first. This accompanies a note that cites the International Military Tribunal at Nuremberg as a “major historical precedent” for future transitional justice.<sup>15</sup> This specific reading of the centrality of Nuremberg is placed at the very core of the orthodox reading of the emergence and definition of transitional justice.

And yet, the significance afforded to the Nuremberg trials by Teitel and others is based on a reading of the trials that merits further scrutiny. Perhaps one of the most significant imputed legacies of Nuremberg is the assessment that it encroached upon the heretofore-sacrosanct boundaries of national sovereignty. In the orthodox transitional justice narrative, national sovereignty is understood to have been an impenetrable force pre-World War II. The Nuremberg trials are here understood to be an important first challenge to this unquestioned preeminence. The opening of this floodgate, then, later allows transitional justice mechanisms to address state atrocity at the international level. As Martha Minow writes, “Nuremberg itself establishes such international law that takes precedence over both claims of state authority and claims of obligation under state law.”<sup>16</sup> Henry T. King took the argument further, stating that Nuremberg “penetrated the veil of national sovereignty to recognize individuals as having rights independent of nation-state recognition.”<sup>17</sup> Nuremberg, for many transitional justice scholars, functions as an opening salvo in a steady

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<sup>13</sup> Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (Boston: Beacon Press, 1998), 33.

<sup>14</sup> *Ibid.*

<sup>15</sup> Neil J. Kritz, ed., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes: Volume 2: Country Studies* (United States: United States Institute of Peace Press, 1995), 2.

<sup>16</sup> Martha Minow, *Between Vengeance and Forgiveness*, 34.

<sup>17</sup> Henry King, “Nuremberg and Sovereignty,” *Case Western Reserve Journal of International Law* 28, no. 1 (1996), 136.

erosion of state sovereignty which would later allow the protection and assertion of individual rights at the international level.

However, the Nuremberg trials did not represent an erosion of the potency of state sovereignty. The four Allied Powers occupying Germany legitimized their jurisdiction not through an appeal to the curtailing of *all* states' sovereignty (including their own), but by assuming control of Germany themselves and subjecting Germany and German citizens to their control. This is clearly illustrated in the "Law Reports of the Trials of War Criminals" selected and prepared by the United Nations War Crimes Commission in 1947.

...[B]y the Declaration regarding the Defeat of Germany and the assumption of supreme authority with respect to Germany, made in Berlin on the 5th June, 1945(9), *the four Allied Powers occupying Germany have assumed supreme authority with respect to Germany, including all the powers possessed by the German government and any state, municipal or local government, or authority.* The jurisdiction of the British court, sitting in the British Zone, could, therefore, also be based on the fact that after the *debellatio* of Germany, *the Allied Powers have been the local sovereigns in Germany [emphasis added].*<sup>18</sup>

Therefore, it was not through the desertion of national sovereignty, but instead, the *active exercise of sovereignty*, that the Allied Powers justified their incursion into domestic German affairs. John Laughland highlights this point by arguing that the main charge leveled against Nazi Germany was that of starting a war of aggression, which is essentially an indictment that the Nazis "violated the national sovereignty of other states by attacking them."<sup>19</sup> Other crimes that form the centerpiece of modern recollections of the Nuremberg legacy, such as crimes against humanity, were pursued in so much as they could be couched in terms of a war of aggression. As Laughland argues, "Nuremberg reaffirmed the concept of national sovereignty as the cornerstone of the international system, and as the main legal bulwark against military aggression."<sup>20</sup>

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<sup>18</sup> Charles Fairman and United Nations War Crimes Commission, "Law Reports of Trials of War Criminals. English Edition. Volume I," *California Law Review* 35, no. 3 (1947), 13.

<sup>19</sup> John Laughland, "The Crooked Timber of Reality: Sovereignty, Jurisdiction, and the Confusion of Rights," *Monist* 90, no. 1 (2007), 13-14.

<sup>20</sup> *Ibid.*, 15.

The transitional justice origin story, ultimately, fails under the weight of further scrutiny. It demonstrates that in order to conclude that Nuremberg represented the erosion of sovereignty when the opposite was the case, transitional justice scholars have had to actively reinterpret the meaning of this seminal moment in the modern state system. This revisionism, however, serves a functional purpose for scholars of transitional justice. All at once, it legitimizes their efforts, places the transitional justice paradigm at the fore of the international scene, and places transitional justice at the center of the new normative structures of the international system.

This interpretation of the Nuremberg trials uncovers an anachronism buried at the heart of transitional justice that attempts to interpret meaningful moments in the field's past. Transitional justice scholars fail to recognize that the primary actors at the inception of transitional justice history would not have described themselves as doing anything of the sort. According to Paige Arthur, these scholars "imput[e] ideas about 'transitional justice' to actors who... were unlikely to have held them."<sup>21</sup> One might argue that this is no more than common social science practice. Ancient Athenians likely did not anticipate the advent of liberal democracy although they are partially credited for it. Similarly, the participants in the Peace of Westphalia could not have anticipated the contours of the modern state when drafting their treaty. But this argument misses the ways that interpretations of the past shape understandings of the present.

We ascribe significance to these historical moments not because of what they meant for the actors at the time, but because of the implications that those moments represent for *us*, the readers of that history. It is true that Nuremberg did not mean for the actors what it has come to mean for transitional justice scholars, and there is a significant distance between the interpretation of these proceedings and the reality of the trials. But the analysis must not stop there. It is important to assess how this reading of the Nuremberg trials shaped the eventual emergence of transitional justice, and how interpreting Nuremberg in this way forwards the normative aims of the transitional justice project.

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<sup>21</sup> Paige Arthur, "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice," *Human Rights Quarterly* 31, no. 2 (2009), 328.



It serves a *functional* purpose for transitional justice scholars to begin the story of transitional justice with such an auspicious start. Jonathan Friedman makes an important link between the inscription of history and the formation of identity. As Friedman argues, “the discourse of history as well as of myth is simultaneously a discourse of identity.”<sup>22</sup> The construction of identity is formed through the discourse of history, as “it consists of attributing a meaningful past to a structured present.”<sup>23</sup> Here, the Nuremberg trials stand as a meaningful past, while transitional justice becomes the structured present that requires explanation and legitimization. As Friedman continues,

If history is largely mythical, it is because the politics of identity consists in *anchoring the present in a viable past*. The past is thus, constructed according to the conditions and desires of those who produce historical texts in the present [*emphasis added*].<sup>24</sup>

Thus, transitional justice literature seeks to anchor itself in the Nuremberg legacy in order to legitimize itself through that association. The Nuremberg trials occurred during a time period that can be rightly characterized as the inception of the modern international state system. Anchoring the inception of transitional justice to Nuremberg serves to legitimize transitional justice theory and practice, such that it becomes an ever-present aspect of the international community, a natural evolution from the atrocities of the past. It serves as a referent for the social project of transitional justice, legitimizing the specific visions of the role of the individual and the international in relation to the state.

Thus, even as this reading of Nuremberg is removed from the complex legal proceedings that bear its name, its importance lies in the significance attributed to it by transitional justice scholars, and its role in legitimizing the transitional justice project. This is where the notion of ‘progress’ in Teitel’s three-phase model becomes incredibly salient. Even if the Nuremberg trials did not contemporarily represent the curtailing of state sovereignty, the assertion by transitional justice scholars that it did has had a marked impact on transitional justice theorizing from that moment onward.

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<sup>22</sup> Jonathan Friedman, “Myth, History, and Political Identity,” *Cultural Anthropology* 7, no. 2 (1992), 194.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*, 207.

As Stéphane Leman-Langlois argues, this specific reading of Nuremberg was utilized to shape further discussions on transitional justice processes moving forward.<sup>25</sup> It formed the background of conversations regarding “justice after atrocity,” and moving on from autocratic regimes. The Nuremberg model was thereafter both revered for its role as a ‘fair trial’ and invoked as an image for “possible perils embodied by conventional justice.”<sup>26</sup> Thus, the question of where transitional justice can be seen to ‘start’ is of more than just a passing significance. The transitional justice origin story, flawed as it may be, has an active, purposeful effect on transitional justice understandings of the present and future.

The hallmarks of contemporary transitional justice thought and practice gain coherence in the post-Cold War moment. Indeed, as Paige Arthur argues, it is significant that this is the moment in which the term ‘transitional justice’ is coined. “The appearance and apparent acceptance of the phrase ‘transitional justice’ is... a response to a set of new problems and a means of legitimating the practices used to respond to those problems.”<sup>27</sup> These ‘problems’ that made the emergence of transitional justice necessary are particular to the post-Cold War historical moment. It is informed by the dissolution of the Soviet Union and the end of the political distortions wrought by the bipolar balance of power. It is also a response to the triumph of the ideological persuasion of the world’s remaining superpower, the United States. A wave of liberalization took hold across the regions that had previously constituted the spheres of influence of the global superpowers. Thus, transitional justice is intimately tied to the international arena in which it emerged. This is important because it further removes us from the transitional justice origin story, but also because it allows us to place transitional justice in a new international context, in dialogue with different prevailing discourses.

Transitional justice was conceived in the post-Cold War era, but it also gained immense political traction upon its arrival. This is evidenced by the incredible expansion of scope and breadth of transitional justice literature at the end of the

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<sup>25</sup> Stéphane Leman-Langlois, “Constructing a Common Language: The Function of Nuremberg in the Problematization of Postapartheid Justice,” *Law and Social Inquiry* 27, no. 1 (2002), 79-99. Ruti Teitel, “Transitional Justice Genealogy,” 76.

<sup>26</sup> Stéphane Leman-Langlois, “Constructing a Common Language,” 80.

<sup>27</sup> Paige Arthur, “How ‘Transitions’ Reshaped Human Rights,” 329.

twentieth century. Teitel notes that transitional justice became more comprehensive in scope, as it “became associated with the more complex and diverse political conditions of nation-building.”<sup>28</sup> Tensions between amnesty and accountability became pronounced in this phase, conceived as a contrast between the relative primacy of truth or justice. Thus, the latitude of the project was expanded: it moved away from offering judgment in particular individual legal cases to revisiting and rewriting the past.<sup>29</sup> If it is here that structural reconstitution of society became the intended aim of the transitional justice project, perhaps this is a better place to ‘begin’ the transitional justice narrative.

Indeed, the normative frameworks that are associated with transitional justice also come into being in the post-Cold War era. As Teitel argues, “the problem of transitional justice was reconceived across moral and psychological lines to redefine identity.”<sup>30</sup> The mechanisms of transitional justice, meant to bring these normative visions into being, begin to take root at that time as well. Of these mechanisms, Teitel states, “these politics became the signs of an age of restoration of the rule of law in a global politics.”<sup>31</sup> In the post-Cold War moment, the language of forgiveness, reconciliation and acknowledgement were joined to one another, and the project of ‘transition’ defined.

Paige Arthur makes a compelling case that transitional justice emerged from a crisis in the human rights community. Without repressive governments to “name and shame,” Arthur argues, the end of autocracy across much of the globe forecast the “los[s] of its central *raison d’être*.”<sup>32</sup> As a result, transitional justice language was mobilized to fill in the gaps, and to retool the existing human rights frameworks into blueprints for transition. Arthur places an emphasis on transition as a concept in this emerging discourse, and its appropriation from Marxist understandings of social transformation to “technocratic approaches to engineering political change.”<sup>33</sup> The endpoint of liberal democracy was integrated early and thoroughly, such that the

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<sup>28</sup> Ruti Teitel, “Transitional Justice Genealogy,” 77.

<sup>29</sup> *Ibid.*, 82.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*, 84.

<sup>32</sup> *Ibid.*, 335.

<sup>33</sup> *Ibid.*, 338-339.

normative goals of transitional justice lose coherence without its inclusion. Consider, for example, the introduction to Neil Kritz's edited collection *Transitional Justice*, which argues from the outset that that the rule of law constituted a "crucial component of both scholarship and practice in peacemaking and peacebuilding," and that rule of law was best achieved through democracy.<sup>34</sup> Thus, it was in this period that transitional justice as we have come to know it takes shape. The mechanisms that we associate with transitional justice have been around for centuries, but the *social project* of transitional justice relies on the emergence of post-Cold War discourses for coherence. Indeed,

it is only recently that they have been justified through appeals to universal norms such as human rights, or that they have been seen as legitimate only when undertaken by a democratic polity, or that they have been seen as having an underlying, determined connection related to the normative goal of promoting democracy.<sup>35</sup>

The orthodox transitional justice history is told as an unfolding progress, in fits and starts. A promising post-WWII era was frustrated by the advent of the Cold War. The end of the Cold War coincided with a normative appreciation for human rights and accountability, brought on by a 'justice cascade' that captured the international scene.<sup>36</sup> However, for this narrative to hold, one must actively reinterpret the meanings and significances of seminal moments in transitional justice history, such as the Nuremberg tribunals. If one does away with this orthodox view, however, one can more clearly view the political dynamics that led to the emergence of transitional justice, and the form that it assumed upon arrival.

Ultimately, the contours and boundaries of transitional justice were molded by the liberal internationalist global system into which it emerged. At the level of abstraction at which much of transitional justice theorizing occurs, the literature can be "ahistorical or decontextualized," frequently treating concepts such as truth,

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<sup>34</sup> Neil J. Kritz, ed., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes: Volume 1: General Considerations* (United States: United States Institute of Peace Press, 1995), xv.

<sup>35</sup> Paige Arthur, "How 'Transitions' Reshaped Human Rights," 334.

<sup>36</sup> Kathryn Sikkink, "The Justice Cascade: The Origins and Effectiveness of Prosecutions of Human Rights Violations," *Annual Review of Law and Social Science* 9, no. 1 (2013), 97.

justice, peace as “abstract and universal principles.”<sup>37</sup> However, in order for these abstract and universal concepts to gain currency, they rely on the existence of pre-existing discourses for comprehension and legitimation. This is why it is important to reassess the origins of transitional justice, and to critically evaluate the origin story of the discipline. To really apprehend the discursive precursors that influenced the discipline that we now call transitional justice, one must have an appreciation of the discourses that rendered it salient. Locating transitional justice in the post-Cold War era allows one to appreciate the important corollaries to other discourses that served as intellectual precursors to transitional justice theory and practice, such as modernization theory, democracy promotion and liberal peacebuilding. These relationships will be explored at length in the subsequent chapters of this thesis.

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<sup>37</sup> Laurel E. Fletcher, Harvey M. Weinstein, and Jamie Rowen, “Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective,” *Human Rights Quarterly* 31, no. 1 (2009), 208.

## Chapter 3

### 3 Transitional Justice: Fashioning the Liberal Democratic Polity?

The ideological triumph of liberalism in the international system is all but uncontested. Since the fall of the Berlin Wall in 1989 and the subsequent ‘third wave’ of democratization, liberal democracy has emerged on the world stage as the “preeminently acceptable form of governance.”<sup>1</sup> As a result, transitional justice literature has entrenched the ‘universal value’ of liberal democracy at the very core of its endeavor. In fact, the liberalizing aims of the transitional justice project have been folded into the very *definition* of the subject. When Olsen, Payne and Reiter set out to define transitional justice as a field, they remarked that the twin aims of the enterprise were to “reduce human rights violations and strengthen democracy.”<sup>2</sup> Indeed, transitional societies have been characterized as “emerging democracies” at least since the publications of Neil Kritz’s edited volumes, which constitute amongst the first coherent utterances of Transitional Justice as a coherent and discrete discipline.<sup>3</sup>

This chapter argues that the assumption of the end-point of liberal democracy in the transitional justice literature has deeply politicized the field, tying the field to the geopolitical, security, and socio-political aims of reigning hegemons. As a result, transitional justice is divested of its emancipatory aims, and is reduced to a mere technocratic approach favored by American and Western policymakers to bring about the proliferation of liberal spaces. Democracy promotion, here, means more than just the introduction of regular elections, although the transformation of political institutions is an important feature of transitional justice efforts. The transplantation of a ‘civic culture,’ replete with liberal values of tolerance, equality and participation are also embedded in this framework.

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<sup>1</sup> Amartya Kumar Sen, “Democracy as a Universal Value,” *Journal of Democracy* 10, no. 3 (1999), 4.

<sup>2</sup> Tricia D. Olsen, Leigh A. Payne, and Andrew G. Reiter, “The Justice Balance: When Transitional Justice Improves Human Rights and Democracy,” *Human Rights Quarterly* 32, no. 4 (2010), 980.

<sup>3</sup> Neil J. Kritz, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes: Volume 1: General Considerations* (United States: United States Institute of Peace Press, 1995).

Taken as a whole, transitional justice literature takes the fittingness of liberal democracy in transitional societies as a given. The end goal of any transition, as dictated by the literature, is liberal democracy. This has numerous effects on transitional justice as a whole. First, it fixes transitional justice in contentious and paradigmatically partisan debates on the value, promotion and practice of democracy. Second, it uncomfortably aligns transitional justice with the hegemonic aims of American foreign policy. Third, it bounds the possible universe of emerging forms of statehood post-‘transition’. Finally, it convolutes the aims of transitional justice that are intended to have value on their own, such as reconciliation and forgiveness, into *means towards the end* of democracy promotion and consolidation.

### 3.1 Transitional Justice and the Democratic Peace

When the United States Institute of Peace set out to complete a volume of works that would become the conceptual framework for the field of transitional justice, the tomes were suggestively titled *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*. To justify this framing, the editors argue that “although in practice imperfect, democracy is *by nature peaceful*: on the international plane, democracies generally do not wage war against each other [*emphasis added*].”<sup>4</sup> The democratic peace thesis, then, is invoked in order to justify the centrality of democracy to the transitional justice enterprise. The following section considers the democratic peace thesis, with an eye to examining its relation to transitional justice as a whole.

