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Citation:

Brownwyn Anne Leebaw, The Irreconcilable Goals of
Transitional Justice, 30 Hum. Rts. Q. 95 (2008)

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The Irreconcilable Goals of Transitional Justice

Bronwyn Anne Leebaw*

ABSTRACT

The goals of transitional justice advocacy and institutions are commonly portrayed as mutually reinforcing and complementary. This article argues that in evaluating the political significance of transitional justice, more attention should be given to their irreconcilable goals. This analysis is informed by the work of legal scholars and political theorists that have drawn attention to the dual role of law in relation to violence. While law can be a tool for regulating violence and exposing abuses of power, law is also utilized to obfuscate and legitimate abuses of power. Similarly, transitional justice institutions aim to challenge the legitimacy of prior political practices by confronting denial and transforming the terms of debate on past abuses, yet they also seek to establish their own legitimacy by minimizing the challenge that they pose to dominant frameworks for interpreting the past. This article demonstrates how a better understanding of this tension sheds light on problematic assumptions and unacknowledged trade-offs associated with the claims regarding the role of transitional justice institutions in advancing political reconciliation through measures designed to counter denial, expand

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A draft of this article was presented at the 2007 meeting of the American Political Science Association. The author would like to thank Brad Roth and Chandra Sriram for their insightful comments as discussants on this panel. The article draws upon ideas developed for a paper done by the author as part of her work on the American Political Science Association Task Force on Inequality and Difference in the Developing World. The author would like to thank members of the committee and others who commented on the paper, including: Susan Woodward, John Echeverri-Gent, Susanne Rudolph, Lloyd Rudolph, John Harbeson, Michael Joseph Smith, and Victor Peskin. For conversations and exchanges that informed the development of the article, the author would also like to thank Ruti Teitel, Eric Stover, Harvey Weinstein, and David Pion-Berlin.

dialogue, and address trauma. It concludes by discussing the implications of the analysis for transitional justice policy as well as debates on the general significance of expanding transitional justice advocacy.

I. INTRODUCTION

In 1994, Madeleine Albright, then Ambassador to the United Nations, gave a speech that made the case for establishing the International Criminal Tribunal for the former Yugoslavia. Albright addressed potential critics of the court by arguing that “establishing the truth about what happened in Bosnia is *essential to* - not an obstacle to - national reconciliation.”¹ Although this was once a controversial claim, the idea that a durable peace requires countries to address past violence is now widely held and promoted by influential leaders and institutions under the broad heading of “transitional justice.” In 2004, the UN Secretary General issued a report outlining a framework for strengthening United Nations support for transitional justice.² The USAID’s Office of Transition Initiatives now claims as one of its central objectives, the promotion of “national reconciliation and conflict resolution by discovering the truth of what happened during the conflict and supporting public acknowledgement of crimes committed.”³ A number of new specialized organizations and institutes now sponsor comparative research or training in transitional justice.⁴ Over the past decade, numerous transitional justice institutions, most notably truth commissions and war crimes tribunals, have been established around the world.

The promotion of transitional justice to support national reconciliation is puzzling given that transitional justice institutions were historically seen as a threat to national reconciliation. Because truth commissions and criminal tribunals investigate extremely divisive and violent histories, they have often been viewed as obstacles to reconciliation and charged with “opening old wounds,” generating political instability and interfering with

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1. Press Release, Madeleine Albright, Bosnia in Light of the Holocaust: War Crimes Tribunals, State Department Dispatch (18 Apr. 1994), available at http://calbears.findarticles.com/p/articles/mi_m1584/is_n16_v5/ai_15282479.
 2. *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, U.N. SCOR, U.N. Doc. S/2004/616 (2004), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf>.
 3. Office of Transition Initiatives, Office of Transition Initiatives Special Focus Areas, available at http://www.usaid.gov/our_work/cross-cutting_programs/transition_initiatives/focus/humright.html.
 4. New transitional justice institutions include the International Center for Transitional Justice in New York, the Harvard Project for Justice in Times of Transition, the Transitional Justice Project at Notre Dame School of Law, the War Crimes Study Center at UC Berkeley, the Transitional Justice Institute at the University of Ulster, and the Institute for Justice and Reconciliation in Cape Town.

forward-looking political change. The promotion of transitional justice is also puzzling given that scholars have always had somewhat mixed views on the political and social role of these institutions. Some hail the proliferation of transitional justice institutions as a triumph for human rights advocates and evidence of their growing influence.⁵ Others have questioned the extent to which transitional justice institutions actually advance the cause of human rights or conflict resolution.⁶ The spread of transitional justice institutions that investigate past abuses has also been identified as symptomatic of a declining faith in possibilities for collective struggles for political change,⁷ and as evidence of a counterrevolutionary agenda.⁸

This article examines the shifting claims associated with transitional justice advocacy. It argues that in evaluating the political significance of transitional justice institutions more attention should be given to the conflicting goals of transitional justice advocacy and that contemporary policy debates are framed in ways that make this very difficult. This analysis is informed by the work of legal scholars and political theorists that have drawn attention to the dual role of law in relation to violence. While law can be a tool for regulating violence and exposing abuses of power, law is also utilized to obfuscate and legitimate abuses of power.⁹

Transitional justice poses an additional complication, as it aims to maintain some degree of order, while simultaneously advancing political transformation.¹⁰ Building on these insights, this article argues that in evaluating the political role of transitional justice institutions, more attention should be given to the ways in which their efforts to expose, remember, and understand political violence are in tension with their role as tools for establishing stability and legitimating transitional compromises. Transitional justice institutions aim to challenge the legitimacy of prior political practices and transform the terms of debate on past abuses, yet they also seek to establish their own legitimacy by minimizing the challenge that they pose to dominant frameworks for interpreting the past. These tensions may not be evident in analyses that focus primarily on the presence or absence of

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5. See generally Kathryn Sikkink & Carrie Booth Walling, *The Impact of Human Rights Trials in Latin America*, 44 J. PEACE RES. 427 (2007).
 6. Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 INT'L SEC. 5, 5 (2003–2004).
 7. John Torpey, *Introduction: Politics and the Past*, in *POLITICS AND THE PAST: ON REPAIRING HISTORICAL INJUSTICES* (John Torpey ed., 2003).
 8. Robert Meister, *Human Rights and the Politics of Victimhood*, 16 ETHICS & INT'L AFF., 91 (2002).
 9. See Chris Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L.J. 49 (1994); LAW, VIOLENCE, AND THE POSSIBILITY OF JUSTICE (Austin Sarat ed., 2001); LEFT LEGALISM/LEFT CRITIQUE (Wendy Brown & Janet Halley eds., 2002); Ruti Teitel, *Transitional Rule of Law*, in *RETHINKING THE RULE OF LAW AFTER COMMUNISM* 279 (Adam Czarnota, Martin Krygier, & Wojciech Sadurski eds., 2005).
 10. RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 3–4 (2000).

transitional justice institutions, but become apparent in analyses that examine diverging strategies for designing and limiting the scope of transitional justice investigations.

