Transitional Justice Genealogy

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INTRODUCTION

This Article proposes a genealogy of transitional justice.[1] Transitional justice can be defined as the conception of justice associated with periods of political change,[2] characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.[3] The genealogy presented in this Article traces the historical pursuit of justice in periods of political flux, reviewing the political developments of the last half-century and analyzing the evolution of the conception of transitional justice.[4] This Article contends that a genealogy of transitional justice demonstrates, over time, a close relationship between the type of justice pursued and the relevant limiting political conditions. Currently, the discourse is directed at preserving a minimalist rule of law identified chiefly with maintaining peace.

The proposed genealogy is structured along critical cycles that divide along three phases.[5] This Article begins by briefly describing the phases, and then elaborates upon each phase as well as upon the critical dynamic interrelationships of the three phases within the genealogy.[6] The notion of genealogy presented in this Article is structured along the lines of and situated within an intellectual history.[7] Accordingly, the genealogy is organized

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1. For a comprehensive analysis of transitional justice, see RUTI G. TEITEL, TRANSITIONAL JUSTICE (2000).

2. *See* GUILLERMO O'DONNELL & PHILIPPE C. SCHMITTER, TRANSITIONS FROM AUTHORITARIAN RULE: TENTATIVE CONCLUSIONS ABOUT UNCERTAIN DEMOCRACIES 6 (1998) (defining transition as the interval between one political regime and another).

3. For a helpful compilation, see TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES (Neil J. Kritz ed., 1997).

4. *See* TEITEL, *supra* note 1; Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2009 (1997).

5. The use of the term "phases" here should be considered primarily as a heuristic, to help understand the periodization of the various political and legal periods. This is not to say that there are acoustic separations dividing these phases. Indeed, there are overlaps among the three phases proposed here.

6. On the "critical" responses of transitional justice to predecessor political repressions, see TEITEL, *supra* note 1, at 216, 220–25.

7. Regarding genealogy, see Michel Foucault, *Nietzche, Genealogy, History* (Donald F. Bouchard &

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along a schematic of the development of ideas associated with the three phases of transitional justice. These phases ultimately reflect the genealogy's link with the broader intellectual trend toward an increased pragmatism in and politicization of the law.[8]

The origins of modern transitional justice can be traced to World War I.[9] However, transitional justice becomes understood as both extraordinary and international in the postwar period after 1945. The Cold War ends the internationalism of this first, or postwar, phase of transitional justice. The second, or post–Cold War, phase is associated with the wave of democratic transitions and modernization that began in 1989. Toward the end of the twentieth century, global politics was characterized by an acceleration in conflict resolution and a persistent discourse of justice throughout law and society. The third, or steady-state, phase of transitional justice is associated with contemporary conditions of persistent conflict which lay the foundation for a normalized law of violence.

Phase I of the genealogy, the postwar phase, began in 1945. Through its most recognized symbol, the Allied-run Nuremberg Trials,[10] this phase reflects the triumph of transitional justice within the scheme of international law. However, this development was not enduring, due to its association with the exceptional political conditions of the postwar period: Germany's diminished sovereignty formed the basis for international nation-building. These political conditions were unique, and would neither persist nor recur in the same manner. Accordingly, this first phase of transitional justice, associated with interstate cooperation, war crimes trials, and sanctions, ended soon after the war. Beginning in the 1950s, the Cold War and a stable bipolar balance of power led to a general political equilibrium and an impasse on the question of transitional justice. Nevertheless, the legacy of the postwar trials that criminalized state wrongdoing as part of a universal rights scheme far exceeds the actual force of historical precedent, and this legacy forms the basis of modern human rights law.[11]

Sherry Simon trans.) *in* THE FOUCAULT READER 80 (Paul Rabinow ed., 1984). On genealogical politics, see WENDY BROWN, POLITICS OUT OF HISTORY, 91–120 (2001); MICHAEL CLIFFORD, POLITICAL GENEALOGY AFTER FOUCAULT: SAVAGE IDENTITIES 149–70 (2001).

8. On pragmatism, see Marion Smiley, *Democratic Justice in Transition*, 99 MICH. L. REV. 1332 (2001) (discussing pragmatic views of transitional justice and reviewing Ruti Teitel's *Transitional Justice*). *See also* Jack Snyder & Leslie Vinjamuri, *Principles and Pragmatism in Strategies of International Justice*, Presented at the Olin Institute National Security Seminar at Harvard University (December 2001) (on file with author).

9. For historical examples see TEITEL, *supra* note 1, at 31, 39–40; for earlier precedents see also MICHAEL WALZER, REGICIDE AND REVOLUTION: SPEECHES ON THE TRIAL OF LOUIS XVI (Michael Walzer ed., Marion Rothstein trans., 1992) (providing a historical account).

10. On the postwar period, see FROM DICTATORSHIP TO DEMOCRACY: COPING WITH THE LEGACIES OF AUTHORITARIANISM AND TOTALITARIANISM (John H. Herz ed., 1983). Of course, there are earlier examples in the century, but these are smaller-scale responses. *See* PHILLIPE C. SCHMITTER, TRANSITIONS FROM AUTHORITARIAN RULE: COMPARATIVE PERSPECTIVES (Guillermo O'Donnell et al. eds., 1986).

11. On the impact of the Nuremberg precedent, see Ruti G. Teitel, *Nuremberg and Its Legacy, Fifty Years Later*, *in* WAR CRIMES: THE LEGACY OF NUREMBERG 44 (Belinda Cooper ed., 1999). For an example of the impact of the postwar precedents in human rights law, see HENRY STEINER & PHILIP ALSTON,

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Phase II is associated with a period of accelerated democratization and political fragmentation that has been characterized as a "third wave" of transition.[12] Over the last quarter of the twentieth century, the collapse and disintegration of the Soviet Union led to concurrent transitions throughout much of the world. Withdrawal of Soviet-supported guerrilla forces in the late 1970s fueled the end of military rule in South America.[13] These transitions were rapidly followed by post-1989 transitions in Eastern Europe, Africa, and Central America.[14] While these changes are often described as isolated developments or as a series of civil wars, many of these conflicts were fostered or supported by international power politics[15] and were therefore affected by the Soviet collapse, which ended the Cold War period of political equilibrium.[16]

While the post–Cold War wave of transition theoretically raises the possibility of a return to Phase I international transitional justice, the form of transitional justice that in fact emerges is associated with the rise of nation-building.[17] Moreover, rather than understanding rule of law in terms of accountability for a small number of leaders, the Phase II transitional model tends to rely upon more diverse rule-of-law understandings tied to a particular political community and local conditions.[18] However, this move toward more local or even privatized justice stands in tension with the potential of a broader conception of justice associated with transnational politics.

By the end of the twentieth century, the third steady-state phase of transitional justice emerges. This third phase is characterized by the fin de siècle acceleration of transitional justice phenomena associated with globalization and typified by conditions of heightened political instability and violence.[19] Transitional justice moves from the exception to the norm to become a paradigm of rule of law. In this contemporary phase, transitional jurisprudence

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INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS (2000).

12. *See* SAMUEL P. HUNTINGTON, THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY (1991).

13. On the Latin American transitions, see PHILIPPE C. SCHMITTER ET AL., TRANSITIONS FROM AUTHORITARIAN RULE: LATIN AMERICA (1986); JAIME MALAMUD-GOTI, GAME WITHOUT END: STATE TERROR AND THE POLITICS OF JUSTICE (1996); LAWRENCE WESCHLER, A MIRACLE, A UNIVERSE: SETTLING ACCOUNTS WITH TORTURERS (1998); *see also* TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY (Irwin P. Stotsky ed., 1993).

14. See *supra* note 12.

15. On Latin America see LARS SCHOULTZ, NATIONAL SECURITY AND UNITED STATES POLICY TOWARDS LATIN AMERICA (1987) (discussing Latin America and the global balance of power); *see also* DAVID GREEN, THE CONTAINMENT OF LATIN AMERICA: A HISTORY OF THE MYTHS AND REALITIES OF THE GOOD NEIGHBOR POLICY (1971); WITH FRIENDS LIKE THESE: THE AMERICAS WATCH REPORT ON HUMAN RIGHTS AND U.S. POLICY IN LATIN AMERICA (Cynthia Brown ed., 1985).

16. This is, of course, not to offer unicausal theory, but rather to clarify shared factors in the multiple transitions that occurred in approximately the last quarter of the last century. For disciplinary reasons, scholarship in each area tends to be isolated.

17. There are exceptions in the turn to international justice regarding the conflicts in the Balkans and in Rwanda. *See infra* text accompanying note 133.

18. *See infra* text accompanying notes 53–73.

19. *See infra* text accompanying notes 128–145.

normalizes an expanded discourse of humanitarian justice constructing a body of law associated with pervasive conflict, which contributes to laying the foundation for the emerging law of terrorism.

I. PHASE I: POSTWAR TRANSITIONAL JUSTICE

The first phase of a genealogy of transitional justice encompasses the post–World War II model of justice. However, the history begins earlier in the century, following World War I. During the inter-war period, the central aim of justice was to delineate the unjust war and the parameters of justifiable punishment by the international community. Questions confronted in this context included whether and to what extent to punish Germany for its aggression, and what form justice should take: international or national, collective or individual. Ultimately, the decision to convene international proceedings reflected the prevailing political circumstances, particularly the limits upon national sovereignty and the conceded international governance of that period.