Current articulations of the democratic peace thesis find their philosophical precursor in the work of Immanuel Kant, and this idea is particularly articulated in *Perpetual Peace*. The current formulation of the democratic peace thesis is that there is a causal relationship between democracy and peace. As the argument goes, liberal-democratic states do not fight one another, even if they may be warring with non-liberal democratic states. Thus, a “zone of peace” exists among states that are liberal-democratic in nature, and conversely, that a threatening “zone of war” in states that are not. As the democratic peace thesis becomes enmeshed in ‘policy relevant’

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<sup>4</sup> Ibid., xv.

technocratic language, “the prescription for more peaceful inter-state relations, then, is to ‘just add liberal democracy.’”<sup>5</sup>

The democratic peace thesis therefore acts as a barometer by which the domestic affairs of states can be normatively evaluated. States that conform to the liberal democratic ideal are considered ‘peaceful,’ whereas those that do not are considered to be possible threats to international security. As Christopher Hobson argues, “democracy has taken on the conceptual characteristics of “civilization”, associated with notions of progress, development, modernisation and a host of other laudable traits.”<sup>6</sup> As an emerging standard of civilization, Hobson argues, states are hierarchically rated on the basis of their ‘democraticness,’ which determines the limits of international society as well as determining relations with those on the outskirts.<sup>7</sup> This normatively laden standard “differentiates, evaluates, includes and excludes... Those barbarians beyond [the bounds of civilization], however, are judged and condemned as inferior, backwards and, often, dangerous.”<sup>8</sup>

This last point deserves elaboration. Reading the world as constituted by two diametrically opposed world orders composed of a democratic “zone of peace” and the non-democratic “zone of war” creates a security dilemma whereby the outright elimination of non-liberal orders becomes not only possible, but *necessary* for the preservation for international peace and stability.<sup>9</sup> Thus, the seeds of bellicosity and intervention are written into the philosophical underpinning of liberal internationalism. As Linda S. Bishai argues, “intervention occurs both as a result of the denial of status for so-called non-liberal states and as a result of the lowered bar for military intervention by liberal states threatened by the refusal of non-members to

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<sup>5</sup> Tarak Barkawi and Mark Laffey, “The International Relations of Democracy, Liberalism and War,” in *Democracy, Liberalism and War: Rethinking the Democratic Peace Debate*, ed. Tarak Barkawi and Mark Laffey (Boulder, Colorado: Lynne Rienner Publishers, 2001), 3.

<sup>6</sup> Christopher Hobson, “Democracy as Civilisation,” *Global Society* 22, no. 1 (2008), 85.

<sup>7</sup> *Ibid.*, 77.

<sup>8</sup> *Ibid.*, 79.

<sup>9</sup> Christopher Hobson, “Democracy as Civilisation,” *Global Society* 22, no. 1 (2008), 90. Tarak Barkawi and Mark Liffey, “The Imperial Peace: Democracy, Force and Globalization,” *European Journal of International Relations* 5, no. 4 (1999), 422. Linda S Bishai, “Liberal Internationalism and the Law Versus Liberty Paradox,” *Journal of International Relations and Development* 15, no. 2 (2011), 203.



join the liberal club...”<sup>10</sup> According to Hobson, the very existence of non-democracies constitutes a threat to liberal democracies for two reasons. First, there is the “behavioral threat” of failed states and rogue states that prevents the expansion of the zone of peace. There is also, however, an “ontological threat” of non-democracies as “liberals do not merely distrust what they do; [they] dislike what they are.”<sup>11</sup> Thus, non-democracies are understood to constitute a threat to non-democracies. The promotion and proliferation of democracy, then, becomes a matter of existential concern.

This has very significant bearings on transitional justice. The wrongs committed by previous regimes are often framed in liberal language that centers individual human rights in opposition to state-sponsored authoritarianism. As well, the challenges of that past that require acknowledgement and redress are often understood to be problems wrought by insufficient liberalization. Transitional societies, according to Juan E. Méndez, “have to reckon with the legacy of human rights violations left by the recent authoritarian past. They all share this common feature...”<sup>12</sup> Neil Kritz also has something to offer on this account:

People had been ruled on a daily basis by violence, terror, and division...civil trust had been impossible, economic opportunity crushed, and congenial relations hard. With democracy in the air, there were penetrating cries for retaliation against old rules and for revelations about the past.<sup>13</sup>

Thus, it is the *lack of democracy* that is diagnosed as the main challenge, the main impediment that transitional states have to overcome. This attempts to draw from elements of the democratic peace thesis, in that the inherent peacefulness of democracies could offer “rule of law” domestically to citizens. It is not just that democracy is an end goal for transitional societies, but also that illiberality is understood to have been a causal factor of the challenges a transitional society faces. Against this backdrop, it is clear that if a lack of democratic principles and liberality created these problems, only democracy can offer refuge.

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<sup>10</sup> Linda S. Bishai, “Liberal Internationalism and the Law Versus Liberty Paradox,” 203.

<sup>11</sup> Christopher Hobson, “Democracy as Civilisation,” 93.

<sup>12</sup> Juan Mendez, “In Defense of Transitional Justice,” in *Transitional Justice and the Rule of Law in New Democracies*, ed. James A. McAdams (United States: University of Notre Dame Press, 1997), 1.

<sup>13</sup> Neil J. Kritz, *Transitional Justice*, xv.

And yet, this reading stretches the democratic peace thesis to its conceptual breaking point. As mentioned earlier, Kritz considers democratic states to be “inherently peaceful,” but this claim is invalidated by the very thesis he invokes. The democratic peace thesis makes a claim about the likelihood of democratic states to fight other democratic states. It makes no claim whatsoever to preventing intrastate conflict. Invoking the democratic peace thesis in this way obscures the actual nature of conflicts in ‘transitional’ societies, and overlays normative prescriptions with little justification, other than the paradigmatic predilections of the transitional justice community.

There is also a significant pedagogical element to transitional justice’s approach to democracy, which solidifies existing international hierarchies. As Teivo Teivainen argues, democracy promotion “assumes the social function of the teacher whose role is to instruct and guide the more child-like countries towards the path of development.”<sup>14</sup> This is also borne out in transitional justice works on democracy. For example, Charles Duryea Smith makes the case that in the aftermath of the dissolution of the communist world, emerging democracies “looked to the democracies, especially the United States, for help in creating democratic institutions and the complex foundation of a citizenry of democrats so necessary to traverse the rough waters ahead.”<sup>15</sup> Smith continues, “How, they asked, might we best inspire our people with the habits of democracy and establish legal institutions and protect our new freedoms?”<sup>16</sup>

The pedagogical inference of this statement is clear. Pursuant to the requests of the newly ‘emerging democracies’ of the world, established democracies were invited to instruct newly democratic nations on the creation and maintenance of democratic institutions and citizenry. Indeed, the pedagogical impulse of the books also extends to the intended audience and use of the volumes themselves. As noted by the then-President of the United States Institute of Peace, their seminal volume of collected and curated wisdom was meant to serve as “a standard reference for

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<sup>14</sup> Teivo Teivainen, “The Pedagogy of Global Development: The Promotion of Electoral Democracy and the Latin Americanisation of Europe,” *Third World Quarterly* 30, no. 1 (2009), 163.

<sup>15</sup> Neil J. Kritz, *Transitional Justice*, xv.

<sup>16</sup> *Ibid.*

governments, private organizations, [and] scholars” in order to “provide insights and examples for leaders in emerging democracies as they confront the challenges of transitional justice.”<sup>17</sup> Clearly, here, it is the role of established democracies to demonstrate the ‘right way’ of performing democracy, for the benefit of emerging democracies.

In some cases, the power hierarchies embedded in the teacher-student relationship are lauded. In “Promoting Democracy by Example,” Loch K. Johnson makes the patronizing case that,

studies examining how best to teach children to read uniformly conclude that the most effective method is for children to see their parents reading... In a similar sense, America’s democracy as often served as an example for other nations, since the power of culture and moral suasion combine to make the United States a showcase for those who aspire to modernize and democratize.<sup>18</sup>

Reinforcing existing hierarchies through this teacher-student, or even parent-child relationship is deeply problematic and disempowering for ‘transitional’ communities, as it relies upon understandings of their inferiority and backwardness. As the following section will show, the current democracy promotion frenzy lends borrows heavily from the legacy of modernization theory, which itself rested on the premise of a racialized international hierarchy of development.

### 3.2 Modernization Theory and Democracy Promotion

Democracy promotion has emerged onto the world stage with a significant force since the fall of the Berlin Wall incited the famed “third wave of democratization.”<sup>19</sup> And yet, this model borrows quite heavily from the universalizing models of human development that emerged in the twentieth century: modernization theory. Indeed, modernization theory, democracy promotion, and, now, transitional justice, have charted similar paths in their emerging trajectories. Modernization theory, just like contemporary democracy promotion, emerged from the social sciences and found adherents in American foreign policy circles. Through this migration, normative

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<sup>17</sup> Ibid., xiii.

<sup>18</sup> Loch Johnson, “Promoting Democracy by Example,” in *Democratic Peace in Theory and Practice*, ed. Steven W. Hook (Kent, OH: Kent State University Press, 2010), 223.

<sup>19</sup> Amartya Kumar Sen, “Democracy as a Universal Value,” 4.

theoretical concepts were converted into technocratic language that was instrumentalized through American foreign policy. This section will consider the rise of modernization theory, its legacy for contemporary democracy promotion, and the underlying assumptions that transitional justice has subsequently absorbed.

Modernization theory posits that societies progress through distinct stages of socio-economic development. In the case of Walt Whitman Rostow's seminal *Stages of Economic Growth: A Non-Communist Manifesto*, he outlines five stages—beginning with a 'traditional society,' through to a 'Take-Off', and concluding with a drive towards modernity and an age of mass-consumption.<sup>20</sup> The process of 'development,' was articulated thereafter as an attempt to encourage 'underdeveloped' states into 'Take-Off' so that they may join the international community in enjoying the fruits of modernity. The end-goal of modernity was ascribed the quality of a 'standard of civilization,' or, "the entry ticket to the community of free and independent nations."<sup>21</sup> Modernization theory was as simplistic as it was prescriptive, constructing a single model of modernity from the example of a handful of states, and attempting to export the model wholesale to the Global South.<sup>22</sup> And the realization of modernity, it seemed, required allowing Western states incredible amounts of penetration in internal affairs, as well as a requisite free-market economy.

Fueled by a need to comprehend, and thus contain, rapidly shifting circumstances in the international arena, the social sciences have long offered technocratic solutions to emerging challenges. There are several legacies that modernization theory has lent to transitional justice. The first legacy is the manner in which social science literature unabashedly served the *political* ends of American policymakers during the Cold War. Here, normative considerations were so immersed within the modernization theory literature that these assumptions were uncontested, and social science knowledge production was tooled toward providing pragmatic frameworks towards the ends specified by American foreign policy. Second,

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<sup>20</sup> Walt Whitman Rostow, *The Stages of Economic Growth: A Non-Communist Manifesto* (Cambridge: Cambridge at the University Press, 1960).

<sup>21</sup> Christopher Hobson, "Democracy as Civilisation," 76.

<sup>22</sup> John Brohman, "Universalism, Eurocentrism, and Ideological Bias in Development Studies," *Third World Quarterly* 16, no. 1 (1995), 125.

understandings of progress were held as a ‘standard of civilization’ which decolonizing states were meant to meet in order to be fully fledged members of the ‘international community.’ Finally, the threshold of international legitimacy, inclusion into the ‘international community’ and indeed, eligibility for sovereignty was predicated on meeting particular criteria. These aspects are integral to understanding the hegemonic tendencies in contemporary democracy promotion in general, and in transitional justice in particular. While there are noticeable distinctions, these are distinctions of degree, rather than of kind.

The Cold War served as a “mobilizer of purpose” for American social scientists. As Michael E. Latham argues, the bifurcated world system brought the political dimensions of knowledge to the fore. According to Latham, the Cold War constituted a “force that shaped [social scientists’] sense of themselves as producers of knowledge and as part of the guardian class for liberal democracy.”<sup>23</sup> Thus, the political implications and repercussions of their readings of political circumstances were not hidden, but extolled. The disruptive and potentially dangerous challenges presented by the decolonization of the ‘underdeveloped’ world, combined with the looming threat of communist incursion motivated social scientists to produce “policy-relevant conclusions,” intimately linking “professional responsibility and patriotic service to the state.”<sup>24</sup> As well, American policymakers keenly anticipated these intellectual developments. The eventual emergence and domination of modernization theory was finely calibrated to the environment in which it was conceived. As Nicolas Guilhot argues, modernization theory acted as an ‘academic product,’ which describes the “subordination of the field of the social sciences to the field of [American] state power.”<sup>25</sup> This means that the tools of knowledge production were formulated by social scientists for consumption by American foreign policymakers, adopting and shaping the policy agenda through the lens of the security climate of the day. This fundamentally politicizes the substance of the knowledge that is produced, and allows the incursion of American hegemonic interest in the academic arena.

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<sup>23</sup> Michael E. Latham, *Modernization as Ideology: American Social Science and Nation Building in the Kennedy Era* (United States: The University of North Carolina Press, 2000), 22.

<sup>24</sup> *Ibid.*

<sup>25</sup> Nicholas Guilhot, *The Democracy Makers: Human Rights and International Order* (Columbia University Press, 2005), 102.

There is a relevant parallel here between the securitization of communist states under the Cold War calculus with the securitization of non-liberal democracies in the logic of the Global War on Terror. Under the Cold War logic, a fear of the rival order of communism required containment, and, a “non-communist manifesto” was the policy-oriented answer. In the post-Cold War era it was rogue states, failed states and terrorism that captured the anxieties of policymakers. Ostensibly driven by social ills including a lack of democracy, forceful intervention in sovereign territories and the promotion of democracy became necessary. Democracy promotion became the ‘academic product’ suited to fit the job.

Guilhot considers the shift from modernization theory to the new doctrinal paradigm of democratization to be an example of “continuity within change.”<sup>26</sup> Even as policymakers in the Cold War era found the concept of democratization to be momentarily out of reach of ‘underdeveloped’ states until they became socioeconomically and politically mature, democracy was considered to be an attribute of modernity.<sup>27</sup> By the 1980s, scholars who challenged modernization theory were at the forefront for the new theorizing of democratization. They argued that it was modernization theorists who allowed authoritarian states to discard democratization in favor of economic growth.<sup>28</sup> Indeed, many of these theorists ironically derided modernization theorists as “‘social engineers’ who offered their expertise on the assumption that economic modernization will foster democracy.”<sup>29</sup> Instead, it seemed, they preferred to be surrounded by social engineers who offered their expertise on the assumption that democracy would foster perpetual peace. In any case, by the time that the Soviet system crumbled and the third wave of democratization was underway, it seemed, democratization literature was already undergoing an explosion.

Paige Arthur notes the move away from structuralism and grand-theorizing in this era, and towards “technocratic approaches to engineering *political* change

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<sup>26</sup> Nicholas Guilhot, *The Democracy Makers: Human Rights and International Order* (Columbia University Press, 2005), 136.

<sup>27</sup> *Ibid.*, 105.

<sup>28</sup> *Ibid.*, 129.

<sup>29</sup> *Ibid.*

[emphasis added].”<sup>30</sup> The particular language of ‘stages’ was ejected, as was the particular socioeconomic focus – states could be expected to modernize through elite bargaining, institutions of the legal system, as well as efforts to constitute liberal subjects.<sup>31</sup> This is a matter of procedure and pacing, rather than a re-evaluation of the problematic core of modernization theory. As Guilhot writes,

[s]evering the link between democratization and more encompassing conceptions of social change, the literature on “transitions” to democracy that they produced rested on a conception of negotiated, orderly and, ultimately, manageable political change, kept distinct and separate from socioeconomic transformations.<sup>32</sup>

One important intellectual legacy that transitional justice draws from modernization theory is the singular vision of modernity: a universal modernity designed by Western states and transplanted onto states in the Global South. As Tarak Barkawi argues, “[t]he bifurcated division of the world found in the [democratic peace] debates reproduces older discourses of North-South relations: the claim that there is a democratic peace rests on a Eurocentric conception of modernity.”<sup>33</sup> Uday Chandra makes the point further, arguing that the Cold War distinction between “modern Western and traditional postcolonial societies... mapped onto an older binary between colonizer and colonized” and that these racialized influences continue to hold an unfortunate credence.<sup>34</sup> “Modernity and democracy were unproblematically regarded as the province of the West. The postcolonial world was imagined as its Other: rooted in the traditions of the past, socially and economically backward, and unfriendly to representative democracy.”<sup>35</sup> Thus, hierarchies in the international arena are reproduced through goal-setting practices, and the bounding of possible outcomes in the international system.

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<sup>30</sup> Paige Arthur, “How ‘Transitions’ Reshaped Human Rights: A Conceptual History of Transitional Justice,” *Human Rights Quarterly* 31, no. 2 (2009), 339.

<sup>31</sup> *Ibid.*, 338.

<sup>32</sup> Nicholas Guilhot, *The Democracy Makers*, 135.

<sup>33</sup> Tarak Barkawi and Mark Laffey, “The International Relations of Democracy, Liberalism and War,” 4.

<sup>34</sup> Uday Chandra, “The Case for a Postcolonial Approach to the Study of Politics,” *New Political Science* 35, no. 3 (2013).

<sup>35</sup> *Ibid.*, 485.

Another parallel between modernization theory and democracy promotion is the emphasis on *progress*, a liberal vision of socioeconomic or sociopolitical evolution. In modernization theory, this is demonstrated by the idea that ‘underdeveloped’ states somehow resembled industrialized states in earlier stages of formation. A similar language is used to describe ‘emerging democracies,’ even if the overt references have been tempered due to criticisms of modernization. The discourse of democratization contains, within it, an implicit premise that western-style liberal democracy is the end stage of political maturity. This is manifest through the language of the insufficient ‘consolidation’ of certain democracies, censuring states for the lack of the rule of law or civil society—all implicitly using western-style statehood as a standard of civilization.

This concept of progressive evolution adds another dimension to the binary opposition between the democratic zone of peace and the illiberal zone of war. For the zone of war, the zone of peace is meant to represent the possible outcome—conforming with the demands of homogeneity imposed externally ostensibly allows states in the Global South to join the elite upper echelons of statehood. For the zone of peace, the zone of war represents a lawless barbarism—a disorder that needs to be dramatically reconstituted internally, or reckoned with, with force. These discourses are grafted temporally onto a linear vision of human evolution of development. Those at the lower end of the developmental totem pole are meant to aspire to the highest reaches, exemplified by the zone of peace. This pedagogical aspect of this binary opposition demonstrates the hierarchical relationship between the zone of peace and zone of war. As Barkawi argues, “the zone of peace shows to the zone of war its future—if it embraces liberal democracy—whereas the zone of war shows to the zone of peace its own recent past.”<sup>36</sup> Only with political and economic liberalization, the argument goes, can a ‘transitional’ state be admitted into the zone of peace and prosperity.<sup>37</sup> As I will now demonstrate, this fundamentally bounds the possible outcomes of state formation in ‘transitional’ states.

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<sup>36</sup> Tarak Barkawi and Mark Laffey, “The International Relations of Democracy, Liberalism and War,”

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<sup>37</sup> Ibid.



For all of the language of “freedom” touted by promoters of liberal democracy, citizens of ‘transitional’ societies are decidedly *not free* in their choice of possible state formation. The restriction does not only exclude non-democratic forms of governance, but even democratic forms of governance that are not grounded in the liberal tradition. A “narrow and settled conception of democracy” is upheld, based primarily on procedural definition that privileges civil and political rights above economic and social needs.<sup>38</sup> According to Barkawi, this ascendant “hegemonic liberalism ‘defines out’ other historically valid democratic claims,” meaning that there is a fundamental intolerance even for other forms of democratic expression.<sup>39</sup> Thus, the tightly dictated ends of the goal of ‘transition’ are bound ever tighter, and failure to pass this standard of civilization is enough to exclude a state from ‘international society,’ as well as inviting possible political and military intervention.