The next section of the article examines changing ideas about the relationship between transitional justice and reconciliation. Contemporary transitional justice advocates, as well as many scholars, tend to view the goals of transitional justice as mutually reinforcing and complementary. This is a departure from debates of the 1980s and early 1990s, which focused on tensions, trade-offs, and dilemmas associated with transitional justice. This shift is often interpreted as evidence that a new generation of approaches to transitional justice is capable of transcending or overcoming dilemmas associated with previous eras. This article suggests that new approaches have not entirely overcome such dilemmas, but rather made them more difficult to evaluate to the extent that they have re-conceptualized the goals of transitional justice in apolitical terms. The third section surveys a range of scholarship on transitional justice institutions, focusing on truth commissions and war crimes tribunals, to demonstrate how attention to the conflicting aspirations of transitional justice is important in evaluating assumptions associated with three major justifications for transitional justice institutions: 1) to counter denial and promote accountability; 2) to expand dialogue and open political space to previously marginalized or silenced people; and 3) to alleviate volatile emotions associated with trauma and the desire for revenge. A concluding section discusses how the analysis sheds light on problematic assumptions and unacknowledged trade-offs associated with transitional justice policy, as well as the general significance of transitional justice advocacy.

II. THE SHIFTING CLAIMS OF TRANSITIONAL JUSTICE ADVOCACY

A. Transitional Justice and Democratization: Dichotomies and Dilemmas

Transitional justice has been defined as “the conception of justice in periods of political transition.”¹¹ It is not a new or uniquely modern phenomenon. Jon Elster includes the 404 and 411 BC restorations of democracy to Athens in his universe of transitional justice cases.¹² Contemporary transitional justice

11. *Id.* at 3. Teitel defines transitional justice as encompassing legal responses to wrongdoings of successor regimes. Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69 (2003). For Elster, the definition is somewhat broader, encompassing private forms of retribution such as the chopping of hair as a penalty for consorting with German occupation forces. JON ELSTER, *CLOSING THE BOOKS: TRANSITIONAL JUSTICE IN HISTORICAL PERSPECTIVE* (2004).

12. ELSTER, *supra* note 11, at 3–23.

debates were greatly influenced by World War II era responses to Nazism. In that context, it was assumed that retribution for Nazi atrocities was appropriate and major debates focused on the proper role for international law in framing retribution.¹³ In addition to the Nuremberg Trials for Major War Criminals, the Allied forces had prosecuted thousands and executed several hundred Nazis under Allied Control Council Law 10. This period also involved wide-ranging private forms of retribution and reprisal.¹⁴ However, comparative scholarship on transitional justice did not really begin to develop until the period of "third wave" transitions to democracy in Latin America and Eastern Europe, as leaders and scholars examined the question of how new leaders should address systematic political violence committed under a prior regime.

In the 1980s and early 1990s, transitional justice debates focused on the role of trials and administrative purges for past abuses in democratizing transitions. In the context of Argentina's 1984 transition and Chile's transition in 1990, successor regimes debated the question of whether to "punish or pardon" human rights violations committed under a prior regime. Argentina's efforts to prosecute abuses committed during the "Dirty War" ended when military protests threatened to destabilize the transition.¹⁵ Truth commissions were developed in both Argentina and Chile as alternative forms of accountability. Although they did not satisfy what some human rights advocates had identified as an "international duty to prosecute" human rights violations committed under a prior regime,¹⁶ truth commissions would investigate and condemn violations of human rights as outlined in evolving international legal standards. In Eastern Europe, purge laws were passed in a number of countries though widespread purges only occurred in the former Czechoslovakia and Albania.¹⁷ A number of highly publicized trials took place in these countries with the prosecution of East German border guards receiving perhaps the most widespread attention. "Truth-telling" was also adopted as a prominent mechanism for dealing with Soviet era repression. Eastern

13. GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* (2000).

14. See ELSTER, *supra* note 11.

15. See CARLOS NINO, *RADICAL EVIL ON TRIAL* (1996); DAVID PION-BERLIN, *THROUGH CORRIDORS OF POWER: INSTITUTIONS AND CIVIL-MILITARY RELATIONS IN ARGENTINA* (1997); Jaime Malamud-Goti, *Transitional Governments in the Breach: Why Punish State Criminals?*, 12 HUM. RTS. Q. 1 (1990); MARK OSIEL, *MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW* (1997); Jose Zalaquett, *Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations*, 43 HASTINGS L.J. 1425 (1992).

16. See Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L. REV. 2537 (1991).

17. Carmen González-Enríquez, *De-communization and Political Justice in Central and Eastern Europe*, in *THE POLITICS OF MEMORY: TRANSITIONAL JUSTICE IN DEMOCRATIZING SOCIETIES* 218 (Alexandra Barahona de Brito, Carmen González-Enríquez, & Paloma Aguilar eds., 2001).

European countries did not develop official truth commissions to pursue state-sponsored official histories, but rather opted for procedures to open secret police files.¹⁸

In 1992, the New York-based Charter 77 Foundation hosted a conference to focus on the question of whether and how Eastern European leaders might learn from the experience of the Latin American transitions of the previous decade. Present at this conference, held in Salzburg, Austria, were fifty participants from twenty-one countries, who had all been involved in projects to address the legacy of past brutalities.¹⁹ The conference was also attended by Neil Kritz, who was directing the "Rule of Law Program" of the U.S. Institute of Peace and in that capacity had embarked upon what would become a three volume comparative and theoretical study of transitional justice projects over the past five decades.²⁰ This conference and others like it would set the stage for the development of comparative transitional justice analysis and the expansion of networking.

Despite the wide variation in context, design, and implementation of transitional justice institutions, the expanding field of comparative transitional justice scholarship identified a unique set of dilemmas that distinguished transitional justice from "ordinary" justice. In one of the most widely cited texts on transitional justice, Ruti Teitel observed that the function of law in the context of transitional justice is paradoxical: "In its ordinary social function, law provides order and stability, but in extraordinary periods of political upheaval, law maintains order even as it enables transformation."²¹ Transitional justice institutions address systematic forms of violence, which were explicitly or implicitly authorized under a prior regime. A core problem associated with transitional justice stems from the widespread involvement or acquiescence typically associated with systematic political violence. These features of transitional justice were associated with legal, policy, and political dilemmas.

The widespread and systematic character of political violence gives rise to a tension between procedural and substantive justice. There is a conflict between "the desire to demarcate oneself from the earlier regime and the

18. TINA ROSENBERG, *THE HAUNTED LAND: FACING EUROPE'S GHOSTS AFTER COMMUNISM* (1995); LUC HUYSE, *Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past*, 20 LAW & SOC. INQUIRY 51 (1995); Stanley Cohen, *State Crimes of Previous Regimes: Knowledge, Accountability, and the Policing of the Past*, 20 LAW & SOC. INQUIRY 7 (1995); TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES (A. James McAdams ed., 1997).

19. NEIL J. KRITZ, *The Dilemmas of Transitional Justice*, TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES at xxix (Neil Kritz ed., 1995).

20. *Id.*

21. TEITEL, *supra* note 10, at 6.

desire to punish that regime as severely as it deserves.”²² Procedural standards, such as the prohibition on retroactive punishment, maintain the integrity of the law in stable systems of justice. Yet transitions imply paradigm shifts in broad conceptions of justice.²³ Transitional justice projects also face basic practical or policy challenges stemming from the sheer number of those implicated in past abuses, which would generally overwhelm even a well-functioning judicial system. Yet in most cases, successor regimes are also engaged in rebuilding political and judicial institutions and in no position to process the volume of cases associated with past abuses.