A genealogical perspective situates postwar transitional justice in its own historical context, specifically the transitional justice of World War I,[20] and reveals the extent to which this preceding conception informs the critical response of post–World War II justice.[21] At least two critical responses emerge regarding World War II transitional justice. First, national justice was displaced by international justice. The administration of the post–World War I model of transitional punitive justice, characterized by failed national trials, was left to Germany.[22] Seen with the hindsight of history, it was clear that the post–World War I national trials did not serve to deter future carnage. In an evident critical response to the past, post–World War II transitional justice began by eschewing national prosecutions,[23] instead seeking international criminal accountability for the Reich's leadership.[24]

The second critical response concerned the post–World War I collective sanctions levied against Germany.[25] Seen through the lens of genealogy,

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20. *See* NIALL FERGUSON, THE PITY OF WAR: EXPLAINING WORLD WAR I (2000).

21. Regarding the postwar Allied Trials program, see TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR (1992); SHELDON GLUECK, WAR CRIMINALS: THEIR PROSECUTION AND PUNISHMENT (Kraus Reprint Co., 1976) (1944).

22. For an account see Geo. Gordon Battle, *The Trials Before the Leipsic Supreme Court of Germans Accused of War Crimes*, 8 VA. L. REV. 1 (1921).

23. On the history of the deliberations, see ROBERT I. CONOT, JUSTICE AT NUREMBERG (1983).

24. However, the subsequent Control Council Ten trials would be convened on a national basis. *See* GOV'T PRINTING OFFICE, TRIALS OF THE MAJOR WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (1953) (commonly known as the "green books").

25. The Versailles Treaty at Article 231 provides: "The Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her Allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of a war imposed upon them by the aggression of Germany and her Allies." According to the Treaty's "war-guilt" clause, all responsibility for the war was to be borne by Germany. *See* Treaty of Versailles, June 28, 1919, art. 231, pt. VIII, Consol. T.S. 225; *see generally* NANA SAGI, GERMAN REPARATIONS: A HISTORY OF THE NEGOTIATIONS (Dafna Alon trans., 1980).

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these transitional responses clearly failed and came to be identified as a basis for the sense of economic frustration and resentment that fueled Germany's role in World War II.[26] Onerous sanctions and their crude undifferentiated impact raised profound normative questions.[27] This approach gave way to the critical response after World War II, and to the liberal focus on individual judgment and responsibility.

While the asserted aim of the transitional justice norm in this first phase was accountability, a striking innovation at the time was the turn to international criminal law and the extension of its applicability beyond the state to the individual. Moreover, through changes in the law of war and its principles of criminal responsibility, the international legal regime enabled holding accountable the Reich's higher echelons for the offenses of aggression and persecutory policy. While claims are made about the forward-looking nature of deterrence, it is clear that the Nuremberg prosecution was primarily intended to justify and legitimate Allied intervention in the war.[28] This use of transitional justice recurs in Phase III.[29]

The period immediately following World War II was the heyday of international justice. The critical turn away from prior nationalist transitional responses and toward an internationalist policy was thought to guarantee rule of law. However, whether deterrence would necessarily be better advanced by international accountability was debatable. Whereas international justice is commonly thought to incorporate the impartiality associated with the rule of law,[30] other rule-of-law values are seen as deriving from the local accountability associated with domestic justice.[31] Moreover, following World War II, the application of international justice involved legal irregularities which raised tensions for the rule of law, especially given its stated liberalizing aim.[32] Ultimately, the Phase I model would offer a very limited precedent. With the Cold War bifurcation, it became eminently clear that this model could not be readily exported. While a form of international justice does recur in Phase III,[33] this more contemporary internationalism has been transformed by the ongoing developments caused by globalization.[34]

The postwar turn to international law also reflected the sense that the relevant subject of transitional justice was an international legal response

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26. *See* FERGUSON, *supra* note 20.

27. The uses of economic sanctions in the contemporary moment have raised similar concerns. On the U.S. sanctions debate, see Audie Klotz, *Norms Reconstituting Interests: Global Racial Equality and U.S. Sanctions Against South Africa*, 49 INT'L ORG. 451 (1995).

28. Transitional justice was used as a norm to distinguish between justified and unjustified military intervention. *See* TAYLOR, *supra* note 21, at 22–42 (discussing the Nuremberg ideas regarding whether launching an aggressive war should be considered a crime under international law).

29. *See infra* text accompanying notes 133–137.

30. *See* TEITEL, *supra* note 1, at 30–39; Stotsky, *supra* note 13.

31. These are discussed *infra* at Part II, notes 53–57, 58–73 and accompanying text. *See* TEITEL, *supra* note 1 at 36–40; *see generally* Stotsky, *supra* note 13.

32. *See* DAVID LUBAN, LEGAL MODERNISM 336 (1994).

33. *See* Teitel, *Transitional Jurisprudence*, *supra* note 4.

34. *See infra* text accompanying notes 132–137.

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governed by the law of conflict. Over the years, this legacy has been mixed: the force of the precedent has hardly been reflected in other instances of international justice,[35] although this is arguably changing given the creation of the permanent International Criminal Court.[36] The postwar legacy's ongoing force has been evident in developments in international law, where dimensions of the precedent establishing international accountability for wartime abuses were entrenched in international conventions soon after World War II, such as the Genocide Convention.[37] Moreover, dimensions of the postwar precedent, such as its preeminent commitment to individual rights, have also informed domestic and comparative law, as evidenced in the heightened wave of related constitutionalism.[38] In the postwar phase, the exportation of forms of transitional justice occurred through legal transplants of treaties, conventions, and constitutionalism. The postwar period was also the heyday of the belief in law and development, and more generally in the belief in law as a tool for state modernization.[39]

The international justice associated with the postwar period returns in a new form in contemporary post-conflict circumstances, revealing transitional justice's critical dynamic. International justice recurs but is transformed by past precedents and a new political context. The subject and scope of transitional justice have expanded to transcend its operative action upon states and to operate upon private actors. Transitional justice has also extended beyond its historic role in regulating international conflict to regulate intrastate conflict as well as peacetime relations, comprising a threshold rule of law in globalizing politics.[40] The significance of these developments will be discussed further in Phase III.

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35. *See* Teitel, *supra* note 11, at 44. The World War II–related prosecutions are still the largest precedents in criminal accountability. For a bibliography of war crimes trials, see WAR CRIMINALS AND WAR CRIMES TRIALS: AN ANNOTATED BIBLIOGRAPHY AND SOURCE BOOK (Norman E. Tuterow ed., 1986). *See* Symposium, *Holocaust and Human Rights Law: The Sixth International Conference*, 12 B.C. THIRD WORLD L.J. 191 (1992).

36. *See infra* notes 132–134 (regarding the Rome Statute).

37. *See* Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, G.A. Res. 95(1), U.N. GAOR, Doc. A/64/Add.1 (1946). For a discussion of the codification process and efforts of the International Law Commission, see M. Cherif Bassiouni, *The History of the Draft Code of Crimes Against the Peace and Security of Mankind*, *in* NOUVELLES ÉTUDES PENALES, COMMENTARIES ON THE INTERNATIONAL LAW COMMISSION'S 1991 DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND 11 (M. Cherif Bassiouni ed., 1993); Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951); The Universal Declaration of Human Rights, G.A. Res. 217A (III), 71 U.N. Doc. A/810 (1948). For broader discussion of these post-war developments, see Ruti G. Teitel, *Human Rights Genealogy*, 66 FORDHAM L. REV. 301 (1997).

38. This is evidenced in the constitution-making of the postwar period. *See* LOUIS HENKIN, THE AGE OF RIGHTS (1990). On the emerging right to democracy, see Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L. L. 46, 53 (1992).

39. John Henry Merryman, *Law and Development Memoirs II: SLADE*, 48 AM. J. COMP. L. 713 (2000). *See* John Henry Merryman, *Comparative Law and Social Change*, 25 AM. J. COMP. L. 457, 483 (1977); *see also* THOMAS CAROTHERS, AIDING DEMOCRACY ABROAD: THE LEARNING CURVE (1999).

40. *See infra* notes 128–140 and accompanying text.

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II. PHASE II: POST–COLD WAR TRANSITIONAL JUSTICE

The last two decades of the twentieth century have been characterized as a veritable wave of political transition. The collapse of the Soviet Union, the end of the bipolar balance of power, and the attendant proliferation of political democratization and modernization ushered in the post–Cold War phase of transitional justice.[41]

The decline and eventual collapse of the Soviet Empire sparked a wave of liberalization that began with the transitions in the Southern Cone of South America in the late 1970s and early 1980s, and continued throughout Eastern Europe and Central America.[42] While these regional developments are generally represented as independent of one another, a genealogical perspective illuminates the connection between these political transitions and illustrates how many local conflicts were supported by United States/Soviet bipolarism.[43] The end of this historical schematic does not imply that such conflict has also ended, as there remain numerous interconnected insurgency movements.[44]

When political transitions occurred 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.[45] In the new democracies that emerged in South America following the collapse of repressive military juntas, it was unclear whether trials of leaders in the style of Nuremberg could be successfully followed in the Americas.[46] This question was first posed in Argentina after the Falklands/Malvinas War,[47] where the successor regime attempted to distinguish the context from that of international postwar justice and called for domestic trials.[48] Throughout Latin America, nascent demo-

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41. Other works refer to this development as the "third wave" of democratization. *See, e.g.*, HUNTINGTON, *supra* note 12.

42. *See supra* notes 14–15; WALTER LEFEBER, INEVITABLE REVOLUTIONS: UNITED STATES AND CENTRAL AMERICA (1984).

43. For a review of this third wave of transition, see HUNTINGTON, *supra* note 12. *See also* SCHOULTZ, *supra* note 15, at 112–204 (discussing geopolitics and human rights regarding U.S. policy in Central America).

44. This was made very clear after the terrorist attacks on September 11, 2001. *See* AHMED RASHID, JIHAD: THE RISE OF MILITANT ISLAM IN CENTRAL ASIA (2002); *see also* Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century,* 46 ST. LOUIS U. L.J. 293 (2002); *infra* notes 130–131 and accompanying text.