### 3.3 Constructing Liberal Spaces through Transitional Justice

I have argued above that transitional justice has tightly bound itself to a problematic and challenging discourse of democratization. However, I want to argue that transitional justice has so enmeshed itself into this discourse that contemporary transitional justice acts as a democracy promotion practice. That is to say, rather than democracy simply being an important feature of transitional justice, instead, transitional justice has become the handmaiden to the liberal project of homogeneity: creating liberal spaces and liberal citizens in order to colonize the furthest reaches of the globe with a “zone of peace.”

The language of transitional justice subordinates its goals to a wider project of democratization; it makes the goals of transitional justice intelligible without reference to democracy and democracy promotion. In this sense, transitional justice becomes a how-to manual for the moment of ‘transition’—from current disorder to democratic harmony. In many texts, the value of transitional justice is justified while the implicit end-point of democracy is not, implying that the value of transitional

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<sup>38</sup> Tarak Barkawi and Mark Liffey, “The Imperial Peace,” 406.

<sup>39</sup> *Ibid.*, 408-409.

justice lies in its ability to create better democracies. For example, Olsen, Payne and Reiter set out to prove that transitional justice achieves a ‘justice balance,’ improving human rights and democracy. They identified the problem as follows:

[Heretofore,] Scholars and policymakers have little systematic evidence to support the claim that transitional justice actually brings improvements in human rights and democracy. Second, if transitional justice does achieve its goals, neither scholars nor policy-makers clarify when, why, or how it might do so.<sup>40</sup>

There are two revealing statements embedded in this text. First, Olsen et al. implicitly identify human rights and democracy as the goals of transitional justice by using “democracy” and the “goals of transitional justice” interchangeably in the text. Second, it is clear that scholars require evidence to substantiate earlier claims about the value of transitional justice for human rights and democracy—demonstrating that transitional justice was justified not for its own sake, but at least sometimes in the name of human rights and democracy. This means that transitional justice is a means to the end of human rights abuse and non-democracy, and not necessarily an end itself.

This framing is all too common in transitional justice literature. Juan E. Méndez identifies that the “the pursuit of retrospective justice is an urgent task of democratization,” as the pursuit of transitional justice “highlights the mental character of the new order to be established, an order based on the rule of law and on respect for the dignity and worth of each human person.”<sup>41</sup> Again, we see transitional justice invoked as a technocratic means to the end of democracy. Transitional justice then becomes embedded as a democracy promotion practice: a means to the end of democracy.

The consequence of situating transitional justice within the remit of democracy promotion is embedding transitional justice within hegemonic practices of ordering the globe. Democracy promotion is currently at the fore of the international agenda and it is heavily supported by the globe’s reigning hegemon, the United States. Moving from the earlier discussion on the production of ‘policy-relevant’

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<sup>40</sup> Tricia D. Olsen, Leigh A. Payne, and Andrew G. Reiter, “The Justice Balance,” 981.

<sup>41</sup> Juan Mendez, “In Defense of Transitional Justice,” 1.

knowledge in social science communities, I want to deal here specifically with the application of that knowledge. As the seeds of interventionism are buried in liberal internationalist prescriptions, and as the democratic peace thesis justifies ordering the world in “zones of peace” and “zones of war,” the practical consequence is the creation of a democracy/security nexus. As Laura Zanotti argues, “liberal democracy became a technology of international government of insecurity.”<sup>42</sup> This is because identity-based discourses of danger permeate considerations of the insufficiently democratic world, where “areas of instability are remapped in the form of ‘borderlands,’ characterized by disorder, irrationality and excessive violence.”<sup>43</sup> It is no longer simply a conversation about the best form of organization of a state, instead, it is the protection of “democratic culture” against an illogical and threatening outside world.

Transitional justice becomes a manner of protection from the threat of the rogue hinterlands. Often, this is in the form of political intervention, ordering particular mechanisms for conflict resolution in the aftermath of mass atrocity and conflict. But it also takes the form of military intervention, as exemplified by one of the crowning achievements of transitional justice its short history, the doctrine of the Responsibility to Protect (R2P), which requires the intervention of states in cases of genocide. As Mahmood Mamdani writes, “the new global regime of R2P bifurcates the international system between sovereign states whose citizens have political rights, and de facto trusteeship territories whose populations are seen as wards in need of external protection. [R2P allows] the legal normalization of certain types of violence such as Western counterinsurgency efforts, while arbitrarily criminalizing the violence of other states as ‘genocide’.”<sup>44</sup>

And even when external intervention is not made primarily on transitional justice grounds, transitional justice can still be of use. Mark Arenhövel earnestly argues “after an external intervention, a coalition of states or the international

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<sup>42</sup> Laura Zanotti, *Governing Disorder: UN Peace Operations, International Security, and Democratization in the Post-Cold War Era* (University Park, Pennsylvania: Pennsylvania State University Press, 2011), 16.

<sup>43</sup> *Ibid.*

<sup>44</sup> Mahmood Mamdani, “Responsibility to Protect or Right to Punish?,” *Journal of Intervention and Statebuilding* 4, no. 1 (2010), 52.

community will often install mechanisms for transitional justice to build a sustainable peace, stabilize the society, and foster democracy.”<sup>45</sup> Indeed, Rosemary Nagy demonstrates how transitional justice scholars that deal with the invasions of Iraq and Afghanistan under the banner of the Global War distort the narrative of ‘transition’ to exclude the most immediate reasons for instability. Iraq “is constructed as being ‘from’ a repressive police state under Saddam Hussein,” and “Afghanistan is “‘from’ cycles of war and repression culminating in the Taliban regime.” Conveniently, this sidesteps the question of foreign intervention altogether, and the accountability for the instability is domesticated.<sup>46</sup> Transitional justice becomes integral to the justification for, prosecution of, and recovery from military intervention.

Transitional justice also attempts to constitute the ideal liberal subjects that are meant to populate the emerging democracies. According to Neil Kritz, the rule of law ensures a system in which “citizens may enjoy trust in their institutions and among one another.”<sup>47</sup> This dovetails with Christopher Hobson’s reading of the value of the ‘rule of law’ and ‘civil society’ for democracy promotion writ large: rule of law is intended to provide the procedural structures, while civil society “foster[s] liberal democracy from below.”<sup>48</sup> Fostering liberal democracy from below is an attempt to transplant civic culture to the grassroots level, which is accomplished through the use of transitional justice mechanisms.<sup>49</sup> There is a corresponding economic argument forwarded by liberals, which addresses the value of liberal democracy for society as a whole. Because liberal democracy makes few demands on its citizens, Patrick Deneen argues, “it frees them to pursue private interests and to cultivate personal talents that

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<sup>45</sup> Mark Arenhövel, “Democratization and Transitional Justice,” *Democratization* 15, no. 3 (2008), 572.

<sup>46</sup> Rosemary Nagy, “Transitional Justice as Global Project: Critical Reflections,” *Third World Quarterly* 29, no. 2 (2008), 280.

<sup>47</sup> Neil J. Kritz, *Transitional Justice*, xv.

<sup>48</sup> Christopher Hobson, “The Limits of Liberal-Democracy Promotion,” *Alternatives: Global, Local, Political* 34, no. 4 (2009), 394.

<sup>49</sup> To ‘foster liberal democracy from below’ is to attempt to transplant liberal democratic civic virtues to the population at large. For more, see Tarak Barkawi and Mark Laffey, “The International Relations of Democracy, Liberalism and War.”

contribute to great and growing prosperity across the society at large.”<sup>50</sup> The social and individual value of fostering the liberal subject, then, is multifaceted.

Cultivating the liberal subject also serves to solve the basest level of the security dilemma posed by illiberal states. Laura Zanotti argues that “liberal conceptions posit that security can be best attained by creating conditions under which reasonable individuals can exercise liberties.”<sup>51</sup> Thus, liberal subjects ensure the security of the whole by being “simultaneously ‘disciplined’ and ‘active’ in society.”<sup>52</sup> The argument is that when democratic values such as toleration, respect and the rule of law are deeply rooted among the populace the likelihood of violent conflict will decrease. This means that democracy promotion endeavors curtail not only the possible universe of state formations, but also the types of citizens meant to inhabit these states.

### 3.4 Fashioning the Liberal Democratic Polity?

In the eyes of those who support transitional justice, democracy acts as a silver bullet. All at once it is intended to ameliorate the social conflicts of the past, construct a vibrant and participatory citizenry in the present, and pave the way for meaningful engagement in the international community in the future. However, all of these hopes are constructed atop a rationale for democratization that has little to do with the particular society in question and everything to do with the preservation of stability and order in the international system.

For all of the emancipatory language surrounding democracy promotion, it is guided neither by the conflicted society in question nor with the particular society in mind. The outcome of transitional justice processes in ‘transitional’ societies is pre-ordained. Liberal democracy and a market economy become the default end-goal of the transitional justice process. This severely circumscribes the possible outcomes of transitional justice processes, as it limits the possible outcomes of state formations in ‘transitional’ states.

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<sup>50</sup> Patrick Deneen, “Democratic Prospects in Undemocratic Times,” in *Democratizations: Comparisons, Confrontations, and Contrasts*, ed. Jose Cipurut (Cambridge, Massachusetts: MIT Press, 2008), 303.

<sup>51</sup> Laura Zanotti, *Governing Disorder*, 17.

<sup>52</sup> *Ibid.*

The implication of transitional justice as democracy promotion practice extends beyond its use as a vehicle for the political homogenization of the globe. It challenges the emancipatory ideals upon which transitional justice girds itself. In the field's current state, the answer to all forms of mass violence comes in the form of a limited number of external prescriptions. Those prescriptions have the possibility of circumscribing avenues of justice and reconciliation that are most relevant for the communities in question. Instead, what is offered is a sweeping project of social engineering, meant to curtail the ontological threat of that state to others. The radical nature of the transitional justice project is, here, taken for granted. Often, it entails upending the political, social, and often economic structures of a society. And yet, the needs and desires of the 'transitional' society, the focus of so much rhetorical commitment and dedication, fades into the background when considering the democratic peace thesis.

## Chapter 4

### 4 Hybridity to the Rescue?

Even as liberalism has emerged triumphant in the international system, a stark reality has dampened the hopes of a liberal peace enveloping all corners of the planet. Intractable violent conflict, a lack of ‘consolidation’ of democratic institutions, and a growing chorus of critics has humbled proponents of the liberal peacebuilding paradigm. Hybridity is meant to be a solution to this challenge. A search for alternatives to this paradigm has led to the ascendance of localized initiatives in the areas of peacebuilding, state-building and transitional justice. This has meant an emphasis on customary peace and justice practices, the hybridization of liberal and illiberal processes and practices, and an emphasis on local ownership of peace processes. The underlying thrust of these approaches is an emphasis on ‘legitimacy,’ which is understood to exist in the domain of the local. This chapter argues that many hybrid approaches to peacebuilding and justice share the same problematic assumptions of liberal peacebuilding, and constitute a shift in procedure rather than a wholesale reassessment of the challenge at hand. As a result, emphasis on hybridity tends to “flatten out and even lose a clear sense of the coordinates of power relations within and between global, national, and local orders.”<sup>1</sup> Hybridity, this section argues, does not escape the underlying logic of the liberal peace.

#### 4.1 Faith, Frustration and Failure: Liberal Peacebuilding in Crisis

Although attempts to precisely define the liberal peace fall prey to its diffuse and ambiguous nature, it has a long philosophical precedent, stretching back to Immanuel Kant’s *Perpetual Peace*.<sup>2</sup> It is constituted by an ideological commitment to marketization and democratization, but either or both of these elements can be privileged at a particular time. Messy constellations of hegemonic states in the Global North, international organizations, and states in the Global South have taken up the

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<sup>1</sup> Suthaharan Nadarajah and David Rampton, “The Limits of Hybridity and the Crisis of Liberal Peace,” *Review of International Studies* 41, no. 01, 61.

<sup>2</sup> *Ibid.*, 51.

mantle of the liberal peace. The aim of building a ‘liberal peace’ takes as an assumption the “pacifying effects of open and integrated societies and markets framed by a liberal state and international institutions, law and norms.”<sup>3</sup> However, as liberalism is not monolithic, this agenda can have diverse and sometimes conflicting manifestations.<sup>4</sup> Oliver P. Richmond and Jason Franks outline four main strands of thinking that constitute the liberal peace framework: “the victor’s peace, the institutional peace, the constitutional peace and the civil peace.”<sup>5</sup> Victor’s peace is premised on might, as “a peace which rests on military victory... is more likely to survive.”<sup>6</sup> Institutional peace attempts to draw states into a normative and legal contexts that determine their behavior nationally and internationally.<sup>7</sup> Constitutional peace rests on Kantian ideals and the democratic peace thesis, with the conclusion that peace requires democratization, trade and a liberal polity.<sup>8</sup> Finally, civil peace rests on advocacy and activism for the attainment of human rights.<sup>9</sup> All of these interactive features of the liberal peace interact with the overall shape of the liberal peacebuilding project.

Roger Mac Ginty offers an insightful conceptualization of the liberal peace, as a “system of complicity and mutual interest.”<sup>10</sup> According to Mac Ginty, this system can be understood as “the coming together of hardware (states and institutions) and software (the operating system).”<sup>11</sup> Institutions are therefore programmed to pursue liberal goals, which can be “updated to suit changing environments.”<sup>12</sup> This is why ideas as diverse as democratization, marketization, the Responsibility to Protect and humanitarian intervention can be housed under the umbrella of the liberal peace. Thus, while these concepts can be traced to different initiating circumstances, the

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<sup>3</sup> Shahrbanou Tadjbakhsh, “Liberal Peace in Dispute,” in *Rethinking the Liberal Peace: External Models and Local Alternatives*, ed. Shahrbanou Tadjbakhsh (New York: Routledge, 2011), 2.

<sup>4</sup> Roger Mac Ginty, *International Peacebuilding and Local Resistance: Hybrid Forms of Peace* (New York: Palgrave Macmillan, 2011), 37.

<sup>5</sup> Oliver P. Richmond and Jason Franks, *Liberal Peace Transitions: Between Statebuilding and Peacebuilding* (Edinburgh: Edinburgh University Press, 2009), 5.

<sup>6</sup> *Ibid.*, 5.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> Roger Mac Ginty, *International Peacebuilding and Local Resistance*, 36.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*



ultimate thrust is a liberal one, moving towards democratization and marketization. These same impulses can be seen to drive much of the transitional justice enterprise. Here, I want to offer a brief overview of the progression and pitfalls of liberal peacebuilding in theory and practice. It will attempt to situate the ‘crisis’ of liberal peacebuilding in historical context, so as to understand the consequent turn to local initiatives.

With the encumbrance of Cold War geo-political bifurcation washed away, the immediate post-Cold War era provided hope for a more proactive role for international organizations in the maintenance of peace. The United Nations Department of Peacekeeping Operations launched fourteen missions between 1988 and 1992, and this trend was buoyed by seeming success in Namibia and Nicaragua in 1990.<sup>13</sup> This paved the way for a comprehensive vision of the role of international organizations in warring regions. Discourses about ‘post-conflict *peacebuilding*’ became enunciated at this moment, best represented in the 1992 *Agenda for Peace*, composed by Secretary General of the United Nations Boutros Boutros-Ghali. In *Agenda for Peace*, Boutros-Ghali defined the “deepest causes of conflict” as “economic despair, social injustice and political oppression.”<sup>14</sup> A holistic approach to peace was therefore necessary to address these concerns, which was manifested through “four key mechanisms: the insertion of political and economic liberalism into peace settlements; providing economic advice during implementation; conditionality attached to economic assistance; and proxy governance.”<sup>15</sup> The orthodoxy became that the quick transfusion of liberal institutions would pave the way for a sustainable peace. No longer would the United Nations be frustrated in its attempts to proliferate peace and development, instead, it would serve as the fulcrum of a “blossoming

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<sup>13</sup> Meera Sabaratnam, “The Liberal Peace? An Intellectual History of International Conflict Management, 1990-2010,” in *A Liberal Peace? The Problems and Practices of Peacebuilding*, ed. Susanna Campbell, David Chandler, and Meera Sabaratnam (New York: Palgrave Macmillan, 2011), 14.

<sup>14</sup> Boutros Boutros-Ghali, *An Agenda for Peace: Preventative Diplomacy, Peacemaking and Peacekeeping*, (New York: United Nations, 1992).

<sup>15</sup> Meera Sabaratnam, “The Liberal Peace? An Intellectual History of International Conflict Management, 1990-2010,” 6.

multilateral progressive consensus for peacemaking, development and social justice.”<sup>16</sup>

This ambitious vision was almost immediately confronted with a series of cataclysms in quick succession: in Somalia, Rwanda, and the Balkans. Meera Sabaratnam argues that these setbacks paradoxically bolstered the expansion of the new peacebuilding regime. This is because “failures were rationalized through the perception that the nature of conflict was changing from interstate to intrastate, and into chaotic, unmanageable situations where state institutions had collapsed.”<sup>17</sup> Thus, while the budding hope and optimism that once drove the peacebuilding project was being withered away by stark reality, the liberal peacebuilding project was still intact.

The emergence of a prolific literature on intractable conflict and ‘failed states’ also occurred at this moment, signifying an important discursive shift in academic literature on peace and security. Sabaratnam argues that the categorical shift of states from ‘transitioning’ to ‘failing’ signified a securitization of areas of conflict, and exhibited a growing sense that areas of disorder were contaminating bordering areas as they spun further adrift from state authority.<sup>18</sup> The reemergence of ‘peace studies’ from relative obscurity and its fusion with ‘security studies’ reinforced the security dilemma endemic to peacebuilding operations. And yet, from these diverse origins, a common consensus emerged that only the liberal peace could address the problems beset by warring states. Borrowing from the respective traditions of peace studies and security studies, scholars and practitioners understood that “on the basis of superior knowledge... and the use of force when necessary, the international community could and should undertake more comprehensive and extensive interventions to secure global peace.”<sup>19</sup> Thus, the dismal realities of peacebuilding operations in these early interventions actually served to *raise the stakes* of the importance of international intervention and peacebuilding.

It was here that discussions on peacebuilding began to crystallize around the importance of ‘good governance’ in order to steer post-conflict states out of a

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<sup>16</sup> Ibid., 15.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid., 18.