Transitional justice efforts also confront a basic political challenge. The criminalization of political violence is likely to be controversial and potentially destabilizing, whether this takes the form of prosecution and punishment or the acceptance of state responsibility through official acknowledgment, apology, or reparations. It is a process that condemns as shameful actions that may previously have been championed as a matter of duty to a particular political community. Justice is commonly evaluated in relation to community norms. Transitional justice institutions represent the aspiration to transform political communities. What constitutes justice in this context will be a matter of potentially volatile conflict and transitional justice institutions generally make use of the law in accomplishing political goals.²⁴ This also means that the long term aspirations associated with transitional justice institutions are likely to be in tension with their short term strategic considerations: In the short term, transitional justice institutions engage with inherited traditions and centers of power in order to maintain a degree of stability and legitimacy. However, transitional justice institutions also aspire to challenge and transform inherited values and political relationships over the long term.

In that era, such dilemmas were commonly framed as tensions between transitional justice and reconciliation. In human rights advocacy, justice was closely identified with prosecutions in accordance with international law that would advance the precedents set by the Nuremberg trials. Yet prosecution and other forms of transitional justice were not only designed to promote retribution, but also the broader goal of fundamental political reform. As Naomi Roht-Arriaza has observed, the term “transition” has always been slippery in transitional justice debates, which have never clearly articulated “what the state is ‘transitioning’ to.”²⁵ However, in many of the debates asso-

22. ELSTER, *supra* note 11, at 237.

23. TEITEL, *supra* note 10, at 6.

24. *Id.*; See also Chandra Lekha Sriram, *Transitional Justice Comes of Age: Enduring Lessons and Challenges*, 23 BERKELEY J. INT’L L. 506 (2005).

25. Naomi Roht-Arriaza, *The New Landscape of Transitional Justice*, in *TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE 1* (Naomi Roht-Arriaza & Javier Mariezcurrena eds., 2006).

ciated with this era, "transition" implied a transition to democracy. The goal of reconciliation was commonly invoked as short hand for compromises and bargains with the old regime that were perceived as necessary to stabilize newly democratizing governments, but often opposed by human rights advocates. Truth commissions were seen as a compromise designed to advance reconciliation, while simultaneously pursuing some level of accountability for past abuse. In the Southern Cone, the appeal for "reconciliation" was invoked in opposition to calls for prosecution and it was in the interest of promoting national reconciliation that the Aylwin government in Chile opted against prosecution for Pinochet era abuses.²⁶ As a result, the rhetoric of "reconciliation" was viewed by many as catering to apologists.²⁷

B. Transitional Justice and Reconciliation

In the mid-1990s, human rights advocates and scholars increasingly began to argue that many of the dilemmas once associated with transitional justice were based on false dichotomies and limited thinking about the range of forms that transitional justice might take.²⁸ As international law and institutions expanded, international actors began to play a greater role in framing approaches to transitional justice.²⁹ New approaches to transitional justice combine local and international authority in hybrid criminal tribunals, for example in Sierra Leone and Cambodia. Truth commissions are no longer seen as a second rate alternative, but rather an important complement to prosecution of systematic atrocity. Countries in the Southern Cone have now embarked on new efforts to circumvent previous amnesties. The Argentine transition, which had long been interpreted as exemplifying the threat to stability posed by human rights trials, came to illustrate quite a different lesson. As Sikkink and Walling recently observed, Argentina has now had the longest uninterrupted period of democratic rule in its history, while also having the most domestic human rights trials of any country in the world.³⁰

As such changes took place, a shift also occurred in the framing of policy debates on reconciliation. Whereas all transitional justice practices were to some extent taken to be at odds with reconciliation in previous

26. See Zalaquett, *supra* note 15.

27. PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY 160–61 (2001). Several scholars view the current discourse of reconciliation in a similar light, as favoring conservative trends. See, e.g., Ruti G. Teitel, *Transitional Justice Genealogy*, *supra* note 11, at 84; Meister, *supra* note 8.

28. On the problem of false dichotomies in transitional justice debates, see esp. CHANDRA LEKHA SRIRAM, CONFRONTING PAST HUMAN RIGHTS VIOLATIONS (2004); Sikkink & Walling, *supra* note 5; Roht-Arriaza, *supra* note 25.

29. THE POLITICS OF MEMORY, *supra* note 17.

30. Sikkink & Walling, *supra* note 5, at 434.

eras, now truth commissions and criminal tribunals alike were promoted as essential tools in achieving national reconciliation. Whereas earlier debates had focused on dilemmas and trade-offs, more recent debates have treated the various goals of transitional justice institutions as mutually reinforcing and complementary. Yet new approaches and institutions of the post-Cold War era did not entirely alleviate the tensions associated with transitional justice.

Some argued that the political dilemmas of transitional justice could be alleviated through the development of clear international standards and stronger international institutions. In the aftermath of the Argentine junta trials, for example, it had been argued that an "international duty to prosecute" would remove the question of whether to "punish or pardon" from the volatile national context.³¹ As the role of international law and institutions in transitional justice expanded, references to "transition" were also less political. Instead of referring to transitions from authoritarian to democratic regimes, post-Cold War debates more typically invoke "transition" in ostensibly neutral terms to refer to a "post-conflict" situation that required resolution and the establishment of authority bound by rule of law.³²

More recent scholarship on the *ad hoc* international criminal tribunals for Rwanda and the former Yugoslavia (ICTR and ICTY) suggests that optimism regarding the role of international law in transcending transitional justice dilemmas rested on a problematic pair of assumptions. First, these arguments assumed that international laws and institutions would be widely accepted as legitimate and neutral. Second, these claims suggested that international institutions would easily establish independence from local elites. Yet international criminal courts continue to depend on state cooperation for access to archives, permission to conduct forensic investigations, permission to interview witnesses, and the ability to make arrests.³³ The legitimacy of ICTY and ICTR has been challenged by substantial populations in Rwanda and the former Yugoslavia.³⁴ International tribunals may override national

31. Orentlicher, *supra* note 16, at 2549.

32. See, e.g., The Secretary General, *Report of the Secretary-General on The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 23, 2004). However, in the post-Cold War era, transitional justice institutions were not necessarily developed in the aftermath of conflict, but as part of a process of resolving ongoing conflicts. TEITEL, TRANSITIONAL RULE OF LAW, *supra* note 9, at 291.

33. See Victor Peskin, *International Justice and Domestic Rebuilding: An Analysis of the Role of the International Criminal Tribunal for Rwanda*, J. HUMANITARIAN ASSISTANCE (1999), available at <http://www.reliefweb.int/library/documents/rwandajha.html>.