45. For a leading advocate of the "Nuremberg Model," see Aryeh Neier, *What Should Be Done About the Guilty?*, N.Y. REV. BOOKS, Feb 1, 1990; *see also* ARYEH NEIER, WAR CRIMES: BRUTALITY, GENOCIDE, TERROR, AND THE STRUGGLE FOR JUSTICE (1998).

46. *See* Ruti G. Teitel, *How are the New Democracies of the Southern Cone Dealing with the Legacy of Past Human Rights Abuses?*, in Kritz, *supra* note 3; Jaime Malamud-Goti, *Transitional Governments in the Breach: Why Punish State Criminals?*, 12 HUM. RTS. Q. 1 n.1 (1990). Other aspects of the precedent, such as reparations, were taken up later in the phase.

47. The war resulted in a crushing defeat of the country's military junta and allowed the transition to go forward. For discussion of the Argentine trials policy, see CARLOS SANTIAGO NINO, RADICAL EVIL ON TRIAL (1996); *see also* Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina*, 100 YALE L.J. 2619 (1991).

48. *See* Nino, *supra* note 47.

cratic governments struggled with national militaries over the chosen justice policy.[49] This provided a haunting reminder of the post–World War I period and again raised the question of whether the administration of criminal justice advanced the rule of law. In Phase II, modernization and the rule of law were equated with trials by the nation-state to legitimate the successor regime and advance nation-building.

Phase II manifests a similarly limited transferability to political contexts of radically different sovereignty as the Phase I model.[50] However, despite the general absence of international trials in Phase II, a review of the transitional jurisprudence demonstrates that international law can play a constructive role, providing an alternative source of rule of law to guide national trials in a transitional society.[51] In this regard, international legal norms serve to construct a perception of continuity and consistency in the rule of law.[52] The profound and permanent significance of the Nuremberg model is that by defining the rule of law in universalizing terms, it has become the standard by which all subsequent transitional justice debates are framed. Whereas the Phase I justice policy simply assumed the legitimacy of punishing human rights abuses, in Phase II the tension between punishment and amnesty was complicated by the recognition of dilemmas inherent in periods of political flux.

Transitional justice in its second phase reflected that the relevant values in the balance were hardly those of the ideal rule of law. Where the aim was to advance legitimacy, pragmatic principles guided the justice policy and the sense of adherence to the rule of law. Transitional jurisprudence was linked to a conception of justice that was imperfect and partial. What is fair and just in extraordinary political circumstances was to be determined from the transitional position itself.[53] Accordingly, multiple conceptions of justice emerged in Phase II.

The deliberations over justice in transition are best understood when situated in the actual political realities and in the transitional political context, which included the features of the predecessor regime as well as political, juridical, and social contingencies. The feasibility of pursuing justice and its ability to contribute to transitional rule of law depended upon the scale of prior wrongdoings, as well as the extent to which they were systemic or state-sponsored. The attempt to impose accountability through criminal law often raised rule-of-law dilemmas, including retroactivity in the law, tampering with existing laws, a high degree of prosecutorial selectivity, and a

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49. *See* Alice H. Henkin, *Conference Report*, *in* STATE CRIMES: PUNISHMENT OR PARDON, PAPERS AND REPORT OF THE CONFERENCE, NOV. 4–6, 1988, WYE CENTER, MARYLAND 1 (1989).

50. *See* TEITEL, *supra* note 1, at 36–39.

51. *See id.*, at 20–23 (identifying and evaluating numerous instances where alternative rule of law values are drawn from international law and incorporated within the national law of transitional societies).

52. *See* Alvarez, *infra* note 56; Schabas, *infra* note 56.

53. *See* TEITEL, *supra* note 1, at 234.

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compromised judiciary.[54] Therefore, to whatever extent imposing transitional criminal justice included such irregularities, it risked detracting from the contribution that justice can make to reestablishing the rule of law.[55] In fledgling democracies, where the administration of punishment can pose acute rule-of-law dilemmas, the contradictions to the uses of the law may become too great.[56] These profound dilemmas were recognized in the deliberations preceding the decisions in many countries to forego prosecutions in favor of alternative methods for truth-seeking and accountability.[57]

Given the tensions present in the administration of transitional justice in its second phase, the principles of justice associated with Phase I were increasingly questioned. In a critical response to the Phase I postwar justice project, Phase II moved beyond retributive justice as historically understood. The transitional dilemmas at stake in Phase II were framed in terms more comprehensive than simply confronting or holding accountable the predecessor regime, and included questions about how to heal an entire society and incorporate diverse rule-of-law values, such as peace and reconciliation, that had previously been treated as largely external to the transitional justice project. Accordingly, the move away from judgment associated with international justice reflected a shift in the understanding of transitional justice, which became associated with the more complex and diverse political conditions of nation-building.

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54. Where prosecutorial strategy singles out individuals, it often fails to adequately express condemnation of the system that defines the modern repressive regime, potentially defeating a core purpose of transitional justice. *See* Jon Elster, *On Doing What One Can: An Argument Against Post-Communist Restitution and Retribution*, *in* Kritz, *supra* note 3, at 566–68. On selective trials, *compare* Teitel, *Transitional Jurisprudence*, *supra* note 4 (presenting selective trials as a limit in transitional punishment policy), *with* Payam Akhavan, *Justice in The Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal*, 20 HUM. RTS. Q. 774, 774–81 (1998) (arguing for selective trials for their "truth-telling impact"), *and* Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991) (offering an argument in favor of selective trials as on balance contributing to the rule of law).

55. *See* TEITEL, *supra* note 1, at 2016–30 (discussing rule of law dilemmas).

56. See TEITEL, *supra* note 1, at 36–39, 46–51. *See generally* Ruti G. Teitel, *Persecution and Inquisition: A Case Study*, *in* Stotsky, *supra* note 13, at 141. Failed trials in fledgling democracies such as Rwanda demonstrate the conflicts between the processes of national reconciliation and criminal justice. For an analysis of the Rwandan judicial system and the debate over UN Security Council Resolutions to create an international criminal tribunal in Rwanda, see NEIL J. KRITZ, U.S. INST. OF PEACE, SPECIAL REPORT, RWANDA: ACCOUNTABILITY FOR WAR CRIMES AND GENOCIDE (A REPORT ON A UNITED STATES INSTITUTE FOR PEACE CONFERENCE) (1995) *available at* http://www.usip.org/oc/sr/rwanda1.html (last visited Jan. 11, 2003). *See also* William Schabas, *Justice, Democracy and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problems*, 7 CRIM. L.F. 523, 551–52 (1996) (citing S.C. Res 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/995 (1994)). Compare the international solution; *see* Jose Alvarez, *Crimes of State/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365 (1999) (discussing the limits of international criminal tribunals).

57. South Africa is a prominent example. For a discussion of the state of the South African judiciary as a factor in South Africa's transitional amnesty agreement, see Paul Van Zyl, *Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission*, 52 J. INT'L AFF. 647 (1999). For a comprehensive analysis of the historical role of the judiciary under apartheid, see STEPHEN ELLMANN, IN A TIME OF TROUBLE: LAW AND LIBERTY IN SOUTH AFRICA'S STATE OF EMERGENCY (1995); David Dyzenhaus, *Transitional Justice*, 1 INT'L J. CONST. L. 163 (2003).

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The post–Cold War phase stands in a critical position relative to Phase I transitional justice. In the Phase II context of a heightened wave of democratic transition and nation-building, transitional justice involved crucial rule-of-law compromises. Therefore, whereas Phase I transitional justice initially appeared to assume its potentially limitless and universal extension in the law, by its second phase transitional justice was more concededly contextual, limited, and provisional. Ultimately, the primary focus on local responsibility in post–Cold War transitions offered a partial, distorted perspective of the historically broader bipolar conflict. While the Phase II reliance on local or national justice constituted a critical response to Phase I, the post–Cold War model was ultimately not appropriate for later globalizing politics, in which national and international factors became interdependent contributors to political change.

A. Juxtaposing Truth to Justice

This Part elaborates upon the link between the chosen form of transitional justice response and political context. In Phase II, the central transitional dynamic responded to postwar transitional justice, while also differentiating itself from that period. Transitional justice responses in the second phase moved away from postwar international transitional justice toward alternative strategies. This was illustrated by the surge of hybridized law and the move to law and society responses.

The leading model in this phase is known as the restorative model. In this phase, the main purpose of transitional justice was to construct an alternative history of past abuses. A dichotomy between truth and justice therefore emerged. Thus, the Phase II paradigm largely eschewed trials to focus instead upon a new institutional mechanism: the truth commission. A truth commission is an official body, often created by a national government, to investigate, document, and report upon human rights abuses within a country over a specified period of time. While first used in Argentina,[58] the investigatory model is now associated with the response adopted in post-apartheid South Africa in the 1990s.[59] Truth and reconciliation commissions of various types have since been proposed or convened throughout the world and often garner significant international support.[60]

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58. Argentina established the first official transitional commission of inquiry in the modern period. While it was a truth commission, it was not aimed at reconciliation. Indeed, the "Nunca Mas" commission inquiry was the first stage in Argentina's post-junta justice following the collapse of the military regime after the Falklands war defeat. For an account, see NINO, *supra* note 47. *See also* NUNCA MAS: THE REPORT OF THE ARGENTINE NATIONAL COMMISSION ON THE DISAPPEARED (Farrar et al. trans, 1986).

59. *See* TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT (Truth and Reconciliation Comm'n eds., 1999); Promotion of National Unity and Reconciliation Act, No. 34 (1995) (S. Afr.) (establishing the Truth and Reconciliation Commission). For an in-depth account of this history from a biographical perspective, see ALEX BORAINE, A COUNTRY UNMASKED (2000).