<sup>19</sup> Ibid.

perceived downward spiral of disorder. At this critical juncture, the ‘holistic’ approach to peacebuilding found relevant parallels in discussions in development circles, which were reeling from the failure of the Washington Consensus.<sup>20</sup> If ‘state failure’ was a poison that caused societies to disintegrate, then ‘good governance’ was the international community’s prescribed antidote. Weak state capacity was understood to contribute to the challenges of order and stability in post-conflict states, chief among them the “rule of law,” and thus, institutionalization was a necessary remedy. According to Laura Zanotti, ‘good governance’ was understood to be a universal good, comprehensive and predictable in nature.<sup>21</sup> In order to accomplish this expanded vision of peacebuilding, a comparable expansion of the scope and invasiveness of the international community’s role in conflict-affected states was necessary. As Zanotti argues, “in addition to recommending reforms aimed at building predictable, regulated and regulatory states... the UN had to equip itself with the instruments for knowing, assessing and steering the behavior of states.”<sup>22</sup> This would require another yet enlargement of the role of international community, to create the instruments that would assess the radical project of social reshaping that was necessary for a liberal peace.

This “increasingly interventionist climate” was justified through a rethinking of the concept of sovereignty itself, moving from a consideration of sovereignty as the exclusive reserve of the state to sovereignty-as-responsibility.<sup>23</sup> The formation of the International Criminal Court and the adoption of the doctrine of Responsibility to Protect are examples of this critical rethinking of sovereignty.<sup>24</sup> Mark Duffield argues that this constituted a reorganization of the international order as “a world of contingent sovereignty,” where “the traditional national/international dichotomy has

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<sup>20</sup> Ibid.

<sup>21</sup> Laura Zanotti, *Governing Disorder: UN Peace Operations, International Security, and Democratization in the Post-Cold War Era* (University Park, Pennsylvania: Pennsylvania State University Press, 2011), 46.

<sup>22</sup> Ibid., 48.

<sup>23</sup> Meera Sabaratnam, “The Liberal Peace? An Intellectual History of International Conflict Management, 1990-2010,” 19.

<sup>24</sup> Adam Branch, “Neither Liberal nor Peaceful? Practices of ‘Global Justice’ by the ICC,” in *A Liberal Peace? The Problems and Practices of Peacebuilding*, ed. Susannah Campbell, David Chandler, and Meera Sabaratnam (London: Palgrave Macmillan, 2011), 122.

blurred.”<sup>25</sup> As a result, “the future lies in enmeshing ineffective states within international public/private governmental assemblages having the developmental technologies and ability to work directly at the level of populations.”<sup>26</sup> intervention, even trusteeship, was necessary to navigate conflicted states toward the liberal peace.

Transitional justice literature is an “integral element” of the liberal peacebuilding project.<sup>27</sup> According to Chandra Lekha Sriram, “concerns for post-conflict reconstruction have become integrally linked with a wide range of rule-of-law programming,” and post-conflict justice.<sup>28</sup> This is true both in scholarship and in practice. The search for ‘holism’ in the liberal peacebuilding agenda allowed the newly emerging field of transitional justice to ride on the coattails of the shifting international agenda. Adam Branch makes an explicit connection between international criminal law, liberal peacebuilding and transitional justice, as “transitional justice has risen to the fore of the so-called ‘liberal peacebuilding’ agenda as part of the ideological framework for remaking societies.”<sup>29</sup> Transitional justice literature was adopted in the name of liberal peacebuilding practices, with the goal of ushering in the ‘rule of law,’ an emphasis on democratization and the democratic peace thesis with the end-goal of crafting a sustainable peace.<sup>30</sup>

Scholars and practitioners of the newly emerging field of transitional justice largely supported the redefinition of sovereignty to one of sovereignty-as-responsibility, as the heavy intervention of the international community in domestic affairs was a necessary precondition for transitional justice practice. Discourses of trauma, healing, illness and recovery “were consistent with the medicalization of ‘war-torn societies’ as patients or wards of the international community, essentially incapacitated and unable to manage.”<sup>31</sup> The core transitional justice concept of

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<sup>25</sup> Mark R. Duffield, *Development, Security and Unending War: Governing the World of Peoples* (Cambridge: Polity Press, 2007), 126.

<sup>26</sup> *Ibid.*

<sup>27</sup> Chandra Lekha Sriram, “Justice as Peace? Liberal Peacebuilding and Strategies of Transitional Justice,” *Global Society* 21, no. 4 (2007), 585.

<sup>28</sup> *Ibid.*

<sup>29</sup> Adam Branch, “Neither Liberal nor Peaceful? Practices of ‘Global Justice’ by the ICC,” 121.

<sup>30</sup> Chandra Lekha Sriram, “Justice as Peace? Liberal Peacebuilding and Strategies of Transitional Justice,” *Global Society* 21, no. 4 (2007).

<sup>31</sup> Meera Sabaratnam, “The Liberal Peace? An Intellectual History of International Conflict Management, 1990-2010,” 20.

“remak[ing] post-conflict social relations and deter[ing] future human rights abuses” became prominent discursive elements of liberal peacebuilding at this time.<sup>32</sup>

This deep integration of transitional justice with liberal peacebuilding meant that transitional justice was not immune when a wave of critical scholarship challenged the assumptions, practices and precepts of the liberal peacebuilding paradigm. Roland Paris argues that the rapid liberalization that had been a cornerstone of the liberal peacebuilding project “is capable of undermining the very peace that it is intended to uphold.”<sup>33</sup> Paris argues that the rapid democratization and marketization attendant to liberal peacebuilding practice creates certain contradictory ‘pathologies,’ which frustrate the possibility for long-term peace.<sup>34</sup> At the same moment, “work focusing on the political economy of war argued that war was its own alternative system of profit, power and protection.”<sup>35</sup> The belligerent and interventionist posture of the international community came under severe criticism, considered to be one aspect of a considerable coercive apparatus constructed in the search for the liberal peace. Mac Ginty outlines many charges against the liberal peace, including claims that it is ethnocentric, elitist, security-centric, technocratic, rigid, superficial, short-termist, neoliberal, and neo-imperial.<sup>36</sup> With the onslaught of theoretical criticism coupled with challenging reality, the liberal peacebuilding paradigm was in crisis.

One of the main criticisms that was levied against international peacebuilding lacked a basic element: legitimacy. By some accounts, the liberal peace was rendered illegitimate because it “centered on imposing the Western model of the Weberian state on those unwilling or not ready to accept it, and for whom it is thus ‘alien.’”<sup>37</sup> Suthaharan Nadarajah argues that those who deemed the liberal peace illegitimate did so on the basis that it favored “local ‘elites’ and international interveners, rather than

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<sup>32</sup> Ibid.

<sup>33</sup> Roland Paris, *At War's End: Building Peace After Civil Conflict* (Cambridge: Cambridge University Press, 2004), 152.

<sup>34</sup> Ibid.

<sup>35</sup> Meera Sabaratnam, “The Liberal Peace? An Intellectual History of International Conflict Management, 1990-2010,” 22.

<sup>36</sup> Roger Mac Ginty, *International Peacebuilding and Local Resistance: Hybrid Forms of Peace* (New York: Palgrave Macmillan, 2011), 42.

<sup>37</sup> Suthaharan Nadarajah and David Rampton, “The Limits of Hybridity and the Crisis of Liberal Peace,” 53.

the majority who bear the weight of both conflict and liberal peace engagements. In this way, the latter are alienated from the state-in-formation, as they are alienated from the elites who manage it with and for international peacebuilders.”<sup>38</sup> This fundamental lack of legitimacy was seen to condemn the liberal peacebuilding project to half-measures, superficial successes and ultimate disappointment. Legitimacy, here, was understood as a value of confidence in the peacebuilding endeavor, the assumption and ownership of a project by the population it is meant to serve. Thus, when critical scholars launched a search for alternatives to the liberal peacebuilding paradigm, it mainly coalesced around forms of peacebuilding that were considered to be more innately ‘legitimate’: local and hybrid forms of peace governance.

## 4.2 Local Knowledge and Knowing the Local

Largely as a result of challenges experienced in the liberal peacebuilding paradigm, scholars of transitional justice and peace studies have increasingly focused on the role of the ‘local’ in determining whether interventions in conflicted societies will succeed or fail. This is because legitimacy is understood to be principally in the domain of the local. However, as the following discussion shows, this new focus on the ‘local’ and ‘legitimacy’ does not necessarily escape the problematic assumptions of the liberal peacebuilding paradigm. This is because the role of the ‘local’ is often relegated to procedural considerations rather than substantive ones. This is not to dismiss the existence or utility of this paradigm wholesale, but rather, to question, “what are the politics of invoking hybridity?”<sup>39</sup> As Suthaharan Nadarajah aptly notes, one must “acknowledge hybridity’s *potential* for resistance and progressive agendas, but question whether it can be *always* equated with these.”<sup>40</sup>

Thania Paffenholz argues that the ‘local turn’ in peacebuilding occurred in two successive waves, each with a different theoretical underpinning and consequently different understandings of the ‘local’.<sup>41</sup> The first wave emerged in the 1990s in the ‘conflict transformation’ school of conflict management as a response to

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<sup>38</sup> Ibid.

<sup>39</sup> Ibid., 55.

<sup>40</sup> Ibid., 56.

<sup>41</sup> Thania Paffenholz, “Unpacking the Local Turn in Peacebuilding: A Critical Assessment Towards an Agenda for Future Research,” *Third World Quarterly* 36, no. 5 (2015), 860.

the failures of peacebuilding operations in Somalia, Rwanda and the Balkans. This wave of the ‘local turn’ moved into the orthodoxy of the international community’s theorization of peace, as evidenced by the explosion of initiatives and funding under the umbrella of ‘civil society’ and ‘local ownership’.<sup>42</sup> According to Paffenholz, this wave of scholarship “emphasized the necessity of empowering local people as the primary authors of peacebuilding instead of externally designed and driven peace interventions.”<sup>43</sup> In this first wave of the ‘local turn,’ the question of ‘legitimacy’ was of chief importance. There was an assumption that “only local actors from within the conflict context would be able to build sustainable peace in their own countries.”<sup>44</sup> According to this wave of scholarship, the international community was misguided in their attempts at intervention as they were incapable of understanding the wants and needs of the local community. The end-goal was effective collaboration between these two groups, because “once the international peace builder has understood the importance of the local, the latter can be more effectively supported.”<sup>45</sup>

By contrast, the second generation of the local turn operates from another theoretical grounding entirely, it relies primarily on Foucauldian and postcolonial understandings of hybridity. Authors such as Mac Ginty and Oliver Richmond conceptualize the local turn as a form of resistance against liberal peacebuilding, and recognize local agency as constituting the building block of a post-liberal order.<sup>46</sup> Local agency is understood to be exercised at all levels of society, it is inherently counter-hegemonic. The local, here, means something qualitatively different than it does in the first iteration of the local turn, here it is “defined in opposition to the international” and constitutes a bulwark against the ongoing liberal peacebuilding project.<sup>47</sup>

According to Oliver Richmond, a reformulation of the liberal peacebuilding paradigm is tantamount to “old wine in new bottles,” and therefore cannot close the

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<sup>42</sup> Ibid., 867.

<sup>43</sup> Ibid., 859.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid., 860.

<sup>47</sup> Ibid., 861.

distance between local and liberal politics.<sup>48</sup> Richmond proposes a radical rethinking of the peacebuilding process, with an eye to the inclusion of the ‘everyday.’ The politics of the everyday does not focus on the practices and policies of elites, but instead investigates how “people are able to adapt and take ownership over structures and institutions, so that they begin to reflect their own everyday lives rather than attempts at assimilation.”<sup>49</sup> Through passive resistance, radical resistance, alterity and subversion, local actors exercise agency over their conditions. This context produces a liberal-local hybridization which, in certain instances, can be the foundation for peace.<sup>50</sup> While promising, this second generation of the local turn endures more in scholarship than in peacebuilding practice. It is the first wave of scholarship, with its emphasis on ‘local ownership’ and the involvement of local scholars that has had more of an impact on peacebuilding as an enterprise.

The localizing efforts that swept transitional justice are almost entirely indebted to the first wave of the ‘local turn’ scholarship in peacebuilding. This has translated into a deep investment in discourses surrounding ‘local ownership,’ ‘bottom-up justice,’ and ‘participation and consultation’ in justice processes.<sup>51</sup> The contentious topic of debate, here, is usually depicted as a struggle between the comparative value of accountability and objectivity provided by international justice processes, and legitimacy and agency offered by local justice processes. However, the transitional justice vision of ‘local ownership’ runs into myriad challenges. It creates an untenable binary between the local and international, effectively discarding the dynamism between the two. It effaces the power imbalances embedded in these relationships in assuming that there could ever be a ‘pure’ local system of justice. It also makes problematic assumptions about the relational value of the justice mechanisms at both ‘poles’ of this dichotomy: the presumptions that the

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<sup>48</sup> Oliver P. Richmond, “Becoming Liberal, Unbecoming Liberalism: Liberal-Local Hybridity via the Everyday as a Response to the Paradoxes of Liberal Peacebuilding,” in *Rethinking the Liberal Peace: External Models and Local Alternatives*, ed. Shahbanou Tadjbakhsh (New York: Routledge, 2011), 42.

<sup>49</sup> Oliver P. Richmond and Audra Mitchell, “Towards a Post-Liberal Peace: Exploring Hybridity via Everyday Forms of Resistance, Agency, and Autonomy,” in *Hybrid Forms of Peace: From Everyday Agency to Post-Liberalism*, ed. Oliver P. Richmond and Audra Mitchell (Basingstoke: Palgrave Macmillan, 2011), 16.

<sup>50</sup> *Ibid.*, 18.

<sup>51</sup> Andrew Friedman, “Transitional Justice and Local Ownership: A Framework for the Protection of Human Rights,” *Akron Law Review* 46, no. 3 (2013), 728



‘international’ offers objectivity, and that the ‘local’ is inherently legitimate runs into serious challenges.

In order to understand the opportunities and challenges inherent to the local turn in transitional justice, one must first deconstruct the concept of the ‘local.’ Here, I analyze the construction and instrumentalization of the ‘local’ identity in peacebuilding and transitional justice efforts, and consider the binary opposition of the local/international interface, as well as the challenges of hegemonic dominance within categories of the ‘local.’ While the newfound emphasis on local justice in transitional justice is a welcome change from older, universalizing paradigms, it presents a whole host of new challenges that prevent it from realizing the counter-hegemonic ideals of its most ardent supporters. For all the talk of ‘hidden agency,’ subversion, and resistance, one must not lose sight of the continual presence of domination, coercion and hegemony.

In order to integrate ‘the local’ into transitional justice and peacebuilding exercises, one must have a malleable, tangible, concrete idea of what it means to be ‘local.’ In transitional justice, there is a distinct vision of the ‘local’ that is rife with unsubstantiated assumptions with problematic outcomes. Here, the ‘local’ is the opposite of the ‘international,’ and both concepts are mutually constituted through their interactions with one another. As well, the local acquires ‘localness’ through its interaction with the international, and vice versa. Here, the ‘local’ was understood to principally constitute those at the middle level of society, as the “local is defined by its peacebuilding potential.”<sup>52</sup> Clearly, defining the local in such exclusive and instrumentalist terms divests subaltern populations of their agency and peacebuilding potential. This section will unpack the concept of the ‘local’ and uncover the problems embedded with conceptions of ‘local knowledge’ and ‘local ownership.’ Understandings of power, hierarchy and hegemony are defined-in to these relational concepts, which frustrates the possibility of emancipatory hybrid interactions from the outset.

The production, dissemination and instrumentalization of knowledge is of utmost importance where it concerns ‘the local.’ As a matter of course, knowledge in

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<sup>52</sup> Ibid., 860.

transitional justice is often goal-oriented and pragmatic in nature, it is distilled into a form that is amenable to “technocratic approaches to engineering political change.”<sup>53</sup> One of the ways that the local turn in transitional justice has impacted upon the field is to combat the universalizing, top-down approaches to knowledge in an attempt to integrate ‘local knowledge’ into the fold. However, in order to do so, local knowledge has had to be packaged and presented in a way that is amenable to blueprints, checklists and practical agendas. A process is then undertaken by which local knowledge is processed and judged useful.<sup>54</sup> This point is eloquently explored by Suthaharan Nadarajah. Even when international peacebuilders, and by extension, transitional justice advocates, attempt to resist the liberal peace, they must

...engage with and encompass these more ‘indigenous’ social forms within a more nuanced and intensified power/knowledge framework, rendering them knowable and amenable to international peacebuilding practices – albeit ones now emphasising ‘empathy’ and ‘local legitimacy’, whether the local and everyday form the basis for more effective statebuilding or an international-local peacebuilding ‘contract’.<sup>55</sup>

This has a dynamic influence on the content and meaning of the knowledge, as it is grafted on to a pre-existing logic of social change. As Martin Nakata argues, local knowledge “becomes not embedded in local meanings and contexts but separated from its original context - an entity to be studied, worked on, developed, integrated, transferred, and ultimately changed to fit another.”<sup>56</sup> Curating local knowledge that supports the overall project of transitional justice, itself, then, cannot be considered to be an inherently emancipatory act. Through this process of selection and rejection, privileging and silencing, ‘local knowledge’ comes to be informed, and indeed, *defined*, by the same hegemonic processes that it is meant to redress.

The ideas and values that one ascribes to the ‘local’ can also be a potential pitfall in transitional justice and peacebuilding. Mac Ginty highlights a principle challenge in ‘romanticizing the local’ in discourses that surround localizing efforts in

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<sup>53</sup> Paige Arthur, “How ‘Transitions’ Reshaped Human Rights: A Conceptual History of Transitional Justice,” *Human Rights Quarterly* 31, no. 2 (2009), 339.

<sup>54</sup> Suthaharan Nadarajah and David Rampton, “The Limits of Hybridity and the Crisis of Liberal Peace,” 60.

<sup>55</sup> *Ibid.*

<sup>56</sup> Martin Nakata, “Indigenous Knowledge and the Cultural Interface: Underlying Issues at the Intersection of Knowledge and Information Systems,” *IFLA Journal* 28, no. 5-6 (2002), 3.

peacebuilding. As Mac Ginty writes, “it is possible to develop a simplistic binary narrative in which ‘indigenous’ and ‘traditional’ aspects of society are equated with being organic, natural, unpolluted, sustainable, authentic and normatively good.”<sup>57</sup> This romanticization is particularly prone to occur when opposed to a caricature of a malevolent and oppressive West, where complex dynamics are reduced to “saintly locals and devilish internationals.”<sup>58</sup> The essentialism intrinsic to this romanticized portrait is ultimately destructive for many reasons.

First, it is an artifice. It paints an unreal and hyper-deterministic portrait of relations on the local-international interface, which is a poor foundation from which to comprehend a complicated web of histories, interests, individuals, and systems. The simplicity afforded by this script is undercut when it is confronted with the messy realities of lived experience in conflicted regions. It simply cannot capture the complex ways in which people navigate conflicted terrain. With these embedded assumptions, the blueprint for social change that is produced is likely to be misguided, at best, and harmful, at worst.