34. See HUMAN RIGHTS CENTER, INTERNATIONAL HUMAN RIGHTS LAW CLINIC, UNIVERSITY OF CALIFORNIA & CENTRE FOR HUMAN RIGHTS, UNIVERSITY OF SARAJEVO, JUSTICE, ACCOUNTABILITY, AND SOCIAL RECONSTRUCTION: AN INTERVIEW STUDY OF BOSNIAN JUDGES AND PROSECUTORS (2000); Peskin, *supra* note 33; Snyder & Vinjamuri, *supra* note 6; Kinglsey Chiedu Moghalu, *Image and Reality of War Crimes Justice: External Perceptions of the International Criminal Tribunal for Rwanda*, 26

conflict over the question of whether to "punish or pardon," yet debates over "whether to cooperate or not to cooperate" may still undermine the goals of these institutions in important ways.³⁵

The idea that transitional justice would contribute to reconciliation was also influenced by changing claims regarding the purpose of truth commissions and criminal tribunals. Several leaders associated with South Africa's Truth and Reconciliation Commission argued that justice and reconciliation should be viewed as mutually reinforcing rather than conflicting aspirations. They developed this position to claim that truth commissions should no longer be viewed as "second best" alternatives to trials, but as forms of "restorative justice."³⁶ Restorative justice theory developed out of a range of alternative dispute resolution practices, including indigenous courts and juvenile justice programs around the world. It centers on the idea that justice must involve an effort to "restore" a lost balance and that prosecution is not the only, or the best, means to attain this balance.³⁷

Claims regarding the role of transitional war crimes trials also changed during this time. In his opening statements at the Nuremberg Trials, Chief Prosecutor Robert Jackson observed that, "[o]ne of the dangers ever present is that this Trial may be protracted by details of particular wrongs and that we [may] become lost in a 'wilderness of single instances.'"³⁸ He argued that the officials who were tried at Nuremberg should not be condemned as individuals alone, but as "living symbols" that represented "racial hatreds," "fierce nationalisms," and the "arrogance and cruelty of power."³⁹ Contemporary advocates of international justice have advanced a very different rationale for individual guilt, arguing that it will serve to counteract collective blame

THE FLETCHER FORUM OF WORLD AFFAIRS 21 (2002); Peter Uvin & Charles Mironko, *Western and Local Approaches to Justice in Rwanda*, 9 GLOBAL GOVERNANCE 219 (2003); Mark Drumbl adds that international criminal law also remains dependent upon modalities of domestic law. Mark A. Drumbl, *Pluralizing International Criminal Justice*, 103 MICH. L. REV. 1295, 1302 (2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=587430.

35. For example, Peskin and Boduszynski demonstrate how political debate over question of whether or not to cooperate with the ICTY was manipulated to the advantage of nationalist leaders in Croatia (2003). Victor Peskin & Mieczyslaw P. Boduszynski, *International Justice and Domestic Politics: Post-Tudjman Croatia and the International Criminal Tribunal for the Former Yugoslavia*, 55 EUROPE-ASIA STUD. 1117 (2003).

36. See Charles Villa Vicencio, *A Different Kind of Justice: The South African Truth and Reconciliation Commission*, 1 CONTEMP. JUST. REV. 407 (1998); ALEX BORAINÉ, *A COUNTRY UNMASKED: INSIDE SOUTH AFRICA'S TRUTH AND RECONCILIATION* (2000); DESMOND MPIOLO TUTU, *NO FUTURE WITHOUT FORGIVENESS* (1999).

37. See HOWARD ZEHR, *CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE* (1990); TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT (Susan de Villiers ed., Truth & Reconciliation Commission 1999) (1998) [hereinafter TRC REPORT].

38. INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 104 (1947).

39. *Id.* at 99.

and so advance reconciliation.⁴⁰ Even the International Criminal Court has incorporated a commitment to responsive justice with a view to enhancing domestic reconciliation.⁴¹ Where truth commissions and trials were once viewed as advancing distinctive and conflicting agendas, they were now seen as promoting complementary and mutually reinforcing goals.

Finally, claims regarding the relationship between human rights and reconciliation changed in the post-Cold War era. In the early 1990s, a number of prominent human rights advocates with significant moral authority, including José Zalaquett of Chile, Nelson Mandela, and Desmond Tutu of South Africa, began to recast the relationship between human rights and reconciliation, arguing that reconciliation would be an important prerequisite for establishing a regime capable of protecting human rights. These claims were based in part on a view that pragmatic compromises made in the name of stability would be essential to establishing a human rights regime.⁴² Yet these concerns also coincided with changing views on the relationship between human rights and state power. In the aftermath of the Second World War, the human rights movement had been concerned primarily with challenging state-sponsored violence. Following the Cold War, prominent human rights advocates and scholars began to view the collapse of state authority as a central cause of political violence and to see the reconstruction of state authority as an important priority for human rights.⁴³

As reconciliation became a concern of human rights and transitional justice advocacy, however, it was redefined to encompass not only the goals of stabilizing and legitimating state authority, but also the aspiration for political community based on consent and shared norms. Reconciliation had previously been associated with the imperative of compromise in the name of stability. Where transitional justice was deemed a threat to short term *stability*, then it would also threaten reconciliation. More recent scholarship on transitional justice has associated reconciliation with the long term aspiration for political community based on consent and shared norms. Whereas minimalist conceptions of peace might refer to the “absence of

40. Payam Akhavan, *Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal*, 20 HUM. RTS. Q. 737, 765 (1998). On the role of the ICC in relation to national reconciliation, see also Juan E. Méndez, *National Reconciliation, Transitional Justice, and the International Criminal Court*, 15 ETHICS & INT'L AFF. 25 (2001).

41. Interview with Gilbert Bitti, Senior Legal Adviser to the Pre-Trial Division, Chambers for the International Criminal Court (at time of interview Bitti was Chief of the Victims Participation and Reparations Unit for the International Criminal Court), The Hague, Netherlands (23 Jul. 2003) (transcript on file with author). On restorative justice at the ICC, see also Christopher Muttukumaru, *Reparation to Victims*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 262 (Roy S. Lee ed., 1999).

42. See Zalaquett, *supra* note 15.

43. See MICHAEL IGNATIEFF, HUMAN RIGHTS AS POLITICS AND IDOLATRY 25 (2001).

large scale, organized violence or war and the extremely low probability of the resumption of war,"⁴⁴ minimalist conceptions of reconciliation have been associated with the principle of democratic reciprocity among conflicting parties or between the governors and the governed.⁴⁵ More expansive conceptions of reconciliation typically incorporate a range of features associated with democracy, including tolerance of political and ethnic diversity and respect for human rights.⁴⁶

In sum, new approaches to designing and conceptualizing transitional justice have moved beyond problematic dichotomies that characterized previous eras. However, they have not entirely resolved major dilemmas. Transitional justice advocacy was once associated with the explicit goal of judgment in the context of democratic change. In the post-Cold War era, transitional justice advocacy became associated with an international agenda to promote goals that were less explicitly political: conflict resolution and rule of law. However, transitional justice institutions continue to judge political violence and so are implicated in political judgments, which is in tension with their aspiration to political impartiality. Reconciliation was also reformulated in apolitical terms. Whereas reconciliation once referred to political compromises to stabilize a new regime, it now encompasses the goals of political community and consensus. The conflation of these goals can be understood as a strategic confusion as well as a logical confusion. It may be strategically useful to confuse compromise and consensus as a way to legitimate compromises made in the name of a hoped for political community. Yet it is a logical error to assume that compromises will result in consensus, let alone a transformed political community. Rather, as discussed below, the strategies developed by transitional justice institutions to judge and transform the basis of political community are often in tension with the strategies that transitional justice advocates have adopted to avoid volatile conflict and legitimate transitional compromises.