60. For a comprehensive discussion of truth commissions, see PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY (2001). For a discussion of the South African Model, see BORAINE, *supra* note 59. For a critical interpretation of the truth commissions project, see

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The appeal of the model is its ability to offer a broader historical perspective, rather than mere judgments in isolated cases.[61] Truth commissions are most popular where the predecessor regime disappeared persons or repressed information about its persecution policy, as was typical in Latin America.[62] In contrast, truth commissions have been of less interest in post-Communist Europe, where the use of history by various governments was itself a destructive dimension of Communist repression.[63] Accordingly, in Eastern Europe, the main critical response by the successor regime was not to create official histories but rather to guarantee access to the historical record.[64]

The second phase model did appear to advance some of the rule-of-law aims of criminal justice in transitional societies, in which legal institutions were functioning under stressed transitional conditions. Seen in a genealogical perspective, the primary aim of truth commissions was not justice but peace. This raised the question of the expected relationship between peace and furthering rule of law and democracy. While proponents of the South African model argued that peace was a necessary precondition to democracy,[65] building democratic institutions was not their primary goal.[66] It is not at all evident that short-term approaches to conflict management would further the rule of law.[67] Nevertheless, often a truth commission's purposes are deemed analogous to those of criminal justice, as both trials and truth commissions can be understood as primarily animated by deterrence.[68] In-

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TEITEL, *supra* note 1, at 77–88.

61. *See* TEITEL, *supra* note 1, at 70 (discussing Foucaultian "truth regimes" and their inevitable association with a political regime).

62. *See* Teitel, *supra* note 46. *See also* THE REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION (Phillip E. Berryman trans., 1993) *available at* http://www.nd.edu/~ndlibs/eresources/etexts/truth/table_of_contents.htm (last visited Jan. 11, 2003).

63. On East Germany and its post-transition treatment of official file archives, see TINA ROSENBERG, THE HAUNTED LAND: FACING EUROPE'S GHOSTS AFTER COMMUNISM 261–394 (1996). *See also* TIMOTHY GARTON ASH, THE FILE: A PERSONAL HISTORY (1998).

64. Many countries in the region have enacted laws allowing victims and others access to the files. *See* TEITEL, supra note 1, at 95–103; *see also* Ruti Teitel, *Preface*, *in* TRUTH AND JUSTICE: THE DELICATE BALANCE: THE DOCUMENTATION OF PRIOR REGIMES AND INDIVIDUAL RIGHTS (1993).

65. *See* BORAINE, *supra* note 59; Margaret Popkin & Naomi Roht-Arriaza, *Truth as Justice: Investigatory Commissions in Latin America*, LAW AND SOC. INQUIRY, Vol. 20 (Winter 1995); KADER ASMAL ET AL., RECONCILIATION THROUGH TRUTH: A RECKONING OF APARTHEID'S CRIMINAL GOVERNANCE 12–17 (1997) (describing the Truth and Reconciliation Commission as "achieving justice through truth").

66. *See* GEORGE BIZOS, NO ONE TO BLAME: IN PURSUIT OF JUSTICE IN SOUTH AFRICA 229–39 (1998) (discussing the African National Congress' debate over the goals to be achieved by a South African truth commission).

67. For a related argument, see HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA 13–31(Carla A. Hesse & Robert Post eds., 1999); *see also* Ruti Teitel, *Millennial Visions: Human Rights at Century's End*, *id.* 339–42.

68. *See* TEITEL, *supra* note 1, at 81. The establishment of the truth commissions does not necessarily imply that their investigative inquiries will be the government's complete and exclusive response to past injustices. For discussion of the Argentine process, see NUNCA MAS, *supra* note 58. In El Salvador and South Africa, Truth and Reconciliation Commission confessions were traded for amnesties. *See* The Truth Commission for El Salvador, *From Madness to Hope: The 12-Year War in El Salvador*, U.N. SCOR, Annex to letter dated 29 March 1993 from Boutros-Boutros Ghali to President of Security Council, U.N. Doc. S/25500 (1993), *available at* http://www.usip.org/library/tc/doc/reports/tc_elsalvador.html (last visited Jan. 11, 2003); Thomas Buergenthal, *The United Nation's Truth Commission for El Salvador*, 27 VAND. J.

deed, such commissions' mandates often include recommendations to prevent recurrence of rights abuses.[69]

The Phase II response transcended the single-minded focus on individual accountability in favor of a more communitarian conception. Nevertheless, this phase's aim was hardly a full-scale social justice project.[70] Instead, transitional justice's aims in this phase shifted from the earlier goal of establishing the rule of law through accountability to the goal of preserving peace.[71] This change in emphasis redefines the understanding of the purposes of transition.

Moreover, in this phase, the modality of transitional justice often became a private matter. Even when vested with government authority, transitional justice through truth commissions often became primarily a vehicle for victims to reconcile and recover from past harms, in consultation and with the assistance of various non-state actors. Transitional justice became a form of dialogue between victims and their perpetrators. There was a move away from the Phase I focus on universalizing judgment to a focus on rebuilding political identity[72] through rule of law, premised on local understandings of legitimacy.

The problem of judgment gave way to other responses, primarily national investigatory commissions which had the advantage of being able to inquire

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TRANSNAT'L L. 497 (1994). A counter example would be Argentina, whose transition commenced with a truth commission, which then led to the formation of criminal justice policy, and finally to prosecutions. On the Latin American agreements see WESCHLER, *supra* note 13. Regarding the South African arrangement, see Promotion of National Unity and Reconciliation Act, *supra* note 59. On amnesty adjudication in South Africa, see TRUTH AND RECONCILIATION COMMISSION, AMNESTY DECISION TRANSCRIPTS, *available at* http://www.doj.gov.za/trc/amntrans/index.htm (last visited Jan. 11, 2003). For further remarks on the reconciliation process, see Abdullah Omar, *Truth and Reconciliation in South Africa: Accounting for the Past*, 4 BUFF. HUM. RTS. L. REV. 5 (1997).

69. *See* Popkin & Roht-Arriaza, *supra* note 65.

70. Of course, there are exceptions. When the South African transition first began, the African National League sought a broader redistributive program.

71. *See* Ruti Teitel, *Bringing the Messiah Through the Law*, in HESSE & POST, *supra* note 67, at 177–93 (discussing the conflict between the political business of peacemaking and the assertion of law in the International Criminal Tribunal for the former Yugoslavia).

72. There are a variety of related aims implied in this shift, including remembering, mourning, and recovering. There is a growing literature on the alternatives to punishment. *See, e.g.*, THE POLITICS OF MEMORY: TRANSITIONAL JUSTICE IN DEMOCRATIZING SOCIETIES (Alexandra Barahona de Brito et al. eds., 2001); GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIME TRIBUNALS (2000); BORAINE, *supra* note 59; JOHN BORNEMAN, RULE OF LAW, JUSTICE AND ACCOUNTABILITY IN POST-SOCIALIST EUROPE (1997); HAYNER, *supra* note 60; Jennifer J. Llewellyn & Robert Howse, *Institutions for Restorative Justice: the South Africa Truth and Reconciliation Commission*, 49 U. TORONTO L.J. 355 (1999); MAHMOOD MAMDANI, WHEN VICTIMS BECOME KILLERS: COLONIALISM, NATIVISM, AND THE GENOCIDE IN RWANDA (2001); A. JAMES MCADAMS, JUDGING THE PAST IN UNIFIED GERMANY (2001); THE (UN)RULE OF LAW & THE UNDERPRIVILEGED IN LATIN AMERICA (Juan E. Mendez et al. eds., 1999); MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE (1998); MARK OSIEL, MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW (1997); Popkin & Roht-Arriaza, *supra* note 65; MARGARET POPKIN, PEACE WITHOUT JUSTICE: OBSTACLES TO BUILDING THE RULE OF LAW IN EL SALVADOR (2000); TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS (Robert I. Rotberg & Dennis Thompson eds., 2000); DESMOND IMPILO TUTU, NO FUTURE WITHOUT FORGIVENESS (1999); RICHARD A. WILSON, THE POLITICS OF TRUTH AND RECONCILIATION IN SOUTH AFRICA: LEGITIMIZING THE POST-APARTHEID STATE (2001).

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more systematically into a state's wrongdoings.[73] Despite the move away from the international criminal justice associated with the first phase, the Phase II response did incorporate the postwar model's human rights rhetoric, albeit in a broader, societal, restorative approach. The central dilemma associated with this phase was often framed in human rights terms, such as whether victims had rights to truth, and whether the state had a duty to investigate in order to reveal truth.[74] Within this framework, the core dynamic of "truth versus justice" suggested that there existed necessary conflicts among justice, history, and memory. This dynamic formulation is best understood as a critical response to the prior postwar model. However, the attempt to accommodate the international human rights rhetoric to a variety of broader social aims raises a number of contradictions and risks its likely misappropriation.[75]

However limited, transitional justice in its second phase enabled a form of preservative justice. The Phase II response allowed for the creation of a historical record while also leaving open the possibility of future judicial resolution. The emphasis on preservation conceded the existing constraints upon political sovereignty associated with modern democratization, globalizing political fragmentation, and other limiting political conditions at the core of contemporary transitional justice.

B. Trading Justice for Peace

A dynamic discourse that juxtaposed and even sacrificed the aim of justice for the more modest goal of peace emerged in Phase II.[76] This Part elaborates upon that discourse and reflects upon its place in the genealogy, largely in terms of its critical dynamic with the Phase I justice model. This Part ultimately contends that the Phase II model expanded the category of transitional justice, with implications for its future normalization.[77]

A jurisprudence of forgiveness[78] and reconciliation[79] is associated with the Phase II model. The truth and reconciliation project incorporated much of

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73. For a comprehensive account of recent truth commissions and for an argument advocating investigation, see HAYNER, *supra* note 60; *see also* Kritz, *supra* note 3.