Second, a romanticized vision of the local erases the existence of hegemonies that exist *within* local communities, which is tantamount to reinforcing them. As Mac Ginty rightly notes, many local approaches to peacemaking, and for our purposes, transitional justice, are conservative in nature and strengthen the position of elites.<sup>59</sup> The disenfranchisement of women, regional minorities, and those removed from the reaches of power can be reinforced through the invocation and use of customary practices. Simon Robins makes this case incredibly well in relation to post-conflict Nepal. Robins argues that social exclusion in Nepal is reinforced through transitional justice mechanisms, which “marginalizes victims and their agendas” and is “dominated by a narrow legalism that neglects the priorities of victims.”<sup>60</sup> The fact that narrow legalism is a feature of human rights discourse and transitional justice practice, Robins argues, allows local elites to translate the outcomes to suit their own

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<sup>57</sup> Roger Mac Ginty, *International Peacebuilding and Local Resistance: Hybrid Forms of Peace* (New York: Palgrave Macmillan, 2011), 51.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*, 52.

<sup>60</sup> Simon Robins, “Transitional Justice as an Elite Discourse,” *Critical Asian Studies* 44, no. 1 (2012), 6.

ends. Thus, “the result of rights language in Nepal emerging almost exclusively from dominant power groups is that it becomes an elite discourse.”<sup>61</sup> Rights language is “removed from the concerns of the marginalized and constrained by the political and other priorities of the privileged.”<sup>62</sup> In sum, the particular plane of interaction between the international and the local, here, results in the privileging of already-privileged Nepalese. As Robins astutely notes, this is not a particular feature of human rights or transitional justice, rather, “in an unequal society, human rights as any other discourse will be articulated subject to existing power relations.”<sup>63</sup> However, a romanticized vision of the local is rendered entirely impervious to these concerns. If this is allowed to occur, it is altogether possible that continued oppression of subaltern populations would be shrouded in the emancipatory language of resistance.

Finally, the romanticization of the local conceives of the ‘local’ as a distinct unitary entity, universal across space and time.<sup>64</sup> As Séverine Autesserre puts it “the definition of ‘local,’ like that of ‘peace,’ is constructed rather than given.”<sup>65</sup> This means that the particular manner in which the local is constructed is illustrative of undergirding assumptions and existing hierarchies. Autesserre argues that the particular construction of the local/international dichotomy is constructed with two particular assumptions as basis. The first conceives of the local as “insular or provincial,” which “ignores the fact that many residents of the host countries have international knowledge and experience.”<sup>66</sup> The second assumption is the homogeneity of the local, where “the opposition between expatriates and locals is central to the intervener’s way of seeing the world.”<sup>67</sup> According to Autesserre, “for interveners, local people are the primary Others.”<sup>68</sup> This effaces the differences between localities across the globe and even *within* the space of the local. It goes

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<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid.

<sup>64</sup> Oliver P. Richmond, *A Post-Liberal Peace: The Infrapolitics of Peacebuilding* (United Kingdom: Taylor & Francis, 2011), 98.

<sup>65</sup> Séverine Autesserre, *Peaceland: Conflict Resolution and the Everyday Politics of International Intervention* (United Kingdom: Cambridge University Press, 2014), 63.

<sup>66</sup> Ibid., 63.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid., 174.

without saying that the politics of the local is historically and politically contingent, as it encompasses as much dynamism as one can possibly conceive. And yet, the image of the 'local' is contrasted against the 'global' in a simplistic binary, often acting as a container of opposites to the construction of the global. It is crucial to understand the source of this image, and its impact.

One reason for this binary between the local/international is a need for policy-directed scholarship to make the local apprehendable, usable, and comprehensible. This is because the local *itself*, as a concrete and bounded entity, is a necessary instrument for peace in 'local turn' discourse. Indeed, just as in the case of local knowledge, there is a pressing need to make the local, her customs, knowledge and ways of being knowable and apprehendable. Predictability is necessary in order to construct technocratic programs for social change. A homogenous image of the local is predictable, even if it is false, and can thus be used to the service of pragmatic social programming.

But there is another reason for this binary, and it strikes at the very heart of the local turn in transitional justice. It can also be attributed to a deep-seated incoherence in localizing efforts, which is a clash between the logics of the particular and the universal. Here, the 'global' is universal; it is understood in terms of ideological consistency, normative dictates and legalistic language that encompasses the globe. For example, transitional justice literature addresses 'victims' and 'perpetrators' as coherent concepts, which attributes constancy to these categories that can only be clear in the abstract. These categories are then applied, *a priori*, to transitional societies. However, the 'local' is inherently particular; it is bounded in place and time by historical trajectories, individual agency, narrative, language, and memory. Attempts to make the local knowable to the global are ultimately acts of translation. It is an attempt to render the local in terms comprehensible by those who are not enmeshed in the particulars of a certain context. The romanticization of the local results in a bastardized vision of the local, it is true, but a readable and understandable one. Only when the local can be rendered intelligible can the technocratic forms of knowledge that form the basis of transitional justice gain credence.

Many of the pragmatic attempts to comprehend the local circulate around a central idea: legitimacy. In liberal states, the social contract is the source of legitimacy that “binds elites and populations together.”<sup>69</sup> Legitimacy in peacebuilding is a prized, but often illusory, goal. Contemporary peacebuilding in the liberal mode is understood to be in the midst of a ‘legitimacy crisis’ or ‘legitimacy lacuna’. This is demonstrated by “cloistering offices in walled compounds with armed checkpoints, using armoured cars and armed guards for transformation and protection... used to impose a material and immaterial border and to increase distance between the international and the local.”<sup>70</sup> The lack of legitimacy for international projects is a deep concern for peacebuilders and transitional justice scholars.

Legitimacy is understood to tie local communities to the transitional justice project, incentivizing participation and investment in its tenets. If only local populations could view the peacebuilding and transitional justice projects as legitimate, the argument goes, there would be a marked success. The problem arises when scholars then move to the realm of prescription in order to solve this legitimacy crisis. They attempt to solve this problem by turning to ways to ‘generate’ legitimacy. This amounts to mining ‘the local’ for its legitimacy which can then be grafted onto existing peacebuilding and transitional justice projects.

The first problem is that legitimacy is understood to be derived from ‘representation’ and ‘ownership’ of peace processes by local actors. In order to fulfill these roles, local elites are often conscripted to lead the charge, with questionable outcomes.<sup>71</sup> Legitimacy is not, and cannot, be automatically conferred on a project simply by the fact of local integration. It is a multifactorial process of communities coming to evaluate the fittingness, meaningfulness and utility of processes to their own lives and to the community at large. Legitimacy is not an ingredient to be added to peace processes to ensure their efficacy; rather, it is the *outcome* of communities determining that peace and transitional justice processes pass the muster of

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<sup>69</sup> David Roberts, *Liberal Peacebuilding and Global Governance: Beyond the Metropolis* (United Kingdom: Taylor & Francis, 2009), 99.

<sup>70</sup> Oliver P. Richmond, Stephanie Kappler, and Annika Bjorkdahl, “The ‘Field’ in the Age of Intervention: Power, Legitimacy, and Authority Versus the ‘local,’” *Millennium - Journal of International Studies* 44, no. 1 (2015), 32.

<sup>71</sup> Simon Robins, “Transitional Justice as an Elite Discourse.”

community and individual needs.

The second problem with this technocratic approach to legitimacy is its ultimate instrumentalization. Andrew Friedman demonstrates this by asserting that the chief challenge facing localizing efforts in transitional justice is merely “to determine where such local ownership may be inserted into transitional justice mechanisms.”<sup>72</sup> Local ownership, here, is grafted on to a pre-existing framework of producing social change. Legitimacy is treated as a currency that can purchase increased success for the transitional justice process, rather than an end itself. According to Nadarajah and Rampton, “hybridity is... offered as potentially speeding up implementation and local acceptance of neoliberal frameworks.”<sup>73</sup> In the search for pragmatic concreteness, legitimacy becomes an element to graft on to peace processes to ensure their success, rather than a concept by which one can evaluate the ethics of a particular practice. This mode of thinking is illustrated by David Roberts when he poses the question, “if local legitimacy is lacking, how might it be generated?”<sup>74</sup> Here, legitimacy acts as a means to rationalize and legitimize the peacebuilding process. Instead of evaluating the reasons why local legitimacy would be absent, instead, the focus is on engineering legitimacy in the service of peacebuilding.

### 4.3 Hybrid Interfaces

Largely as a result of challenges experienced in the liberal peacebuilding paradigm, a growing number of scholars of transitional justice and peace studies have focused on the role of the ‘local’ in determining whether interventions in conflicted societies will succeed or fail. This is because legitimacy is understood to be principally in the domain of the local. However, as the following discussion will show, this new focus on the ‘local’ and ‘legitimacy’ does not necessarily escape the problematic assumptions of the liberal peacebuilding paradigm. This is because the role of the ‘local’ is often relegated to procedural considerations rather than substantive ones.

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<sup>72</sup> Andrew Friedman, “Transitional Justice and Local Ownership,” 728.

<sup>73</sup> Suthaharan Nadarajah and David Rampton, “The Limits of Hybridity and the Crisis of Liberal Peace,” 62.

<sup>74</sup> David Roberts, *Liberal Peacebuilding and Global Governance*, 99.

This is not to dismiss the existence or utility of this paradigm wholesale, but rather, to question, “what are the politics of invoking hybridity?”<sup>75</sup> As Suthaharan Nadarajah aptly notes, one must “acknowledge hybridity’s *potential* for resistance and progressive agendas, but question whether it can be *always* equated with these.”<sup>76</sup>

The presence of hegemony and domination does not simplify the complicated nexus at which the local and the international meet. Instead, it produces a complicated web of interactions that cannot be distilled to a simplistic binary. Evaluating the claims of local agency, post-liberal peacebuilding and emancipation in the form of hybridity requires unpacking these moments of association between the local and the international, in order to lay bare the politics of hierarchy and resistance within these interfaces. It is in fact true that “hybridization, rather than liberalization, has been the dominant trend” in peacebuilding.<sup>77</sup> I want to argue that at present, localized forms of transitional justice do not produce emancipating hybridities for subaltern populations. This is because it is a hybridization of *practice* rather than a hybridization of undergirding assumptions, and also because many aspects of hierarchy are reproduced in the name of hybridity. This section considers two manifestations of the hybridization of transitional justice, hybrid tribunals and the revival of customary practices. This thesis demonstrates that in these hybrid interfaces, the machinations of hegemony continue to dictate the course of justice. However, this does not hold fast in all cases, and does not preclude the possibility of ‘everyday agency’ serving as the foundation for emancipation in the future.

Many discourses carry the banner of hybridity, ranging from the radical and emancipatory to the moderate and procedural. In practice, transitional justice’s assumption of hybridity has been primarily of the moderate sort, it emphasizes hybridity of actors rather than assumptions. Transitional justice is tied to the first wave of the local turn, not the second. As a result, many of the opportunities for subaltern agency and emancipation provided by hybridity are lost. In sum, a non-radical vision of hybridity is unlikely to produce radical ends.

Hybridization of transitional justice has particularly taken the form of hybrid

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<sup>75</sup> Ibid., 55.

<sup>76</sup> Ibid., 56.

<sup>77</sup> Oliver P. Richmond and Audra Mitchell, “Towards a Post-Liberal Peace,” 8.



tribunals, which are considered to be the complementary engagement of international law and domestic law in order to “provide the necessary resources and guarantees for a high level of justice in the country where the conflict occurred.”<sup>78</sup> Judicial systems were often in shambles by conflict’s end, and hybrid tribunals were understood to be a way to reconstruct “law, order, and stability” which were the “essential conditions for a fair and effective judiciary.”<sup>79</sup> Unlike the *ad hoc* International Criminal Tribunal for Rwanda (ICTR) and International Criminal Tribunal for the Former Yugoslavia (ICTY), these hybrid tribunals are locally-based. A number of hybrid criminal tribunals have subsequently proliferated, in Cambodia (1997), Kosovo (2000), Timor-Leste (2000), Sierra Leone (2002), and Bosnia and Herzegovina (2005).<sup>80</sup> Criticisms of liberal peacebuilding have been central to the construction of these apparatuses. According to Padraig McAuliffe, hybrid tribunals were the result of a dialectic process “revealed through critique of international tribunals in terms of axes of legitimacy, capacity building and norm penetration, which were then contrasted with the benefits of local participation and location in the State where the crimes occurred.”<sup>81</sup> Thus, the model’s potential was understood to be the legitimacy that local participation conferred onto the justice process.

According to Laura Dickenson, the hybridity of these courts emerges from the engagement of international apparatuses alongside domestic legal instruments, resulting in a “blend of the international and the domestic.”<sup>82</sup> In hybrid courts, foreign and domestic judges adjudicate cases litigated by a mix of local and international legal experts. Thus, the hybridity of these structures is meant to emerge from their procedures and a variation of actors. However, this troublingly leaves some underlying assumptions uncontested.

First, supporters of hybrid tribunals envision of the international community

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<sup>78</sup> Olga Martin-Ortega and Johanna Herman, “Hybrid Tribunals: Interaction and Resistance in Bosnia and Herzegovina and Cambodia,” in *Hybrid forms of peace: From everyday agency to post-liberalism*, eds. Oliver P. Richmond and Audra Mitchell (Houndmills, Basingstoke, Hampshire: Palgrave Macmillan, 2011), 73.

<sup>79</sup> Padraig McAuliffe, “Hybrid Tribunals at Ten: How International Criminal Justice’s Golden Child Became an Orphan,” *Journal of International Law and International Relations* 7, no. 1 (2011), 8.

<sup>80</sup> Olga Martin-Ortega and Johanna Herman, “Hybrid Tribunals,” 78.

<sup>81</sup> *Ibid.*, 7.

<sup>82</sup> Laura A. Dickinson, “The Promise of Hybrid Courts,” *The American Journal of International Law* 97, no. 2 (2003), 295.

as inherently ‘objective’ in its interventions in domestic disputes, and uses this idea to bolster their integration into domestic legal systems.<sup>83</sup> The objectivity of the international community was meant to be a bulwark against “state complicity, cover-up, and other obstructions [of] the very possibility of justice.”<sup>84</sup> However, this vision seriously underestimates the deep politicization of international actors in conflicted contexts. For one, one must note that the conflicts that are attempting to be reconciled are not confined to the particular territory in which the violence occurs. Rather, conflict in the globalized age is international. Jan Selby rightly notes “peace processes are typically informed by sharply realist power politics.”<sup>85</sup> Roger Mac Ginty eloquently refers to this paradox as the “Janus-faced nature of hybridity,” noting that “Canadian troops fired 4.7 million bullets in Afghanistan in a twenty-month period in the mid-2000s, while, at the same time, Afghanistan was Canada’s largest recipient of international assistance,” with much of that assistance earmarked for peace processes.<sup>86</sup> Interactions between the international and the local in conflicted contexts begin long before the moment of reconciliation, which casts serious doubt on the possibility of international community’s ‘objectivity.’

Second, hierarchy in hybrid tribunals is manifested in certain pedagogical practices that shape the procedures and outcomes of the trials. As there is the assumption that “the transitional State... knows neither democracy nor justice,” many hybrid tribunals are structured in manners that explicitly limit local determination.<sup>87</sup> In the hybrid tribunals in Bosnia and Herzegovina, according to Elizabeth Brunch, there were institutional differences in the treatment of international judges and staff and local judges and staff which reinforced the “retaining wall” between the groups.<sup>88</sup> These distinctions included the living conditions, travel and pay disparities between the international and domestic staff. One of the most salient examples Brunch

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<sup>83</sup> *Ibid.*, 83.

<sup>84</sup> Ruti G. Teitel, *Transitional Justice* (Oxford: Oxford University Press, USA, 2002), 65.

<sup>85</sup> The peacebuilding project itself is one that is deeply economically, ideologically and politically motivated. For more, see Jan Selby, “The Political Economy of Peace Processes,” in *Whose Peace? Critical Perspectives on the Political Economy of Peacebuilding*, ed. Michael C. Pugh, Neil Cooper, and Mandy Turner (New York: Palgrave Macmillan, 2008).

<sup>86</sup> Roger Mac Ginty, *International Peacebuilding and Local Resistance*, 80.

<sup>87</sup> Pádraig McAuliffe, “Hybrid Tribunals at Ten,” 9.

<sup>88</sup> Elizabeth Brunch, “Hybrid Courts: Examining Hybridity Through a Post-Colonial Lens,” *Boston University International Law Journal* 28, no. 1 (2010), 13.

provides is the case of language, she notes “the idea that international judges and staff might use (or learn) the national language(s) was never suggested; English was the primary language of daily interaction...”<sup>89</sup> While this is par for the course in international work, Brunch incisively connects it to the impact of hierarchy and status that operated within the institutional structure. International judges and staff assumed the role of ‘supra-citizens,’ a class of mobile professionals with social and economic capital that serve ‘sub-citizens,’ the locally-bound beneficiaries of their work.<sup>90</sup> Brunch argues that these structures of membership created an “ambivalent and unequal hybridity” that colored the work done by the court, and impacted upon its decisions.<sup>91</sup> This example clearly demonstrates that hybrid institutions have as much capacity to institutionalize and reinforce existing hierarchies as it has the potential to dismantle them.

The final challenge is the interpretation and reformulation of law and knowledge in hegemonic ways. True to the hybrid name, “there is no single or monolithic model of hybrid tribunals, and all manifestations enjoy a diverse nomenclature.”<sup>92</sup> However, as a matter of practice in hybrid tribunals, “judges apply domestic law that has been reformed to accord with international standards.”<sup>93</sup> This reformulation of law can have distinct impacts on the decisions themselves, as well as the legal and ideological reasoning that leads to the decisions. Brunch argues that this ‘reformulation’ is can be tantamount to the “wholesale importation of human rights law” on the basis of universality.<sup>94</sup> While it is not necessary to outline the long-standing debate on the universality of human rights here, Brunch makes the cogent case that the uncritical application of human rights law in hybrid tribunals is a demonstration of hierarchical power relations amongst states. She concludes that the outcome of this imposition is the “translation of the law of Europe... to the domestic legal system” and “shifted the balance of power toward international or European dominance while simultaneously ensuring that Bosnia was always ‘not quite’

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<sup>89</sup> Ibid.

<sup>90</sup> Ibid., 14.

<sup>91</sup> Ibid.

<sup>92</sup> Pdraig McAuliffe, “Hybrid Tribunals at Ten,” 4.

<sup>93</sup> Laura A. Dickinson, “The Promise of Hybrid Courts,” 295.