III. EVALUATING TRANSITIONAL JUSTICE

A better understanding of the tensions inherent in transitional justice advocacy is useful in evaluating the political role of transitional justice institutions. In

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44. David Mendeloff, *Truth-Seeking, Truth-Telling, and Postconflict Peacebuilding: Curb the Enthusiasm?*, 6 INT'L STUD. REV. 355, 363 (2004).
 45. See Amy Gutmann & Dennis Thompson, *The Moral Foundations of Truth Commissions*, in TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS (Robert I. Rotberg & Dennis Thompson eds., 2000); HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA (Carla Hesse & Robert Post eds., 1999).
 46. See JAMES L. GIBSON, *OVERCOMING APARTHEID: CAN TRUTH RECONCILE A DIVIDED NATION?* (2004); Tristan Anne Borer, *A Taxonomy of Victims and Perpetrators: Human Rights and Reconciliation in South Africa*, 25 HUM. RTS. Q. 1088 (2003); RICHARD A. WILSON, *THE POLITICS OF TRUTH AND RECONCILIATION IN SOUTH AFRICA: LEGITIMIZING THE POST-APARTHEID STATE* (2001).

this section, three types of claims regarding the role of transitional justice institutions in promoting political reconciliation will be examined: claims about how transitional justice institutions serve to counter denial and promote accountability, claims about how they function to expand dialogue, and claims about how they function to alleviate volatile emotions and advance healing processes. A range of scholarly efforts to evaluate these claims will be reviewed, but this article does not strive to present a comprehensive evaluation of transitional justice. Rather, the main goal is to demonstrate how conflicting goals associated with transitional justice advocacy have been associated with tensions in the design of transitional justice investigations. Finally, this article suggests that understanding such tensions helps to shed light on the complex political role of transitional justice institutions.

A. Countering Denial, Establishing Accountability, Writing Political Myth

In his opening address to the Nuremberg tribunal, Justice Robert Jackson famously announced that the trials would aim to provide “undeniable proofs of incredible events.”⁴⁷ A primary justification for transitional justice institutions is that they establish a historical record of political violence. One reason for doing so is to counter denial about the extent and impact of systematic violence. Transitional justice institutions also aim to counter denial about responsibility for past violence. A unique contribution of truth commissions has been their efforts to analyze patterns of violence as a basis for facilitating political reform.⁴⁸ These goals align with what might be viewed as a Habermasian approach to confronting the past. In the context of the German *Historikerstreit*, Habermas argued that confronting and remembering past abuses would reinforce a commitment to democratic values and reforms.⁴⁹ Thomas McCarthy and Andrew Valls invoke a similar logic to argue that the general lack of awareness, among whites in the United States, of the extent and impact of slavery, segregation, and lynching, undermines the quality of our democracy and that a commitment to re-examining our past might address this problem.⁵⁰

By establishing a historical record of abuses that are denied, transitional justice institutions seek to challenge conventional understandings of the past. In several cases, transitional justice investigations seem to have played an

47. INTERNATIONAL MILITARY TRIBUNAL, *supra* note 38, at 99.

48. HAYNER, *supra* note 27. See Audrey R. Chapman & Patrick Ball, *The Truth of Truth Commissions: Comparative Lessons from Haiti, South Africa, and Guatemala*, 23 HUM. RTS. Q. 1 (2001) for a comparative analysis of the methodology used by truth commissions.

49. JÜRGEN HABERMAS, *A BERLIN REPUBLIC: WRITINGS ON GERMANY* (Steven Rendall trans., 1997).

50. See Thomas McCarthy, *Vergangenheitsbewältigung in the USA: On the Politics of the Memory of Slavery*, 30 POLITICAL THEORY 623 (2002).

important role in generating awareness of abuses that were previously hidden or denied. Historian Jeffrey Herf writes that following the Nuremberg trials, "no major national political figure in either of the two parties questioned the factual occurrence of [Nazi] crimes."⁵¹ In Argentina, installments of truth commission reports sold an average of 200,000 copies per week.⁵² South Africa's truth commission aired public hearings on a weekly television show. Based on a series of surveys, James Gibson reports that the vast majority of South Africans now accept the TRC's claim that apartheid was a "crime against humanity."⁵³ The report of Guatemala's Historical Clarification Commission was criticized by the right wing, but neither the government nor the military openly disputed its findings.⁵⁴

In other cases, the findings of transitional justice investigations have been ignored, rejected, or not even disseminated. Although confronting denial is ostensibly a major goal of transitional justice, officials associated with *ad hoc* tribunals have tended to frame their work for audiences of international lawyers rather than the affected local populations.⁵⁵ Where the legitimacy of transitional justice institutions is successfully challenged, this undermines their impact in addressing denial. In El Salvador, the military and the Supreme Court accused the truth commission of political bias and "the president condemned . . . [the report] for failing to meet expectations for national reconciliation." Five days later, an amnesty law was passed.⁵⁶ In a recent poll conducted in Serbia, half of the respondents said they did not believe Serbs had committed war crimes during the 1990s.⁵⁷ Although ICTY convened four trials focusing on a massacre in the village of Amhici, Stover and Weinstein report that even the testimony of a dozen Bosnian Croat defendants "has not transformed the way in which Croats in the village interpret what happened on that fateful day" and Amhici remains a divided village.⁵⁸

51. JEFFREY HERF, *DIVIDED MEMORY: THE NAZI PAST IN THE TWO GERMANYS* 373 (1997).

52. Alexandra Barahona de Brito, *Truth, Justice, Memory, and Democratization in the Southern Cone*, in *THE POLITICS OF MEMORY*, *supra* note 17, at 156.

53. GIBSON, *supra* note 46, at 115.

54. Rachel Seider, *War, Peace, and Memory Politics in Central America*, in *THE POLITICS OF MEMORY*, *supra* note 17, at 177.

55. In a 2002 survey, "87.2 percent of Rwandan respondents claimed that they were either not well informed or not informed at all" about the ICTR proceedings. Alison Des Forges & Timothy Longman, *Legal Responses to the Genocide in Rwanda*, in *MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY* 49, 56 (Eric Stover & Harvey M. Weinstein eds., 2004).

56. Seider, *supra* note 54, at 117.

57. Tim Judah, *Serbia Struggles to Face the Truth about Srebrenica*, Crimes of War Project (2005), available at <http://www.crimesofwar.org/news-srebrenica2.html>.

58. Eric Stover & Harvey M. Weinstein, *Conclusion: a common objective, a universe of alternatives*, in *MY NEIGHBOR, MY ENEMY*, *supra* note 55, at 332.

In response to this problem, transitional justice advocates have argued that truth commissions and criminal tribunals play an important role in conveying messages or lessons about past violence that serve as the basis of a shared history, even where people continue to dispute factual and causal claims. Despite variation in the context and extent of the violence addressed by transitional justice institutions, they commonly seek to teach a similar set of lessons about past violence. For example, many transitional justice institutions now seek to convey the message that regardless of what caused atrocities or abuses to occur, both or all parties to the conflict committed abuses. Another message that many transitional justice institutions seek to convey is that individuals can and should be held responsible for systematic political violence. In contrast with the Habermasian goal of confronting and learning from the past, these historical lessons are framed in relation to the needs of the present: to legitimate transitional justice institutions and transitional regimes. Insofar as the historical lessons associated with transitional justice institutions function to avoid volatile conflict or contentious issues, they combine history and political myth in the spirit of Renan's claim that "[t]he essence of a nation is that all individuals have many things in common, and also that they have forgotten many things."⁵⁹

James Gibson has argued that the most important truth promoted by the TRC was that "both sides [in the struggle] did bad things."⁶⁰ Through public opinion polling in South Africa, Gibson found evidence that acceptance of TRC's messages was correlated with greater levels of interracial reconciliation among substantial proportions of the population.⁶¹ However, South Africa's TRC was able to focus on political violence committed by parties on both sides of the struggle because its mandate was designed to investigate crimes committed *in excess* of apartheid, rather than the violence of apartheid.⁶² Thus, the pursuit of a common basis for understanding past violence was in tension with the goal of countering denial regarding the implications of apartheid per se. International courts have also made strategic decisions designed to convey the message that all parties to the conflict are culpable. As Osiel observes, in international courts, "defendant selection . . . consistently seeks to broaden liability to kingpins of all culpable groups, irrespective of how small a group's contribution to total horrors."⁶³

59. Ernst Renan, *What is a Nation?* reprinted in *NATION AND NARRATION* 11 (Homi Bhabha ed., 1990).

60. GIBSON, *supra* note 46, at 162.

61. Gibson developed a measure of racial reconciliation using a series of indicators to evaluate levels of trust, comfort, and stereotyping of other racial groups. *Id.* at 166.