74. *See* Popkin & Roht-Arriaza, *supra* note 65, at 79; *see also* Rotberg & Thompson, *supra* note 72. Certainly there is no necessary conflict between investigation and justice, as is reflected in the first truth commission, convened during Argentina's 1983 political transition. *See* NUNCA MAS, *supra* note 58, preface.

75. For an argument that there is such an obligation, see Velasquez Rodriguez, Inter-Am. C.H.R. 35, at ¶ 166, OEA/ser. L/V/III.19, doc. 13 (1988) ("[T]he state must prevent, investigate and punish any violation of the rights recognized by the convention and . . . restore the right violated and provide compensation as warranted."). *See also* Torture Victim Protection Act, 28 U.S.C. § 1350 (1992).

76. *See* TEITEL, *supra* note 1, at 51.

77. *See* discussion *infra* at Part III.

78. *See* TUTU, *supra* note 72, at 260; MINOW, *supra* note 72; JACQUES DERRIDA, ON COSMOPOLITANISM AND FORGIVENESS 55–59 (Mark Dooley & Michael Hughes trans., 2001).

79. For a thoughtful philosophical justification of restorative justice, see Elizabeth Kiss, *Moral Ambitions Within and Beyond Political Constraints: Reflections on Restorative Justice*, *in* Rotberg & Thompson, *supra* note 72, at 68.

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its normative discourse from outside the law, specifically from ethics, medicine, and theology.[80] Its purpose was not merely justice, but peace for both individuals and society as a whole.[81] The problem of transitional justice was reconceived across moral and psychological lines to redefine identity. The evident mix of legal, political, and religious language reflected both the conceit and the limits of the law. Phase II had its roots in Phase I and constituted a critical response to the broader postwar justice project. Whereas in its first phase the problem of transitional justice was framed in terms of justice versus amnesty, with amnesty considered exceptional to general adherence to the rule of law, the second phase adopted a broader amnesty policy with the aim of reconciliation.[82] The exception became generalized and reflected an explicit attempt to incorporate both mercy and grace into the law.

Both political activism and scholarship sought to move outside contemporary politics and history to represent conflict in timeless and universal terms.[83] Phase II did not resist the universalizing impetus associated with Phase I.[84] There was some continuation of the Phase I norm of deployment of universal rights as part of the justifying structure of Phase II. The form of law adopted offers a universalizing language about the aims of forgiveness and the possibility of political redemption.[85] While law as conventionally understood had almost disappeared, the alternative model was said to have universal applications and claimed general diffusion around the world.[86] Consider the extent to which the transitional justice being exported in the post–Cold War paradigm is a secularized religion without law.[87]

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80. For a discussion of the turn to therapeutic language, see MINOW, *supra* note 72, at 21–22; Kenneth Roth & Alison Desforges, *Justice or Therapy?*, BOSTON REV., Summer 2002, *available at* http://bostonreview.mit.edu/BR27.3/rothdesforges.html. For an historical account of the turn to moral and religious language, see *infra* note 87; ASMAL ET AL., *supra* note 65, at 25.

81. On the uses of justice to advance peace, see Teitel, *supra* note 71, at 177–93. The Truth and Reconciliation Commission confronted "crucial questions of moral and political responsibility." ASMAL ET AL., *supra* note 65, at 25. *Compare* Popkin & Roht-Arriaza, *supra* note 65 (truth as route to peace), *with* Akhavan, *supra* note 54 (trials as route to peace). *See* HAYNER, *supra* note 60, at 134–35 (discussing complicated results of truth commissions for the aim of individual healing).

82. Most of the amnesties are pursuant to legislation, as in much of Latin America's Southern Cone. *See* Teitel, *supra* note 46. Others, as in South Africa, are handled on an individual basis but still pursuant to a broader transitional amnesty project. *See supra* note 59.

83. For example, there is an explosion of writing on the subject of evil. *See, e.g.*, ALAN BADIOU, ETHICS: AN ESSAY ON THE UNDERSTANDING OF EVIL (2001); SUSAN NEIMAN, EVIL IN MODERN THOUGHT: AN ALTERNATIVE HISTORY OF PHILOSOPHY (2002); JOHN KEKES, FACING EVIL (1990).

84. *See* STEINER & ALSTON, *supra* note 11 (discussing Nuremberg and the development of the universal human rights movement); *see also* HENKIN, *supra* note 38.

85. Indeed, this aim is made clear in the Truth Commission Reports. *See* TEITEL, *supra* note 1, at 69–72.

86. *See* BORAINE, *supra* note 59.

87. On the link between the corruption of political and legal authority and the move to moral and religious authority, see BORAINE, *supra* note 59, 340–78; *see also* LOOKING BACK, REACHING FORWARD: REFLECTIONS ON THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA (Charles Villa-Vicencio & Wilhelm Verwoerd eds., 2000) (discussing the religious character of South Africa's Truth and Reconciliation Commission).

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In Phase II, there was an apparent conflation of the realm of ethics, generally considered to involve the private sphere rather than public choices,[88] and the realm of the political. This signaled the breakdown and interconnection of the private and the public spheres, a phenomenon associated with globalization.[89] Further, in the second phase, the relevant political actors changed from those with legal and political authority to those with moral authority in civil society. Whereas in its first phase justice was chiefly the purview of the successor regime and courts of law, in the second phase many of the relevant actors and institutions lay outside law and politics, and included churches, NGOs, and human rights groups that incorporated a variety of alternative forms of conflict resolution.[90]

Moreover, the Phase II model adhered only tenuously to conventional legal processes. This was illustrated by the move from the courtroom to the hearing room and the turn to discursive confessional testimonials. The choice of language had significant juridical and political implications. An ethical-religious discourse injected a moral basis into transitional justice. Yet the truth and reconciliation movement tended to eschew judgment and instead aimed to move beyond legal notions of guilt and responsibility. It contributed a political theology,[91] building a discourse that incorporated moral imperatives and had the potential to threaten the parameters of legitimate political discourse in liberalizing states, which conceives of the public sphere as a realm of free contestation.[92] Nevertheless, the truth commission was also associated with critical responses to globalization, where the perceived democratic deficit has led to the pursuit of a universalizing and legitimizing discourse.[93]

The evolution of the transitional justice discourse in the second phase highlighted a complex interaction between the dimensions of the universal, the global, and the local. While framing the problem in universalizing human rights terms suggested a form of justice that is abstracted from the interests and needs of societies, even the Phase II approach assumed conditions not formally present in many countries, with often dubious restorative re-

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88. On the broader developments at this time toward an ethically driven public discourse, see THE TURN TO ETHICS (Marjorie B. Garber et al. eds., 2000); *see also* ZYGMUNT BAUMAN, POSTMODERN ETHICS (1993).

89. *See* DAVID HELD, GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS, AND CULTURE (1999); ULRICH BECK, WHAT IS GLOBALIZATION? (Patrick Camiller trans., 2000).

90. *See infra* notes 120, 123.

91. On political theology, see CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY (George Schwab trans., 1985). On the relationship of religion and violence, see HENT DE VRIES, RELIGION AND VIOLENCE: PHILOSOPHICAL PERSPECTIVES FROM KANT TO DERRIDA (2002); *see also* JACOB TAUBES, DIE POLITISCHE THEOLOGIE DES PAULUS (Aleida Assman et al. eds., 1993). For a related argument, see HANNAH ARENDT, THE HUMAN CONDITION 38–78 (U. Chi. Press 2d ed. 1998) (1958) (exploring the distinctions between the public and the private realms).

92. *See* JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY (1985).

93. The emergence of this form of transitional justice discourse at this time reflects its association with the politics of globalization, and the related challenges to the maintenance of a robust public sphere.

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sults. Genealogical review illuminates the historical and political contingencies in the policy choices. It also shows the extent to which the Phase II juridical regime incorporated rule-of-law ideas that related closely to the legitimacy of local institutions, thus addressing the multiple aims associated with periods of political flux.

The politics associated with the post–Cold War transitional response are illustrative. The asserted aim of transitional policy was said to be the threshold goal of peace rather than democracy. The turn to alternative strategies, whether theological or therapeutic, was animated by the forward-looking aim of reconciliation. Forgiveness became a distinctive form of political apology,[94] understood as an act of contrition in a realm of unity politics.[95] A variety of conciliatory mechanisms emerged in many transitional societies, with the ostensible aim of stabilizing internal politics. These policies became the signs of an age of restoration of the rule of law in a global politics.

Nevertheless, there may well be long-term negative consequences to this type of reconciliation politics. For example, instigation of the settlement of claims can have conservative ramifications. The focus may subvert broader political reform[96] and generally cannot assist in laying the basis for development of democracy.[97] Moreover, as the responses discussed here have mostly implied national political resolutions, they often missed the broader structural causation associated with the bipolar balance of power. The Phase II discourse was being renegotiated at the same time as the debate on globalization reform. This appears to be more than historical coincidence. Even as the disparities between rich and poor associated with the free market economy have grown,[98] the impetus has been to resort increasingly to the transitional justice discourse and a project that is to some extent backward-looking and limited to restoration.[99] Presently, the extent to which transi-

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94. For a discussion of some of the philosophical and sociological implications of forgiveness, see NICHOLAS TAVUCHIS, MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION (1993); *see also* JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY (1990); Michel Rolph-Trouillot, *Abortive Rituals: Historical Apologies in the Global Era*, *in* INTERVENTIONS: RIGHTING WRONGS, REWRITING HISTORY, vol. 2(2), at 171–86 (H. Bhabha & R. S. Rajan, eds., 2000).

95. On the role of forgiveness in the political sphere, see ARENDT, *supra* note 91, at 236–43. On South Africa, see BORAINE, *supra* note 59, 340–78, at 340–78 (discussing the need for "[f]acing up to collective responsibility"). On the expected role of the South African Truth and Reconciliation Commission, see ASMAL ET AL., *supra* note 65, at 143.