<sup>94</sup> Elizabeth Brunch, “Hybrid Courts: Examining Hybridity Through a Post-Colonial Lens,” 19.

Europe.”<sup>95</sup> reformulation of knowledge and legalism can reinforce what Dustin Sharp calls a “subtext of locals as passive recipients of international justice discourse and practice.”<sup>96</sup>

Customary practices of justice are at the very core of localized efforts to forward transitional justice. Cynthia Horne argues that “attention to culturally resonant and community-driven approaches provides needed balance” to early efforts that were driven externally, and drew on Western understandings of law and society.<sup>97</sup> By and large, localizing transitional justice has meant a hearty embrace of customary practices.<sup>98</sup> There is an embedded assumption that customary practices and traditional justice holds the important element of ‘legitimacy.’ Therefore, if local practices and understandings of justice inform the transitional justice project, the overall project would be markedly more successful. “Bottom-up” approaches to transitional justice are the logical extension of this understanding. Horne describes the three key features of bottom-up programs. First, bottom-up programs “hav[e] the affected communities themselves generate programs reflecting their ideas for reconciliation.”<sup>99</sup> Second, they “incorporate traditional practices to confer additional legitimacy on the proceedings.”<sup>100</sup> Finally, “locals implement the programs at a community level in order to facilitate citizen participation.”<sup>101</sup> All of these features are meant to embed the transitional justice project within the community, such that the community would embrace the project as germane to their process of healing.

Problematically, this impulse often represents the instrumentalization of customary practices to forward the overarching goals of transitional justice. Toby S. Goldbach writes about the distinction between the ‘instrumental’ and ‘expressive’

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<sup>95</sup> Ibid., 26.

<sup>96</sup> Dustin N. Sharp, “Addressing Dilemmas of the Global and the Local in Transitional Justice,” *Emory Law Transitional Law Review* 29, no. 1 (2014), 88.

<sup>97</sup> Cynthia M. Horne, “Reconstructing ‘Traditional’ Justice from the Outside in: Transitional Justice in Aceh and East Timor,” *Journal of Peacebuilding & Development* 9, no. 2 (2014), 18.

<sup>98</sup> Customary practices are those that draw from cultural understandings of justice, invoke meaningful cultural symbolism and rely on processes that are often distinct from the formalized legal mechanisms constructed in the Western model. The inclusion of customary practices in legal formal settings can result in the “motivated misrecognition of local cultural realities.” For more, see John R. Bowen, “On the Political Construction of Tradition: Gotong Royong in Indonesia,” *The Journal of Asian Studies* 45, no. 3 (1986).

<sup>99</sup> Ibid., 19.

<sup>100</sup> Ibid.

<sup>101</sup> Ibid.

genres of law. For Goldbach, the instrumental genre of law responds to means and ends, while the expressive genre of law deals with the generation and production of meaning.<sup>102</sup> In relation to the adoption of Indigenous sentencing circles in Canadian criminal law, Goldbach utilizes the useful language of ‘instrumentalizing the expressive,’ which means “fashioning constructed expressions of culture into an instrument for use— may present new and troubling implications for what it means to employ the law as a tool metaphor.”<sup>103</sup> The instrumentalization of custom to the ends of transitional justice may itself reintroduce the “hegemonic logic of means and ends,” and risks “destabilizing developments in its effort to deem everything up for instrumental grabs.”<sup>104</sup> Goldbach utilizes the language of ‘transplantation’ and ‘translation’ to convey the movement between the instrumental and the expressive, in order to conclude that this moment of conversion presents a “jeopardy for unmet expectations.”<sup>105</sup> This is the first challenge of the instrumentalization of customary justice.

There are more challenges inherent to the instrumentalization of custom. Customary practices are intimately tied to their local contexts, meaning that they are often deeply politicized. Joanna R. Quinn makes the compelling case that the formalization and codification process of customary mechanisms is by no means apolitical, but is instead intimately tied to political processes. For example, according to Quinn, “the government of Uganda has inserted itself into the day-to-day workings of the traditional cultural institutions themselves.”<sup>106</sup>

The perceived independence of customary justice from external actors, commonly understood to be the source of local ‘agency,’ is disputed by Cynthia Horne. In post-conflict Aceh and Timor-Leste, Horne argues, scholars that laud the ‘bottom-up’ transitional justice mechanisms for their ‘authenticity’ “understate the role played by extra-regional actors in actually reconstructing and implementing these

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<sup>102</sup> Toby Goldbach, “Instrumentalizing the Expressive: Transplanting Sentencing Circles into the Canadian Criminal Trial,” *Transnational Law and Contemporary Problems* 25, no. 1 (2015), 68.

<sup>103</sup> *Ibid.*, 69.

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.*

<sup>106</sup> Joanna R. Quinn, “Tradition?! Traditional Cultural Institutions on Customary Practices in Uganda,” *Africa Spectrum* 49, no. 3 (2014), 44.

‘traditional’ justice programmes.”<sup>107</sup> Horne writes of a process of ‘reconstitution’ wherein international actors are intimately involved in the overall shape and tenor of purportedly ‘bottom-up’ mechanisms. Indeed, Horne argues that it was the *external actors* that primarily implemented the indigenous practices and their implementation, ultimately distorting the symbolic meanings associated with the practices.

The decision to incorporate *adat*, or customary Indonesian reconciliation practice, into the transitional justice program in Aceh was determined in the design phase of the project, which occurred in Helsinki. The Helsinki process was run almost to the exclusion of Indonesian representatives, even as the decision was made to incorporate ‘bottom-up’ transitional justice initiatives.<sup>108</sup> Horne cites an Indonesian negotiator in the process as confirming “the use of *adat* was driven by the international community in Aceh and East Timor.”<sup>109</sup> Thus, even as the international community embraced local customary practices with a renewed zeal, the power to make the decision about the ultimate shape of the transitional justice enterprise was in Helsinki, not in Aceh. This is not to cast aspersions on the ultimate utility of the inclusion of *adat* in Aceh, *gacaca* in Rwanda, or *mato oput* in Uganda. The aim, here is to interrogate where the decision-making power ultimately rests, and to what specific aims the customary practices are utilized.

This demonstrates a central tension within the localizing turn in transitional justice. Here, it is the *process* of transitional justice that is negotiable, and not the end-point. Even when infused with the express purpose of ‘localizing’ transitional justice, there are inherent tensions between the universalizing, liberalizing end-goals of transitional justice and the customary practices which are employed to serve its ends. Legitimacy is conferred onto the overall transitional justice enterprise through this fusion, but the assumptions and rationales of transitional justice as a hegemonic discourse remain intact. Liberal democracy, marketization and the ‘rule of law’ are non-negotiable outcomes of the transitional justice enterprise. Customary practices of justice and reconciliation are thus relegated to the subordinate position as instruments

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<sup>107</sup> Cynthia M. Horne, “Reconstructing ‘Traditional’ Justice from the Outside in: Transitional Justice in Aceh and East Timor,” 19.

<sup>108</sup> *Ibid.*, 22.

<sup>109</sup> *Ibid.*

to the ends of these goals; that is, customary practices serve as the vehicles to secure these outcomes, rather than outcomes in their own right.

#### 4.4 Hybridity Reexamined

This is not to argue that local agency is completely circumscribed in hybrid interactions. Indeed, fascinating studies of the ‘everyday’ demonstrate an incredible subaltern potential for adaptation, contestation, cooption and resistance. Even actions that international actors may consider to be ‘spoiling’ the process can emerge from this impulse. Richmond and Mitchell argue that partial compliance and cooptation can be an act of local authorship, it can emerge as “a means for reforming the norms and institutions that were in effect imposed on them.”<sup>110</sup> This is illustrative of the vision of hybridity informed by postcolonialism. Rather than viewing the relationship of hegemony as one of complete determinism, scholars such as Homi Bhabha have articulated that at the meeting of different constituencies a ‘Third Space’ is borne, which is a site of subversion and a “renegotiation of cultures and identity, and multiple positionality.”<sup>111</sup> For Bhabha, the hybrid holds a valorized position of ultimate resistance against hegemonic power. According to Amar Acheraïou, Bhabha understood hybridity to be the “fundamental tool by which the colonized resisted and subverted the colonizer’s cultural, political and ideological domination.”<sup>112</sup> Agency, here, lies in the ability to upend hegemonic order through subversion, resistance and negotiation.

However, it is important not to lose sight of hierarchy in the search for local agency. It is true that hybridity can serve as an opportunity for local and even subaltern populations to demonstrate incredible dynamism. However, Nadarajah and Rampton argue that a consequence of “locating in ‘hidden’ local agency both resistance to liberal peace and the possibility of ‘alternative’ hybrid forms of peace/building is the neglect of economic and social structures” as well as an

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<sup>110</sup> Oliver P. Richmond and Audra Mitchell, “Towards a Post-Liberal Peace,” 8.

<sup>111</sup> Amar Acheraïou, *Questioning Hybridity, Postcolonialism and Globalization* (Houndmills, Basingstoke, Hampshire: Palgrave Macmillan, 2011), 91.

<sup>112</sup> *Ibid.*, 95.

understanding of “how the international weighs heavily on the local.”<sup>113</sup> Customary practices of justice are not exempt from this calculus. Where customary peacemaking and justice practices are “*permitted* by the liberal peace,” they always occur “in a meta-environment shaped by liberal peace norms and institutions...”<sup>114</sup> For Mac Ginty, this means that one can envision indigenous peace and reconciliation initiatives as occurring at the behest of a “paradigm established elsewhere.”<sup>115</sup> Often, the impulse for local ownership, integration and agency therefore acts as an amendment to the transitional justice toolkit, rather than a wholesale revision of its contents.

Hybrid transitional justice does not escape the logic of the liberal peace. For all the literature that declares the death knell of liberal peacebuilding, reality suggests that the underlying project remains very much intact. This is because the liberal peace forms the skeleton onto which the peacebuilding project is grafted: it provides the ideological, political, and practical means by which peacebuilding is conceptualized and implemented. It has been so thoroughly ingrained in humanitarian, development and justice works that even discourse at the margins of these fields are colored by its influence. For Richmond and Mitchell, “the liberal register in which peacebuilding occurs made it extremely difficult to conduct unscripted conversations with local communities or elites.”<sup>116</sup> In essence, hybrid forms of justice in the current mode can serve as mere vectors for the production of legitimacy, to complete for the overriding project of human rights, democratization and marketization. In hybrid transitional justice, the liberal peace assumes a new and more ‘legitimate’ shape.

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<sup>113</sup> Suthaharan Nadarajah and David Rampton, “The Limits of Hybridity and the Crisis of Liberal Peace,” 61.

<sup>114</sup> Roger Mac Ginty, *International Peacebuilding and Local Resistance*, 61.

<sup>115</sup> *Ibid.*

<sup>116</sup> Oliver P. Richmond and Audra Mitchell, “Towards a Post-Liberal Peace,” 8.



## Chapter 5

### 5 Constructing the Victim, Settling Accounts

Transitional justice prides itself on being ‘victim-centered’ as a field, with an emphasis on victims’ desires, needs and dignity post-conflict. Transitional justice processes are frequently accompanied by a call to “ask the victims what they want,” which “reinforces the notion that victims should occupy a central role in determining responses to harm.”<sup>1</sup> But before questions of culpability, accountability and reconciliation can have salience in transitional justice, the categories of ‘victim’ and ‘perpetrator’ must be constructed and codified. However, the realities of mass atrocity and conflict rarely comport with these sanitized categories. The particular manner of the construction of these categories, and their use in the social project of transitional justice requires further scrutiny. This chapter has three main purposes. First, it considers and complicates the particular construction of the victim in transitional justice and its usage. Second, it considers the ways that the search for justice in the name of victims can result in the instrumentalization of victim’s narratives and victims themselves. Finally, it finds that the practice of ‘settling accounts’ in truth commissions can have the effect of neutralizing contesting narratives of victimhood.

#### 5.1 Constructions of Victimhood in Transitional Justice

As Annalise Acorn writes, “we do not feel pity for those who bring about their own demise.”<sup>2</sup> Ultimately, the determination of those victim narratives that are deemed worthy of compassion is intimately tied to perceptions of agency. For those to whom one extends their compassion, blots of character and difficult decisions are often smoothed out with the assurance of determinism. On the other hand, narratives that are deemed unworthy of compassion are suffused with agency. Bronwyn Leebaw outlines Hannah Arendt’s distinction between ‘temptation’ and ‘coercion,’ with ultimately different culpabilities. “Arendt insisted that, ‘if someone points a gun at

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<sup>1</sup> Kamari Maxine Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (United Kingdom: Cambridge University Press, 2009), 162.

<sup>2</sup> Annalise E. Acorn, *Compulsory Compassion: A Critique of Restorative Justice* (Vancouver: University of British Columbia Press, 2004), 129.

you and says, ‘Kill your friend or I will kill you,’ he is tempting you, that is all.”<sup>3</sup> When it comes to perpetrators, the question of agency is tied up in considerations of their ultimate culpability in atrocities. Consider, for example, the long-standing deliberations about the ultimate culpability of ‘big fish,’ the leaders of organizations charged with atrocities and the ‘small fry,’ those at the bottom of the totem pole that executed orders from those above them. However, as this section demonstrates, the same logic of agency and culpability is used to determine the veracity of victim narratives, and the victimhood of victims themselves. The construction of victims in transitional justice is problematic in three main ways: first, it defines victims reductively in opposition to perpetrators; second, it demands ‘innocence’ from victims in order to claim the mantle of victimhood; and finally, it excludes the possibility of actors that do not fit comfortably on any side of this dichotomy.

Transitional justice literature often relies on a construction of victims and perpetrators as existing on a diametrically opposed binary. As Tristan Anne Borer notes, there is an implicit assumption here that the groups are homogenous, “victims and perpetrators are referred to as if they are all the same. *The victims and The perpetrators.*”<sup>4</sup> The interrelations between these groups are similarly scripted. Govier and Voerword outline this dichotomy as follows: “One person acts; the other is acted upon. One harms; the other is harmed. One is evil; the other is good. One bears responsibility; the other none.”<sup>5</sup> Clearly this dichotomy is reductive, as it shrinks complex interrelations in situations of extreme stress to a morality play between the forces of good and evil. There is an important parallel here to the construction of victims of ‘ordinary crimes,’ or those crimes that are not understood to rise to the level of mass atrocity. Alleta Brenner considers the victim-perpetrator binary in the case of rape. Brenner argues that the victim-perpetrator binary is “simultaneously fixed and relational.”<sup>6</sup> This means that the crime itself, and its mutually constitutive

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<sup>3</sup> Bronwyn Leebaw, *Judging State-Sponsored Violence, Imagining Political Change* (United Kingdom: Cambridge University Press, 2011), 153.

<sup>4</sup> Tristan Anne Borer, “A Taxonomy of Victims and Perpetrators: Human Rights and Reconciliation in South Africa,” *Human Rights Quarterly* 25, no. 4 (2003), 1089.

<sup>5</sup> Trudy Govier and Wilhelm Verwoerd, “How Not to Polarize ‘Victims’ and ‘Perpetrators,’” *Peace Review* 16, no. 3 (2004), 372.

<sup>6</sup> Alleta Brenner, “Resisting Simple Dichotomies: Critiquing Narratives of Victims, Perpetrators, and Harm in Feminist Theories of Rape,” *Harvard Journal of Law and Gender* 36, no. 2 (2013), 505.

categories of ‘victim’ and ‘perpetrator’ are all intricately tied to one another. Here, victims are primarily constituted through their experience of harm from perpetrators. Thus, there can be no crime without a perpetrator and victim, and no victim without a distinct perpetrator. This reductive approach to conflict belies the fact that reality can have multiple, contradictory elements.

One must also consider the *sorts* of harm that can be accounted for by this victim-perpetrator nexus. As this dichotomy relies on a perpetrator to act against a victim, this greatly reduces the scope of possible harm to that which can be understood on an interpersonal level. Here, in order to claim the mantle of victimhood, one must have been harmed by an individual perpetrator in a tangible, knowable way.<sup>7</sup> This is a result of the fact that harms in transitional justice are conceptualized as violations of human rights, which are individual in nature. Human rights theory presumes that individuals constitute the reserve of rights-holders, as rights are a “justified claim on someone for something that is owed.”<sup>8</sup> This limits the scope of the human rights enterprise to those that can be articulated within the liberal, individual framework. The consequence is that may lose the opportunity to redress systemic-level harms, which are often diffuse and imprecise in nature, and unsuitable to be conceptualized through a victim-perpetrator dichotomy.<sup>9</sup>

This victim-perpetrator dichotomy also constructs a particular vision of an idealized ‘victim,’ which can become a litmus test to claim the mantle of victimhood. Susan Hirsch uses the provocative language of the ‘victim deserving of global justice’ to illustrate this point. Particularly after the ratification of the Rome Statute which explicitly centers the figure of the victim, Hirsch presciently reminds readers that “the establishment and early development of new global institutions is intertwined with the constitution of new global subjects.”<sup>10</sup> To explain this point, Ben Golder illustrates the Foucauldian vision of the ‘ambivalence of rights,’ which means that “position of rights- claimant or rights-holder is simultaneously our entry into regimes

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<sup>7</sup> Kamari Maxine Clarke, *Fictions of Justice*, 108.

<sup>8</sup> Anthony Langlois, ‘Indigenous Rights,’ 21.

<sup>9</sup> Erin K. Baines, “‘Today, I Want to Speak Out the Truth’: Victim Agency, Responsibility, and Transitional Justice,” *International Political Sociology* 9, no. 4 (2015), 327.

<sup>10</sup> Susan Hirsch, “The Victim Deserving of Global Justice: Power, Caution, and Recovering Individuals,” in *Mirrors of Justice: Law and Power in the Post-Cold War Era*, ed. Kamari Maxine Clarke and Mark Goodale (Cambridge: Cambridge University Press, 2010), 153.

of power- knowledge which bind us to particular truths, ways of thinking and acting and being.”<sup>11</sup> This means that at the moment that one claims a right and the privileges associated by that right, one becomes a subject produced by the definitional constricts of that right. Here, the victim becomes a ‘victim-subject,’ or “one who conforms to institutional requirements” of victimhood.<sup>12</sup>

Innocence is an important aspect of the construction of victimhood in transitional justice. For victims to be ‘true’ victims, transitional justice requires a form of blamelessness that can be contrasted against the perpetrator from which one demands accountability. This is especially true in terms of claims-making, where the figure of the child is often invoked as the ultimate symbol of innocence.<sup>13</sup> It is important to note how the designation of innocence and guiltlessness can be a process that is more illustrative of societal structures than the actual veracity of a victim’s claims. Brenner makes the point that the trope of the innocent victim in cases of rape severely circumscribed the manner in which their claims were handled. According to Brenner, “Within this framework, which has endured into the present day, only women who were sexually pure and thus chaste were capable of being raped. Once she had “fallen,” it was assumed that a woman was always ready, and looking, for sex.”<sup>14</sup> The designation of victimhood, here, is only available to those who are deemed to ‘deserve’ that status. In the presence of gendered, racialized, and otherwise hegemonic structures, the designation of victimhood can be filtered through the lens of these societal understandings. Thus, the particular manner in which innocence is constructed and interpreted can be a useful indicator of hierarchies and hegemonies within societies and the international system.