62. See Meister, *supra* note 8; Mahmood Mamdani, *Reconciliation without Justice*, 10 SOUTHERN REV. 22-25 (1996).

63. Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 COLUM. L. REV. 1751, 1814 (2005).

Another common argument for transitional justice is that "individualizing guilt" will minimize feelings of vengefulness, stereotyping, and reinforce respect for the law. On the role of ICTY in the Balkans, Payam Akhavan writes, "By telling the truth of what transpired in the former Yugoslavia and ascribing individual guilt to those responsible for manipulating ethnic tensions, the ICTY can counter the campaign of collective demonization instigated by political elites."⁶⁴ The idea of "individualizing guilt" is appealing in theory because it shifts attention away from the controversial terrain of explaining and responding to widespread involvement and participation in systematic violence. However, Akhavan's case for "individualizing guilt" rests on the premise that widespread participation in systematic political violence either is, or should be portrayed as, a product of elite manipulation of the masses. The question as to why large numbers of people became involved in systematic violence is deemphasized in this formulation. If criminal trials aimed to demonstrate how a large segment of society had participated in mass atrocities, writes Osiel, "then victims and the public at large would no longer be content to vent their rage on a small handful of now powerless individuals."⁶⁵ Thus, the goal of "individualizing guilt" is also in direct tension with the goal of countering denial regarding widespread complicity in systematic political violence. Fletcher and Weinstein take this point further, arguing that where "individualizing guilt" is successful, it offers individuals "the opportunity to rationalize or deny their own responsibility for crimes committed in their name."⁶⁶

One of the most common arguments made on behalf of transitional justice institutions is that they will end impunity, not only by holding leaders accountable, but also by conveying a message to the broader public that in the new regime, no one will be above the law.⁶⁷ However, transitional justice institutions are extraordinary, temporary, responses to past abuses, which places them in tension with core principles associated with rule of law.⁶⁸ The difficulty with arguments regarding the role of transitional justice in conveying a message about the dangers of impunity is that they tend to assume that the pragmatic compromises that narrow the scope and efficacy of transitional justice will not serve to undermine the intended symbolic message of their principled judgments. Yet lenient sentences, plea bargaining, and the refusal or inability to attain custody of key suspects can undermine

64. Akhavan, *supra* note 40.

65. Osiel, *The Banality of Good*, *supra* note 63, at 1811.

66. Laurel E. Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 HUM. RTS. Q. 573, 601 (2002). For a similar argument, see Mamdani, *supra* note 62.

67. Orentlicher, *supra* note 16.

68. Political transition itself poses dilemmas for rule of law. For an argument about the unique role of transitional justice in mediating these dilemmas, see TEITEL, *TRANSITIONAL JUSTICE*, *supra* note 10, at 11–26.

the message that international tribunals will serve as vehicles for ending impunity.

Finally, it is important to consider that the historical lessons favored by transitional justice institutions typically focus on local responsibility with little attention to the role of external intervention. One worrisome implication of this is that the phenomena of transitional justice may function to construct a revisionist history of Cold War era repression that portrays it as an entirely local affair, thereby contributing to denial regarding the role of Great Power interventions in local conflicts. The proliferation of truth commissions in the developing world has led to some critical debate and reflection on US Cold War policies. Some commentators have called for truth commissions to investigate various US actions.⁶⁹ However, as transitional justice institutions investigate atrocity and conflict in Central America, East Timor, and now Cambodia, there has been very little effort to consider US involvement in these conflicts.⁷⁰ In evaluating the role of transitional justice in establishing accountability, ending impunity, and countering denial, then, it is important to consider how these institutions also function to construct political myths, whether deliberately or inadvertently, that are in tension with the former set of goals.

B. Expanding Inclusive Dialogue, Transforming the Terms of Debate

Transitional justice investigations have also been championed as a way to promote reconciliation by fostering dialogue across lines of political and social conflict.⁷¹ South Africa's TRC suggested that it came closest to fulfilling its goals by "listening carefully to the complex motives and perspectives of all those involved," and by trying to "provide an environment in which all possible views could be considered and weighed, one against the other."⁷² Gutmann and Thompson argue that truth commissions can foster deliberative democracy by encouraging "accommodation to conflicting views that fall within the range of reasonable disagreement."⁷³ In their view, truth commis-

69. Reed Brody, *Justice: The First Casualty of Truth?*, NATION, 30 Apr. 2001, at 25; Andrew Valls, *A Truth Commission for the United States?* 7 INTERTEXTS 157, 25 (2003).

70. An exception is the report of Guatemala's truth commission, which evaluates US responsibility in relation to atrocities dealt with in the investigation, stating that US military assistance "had significant bearing on human rights violations during the armed confrontation," and that US anti-communism and the National Security Doctrine, were expressed in Guatemala as "anti-reformist, then anti-democratic policies, culminating in criminal counterinsurgency." GUATEMALAN COMMISSION FOR HISTORICAL CLARIFICATION, GUATEMALA MEMORY OF SILENCE: REPORT OF THE COMMISSION FOR HISTORICAL CLARIFICATION (1996), available at <http://shr.aaas.org/guatemala/ceh/report/english/toc.html>.

71. See OSIEL, MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW, *supra* note 15.

72. TRC REPORT 1998, *supra* note 37, at 113.

73. Gutmann & Thompson, *supra* note 45, at 41.

sions can "express respect for differing points of view without either endorsing them as clearly correct or rejecting them as clearly incorrect," leaving it to the participants and observers to determine what constitutes the "range of reasonable disagreement."⁷⁴ In this way, they suggest, truth commissions contribute to both democracy and reconciliation.

In theory, a non-judgmental truth commission may be in a better position to foster dialogue, yet this approach is in tension with one of the central activities of these institutions, which is to criminalize past political violence by labeling acts once considered legally or politically appropriate, "human rights violations." Advocates of transitional justice as a basis for inclusive dialogue may be suggesting that under the right conditions, dialogue among those who once condoned abuse and those who suffered from it will generate a common disdain for that abuse. Whether or not this is the case, the uncritical display of varying perspectives on past violence is unlikely to function as a neutral listening exercise and may function instead to legitimate the views of apologists for the old regime. Thus, the long term goal of utilizing transitional justice institutions to shift the terms of debate on past abuse is often in tension with the goal of facilitating inclusive dialogue in the immediate aftermath of transition.