96. *Compare* Robert Meister, *The Politics and Political Uses of Human Rights Discourse: A Conference on Rethinking Human Rights*, paper presented at conference at Columbia (Nov. 8–9, 2001) (focusing on the model's effect upon the revolutionary project, rather than the democracy building project), *with* Jung & Shapiro, *infra* note 97.

97. In South Africa, the politics of reconciliation was associated with the politics of consociationalism. *See* S. AFR. CONST. ch. 15, § 251 (1993) (the "National Unity and Reconciliation" provision); Courtney Jung & Ian Shapiro, *South Africa's Negotiated Transition: Democracy, Opposition, and the New Constitutional Order*, 23 POL. & SOC. 269 (1995).

98. For a discussion of current tensions in the globalization of the market, see JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS (2002).

99. For a discussion of some of the contradictions, see Meister, *supra* note 96.

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tional justice has displaced other justice projects signals chastened political expectations responding to the failed experiments of a not so distant past.

C. Fin-de-Siècle Transitional Justice and the Passage of Time

This Part examines transitional justice over time. It explores the degree to which the discourse of transitional justice has become ever-present in politics. With apparently ongoing processes of transitional justice delayed, the very meaning of the category of transition has expanded over time to become a persistent trope.[100]

The developments described above have implications for human historical self-understanding. By the end of the twentieth century, it seemed that all justice had become transitional, *ex post*, and backward-looking. Among some theorists of the period, the post-Soviet dynamics and the related wave of transitions were expected to lead to political stabilization and, according to Francis Fukuyama, "the end of history."[101] Other theorists suggested that the Communist collapse left few political choices, and that therefore politics was past and all that remained was history. Thus, Jacques Derrida wrote about Marxism as a "ghost" to be mourned.[102] And while Derrida and Fukuyama shared little in the way of politics, they reflected a broad span of political writers whose work at century's end clearly memorialized a time when politics involved a pronounced revolutionary project.[103] However, these conclusions forecasting the end of history or the end of politics certainly seem inapposite.[104] Existing scholarship has not yet captured the prevailing dynamic of transitional justice or its nexus with ongoing political change.

The persistent discourse of the final years of the twentieth century was that of transitional justice. Developments seeking closure, associated with both the end of century and the end of millennium, reflected a pervasive sense of metatransition. At century's end, there was an evident increase of facing old injustices and of transitional justice delayed. There were persistent calls for apologies, reparations, memoirs, and all manner of account-settling related to past suffering and wrongdoing.[105] Examples of claim-

100. On the normalization of transitional justice, see *infra* Part III(A) and notes 130–147.

101. *See* FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992).

102. *See* JACQUES DERRIDA, SPECTERS OF MARX: THE STATE OF THE DEBT, THE WORK OF MOURNING, AND THE NEW INTERNATIONAL (Peggy Kamuf trans., 1994) (discussing the remains of Marxism after the fall of communism).

103. *But see* ERIC HOBSBAWM, ON THE EDGE OF THE NEW CENTURY 95–107 (Allan Cameron trans., Antonio Polito ed., 2000) (discussing the changes in the meaning of the political discussion of left and right and in particular "progressive" politics).

104. Indeed, there is an evident post-Soviet fragmentation and disaggregation. For an argument that the contemporary world today appears more violent, see KEN JOWITT, NEW WORLD DISORDER (1992). For discussion of the role of law in circumstances of apparent perpetual conflict, see Ruti Teitel, *Humanity's Law: Rule of Law in the New Global Politics*, 35 CORNELL INT'L L.J. 352 (2002).

105. *See generally* John Torpey, *Making Whole What Has Been Smashed: Reflections on Reparations*, 73 J. MOD. HIST. 333, 334 (2001) (discussing the global spread of "reparations politics"); Sharon K. Hom & Eric K. Yamamoto, *Symposium, Race and the Law at the Turn of the Century: Collective Memory, History, and Social Justice*, 47 U.C.L.A. L. REV. 1747 (2000).

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making and settlements abounded, including those related to assets and property lost during World War II,[106] reparations for slave labor,[107] and even more ancient injustices such as colonization, the Inquisition, and the Crusades.[108]

As a genealogical perspective illustrates, interest in the pursuit of justice does not necessarily wane with the passage of time.[109] This may be because transitional justice relates to exceptional political conditions, where the state itself is implicated in wrongdoing and the pursuit of justice necessarily awaits a change in regime. In recent years, this has been characterized by some as the "Scilingo Effect," for a confession given two decades after junta rule ended in Argentina that reopened the question of justice for crimes committed during the dirty war.[110] Transitional justice implies a non-linear approach to time. This phenomenon is reflected in legal responses taken, often in the form of delayed litigation, to extend the scope of transitional justice litigation on a case-by-case basis.[111] In the international sphere, this dilemma was resolved by the adoption of the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, although this did not necessarily resolve the attendant political tensions.[112]

There is a complicated relationship between transitional justice, truth, and history. In the transitional justice discourse, revisiting the past is understood as the way to move forward.[113] There is an implied notion of progressive history. As a matter of intellectual historiography and human self-understanding, this notion is under siege.[114] However, transitions are rare

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106. On the Holocaust as a standard and globalized model, see Torpey, *supra* note 105, at 338–42. *See also* Farmer-Paellmann v. FleetBoston Financial Corp., No. CV-02-1862 (E.D.N.Y. filed Mar. 26, 2002); Anthony Sebok, *Prosaic Justice*, LEGAL AFF., Sept.–Oct. 2002, at 51–53; Anthony Sebok, *The Brooklyn Slavery Class Action: More than Just a Political Gambit* (Apr. 9, 2002), *at* http://writ.news.findlaw.com/sebok/20020409.html (Findlaw's Legal Commentary); WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE (Roy L. Brooks ed., 1999).

107. Declaration of the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, South Africa (31 August–8 September 2001), *at* http://193.194.138.190/pdf/Durban.pdf.

108. For historical discussion, see for example ELAZAR BARKAN, THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES (2002); JUSTICE DELAYED: THE RECORDS OF THE JAPANESE AMERICAN INTERNMENT CASES (Peter Irons ed., 1989); *see generally* ERIC YAMAMOTO ET AL., RACE, RIGHTS, AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT (2001).

109. *Compare* Jeremy Waldron, *Superseding Historic Injustice*, 103 ETHICS 4, n.1 (1992) (arguing for "succession" of claims) *with* TEITEL, *supra* note 1, at 138–39 (discussing the paradox of the passage of time as concerns transitional justice, which generally involves state wrongdoing).

110. *See* MARGUERITE FEITLOWITZ, A LEXICON OF TERROR (1988) (discussing Argentina's "Scilingo Effect" of justice delayed).

111. *See infra* note 124 (regarding the Pinochet litigation).

112. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity G.A. Res. 2391, U.N. GAOR, 23rd Sess., Supp. No. 18, at 40, U.N. Doc. A/7218 (1968).

113. Indeed, this notion appears throughout the truth commission literature. In South Africa, the role of the Truth and Reconciliation Commission was envisioned as a "bridge" between the past and the future. *See* S. AFR. CONST. ch. 15, § 251 (1993) (the "National Unity and Reconciliation" provision).

114. For the most part such notions of history are associated with now largely passé perfectionist proj-

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periods of rupture which offer a choice among contested narratives. The paradoxical goal in transition is to undo history. The aim is to reconceive the social meaning of past conflicts, particularly defeats, in an attempt to reconstruct their present and future effects.[115]

Transitions present a threshold choice. By definition they are times of contestation in historical narratives. Transitions thus present the potential for counter-histories. The question is posed anew after the passage of time, which underscores the threshold challenge of remaining in history as well as the limits to transformation. Indeed, the possibility of some minimal amelioration is often juxtaposed with the countervailing resistance to working within historical and political parameters for the possibility of change. The notion of a threshold choice following massive tragedy appears in works chiefly addressing responses to the Holocaust.[116] In this context, there is often resistance to the very idea of a transition, which would raise the possibility of political change. The problem concerns the propriety of further engagement after massive catastrophe, whether in the form of giving testimony, taking political action, or contributing scholarship.[117]

In the post–Cold War phase, historical production was fundamental to building a state's political identity,[118] and control over construction of an alternative history could lie with multiple actors, including historians, lawyers, journalists, and victims.[119] This raised the normative question of who should write the history of the transition. In this regard, Phase II transitional justice moved from a project dependent upon the leading role of the state to a process that often elided it. The devolution of state power reflected the broader political conditions associated with post–Cold War transitions and globalization. Given the fact that predecessor regimes were frequently implicated in past wrongdoing, the diminished role for political authority in Phase II managed to avoid many of the dilemmas associated with the more ambitious Phase I justice project.

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ects such as Marxism. For a later critical presentation, see Walter Benjamin, *Theses on the Philosophy of History*, *in* ILLUMINATIONS: ESSAYS AND REFLECTIONS 253–64, at 257 (Hannah Arendt ed., 1968) (opposing progressive historical thought); *see also* FOUCAULT, *supra* note 7 (distinguishing genealogy from progressive histories).

115. On the notion of "working through history" or "vergangenheitsbewältigung," see Marc Silberman, *Writing What—for Whom? 'Vergangenheits Gewältigung' in GDR Literature*, 10 GERMAN STUD. REV. 527, n.3 (1987); Richard Evans, *The New Nationalism and the Old History: Perspectives on the West German Historikerstreit*, 59 J. OF MOD. HIST. 761, 785 n.4 (1987); *see also* Gordon Craig, *The War of the German Historians*, N.Y. REV. BOOKS, Jan. 15, 1987, at 16–19; CHARLES MAIER, THE UNMASTERABLE PAST (1988).

116. *See* JEAN AMERY, AT THE MIND'S LIMITS: CONTEMPLATIONS BY A SURVIVOR ON AUSCHWITZ AND ITS REALITIES (Stella P. Rosenfeld & Sidney Rosenfeld trans., 1980).