In transitional justice, the trope of the innocent victim takes on a distinctly political character. As Luke Moffett notes, the trope of the innocent victim is “often used to deny victimhood to those who suffered due to their background or conduct, or

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<sup>11</sup> Ben Golder, “Foucault, Rights and Freedom,” *International Journal for the Semiotics of Law* 26, no. 1 (2012), 14.

<sup>12</sup> *Ibid.*, 13.

<sup>13</sup> Kieran McEvoy and Kirsten McConnachie, “Victimology in Transitional Justice: Victimhood, Innocence and Hierarchy,” *European Journal of Criminology* 9, no. 5 (2012), 531.

<sup>14</sup> Allesta Brenner, “Resisting Simple Dichotomies,” 508.

to legitimize violence against individuals or groups.”<sup>15</sup> Laplante and Theidon outline exactly this process in the case of Peru. In Peru, “to be a victim today, one must claim innocence.”<sup>16</sup> In the aftermath of Peru’s civil war between the state armed forces and the two rebel groups *Sendero Luminoso* (SL) and the *Movimiento Revolucionario Tupac Amaru* (MRTA), ‘claiming innocence’ has a distinct political meaning. Those who supported ‘subversives’ were understood to have *lost their innocence* in the process of defying the state, with distinct consequences. According to Laplante and Theidon, “national reparations plan specifically exclude members of subversive groups, whether or not victimized in the same war.”<sup>17</sup> The determination of ‘innocence’ in contexts of political conflict, then, can take on distinctly political appearances. The trope of the innocent victim, according to Erin K. Baines, reduces the agency of people in conflicted context to “navigate in order to survive.”<sup>18</sup> Baines argues that people “contest, resist, and protest gross violations of their person.”<sup>19</sup> However, those who resist the harms they experience can be denied the title of victim, simply the constructed image of ‘true’ victimhood is depoliticized. This construction of victimhood legitimizes the narratives of some victims, while leaving others troublingly excluded from the fold.

The construction of victimhood in transitional justice is often conceived as the direct opposite to the construction of the perpetrator. The dichotomy between victims and perpetrators assumes that people navigating complex conflict scenarios can be neatly categorized in terms of their culpability and experiences of harm. However, as Govier and Verwoerd argue, “the dichotomy between ‘victims’ and ‘perpetrators’ is neither exclusive nor exhaustive.”<sup>20</sup> This binary framework is a poor representation of the lived experiences of people in conflict scenarios, as it excludes two possibilities:

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<sup>15</sup> Luke Moffett, “Reparations for ‘Guilty Victims’: Navigating Complex Identities of Victim–Perpetrators in Reparation Mechanisms,” *International Journal of Transitional Justice* 10, no. 1 (2015), 147-148.

<sup>16</sup> Lisa Laplante and Kimberly Theidon, “Commissioning Truth, Constructing Silences: The Peruvian Truth Commission and the Other Truths of ‘Terrorists,’” in *Mirrors of Justice: Law and Power in the Post–Cold War Era*, ed. Kamari Maxine Clarke and Mark Goodale (Cambridge: Cambridge University Press, 2010), 307.

<sup>17</sup> *Ibid.*

<sup>18</sup> Erin K. Baines, “‘Today, I Want to Speak Out the Truth’: Victim Agency, Responsibility, and Transitional Justice,” *International Political Sociology* 9, no. 4 (2015), 320.

<sup>19</sup> *Ibid.*

<sup>20</sup> Trudy Govier and Wilhelm Verwoerd, “How Not to Polarize ‘Victims’ and ‘Perpetrators,’” 372.

the possibility of actors that exist as neither victims nor perpetrators, and the possibility of a single actor embodying both characteristics at different times. People navigate the spaces of criminality and victimhood in dynamic ways; they can be victims and perpetrators at the same instance, and even in the same interaction. As McEvoy and McConnachie argue, these changes can occur “depending on a whole range of variables—these are not static categories.”<sup>21</sup> The presumption of static categories allows transitional justice literature to speak of victims and perpetrators as concrete concepts, articulating a vision of victim’s needs and perpetrator culpability in coherent ways. When mapped onto instances of conflict, however, these concepts begin to lose some of their salience. Child soldiers have become paradigmatic cases of the contradictory constructions of “newly emergent subject forms” such as the victim and perpetrator.<sup>22</sup> Julie Bernath considers the cases of ‘complex political victims’ in Cambodia, who are “victims who simultaneously or successively experienced harm and participated in systems of oppression and political violence.”<sup>23</sup> Bernath makes the trenchant observation that the simplicity of the image of the victim in political violence “constitutes the first step in producing the political space for mass victimization,” as it “contributes to problematic differentiations between good/bad and us/them.”<sup>24</sup> The harms experienced by complex political victims complicates the search for reconciliation and peacebuilding, which often invokes the image of the victim and envisions these practices as victim-centered.

## 5.2 Invoking the Victim

The image of the victim is a potent clarion call for action, and it has been utilized as a rhetorical device in numerous transitional contexts to advocate for specific transitional justice processes. Susan Hirsch considers the debate on the implementation of *Mato Oput* in Uganda, and particularly clarifies that *both* sides of the debate argued on the basis of victims’ needs and interests. Hirsch writes that the

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<sup>21</sup> Kieran McEvoy and Kirsten McConnachie, “Victims and Transitional Justice: Voice, Agency and Blame,” *Social & Legal Studies* 22, no. 4 (2013), 493.

<sup>22</sup> Kamari Maxine Clarke, *Fictions of Justice*, 96.

<sup>23</sup> Julie Bernath, “‘Complex Political Victims’ in the Aftermath of Mass Atrocity: Reflections on the Khmer Rouge Tribunal in Cambodia,” *International Journal of Transitional Justice* 10, no. 1 (2015), 47.

<sup>24</sup> *Ibid.*

features of the practice were represented in polar opposite ways depending on the outlook of the discussants, “as if reflected in a series of fun-house mirrors that exaggerated its purported positive or negative qualities.”<sup>25</sup> On one hand, there are those who characterize the processes as “well-respected responses to conflict dating from ‘time immemorial’ and with strong roots in Acholi culture.”<sup>26</sup> Others characterize the practices as recent constructions of tradition, “long severed from Acholi cultural practice—that were being forced onto a population by leaders with questionable motives.”<sup>27</sup> The important element, here, is that *both sides* used the image of the victim to buttress their arguments, evaluating the use of ‘international’ or ‘local’ justice mechanisms by their impact on victims. This is indicative of the ‘victim-centered approach’ to transitional justice, but it is also illustrative of how the image of the victim can become a rhetorical device used to forward the aims of a particular project or paradigm. Here, it is the “a general appeal to the cultural salience to victims” that is important to consider.<sup>28</sup>

The seemingly simple task of ‘asking victims what they want’ is belied by myriad conceptual and pragmatic challenges.<sup>29</sup> As discussed above, the designation of victimhood is not a straightforward process, and it is sometimes a difficult prospect to know exactly who ‘ask.’ Hirsch brilliantly outlines the ways in which the production of knowledge about victim’s wants and needs can be colored by the agendas and vantage points of the inquirer. Here, “‘For whom is the pollster working?’ becomes an important question that disavows of political manipulation may not easily satisfy.”<sup>30</sup> For this to be true, one does not necessarily have to ascribe a malicious intent to the organizations that produce and disseminate this knowledge. Rather, these “partisan attempts to illuminate victim’s interests” are the result of the application of pre-existing frameworks of knowledge to the conflicted contexts.<sup>31</sup> As Hirsch argues, “representatives from human rights organizations were long involved in assessing the extent of the violence in the northern Uganda conflict and advocating for redress

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<sup>25</sup> Susan Hirsch, “The Victim Deserving of Global Justice,” 158.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*, 160.

<sup>29</sup> *Ibid.*, 163.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*, 160.

through recognizable human rights processes.”<sup>32</sup> The fact that these organizations that produced knowledge on victims would interpret and articulate what they saw in the language of human rights violations and redress is unsurprising. However, it is important to consider how the framing of ‘victim’s interests’ in this manner can distort the narratives and experiences of victims.

The invocation of victim’s interests can be an exercise in instrumentalization. Transitional justice translates the powerful narrative of victim harms into normative prescriptions for social reshaping. According to Kieran McEvoy, victims’ stories can be invoked “in the pursuit of larger political and social goals such as reinforcing the rule of law, deterring future offenders, getting to the ‘truth’ of past violence and, of course, the pragmatic deal-making that is inherent in making peace.”<sup>33</sup> This can have serious psychological impacts on the victims, whose narratives can be key “means to achieve a successful prosecution.”<sup>34</sup> In retributive justice mechanisms, victims can be subjected to the troubles of an adversarial justice process, significant delays in the meting out of justice, and unrealistic expectations of the outcomes of the justice processes.<sup>35</sup> All of this can be expected of the victim with the assumption that this will assist in the process of personal recovery, but mostly in the hopes that it will support *societal* recovery. However, as the following section shows, this instrumentalization is not exclusive to the retributive paradigm, it also features prominently in the primary mechanism of restorative justice: truth commissions.

### 5.3 Settling Truth

For Ruti Teitel, truth commissions represent “impunity’s antidote and amnesty’s analogue,” a fight against disappearance of crimes, and the reformulation of collective memory.<sup>36</sup> The reach of truth commissions across the globe is breathtaking,

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<sup>32</sup> Ibid., 164.

<sup>33</sup> Kieran McEvoy, “Letting Go of Legalism: Developing a ‘Thicker’ Version of Transitional Justice,” in *Transitional justice from below: Grassroots activism and the struggle for change*, ed. Kieran McEvoy and Lorna McGregor (Portland, Or: Hart Publishing, United Kingdom, 2008), 42.

<sup>34</sup> Ibid.

<sup>35</sup> Sam Garkawe, “The Victim-Related Provisions of the Statute of the International Criminal Court: A Victimological Analysis,” *International Review of Victimology* 8, no. 3 (2001), 285-287.

<sup>36</sup> Ruti Teitel, *Transitional Justice* (Oxford: Oxford University Press, USA, 2002), 79.



extending from Argentina, Canada, Chad, Guatemala, Haiti, South Africa, and Uganda, amongst others. The claim of the truth commission is a simple one: it is an attempt to ‘settle the account’ of collective memory so that the harms experienced by victims can be made material, and so that the victims of those crimes are not lost to history. As Teitel argues, “the disappearance of the citizen displays a perversely cruel and absolute sovereignty.”<sup>37</sup> The truth commission, then, attempts to restore the dignity lost by those victims, assuring that their injustices would not go unmarked. Chrisje Brants and Katrien Klep succinctly describe the relationship between transitional justice and memory this way:

Transitional justice... (re)produces memories but aspires to more than that. “Justice” requires that the different theatres of memory are collected into one “truth” (Osiel’s “coherent collective memory,” Minow’s “national narrative”). This means that transitional justice can be understood as a mediator between different collective memories. Moreover, unlike film, this mediator embodies the voice of (legal) authority. The version of past events that courts and truth commissions produce in their verdicts and reports is an authoritative claim of truth.<sup>38</sup>

Truth commissions translate victim narratives into an authoritative account of history, they attempt to ‘settle the account’ of the past by introducing a ‘truth’ that is tangible, provable and appreciable. This is an incredibly important process, as it renders victim accounts impervious to denial, forgetting and relativization.<sup>39</sup> Thus, “truth commissions are at once socially embedded and transformative,” they are socially embedded as they draw from testimony to substantiate accounts, and transformative as they actively participate in the construction of social memory.<sup>40</sup> However, the production of an authoritative truth can become challenging when faced with the complex reality of conflict-affected contexts, where contested narratives of harm and victimhood are common.

Truth commissions are caught between competing aims, as they are simultaneously rooted in the immediate context of conflict and aspiring to move

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<sup>37</sup> Ibid., 77.

<sup>38</sup> Chrisje Brants and Katrien Klep, “Transitional Justice: History-Telling, Collective Memory, and the Victim-Witness,” *International journal of conflict and violence* 7, no. 1 (2013), 38.

<sup>39</sup> Onur Bakiner, “One Truth Among Others? Truth Commissions’ Struggle for Truth and Memory,” *Memory Studies* 8, no. 3 (2015), 346.

<sup>40</sup> Ibid.

beyond those very cleavages.<sup>41</sup> Although truth commissions regularly make truth claims about their findings, the reality is that the truth-seeking process requires an active, normative interpretation of the past.<sup>42</sup> Molly Andrews draws out this dynamic this way, “we have a responsibility to remember, ‘to keep memory alive, not to forget’... But never forget what? Keep which memory alive?”<sup>43</sup> Ultimately, the production of collective memory in truth commissions involves the rendering of a verdict. It requires adjudicating “between contending positions by confirming or rejecting certain narratives and explanations that hold sway in public debates.”<sup>44</sup> The process of combing through and divining ‘truth’ from these competing claims can have a marked impact on the collective memory of the past, as well as on the victims whose narratives are appraised, evaluated, and decided upon.

Although contested narratives continue to exist, the elevation of specific narratives to the authority of ‘truth’ carries problematic assumptions. Of course, there is the epistemological assumption that truth can be divined through a particular political process. But there is also a deeper ontological understanding about the nature and apprehension of ‘truth’ itself. While the particular mode of capturing truth is dialectic, there remains a “positivist assumption that a single truth is possible and identifiable,” which can complicate the reality that “multiple and contradictory truths may exist within a single interaction.”<sup>45</sup> If this is true, then the particular ‘truths’ that are raised to the mantle of ‘truth’ can be illustrative of the pitfalls of social structures in transitional contexts.

The image of the ‘ideal victim’ has social, as well as political implications. Hegemonies of identity, social class and cleavage and gender can find their way into the authoritative account of the ‘truth’ established by truth commissions. The language of ‘hearing’ and ‘voicing’ narratives of truth can obscure the politics of erasure and silence that works behind the scenes. “People do not enter the public forum as equals,” and therefore “the stories of some people made it... more easily

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<sup>41</sup> Ibid.

<sup>42</sup> Jan Blommaert, Mary Bock, and Kay McCormick, “Narrative Inequality in the TRC Hearings: On the Hearability of Hidden Transcripts,” *Journal of Language and Politics* 5, no. 1 (2006), 45.

<sup>43</sup> Molly Andrews, “Grand National Narratives and the Project of Truth Commissions: A Comparative Analysis,” *Media, Culture & Society* 25, no. 1 (2003), 46.

<sup>44</sup> Onur Bakiner, “One Truth Among Others?” 346.

<sup>45</sup> Allea Brenner, “Resisting Simple Dichotomies,” 505.

into ‘history’ than those of others.”<sup>46</sup> Elizabeth Jelin makes this case incredibly well in reference to the *Nunca Más* report that formed the basis for the determination of an authoritative truth in Argentina following the Dirty Wars. Here, ‘multiple marginalities,’ on the basis of class, ethnicity and region formed the official account of what happened in the Ledesma blackout (*Apagón de Ledesma*) in which hundreds were detained, and dozens forcibly disappeared. Here, “a master narrative of the Ledesma case developed in the national human rights community.”<sup>47</sup> To be sure, this master narrative is informed by other narratives, but it also *actively shapes* the other narratives.

The case of the date of the Ledesma blackout is instructive. According to the *Nunca Más* report, the Ledesma blackout occurred in July 27<sup>th</sup>, 1976. And yet, those that lived through the brutalization contest that it did not occur on July 27<sup>th</sup>, but instead on July 20<sup>th</sup>. As Jelin accounts, “Why commemorate on July 27, then? Clearly, because it is in the book.”<sup>48</sup> Jelin recounts relatives of the disappeared arguing that “they can put today, yesterday or tomorrow; you can go and change dates, but those of us who lived through it know. It was July 20, July 20, 1976.”<sup>49</sup> And yet, public commemorations of the Ledesma blackout occur, without fail, on July 27<sup>th</sup>. This has served to alienate the very victims that it was meant to honor. According to Jelin, “they did not participate in an event that they felt was not theirs.”<sup>50</sup> This minute but incredibly meaningful example illustrates the manner in which those in authority can settle contested narratives of truth. However, the settling of these accounts does not diffuse contested truths, instead, the permeation of existing hegemonies can produce tension and silence. As Jelin explains,

This is a story of class, region, and race. The events referred to seem rather minor. They are not registered by the media, by public opinion, or by state agencies. Nobody talks about them. Nobody interprets the microdynamics of the case in terms of class, ethnic, or racial cleavages. That is part of the

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<sup>46</sup> Jan Blommaert, Mary Bock, and Kay McCormick, “Narrative Inequality in the TRC Hearings: On the Hearability of Hidden Transcripts,” 38.

<sup>47</sup> Elizabeth Jelin, “Silences, Visibility, and Agency: Ethnicity, Class, and Gender in Public Memorialization,” in *Identities in transition: Challenges for transitional justice in divided societies*, ed. Paige Arthur (Cambridge: Cambridge University Press, 2010), 202.

<sup>48</sup> *Ibid.*, 203.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*, 204.

cultural silences of Argentina. Yet it is clear that in the (mostly muted) conflicts about the memories of the past, there are deeper social cleavages, which anteceded the specific events referred to. The emergence of the stories of the “others,” however, may only be circumstantial, unless there are deeper changes in the structures of power, locally and nationally.<sup>51</sup>

The political aspect of the ‘ideal victim’ and the production of silence is salient here. In the Argentinian case outlined by Jelin, the isolated region of Jujuy was considered to be ‘subversive,’ which impacted significantly on the reception of their accounts of victimhood.<sup>52</sup> However, the vision of history and politics forwarded by truth commissions depoliticizes the conflict and violence that makes them necessary. According to Greg Grandin, truth commissions historicize the past as a background against which the present can be contrasted, rather than viewing the structural conditions that contributed to conflict. Truth commissions can use avoidance of contentious topics in an attempt to diffuse and transform conflicted political landscapes.<sup>53</sup> However, as Bronwyn Leebaw argues, “depoliticization does not *transcend* the politics of transitional justice, but rather functions to obfuscate and naturalize the way that politics operate in the process of judging the past.”<sup>54</sup> As Grandin argues, “by presenting an interpretation of history as parable rather than as politics, largely denied the conditions that brought them into being.”<sup>55</sup> Paradoxically, it seems, in the name of memory, truth commissions can institutionalize a particular form of forgetting.