Others have argued that truth commissions and criminal tribunals can foster a more inclusive democratic dialogue by providing official spaces for previously marginalized or silenced populations to share their stories.⁷⁵ Rachel Seider and Victoria Sanford have both argued that the Guatemalan Historical Clarification Process contributed to the political empowerment of marginalized groups.⁷⁶ In Guatemala, where changes at the elite level have been minimal, a "grassroots memory politics" emerged around the official work of the truth commission. Activities such as the exhumation of mass graves and construction of monuments have, according to Seider, contributed to the formation of transregional communities of survivors and "with the support of international observers, many rural Mayans have come to reject military domination and to demand their rights."⁷⁷ Where previously marginalized people are mobilized by transitional justice, this may expose the limitations of transitional compromises. For example, in South Africa, the Khulumani Support Group on Behalf of Victims and Survivors of Apartheid organized in response to the TRC and has been a vocal critic of the disappointing reparations process in South Africa. Khulumani also launched a civil suit, under the US Alien Tort Claims Act, against a number

74. *Id.*

75. See TRC REPORT 1998, *supra* note 37.

76. Seider, *supra* note 54; VICTORIA SANFORD, BURIED SECRETS: TRUTH AND HUMAN RIGHTS IN GUATEMALA (2003).

77. Seider, *supra* note 54, 187; see also IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 156 (Naomi Roht-Arriaza ed., 1995).

of corporations for complicity in the apartheid system.⁷⁸ The organization of victim groups may expand democratic debate and exert pressure for further reform in some cases, while in other cases it may have potentially violent repercussions. Mobilization around victim identities has historically been associated with extremism, rejection of compromise, and rationalization of brutality as self-defense.⁷⁹

Focusing on the stories of “official victims” has functioned as a way for transitional justice institutions to avoid potentially destabilizing challenges to transitional compromises. In South Africa, for example, those who did not view themselves as victims, but rather as unrepentant soldiers of a just struggle, did not view the TRC framework as appealing and the historical record developed by the TRC did little to incorporate their stories. Truth commissions also define the very category of victimhood in ways that are designed to avoid destabilizing conflict.⁸⁰ In South Africa, the TRC investigations addressed only victims of “gross violations of human rights,” which did not include abuses that were legal under apartheid, such as forced removals, but only extreme forms of physical abuse.⁸¹ In Chile, truth commission investigations addressed only murdered victims and did not document the vast number of torture cases.⁸² In assessing the role of transitional justice institutions in providing opportunities for previously marginalized people to speak, it is important to consider how they also function to circumscribe spaces for dialogue and testimony.

C. Establishing Closure, Committing to Remembrance

It is commonly argued that transitional justice investigations promote reconciliation by addressing volatile emotions resulting from past violence. Antonio Cassesse, the first ICTY president, has argued that trials are the only “civilized alternative . . . to revenge” and that without justice, “feelings of hatred and resentment seething below the surface will, sooner or later, erupt and lead to renewed violence.”⁸³ G. Jonathan Bass argues that “if the international community does not punish war criminals, then in many cases

78. *Khumani v. Barclay Nat. Bank Ltd.*, 2007 WL 2985101 (C.A.2 N.Y., 2007).

79. Mendeloff, *supra* note 44. For an analysis of victimhood in US conceptions of transitional justice, see Meister, *supra* note 8.

80. Martha Minow, *The Hope for Healing: What Can Truth Commissions Do?*, in *TRUTH V. JUSTICE*, *supra* note 45. See also Fiona Ross, *BEARING WITNESS: WOMEN AND THE TRUTH AND RECONCILIATION COMMISSION IN SOUTH AFRICA* (2003) on the testimony of women before South Africa's TRC.

81. TRC REPORT 1998, *supra* note 37, at 70–71, 64.

82. Hayner, *supra* note 27, at 303.

83. Quoted in PAUL R. WILLIAMS & MICHAEL P. SCHARF, *PEACE WITH JUSTICE? WAR CRIMES AND ACCOUNTABILITY IN THE FORMER YUGOSLAVIA* 21 (2002).

victims will be tempted to take justice into their own hands."⁸⁴ According to Kenneth Roth, executive director of Human Rights Watch, this has been a dominant cause of violence in Haiti. "Frustrated by their inability to bring persecutors before a court of law," he argues, "many Haitians took matters into their own hands."⁸⁵ Claims regarding the role of transitional justice in healing individuals, communities, and nations, continue to serve as "articles of faith" for transitional justice policy.⁸⁶

In many cases, however, transitional prosecutions have been ineffective as a response to vengeful or volatile emotions. For example, substantial reprisal killings have taken place in Kosovo and Rwanda since the creation of the ICTY and the ICTR. One problem is that the goal of individual healing is often in tension with other transitional justice goals. The pursuit of individual accountability in the context of a criminal tribunal requires adherence to due process guarantees, which means that justice is slow and that those who are guilty may be released on a technicality. Yet as Jon Elster has observed, the demand for reprisals is historically strongest in the immediate aftermath of abuses and fades over time.⁸⁷ The slow pace of criminal proceedings may inevitably limit their role in addressing cycles of revenge.⁸⁸ Based on interviews with eighty-seven ICTY witnesses, Eric Stover finds that those who testified at the tribunal did not generally do so out of a desire for revenge, but that the experience actually seemed to exacerbate painful or volatile emotions associated with past violence. Victims and survivors have commonly perceived the sentences as too lenient and they have been frustrated to see sentences overturned on appeal.⁸⁹

Some have proposed that truth commissions may do better than trials at addressing trauma, anger, or fear.⁹⁰ Restorative justice has combined ideals associated with therapeutic healing and the traditional use of informal justice as a tool for mediating conflict. South Africa's TRC developed this therapeutic conception of its mission by hiring "briefers," who were specially trained in mental health, to provide assistance to victims who appeared at

84. Bass, *supra* note 13, at 305.

85. Kenneth Roth, *Human Rights in the Haitian Transition to Democracy*, in *HUMAN RIGHTS IN POLITICAL TRANSITIONS*, *supra* note 45, at 95.

86. For a discussion of "articles of faith" in transitional justice policy, see Michael Ignatieff, *Articles of Faith*, 5 *INDEX ON CENSORSHIP* 110 (1996).

87. Elster, *supra* note 11, at 223.

88. Mendeloff, *supra* note 44.

89. ERIC STOVER, *THE WITNESSES: WAR CRIMES AND THE PROMISE OF JUSTICE IN THE HAGUE* 76, 105–09 (2005); See also Peskin, *supra* note 33.

90. See Zalaquett, *supra* note 15; MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1998); Albie Sachs, Judge of the Constitutional Court of S. Afr., Fourth DT Lakdawala Memorial Lecture, Institute of Social Sciences, Nehru Memorial Museum and Library Auditorium, New Delhi, India (Dec. 18, 1998); TERESA GODWIN PHELPS, *SHATTERED VOICES: LANGUAGE, VIOLENCE, AND THE WORK OF TRUTH COMMISSIONS* (2004).

public hearings. Early enthusiasm for the healing potential of truth commissions was connected to the view that human rights advocates, in their drive to promote prosecution, had neglected the needs of those damaged by past abuses. The subsequent attention to the psychological dimension and the needs of affected populations is a welcome development.⁹¹ However, a number of studies call into question the role of truth commissions in healing traumatized individuals. As in the case of criminal tribunals, the role of truth commissions in addressing individual trauma changes over time and cannot be divorced from the context of political and social conflict.