117. On the problem of post-Holocaust representation, in scholarly writing in particular, see for example PROBING THE LIMITS OF REPRESENTATION: NAZISM AND THE FINAL SOLUTION (Saul Friedlander ed., 1992).

118. *See* TEITEL, *supra* note 1, at 77–92.

119. On victims' testimony, see LAWRENCE L. LANGER, HOLOCAUST TESTIMONIALS: THE RUINS OF MEMORY (1993); MINOW, *supra* note 73.

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This transforming context increased the possibility of various alternative and even competing transitional justice resolutions involving international, transnational, national, or private settlements. In Phase II, there were a host of new political actors[120] and a distinct privatization of the transitional response. The trend toward privatization took a number of forms, from its devolution to civil society to its relegation to private citizens via litigation.[121] These processes were partially related to globalization, and raised the question of the extent to which normative principles were available to guide transitional decision-making. The second phase policy reflected a struggle between local and global resolutions, even as globalization increased the interconnectedness of political decision-making. Genealogical, interdisciplinary, and comparative review reveals highly divergent approaches to the rule of law,[122] which in turn reflect different legal and cultural perspectives.[123] A profound normative question was raised in the interaction of transitional justice, globalization, and sovereignty: whether and to what extent the response to a harm should rightly remain under the control of the state where the harm occurred. In Phase II, actions related to transitional justice were increasingly taken independent of state actors. This unsettled earlier determinations, as illustrated in the landmark extradition case of General Augusto Pinochet.[124] Moreover, this case also demonstrated the expansion of transitional justice in time.[125] In a world that is increasingly economically, technologically, politically, and juridically interdependent, profound questions arise at the intersection of the principles of jurisdiction and sovereignty. Given the ongoing processes of globalization, this phenomenon will likely accelerate.[126] This seems to portend an expanded category of transitional justice.

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120. On the growing role of transnational networks, see Martha Finnemore & Kathryn Sikkink, *International Norms Dynamic and Political Change*, 52 INT'L ORG. 887, 907 (1998); MARGARETH KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS (1998).

121. This is seen in the contemporary proliferation of lawsuits against multinationals. *See Developments in the Law–International Criminal Law: II. The Promises of International Prosecution*, 114 HARV. L. REV. 1957 (2001). On the problem of the relationship between state and individual responsibility, see STATE RESPONSIBILITY AND THE INDIVIDUAL: REPARATIONS IN INSTANCES OF GRAVE VIOLATIONS OF HUMAN RIGHTS (Albrecht Randlezhofer & Christian Tomuschat eds., 1999); Guillermo A. O'Donnell, *Democracy, Law, and Comparative Politics*, 36 STUD. COMP. INT'L DEV. 7 (2001).

122. Whereas the U.S. approach tends to delegate resolution of controversies to case-by-case litigation, the European approach generally focuses on rulemaking through legislation. For a comparative discussion of illustrations of the transitional rule of law, see TEITEL, *supra* note 1.

123. One illustration of these differences in transitional justice is postwar litigation, chiefly regarding the Holocaust, which has occasioned a reaction against the supposed export of the "American" approach to injury abroad.

124. *See* Regina v. Bow St. Metro. Stipendiary Mag., *ex parte* Pinochet Ugarte (No. 3) 1 A.C. 147 (2000).

125. For discussion of the relation of transitional justice to the passage of time, see *supra* text accompanying note 109.

126. For commentary on the potential of universal jurisdiction, see *infra* note 138; *see generally* HUMAN RIGHTS WATCH, 2001 WORLD REPORT, *at* http://www.hrw.org/wr2k1/index.html (last visited Jan. 13, 2003).

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The association of post–Cold War transitional justice with a globalizing politics acutely reflected the constructivist dimension of the more limited Phase II approaches. Whereas the first phase conceived of the rule of law in universalizing terms associated with accountability for humanity, the Phase II model was instead concerned with advancing an opposing idea of the rule of law associated with the legitimacy of a country's national jurisdiction and sovereignty. This Phase II narrowing of the relevant scope of inquiry illuminated the political construction that correlated with this form of transitional justice, specifically responses that implicated local rather than international actors, and those lower rather than higher in the echelon of political responsibility and power. This signaled the Phase II response's constructive force and also showed the extent to which the Phase II model was amenable to politicization and ultimately depended upon promoting alternative values, besides universal rights and accountability, underlying the rule of law.

To the extent that the second phase moved away from traditional legal remedies, it challenged whether any threshold remained regarding what constitutes the predicate transitional rule of law.[127] These changes illustrate the normative implications of deploying a discourse of justice. The discourse can influence the legitimacy of the response by giving it the provenance and hence the democratic accountability of the successor regime, and by imputing the administration of the transitional response with the legality traditionally associated with judicial proceedings.[128] The question remains whether there are any transitional justice baselines or any threshold minimum beyond which historical, psychological, or religious inquiry ought to be characterized as justice-seeking. This genealogical review suggests that the relevant inquiry is not a metaphysical enterprise, but rather must be understood in its historical and political context. Still, there is an independent basis for critique which influences the nature of the emerging discourse and affects whether it is likely to simply assist in the immediate aim of conflict resolution or also contribute to the goals of democracy, nation-building, and the advancement of liberal political aims.[129]

III. Phase III: Steady-State Transitional Justice

A. Transitional Justice All the Time

The present phase can be characterized as steady-state transitional justice. The discourse has now moved from the periphery to the center. As discussed above, the new millennium appears to be associated with the expansion and normalization of transitional justice. What was historically viewed as a legal

127. *See* Teitel, *supra* note 1, at 213–28 (promoting an explicitly transitional rule of law that is not merely symbolic).

128. *See* H. L. A. Hart, The Concept of Law (2nd ed. 1997); *see also* Henkin, *supra* note 38, at 31–41.

129. On the evolution of transitional justice, see Teitel, *supra* note 1, at 223–28.

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phenomenon associated with extraordinary post-conflict conditions now increasingly appears to be a reflection of ordinary times. War in a time of peace,[130] political fragmentation, weak states, small wars, and steady conflict all characterize contemporary political conditions.[131] These contemporary developments have spurred the attempted normalization of transitional justice, leading ultimately to ambivalent consequences. As a jurisprudence associated with political flux, transitional justice is related to a higher politicization of the law and to some degree of compromise in rule-of-law standards.

The most recognized symbol of the normalization of transitional jurisprudence is the entrenchment of the Phase I response in the form of the International Criminal Court ("ICC"), the new international institution established at the end of the twentieth century.[132] This court was preceded by the *ad hoc* international criminal tribunals convened to respond to genocidal conflicts in the Balkans and Rwanda.[133] Half a century after World War II, the ICC symbolizes the entrenchment of the Nuremberg Model: the creation of a permanent international tribunal appointed to prosecute war crimes, genocide, and crimes against humanity as a routine matter under international law.[134] The threshold global rule of law presently appears to be based on an expansion of the law of war.[135] Indeed, the move back to international humanitarian law incorporates the complex relationship between the individual and the state as a legal scheme which enables the international community to hold a regime's leadership accountable and condemn a systematic persecutory policy, even outside the relevant state.[136] Further, this particular form of international justice offers the potential for regime delegitimation that can support or even instigate transition.[137] Nevertheless, there are also

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130. *See* DAVID HALBERSTAM, WAR IN A TIME OF PEACE: BUSH, CLINTON, AND THE GENERALS (2001).

131. For a more thorough discussion of law and politics in the post–September 11 political context, see Teitel, *supra* note 104.

132. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998) *reprinted in* 37 I.L.M. 999 (1998) [hereinafter Rome Statute].

133. *See Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, U.N. Doc. S/25704/Annexes (1993); *Statute of the International Criminal Tribunal for the Former Yugoslavia*, U.N. SCOR, 48th Sess., 3217th Mtg., U.N. Doc. S/RES/827 (1993), *amended by* U.N. SCOR, U.N. Doc. S/RES/1166 (1998); *Statute of the International Tribunal for Rwanda*, U.N. SCOR, 49th Sess., 3453rd Mtg., U.N. Doc. S/RES/955 (1994), *annexed to* U.N. Doc. S/IN-F/50 (1996). For discussion of the expectations of the *ad hoc* international criminal tribunals, see Teitel, *supra* note 71. For discussion of these tribunals' constraints, see Alvarez, *supra* note 56 (discussing the limits on international tribunals).

134. *See* Rome Statute, *supra* note 132, Preamble, at 1002 (affirming that "the most serious crimes of concern to the international community as a whole must not go unpunished").

135. *See United Nations Diplomatic Conference of the Plenipotentiaries on the Establishment of an International Criminal Court*, 17 July 1998, Annex 11, U.N. Doc. A/CONF. 183/9, *reprinted in* 37 I.L.M. 999 (1998), *available at* http://www.un.org/icc.

136. *See supra* text accompanying notes 27–28.