This form of forgetting has particular social ramifications when considered in light of the social project that transitional justice attempts to foster. According to Grandin, the historicity that is often reproduced in truth commissions mirrors “nationalism’s enabling paradox,” which is “the need to forget acts of violence central to state formation that can never be forgotten.”<sup>56</sup> It is telling, then, that the

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<sup>51</sup> Ibid., 205.

<sup>52</sup> Ibid., 203.

<sup>53</sup> Onur Bakiner, “One Truth Among Others?” 346. Bronwyn Leebaw, *Judging State-Sponsored Violence*, 15.

<sup>54</sup> Bronwyn Leebaw, *Judging State-Sponsored Violence*, 15.

<sup>55</sup> Greg Grandin, “The Instruction of Great Catastrophe: Truth Commissions, National History, and State Formation in Argentina, Chile, and Guatemala,” *The American Historical Review* 110, no. 1 (2005), 48.

<sup>56</sup> Ibid.

specific historical and political elements of the conflicts that germinated the truth commissions that proliferated in Latin America were depoliticized. Terror was not read “as an essential element in the consolidation of a new neoliberal order,” or “as an extension of a reactive campaign against social-democratic nationalist projects,” but instead “as a breakdown of social relations as but one more instance in a repetitive cycle of ‘interruptions in democratic rule.’”<sup>57</sup> This limits the transformative and radical potential of truth-telling. The individual experiences of repression may here be captured, but the core interpretation of historical and political forces leaves something to be wanting. According to Leebaw, this naturalizes “the compromises, distortions and asymmetries that frame their investigations,” and this in turn forecloses “ongoing debate regarding the terms of official memory in the process of political change.”<sup>58</sup> This serves as the moment of the construction of political truth that is meant to be the basis of the state and society going forward.

Forgiveness, reconciliation and compassion are the cornerstones of restorative justice. According to the restorative justice argument, a realignment of social relations between the perpetrator and victim social change can begin. Of course, this understanding is wrought with the challenges of a fixed conception of ‘victim’ and ‘perpetrator,’ but this must be left aside for the moment. The requirement for forgiveness clearly demands a significant contribution from the victim. Annalise Acorn argues that victims can be ‘compelled to compassion’ through this mandate. As Annalise Acorn asks, “how can a system of justice be structured around a general demand for such supererogatory patience and devotion from victims?”<sup>59</sup> If the healing begins with the victims, it seems, there is an incentive for victim participation. But one can imagine contexts in which this is not the case. According to Acorn, “The significance of forgiveness to restorative justice lies in its possible contribution to the ultimate restorative goal of right-relation - that is, a lived relationship of mutual equality and respect.”<sup>60</sup> Note that this is not, itself, a victim-centered reality.

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<sup>57</sup> Ibid.

<sup>58</sup> Bronwyn Leebaw, *Judging State-Sponsored Violence*, 15.

<sup>59</sup> Annalise E. Acorn, *Compulsory Compassion*, 12.

<sup>60</sup> Ibid.

Therefore, Acorn argues, “if forgiveness is a necessary element of restorative justice, it is only instrumentally so.”<sup>61</sup>

This does not mean that the function of or reason for forgiveness is *never* an agential decision on the victim’s behalf. However, it means that sometimes, the function of forgiveness, and a significant reason for its consistent invocation, is that it forwards the social project of transitional justice. The victim’s forgiveness, here, is an *instrument* in the wide-reaching social project of transitional justice. Consider, as well, the role that victims are meant to play in the process of reconciliation. The role is dualistic; it is intended to be a path of personal, as well as social recovery. The victim-witness bears a responsibility to herself, as well as to the social project of which her testimony is a part. However, there are tensions involved in the process that lead to the possibility of these two roles of the victim can come in conflict with one another. Thus, it is true that ‘the victim’ is a central figure in transitional justice, mooring the literature and practice in its normative and pragmatic understanding. However, the victim-centered approach in transitional justice is fraught with challenges.

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<sup>61</sup> Ibid.

## Chapter 6

### 6 Conclusion

In the preceding chapters, I have outlined the ways in which the current state of transitional justice is entangled with, and often indebted to, the presence and workings of hegemony. I argued that this reality can frustrate the emancipatory aims of transitional justice. This concluding chapter begins by summarizing the critiques this thesis has forwarded thus far, and considering the implications that these criticisms have on current transitional justice theory and practice. This thesis ends on a note of meditation, as I consider the prospects of a transitional justice that discards these problematic assumptions and associations and reworks itself to confront hegemonic forces rather than bolstering them.

#### 6.1 Summary of Arguments

The first chapter of this thesis, “Locating Transitional Justice in Historical Perspective,” evaluated the orthodox narrative of the emergence of transitional justice onto the international stage. The transitional justice origin story tells of an emergence onto the world stage in fits and starts, culminating in an eventual normative acceptance of transitional justice principles at a global level. The orthodox transitional justice history proceeds as follows: beginning with the auspicious opportunities presented by the end of the Second World War, transitional justice was temporarily hampered by the onset of the Cold War and the political distortions wrought by the bipolar world system. At the end of the Cold War, this narrative goes, a normative shift in the international system allowed for the procession of a ‘justice cascade,’ which itself became the centerpiece of a move towards transitional justice. However, this thesis argued that this transitional justice origin story relied on an active re-interpretation of the motives and actions of states and policymakers at seminal moments in each of these shifts. To demonstrate the revisionism inherent to the transitional justice origin story, this chapter considered the case of the Nuremberg trials, which many transitional justice scholars consider to be a pivotal moment in transitional justice history.

The Nuremberg trials, according to transitional justice scholars, were a symbolic moment of change in the post-WWII era. For transitional justice literature, the ‘Nuremberg legacy’ came to mean the first real challenge to the inviolability of state sovereignty. For transitional justice scholars, Nuremberg came to signify the moment when the jurisdiction of the state could no longer be utilized as a justification for the wanton deprivation of human rights for citizens. Contrary to this revisionist reading, however, the Nuremberg trials can be seen to *buttress* the authority of state sovereignty, as it was through the active invocation of the principle of sovereignty that the Allied powers justified their jurisdiction over the proceedings. This thesis argued that the repeated misreading of the substance and significance of the Nuremberg trials served a legitimizing function for transitional justice literature. This reading anchors the field in the moment of the creation of the modern state system, which grants transitional justice field a precedence and validity that it otherwise might not have had.

The significance of this argument is twofold. First, it casts doubt on the orthodox narrative of transitional justice. But more crucially, it allows for a reorientation of emergence of transitional justice discourse in the twentieth century. Unmooring the rise of transitional justice from its dubious situation in the post-WWII era allows one to place it in the moment where the term ‘transitional justice,’ along with its normative aims and pragmatic goals actually came to fruition: the post-Cold War era. This, in turn, permits the analysis of transitional justice discourse in relation to an entirely different international arena, and places transitional justice discourse in dialogue with the geopolitical and ideational changes that were occurring at this precise moment. Thus, transitional justice can be considered in line with the ‘third wave of liberalization,’ the emergence of the United States as the world’s remaining superpower, and the ideological triumph of liberalism in the world system. In the proceeding chapters, it allows for transitional justice literature to be considered in concert with democratization, liberal peacebuilding, and the legacy of modernization theory.

“Transitional Justice: Fashioning the Liberal Democratic Polity?” is the second chapter of this thesis. This chapter considers the embedded end-goal of liberal



democracy in transitional justice literature, the problematic assumptions that undergird this end, and the implications of this democratic objective on the transitional justice project. The democratic peace thesis is central to understandings of the value and necessity of democracy in transitional justice. The democratic peace thesis argues that, as a general trend, democratic states in the international system do not go to war with one another. Transitional justice scholars use this thesis to argue that democratic states are, by nature, peaceful. As ‘transitional’ states are often wracked by war and social conflict, the lack of democracy is diagnosed as a principle problem for transitional states. Setting aside the contested validity of the democratic peace thesis itself, this argument stretches the democratic peace thesis to its conceptual breaking point. The democratic peace thesis makes no argument about the likelihood of democratic states to experience intrastate conflict, which is the sort of conflict that ‘transitional’ states are most likely to face. As well, the transitional justice assumption of the democratic peace thesis raises troubling concerns about the nature of power and hegemony in transitional justice prescriptions. It aligns transitional justice with the hegemonic aims of American foreign policy.

The democracy promotion impulse embedded in transitional justice shares troubling resonances with the assumption and proliferation of modernization theory in the Cold War era. This is combined with the particular features of the moment of transitional justice’s emergence onto the world stage: unipolar American hegemony, the ideological triumph of liberal internationalism in the world system, and the proliferation of liberal peacebuilding theory and practice. Together, this indicates that transitional justice practice does the grunt work of laying a foundation for the creation and maintenance of liberal spaces across the world. This means the construction of liberal institutions from on high, in such a manner as to exclude all other possibilities of state formation and the concurrent construction of liberal subjects from below, those that are meant to populate these liberal states. Together, global governance of state-building, liberal peacebuilding and transitional justice can be seen to close this gap. This thesis demonstrated that the democratic peace thesis creates a security dilemma whereby all non-liberal democratic state formations and populations are

considered a threat to the 'zone of peace.' Transitional justice, this thesis argues, may be the technocratic solution to this security dilemma.

The guiding question of this chapter is "who is transitional justice meant to serve?" If the scholars of transitional justice and the proponents of the democratic peace thesis are meant to be believed, the democratization of 'transitional' states will lessen past social conflict, meaningfully engage the populace in the present and allow for the inclusion in the international community in the future. However, these hopes are pinned on a rationale for democratization that, at its core, is about the preservation of order in the international system and not the society in question. In the face of the script of marketization and democratization, alternative forms of governance are effectively excluded from the outset. This discord is made particularly troubling when understood in the context of a radical program of social engineering where liberal democracy is the pre-ordained outcome.

The third chapter, "Hybridity to the Rescue?" considers transitional justice in relation to current peacebuilding practice. It begins by outlining the rise and crisis of liberal peacebuilding in the international arena. Liberal peacebuilding attempts to realize the hopes and promises of the liberal peace. Similar to the democratic peace, the liberal peace is constituted by an ideological and political commitment to marketization and democratization. In the immediate post-Cold War era, the hope of the liberal peace extending to all corners of the globe encouraged the enlargement of international organizations and their deeper penetration into matters of conflict. Transitional justice, as a discipline, is an integral element of the liberal peacebuilding paradigm. It emerged on the coattails of this changing wind in the international system, and the goals of ushering in the 'rule of law' were understood to be central to the attainment of the liberal peace.

The material and ideological elements of liberal peacebuilding were quickly called into question, as the liberal peacebuilding paradigm was frustrated by intractable conflict, peacebuilding failures and challenges to the interventionist posture of international organizations. For liberal peacebuilding, and for transitional justice in particular, the solution was understood to be a turn to the 'local.' I argue that the turn towards the local was affected by two problems: the problem of knowing

the local and the problem of local knowledge. The problem of knowing the local is the essentialized portrait of the ‘local’ that emerges from the instrumentalist approach that peacebuilding and transitional justice scholars used in relation to ‘transitional’ societies. Here, a binary opposition is drawn between the ‘local’ and the ‘international,’ with problematic results. This leads to the problem of local knowledge, which is the process by which an artificial script and understanding of the ‘local’ is produced that can be translated into the language of technocratic solutions.

From this grounding, I then analyze the ways that these problematic assumptions can impact the interfaces at which the ‘local’ and the ‘international’ interact. Hybrid tribunals and the incorporation of customary justice mechanisms, two manners in which transitional justice has attempted to incorporate the local into transitional justice, are considered from this perspective. Ultimately, I argue that hybrid attempts at transitional justice fails to escape the logic of the liberal peace. This is because the rethinking of approaches with local communities has largely been in the procedural realm, and does not reach the theoretical assumptions that undergird the field. As a result, many attempts at ‘local ownership,’ can be read as attempts to generate legitimacy for the overarching social project of transitional justice.

The final chapter of this thesis is “Constructing the Victim, Settling Accounts.” It follows from the earlier discussion of agency and constraint in transitional justice, as experienced through hybrid interfaces between the ‘local’ and ‘international’. As new global institutions are created, new subjects must also be created to populate those institutions. The victim in transitional justice is one example of a new subject on the global stage. This chapter considers the construction of victimhood in transitional justice, the invocation of the victim in transitional justice and the neutralization of contesting narratives of victimhood through transitional justice mechanisms. The neatly categorized binaries between victim and perpetrator in transitional justice require deconstruction. The idealized image of the victim in transitional justice is of a ‘blameless victim,’ which can have the effect of depoliticizing the manner in which individuals navigate conflicted landscapes. The image of the victim is invoked in transitional justice in order to forward policy proposals, even as the impulse to ‘ask the victims what they want,’ is mediated

through a liberal filter. Thus, needs and wants of the victims of a conflict can be distorted for distinctly political ends, even if that is not the intended effect of the inquirer.

Contested narratives of victimhood are settled through the process of ‘reconciling the past,’ particularly through the transitional justice mechanism of truth commissions. Truth commissions aim to ‘settle the truth,’ and to come to a resolution regarding the injustices of the past. This is significant because truth commissions are meant to serve a dual purpose, they are meant to remedy personal injury as well as provide a basis for nation-building. In effect, however, through authoritative appeals to the Truth, truth commissions can cement in place the same unjust political dynamics that propagated the conflict that made them necessary.

## 6.2 Imagining Transitional Justice Anew

The rule of law, accountability, reconciliation and justice constitute the cornerstone of the transitional justice enterprise. These are all ‘essentially contested concepts,’ meaning that their utility, application and implementation are ceaselessly under negotiation.<sup>1</sup> At the very moment of its utterance, the invocation of a contested concept inspires dialogues that comb through meanings and create meanings anew. And yet, the particular manner in which transitional has reconciled the contested landscape that it navigates seems to have been to ignore these paradigmatic debates altogether. Transitional justice has constructed a literature and practice, complete with a toolkit, atop a single answer to the questions inspired by these concepts. As I have argued throughout this thesis, there are many problems with the liberal register in which transitional justice occurs. But these problems emanate from the initial effort to close down paradigmatic discussions about these essentially contested concepts through technocratic language and appeals to pragmatism.

Homogeneity, which is the intended outcome of the liberal peace, cannot be the guidepost for transitional justice. As Derrida notes, there is a “necessary iterability

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<sup>1</sup> Christine Bell, “Transitional Justice, Interdisciplinarity and the State of the ‘Field’ or ‘Non-Field,’” *International Journal of Transitional Justice* 3, no. 1 (2008), 27.

of justice,” which is “foreign to symmetry, heterogeneous and heterotrophic.”<sup>2</sup> Contested concepts provide a universe of possibilities to select, reject and renew. Stymying this essential process of negotiation inherent to contested concepts has grave consequences for the field. The process of coming to a single answer in response to the infinite potentiality offered by contested concepts forces transitional justice to assume a hegemonic posture. This can “close our understandings of justice,” to those that meet certain pre-defined criteria.<sup>3</sup> It can also allow the politics of hegemony, coercion and domination to work through the transitional justice process unchecked. In denying the contestations inherent to justice seeking, indeed, those very contestations that *generate* justice, transitional justice forecloses the critique of hegemonic forces that should guide its pursuit. With the definitions of ‘justice’ preset, the end-goal of the liberal democratic peace programmed-in, and an instrumentalist approach to victims and the ‘local’ to achieve these determined goals, transitional justice loses its most indispensable asset: its potential for emancipation.

This is a disappointment. Transitional justice is a promising endeavor. It seeks reconciliation after conflict, justice in the face of mass atrocity, and acknowledgement for victims in a sphere which silences and marginalizes them. These goals are laudable, essential, and liberatory. But, my research implies, the manner in which these concepts have been treated precludes their realization. An alternative vision of transitional justice is not only possible, but necessary. Promising strides have been recently made by some scholars in the realm of peacebuilding, which transitional justice could certainly incorporate into the field. The second wave of the local turn in peacebuilding emphasizes everyday agency, resistance to hegemony and the power of subaltern populations in order to mount a devastating critique of liberal peacebuilding.<sup>4</sup> This critique reorients peacebuilding scholarship

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<sup>2</sup> Jacques Derrida, “Force of Law: The Mystical Foundation of Authority,” in *Acts of Religion*, ed. Gil Anidjar (New York: Routledge, 2002), 250.

<sup>3</sup> David Hoogenboom, “Theorizing ‘Transitional Justice’” (PhD diss. Western University, 2014).

<sup>4</sup> See Roger Mac Ginty, *International Peacebuilding and Local Resistance: Hybrid Forms of Peace* (New York: Palgrave Macmillan, 2011), Oliver P. Richmond and Audra Mitchell, “Towards a Post-Liberal Peace: Exploring Hybridity via Everyday Forms of Resistance, Agency, and Autonomy,” in *Hybrid forms of peace: From everyday agency to post-liberalism*, ed. Oliver P. Richmond and Audra Mitchell (Houndmills, Basingstoke, Hampshire: Palgrave Macmillan, 2011), Oliver P. Richmond, *A Post-Liberal Peace: The Infrapolitics of Peacebuilding* (United Kingdom: Taylor & Francis, 2011).

towards a vision of hybridity which acknowledges disparities in power and allows for the prospect of conflicting meanings of the contested concept of ‘peace.’ Driving transitional justice thought and practice in this direction would illuminate the space at the margins of the field for the construction of new, emancipatory paradigms. It would allow marginalized and subaltern populations to participate in the process of knowledge and policy production. And, most importantly, it would eschew the assumptions that force us to bound the possible universe of justice.

As transitional justice enters the ‘paradoxical moment of fieldhood’ where it becomes self-critical and contesting voices clamor for inclusion, transitional justice is presented with an opportunity.<sup>5</sup> Instead of holding fast to the problematic assumptions that led to field to a ‘premature midlife crisis,’ a critical reappraisal of transitional justice thought and practice is in order.<sup>6</sup> This requires more than an attempt to expand the field in superficial or procedural ways, such as the inclusion of ‘local ownership,’ or a reorientation towards socioeconomic issues. This means more than the invention of a new transitional justice mechanism, or the tailoring of an already existing one. It entails a hollowing out of the flawed assumptions embedded in transitional justice literature, including its goals, its desires and its methods. Bounding the limits of the field, holding close its untenable assumptions and refusing to meet the demands of reconstruction will likely lead to irrelevance and atrophy. If the goals of transitional justice are to hold any true significance, we must constantly insist that transitional justice act as a force for the dismantling of hegemonic structures, rather than the vehicle for delivering them.

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<sup>5</sup> Christine Bell, “Transitional Justice, Interdisciplinarity and the State of the ‘Field’ or ‘Non-Field,’” 13.

<sup>6</sup> Ibid.

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