137. *See* Teitel, *supra* note 71 (discussing the limited normative potential of such off-site tribunals); *see also* Christopher Rudolph, *Constructing an Atrocities Regime: The Politics of War Crimes Tribunals*, 55 INT'L ORG. 655, 684–85 (2001). Indeed, this is something of the theory for the Milošević trial, in light of the Kosovo Commission's conclusion that the NATO intervention in the conflict was "illegal but legiti-

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many dilemmas and limits raised by the turn to the law of war in relative peacetime, as well as by the preference for international legal regimes. A dynamic tension emerges among adjudicatory fragmentation, the attendant potential for universal jurisdiction associated with transitional justice,[138] and the attempted centralization of accountability in the ICC.[139]

The normalization of transitional justice currently takes the form of the expansion of the law of war, as illustrated by the rise of humanitarian law.[140] Contemporary developments involve an appropriation of the discourse of the humanitarian law regime with twofold significance. The establishment of humanitarian law as the present rule of law constrains not only the conduct of war,[141] but also appears to expand the humanitarian regime to address broader aspects of the law of war, including the justification of its possible initiation. Further, the use of the international humanitarian regime to justify the NATO intervention in Kosovo appears to have established a precedent for expanding the legitimate bases for intervention, specifically a humanitarian basis for just war.[142] A juridical scheme in which the law of war forms the basis for international criminal justice resonates more deeply and offers a more thorough justificatory structure. Whether unilaterally or multilaterally, the expanded humanitarian law enables recognition of lapses in state action, but also appears to enforce state respect for human rights. This demonstrates the potential for sliding from a normalized transitional justice to the campaign against terrorism. The use of human rights law and the law of war has shifted after the move away from modern state theory to the period of globalization. The contemporary conflation of human rights law, criminal law, and the international law of war implies a pronounced loss for those seeking to challenge state action. Through the use of the transformed law of war and its rights enforcement scheme as a basis for intervention, the

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mate." THE INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE KOSOVO REPORT (2001), *available at* http://www.kosovocommission.org.

138. Certainly it is the legacy of Phase I postwar justice that is amplified in the globalizing context where greater international interconnectedness allows for the pursuit of offenders regardless of status or citizenship. *See* PRINCETON UNIVERSITY PROGRAM IN LAW AND PUBLIC AFFAIRS, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION (2001); Kenneth C. Randall, *Universal Jurisdiction under International Law*, 66 TEX. L. REV. 785 (1988). On the effect of universal jurisdiction, *compare* Andrea Bianchi, *Immunity versus Human Rights: The Pinochet Case*, 10 EUR. J. INT'L L. 237 (1999), *with* Curtis A. Bradley & Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 MICH. L. REV. 2129 (1999).

139. On the prospective role of the ICC and its likely interaction with domestic transitional justice, see Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381 (2000); Gwen K. Young, *Amnesty and Accountability*, 35 U.C. DAVIS L. REV. 427 (2002). On a related point regarding the Pinochet precedent, see Richard J. Wilson, *Prosecuting Pinochet: International Crimes in Spanish Domestic Law*, 21 HUM. RTS. Q. 927 (1999) (discussing implications of universality).

140. For elaboration of this current development, see Teitel, *supra* note 104.

141. On this distinction between *jus in bello* and *jus ad bello*, which has given rise to modern humanitarian law, see STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOUR OF JEAN PICTET (Christophe Swinarsky ed., 1984). On *jus ad bello*, see MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 21 (1977).

142. *See* THE INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, *supra* note 137.

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expanded humanitarian regime introduces new human rights dilemmas that bring to the surface the tension in the aims of justice and peace.

Under the label of "preemptive self-defense," a related discourse of apparently constant war is currently being appropriated to legitimate the next stage in the war on terrorism.[143] The rhetoric attempts to eviscerate the distinctions between war and peace, and between law and its exception. The notion of Phase III steady-state transitional justice is evident in the deployment of the humanitarian regime, which has expanded and merged with the law of human rights.[144] The appeal to a language of universal morality in humanitarian legal discourse resonates with recent developments in transitional justice. The apparent normalization of transitional justice is also evident in the toleration of greater political discretion,[145] politicization in the uses of justice, the rise of highly irregular procedures, and explicit departures from prevailing law,[146] all justified in humanitarian terms.[147]

The expansion of the transitional justice discourse to the issue of terrorism proves problematic due to the inadequacy of the analogies between terrorism and war or political crisis. Transitional justice tends to look backward in responding to the last conflict, and therefore it does not adapt easily to use as a template to guarantee prospective security. Any attempt to generalize from exceptional post-conflict situations in order to guide politics as a matter of course becomes extremely problematic.

Resisting the normalization of transitional justice is difficult. There is a significant loss in vocabulary from which to make any critique, since in the expanded discourse of transitional justice the law of war has merged with the law of human rights. Only time will tell whether and to what extent these developments pose a serious challenge to the rule of law or are associated with the present cycle of contemporary politics.

B. Transitional Justice: Discontinuity Versus Continuity

The remaining question that follows, given current trends in normalization, is what a genealogical perspective of transitional justice might convey about the conception of justice in ordinary times. To what extent is there continuity, and to what extent discontinuity, both descriptively and normatively? In recent years the question has been controversial, sparking a prolif-

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143. *See* RICHARD TUCK, THE RIGHTS OF WAR AND PEACE 22–25 (1999) (discussing the historical justifications for preemptive attacks in the law of empire).

144. On this development, see Teitel, *supra* note 104.

145. This is seen in the lack of precise definition of the "enemy," other than in terms of executive discretion. *See* Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, at § 1(e), 66 Fed. Reg. 57,833, 57,834 (2001) (military order of Nov. 13, 2001).

146. *See* DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (1997). Compare with discussion of characteristics of rule of law in transition, *see* TEITEL, *supra* note 1, at 11–26.

147. On the general decline in adherence to the rule of law during this period, see Ruti G. Teitel, *Empire's Law: Foreign Relations by Presidential Fiat*, *in* SEPTEMBER 11TH: TRANSFORMATIVE MOMENT? CULTURE, RELIGION AND POLITICS IN AN AGE OF UNCERTAINTY (Mary Dudziak ed., 2003).

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eration of scholarly writing. A number of scholars have challenged any conceptualization of transitions as exceptional in political life, claiming that the aspiration during transitional periods ought to be based on a general theory about the rule of law.[148]

This Article's genealogical review of the phenomena of transitional justice-seeking in periods of substantial political change suggests that this is a false dichotomy. Two political dimensions determine what signifies rule of law in periods of transition: the transitional context, specifically the circumstances relating to political and legal conditions associated with periods of political change, and other political factors, such as local context. Beyond the dimension of transition, local factors also affect the legitimacy of transitional responses. Thus, the mere exportation of ideal rule-of-law models does not provide sufficient guidance. While there is no clear boundary between ordinary and transitional periods, justice-seeking in periods of transition is differentiated by the rule of law associated with limited conditions of political flux. The central dilemma of transitional justice relates to the recurring issues that, even if not *sui generis*, are largely associated with the legal and political factors common to unstable periods of liberalizing political transformation.[149] To the extent that these political conditions are present in a successor regime, the circumstances will present rule-of-law challenges that are peculiar to or arise more frequently in the transitional context. Therefore, while in the abstract it might be desirable to insist that justice-seeking projects in transitional times emulate those of established liberal democracies, this exhortation will ultimately be of limited normative guidance. The rule of law capacity of transitional societies cannot be expected to function at the same level as states that have a consolidated liberal juridical apparatus.

Transitional periods, depending on the political and legal conditions in the relevant society, will fall somewhere along the continuum of the rule-of-law-established democracies. This observation should have implications for the impetus to entrench any particular form of transitional rule of law. To some extent, the dilemmas of transitional justice in its contemporary phases raise issues that resonate more generally with the efforts to establish rule of law in a globalizing world. These include how to shape law reform and justice projects in light of growing global interdependence, and to what extent to accommodate local structures to outside forces.[150]

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148. *See* Martin Krygier, *Transitional Questions about the Rule of Law: Why, What and How?*, Presented before the Conference of the East Central Europe Institute for Advanced Study, Budapest (L'Europe du Centre Est. Eine wissenschaftliche Zeitschrift at Collegium Budapest) (Feb. 15–17, 2001); Dyzenhaus, *supra* note 57.

149. *See* TEITEL, *supra* note 1, at 11–18, 33–36.

150. *See* STIGLITZ, *supra* note 98. For discussion of globalization's effect on the third world, *see* Tina Rosenberg, *Globalization*, N.Y. TIMES MAG., Aug. 18, 2002, § 6, at 28.

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CONCLUSION

This Article provides a genealogy of transitional justice over the arc of the past half-century. The genealogical perspective situates transitional justice in a political context, moving away from essentializing approaches and thereby illuminating the dynamic relationship between transitional justice and politics over time.

The genealogical inquiry highlights the relationship between juridical and political conditions during periods of political transformation. This inquiry indicates that transitional justice, while contingent upon local conditions and culture, also displays dimensions commonly associated with periods of political flux.

The genealogical approach contributes a needed perspective on the postwar model's enduring dominance in the field of transitional justice. It also illuminates the critical move in Phase II toward local, alternative approaches associated with nation-building and highlights the Phase II privatization and hybridization of the law, which also reflects trends in globalization. The post–Cold War focus on alternative methods for changing political identity was a strategy that responded critically to the post–World War II movement to internationalize and universalize the rule of law, but the strategy was also closely related to the particular national politics of the immediate post–Cold War moment. Change was therefore inevitable: roughly fifteen years after the end of the Cold War, we are now witnessing the normalization of transitional justice, as seen in the current expansion of humanitarian law to ordinary peacetime contexts.

Finally, transitional justice is an important part of broader political developments in recent international history. Thus, in Phase I, transitional justice adhered to juridical rights enforcement associated with liberal ideals of rule of law. However, as time passed, those normative assumptions were challenged, and similar trends emerged in both transitional justice and in the broader discussion of the concept of the rule of law. Just as postmodernist challenges generally offer better critiques than practical strategies,[151] in moving the discourse away from universalizing rule of law, the contemporary transitional justice model reflects a limited critical response. The genealogical method is no exception: it yields ongoing critical cycles rather than a progressive history of transitional justice.

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151. On postmodernism as a source of critical theory, *compare* POSTMODERNISM & SOCIAL THEORY: THE DEBATE OVER GENERAL THEORY (Steven Seidman & David G. Wagner eds., 1992) (discussing the postmodern critique) *with* Jacques Derrida, *Force of Law: Mystical Foundation of Authority*, 11 CARDOZO L. REV. 919 (1990).

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