David Backer, who conducted a systematic survey of participant experiences at South Africa's TRC, found that victims in general were "reasonably satisfied" with their engagement with the truth commission, but that many had experienced the process as an "emotional roller coaster" with initial feelings of relief followed by anguish, confusion, and frustration.⁹² The role of truth commissions in contributing to individual healing can also conflict with their efforts to address community and social divisions. Backer reports that some victims felt "stigmatized as a result of [their] public exposure" through the TRC process and a few describe having been "shunned by their community after they appeared" at public hearings.⁹³ Rosalind Shaw's ethnographic study of local responses to Sierra Leone's TRC finds that the concept of healing through truth resonated in powerful ways with certain very vocal constituencies, but was starkly at odds with dominant local strategies for reintegrating ex-combatants through "social forgetting."⁹⁴ Another study conducted in Sierra Leone concluded that the reconciliation rituals associated with the truth commission did have a powerful cathartic impact on communities, but that this effect was not a result of success in getting at the truth. Rather, the process of confession functioned as an elaborate prelude for the closing ritual.⁹⁵

Claims regarding aggregate individual responses to truth commissions do not translate into conclusions regarding the political implications of these institutions. However, transitional justice officials and advocates often explain

91. For an analysis of the relationship between trauma and transitional justice, see IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE, *supra* note 77, at 19–20; Helena Cobban, *The Legacies of Collective Violence*, BOSTON REVIEW (2002); IMAGINE COEXISTENCE: RESTORING HUMANITY AFTER VIOLENT ETHNIC CONFLICT (Antonia Chayes & Martha Minow eds., 2003); MY NEIGHBOR, MY ENEMY, *supra* note 58.

92. David Backer, *Exit, Voice & Loyalty in Transitional Justice Processes: Evidence on Victims' Responses to South Africa's Truth and Reconciliation Commission*, paper presented at the annual conference of the American Political Science Association, Chicago, IL 16 (2004).

93. *Id.* at 18.

94. ROSALIND SHAW, INSTITUTE OF PEACE RETHINKING TRUTH AND RECONCILIATION COMMISSIONS: LESSONS FROM SIERRA LEONE 130 (Special Report Feb. 2005).

95. Tim Kelsall, *Truth, Lies, Ritual: Preliminary Reflections on the Truth and Reconciliation Commission in Sierra Leone*, 27 HUM. RTS. Q. 361 (2005).

the connection between individual healing and political reconciliation by way of metaphor, suggesting that by facilitating a public “working through” of the past, these institutions will contribute to a national “healing process.”⁹⁶ As Vanessa Pupavac has argued, this analogy “proposes emotional adjustment for societies, rather than material advancement of their circumstances.”⁹⁷ When individual healing is used as a metaphor for national healing, this implies a pre-existing body politic or a single collective psyche with shared wounds and experiences.⁹⁸ As a general way of framing the process of transitional justice, then, the concept of a “national healing process” is consistent with the goal of stabilizing transitional compromises, but in tension with the goal of countering denial and analyzing the legacy of political violence.

The focus on establishing “closure” at a national level is also in tension with the moral commitment to remembrance that has been associated with transitional justice. Theodor Adorno analyzed this tension in a 1959 speech entitled, “What does ‘Coming to Terms with the Past’ Mean?”⁹⁹ In the speech, Adorno argued that the German process of “coming to terms” with the past was functioning as a way to guard against the moral implications of remembrance by treating painful memories as part of a “guilt complex.”¹⁰⁰ Adorno observed that talking about the past is not necessarily an indication that people are confronting issues of accountability and rather may serve the opposite purpose. Healing is currently cited as one of the most prominent rationales for transitional justice institutions. This analysis suggests that in evaluating the role of transitional justice it will be important to take into account the ways in which a therapeutic framework for addressing political violence conflicts with other goals associated with transitional justice.

IV. CONCLUSION: THE POLITICAL DYNAMICS OF TRANSITIONAL JUSTICE

In recent years, transitional justice advocates have worked to develop principles of “best practices” to guide the development of transitional justice

96. See ALEX BORAINÉ & JANET LEVY, *THE HEALING OF A NATION? CAPE TOWN: JUSTICE IN TRANSITION* (1995).

97. Vanessa Pupavac, *International Therapeutic Peace and Justice in Bosnia*, 13 SOC. LEGAL STUD. 377, 385 (2004); See also ANDREW RIGBY, *JUSTICE AND RECONCILIATION: AFTER THE VIOLENCE* (2001).

98. See Ignatieff, *Articles of Faith*, *supra* note 86; Kenneth Roth & Alison Des Forges, *Justice or Therapy?*, BOSTON REV. (2002), available at <http://www.bostonreview.net/BR27.3/rothdesForges.html>.

99. Theodor W. Adorno, *What Does Coming to Terms with the Past Mean?*, in BITBURG IN MORAL AND POLITICAL PERSPECTIVE 114 (Timothy Bahti & Geoffrey Hartman trans., Geoffrey Hartman ed., 1986).

100. *Id.* at 116.

approaches. At the same time, there has been a greater recognition of the idea that if transitional justice institutions are to advance political reconciliation, they must be responsive to local context, traditions, and political dynamics. A 2004 report by the Secretary General of the United Nations, entitled "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies" stresses this point, adding that transitional justice policies are political questions, rather than merely technical decisions.¹⁰¹ Understanding how transitional justice approaches can evolve in ways that are responsive to local political context means recognizing that transitions are defined by disputes over the values, practices, and memories that will define the "local" or "national." As interventions in this context, transitional justice institutions generally have a conflicting set of aspirations: they seek to respond to local practices in order to be perceived as legitimate, yet they also seek to challenge and transform the basis of political legitimacy by rejecting traditions and practices implicated in systematic political violence.

This article has argued that understanding the tension between these goals helps to shed light on some of the problematic assumptions and unacknowledged trade-offs in the design of transitional justice institutions and strategies of advocates. One problem with the "transition paradigm" adopted by the U.S. government in the mid-1980s, according to Thomas Carothers, was the view that initial "breakthroughs" would lead to the progressive implementation of democracy.¹⁰² Transitional justice institutions and advocates have typically adopted a similar logic in relation to the goal of reconciliation, formulating the goal of reconciliation in ways that conflate political compromise with political consensus, and political stability with political community. Failure to distinguish among these goals contributes to the assumption that the influence of transitional justice will be progressive and linear. This assumption has reinforced the questionable view that if transitional justice investigations are initially controversial or volatile, this will undermine the transition altogether.¹⁰³ Similarly, the assumption of a linear, progressive transitional path has informed the view that if transitional justice institutions succeed in reinforcing approval of compromises and negotiations that frame political change, they will also contribute to the long term goal of cultivating political community based on principles of human rights and rule of law.

101. The Secretary General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, *supra* note 32, at 8.

102. Thomas Carothers, *The End of the Transition Paradigm*, 13 J. DEMOCRACY 5, 7 (2002).

103. In a study of eleven civil conflicts, Long and Brecke concluded that even where "truth-telling" processes could threaten stability in the short term by countering denial, they still contributed to long term goals associated with reconciliation. WILLIAM J. LONG & PETER BRECKE, *WAR AND RECONCILIATION: REASON AND EMOTION IN CONFLICT RESOLUTION* (2003).

Instead, as Sriram has observed, “transitional situations . . . are *dynamic*,” and transitional compromises are better understood as serving “interim purposes”, rather than permanent goals.¹⁰⁴ Understanding transitional justice as dynamic also means thinking about how the short term compromises associated with stability are in tension with the long term aspirations that have been associated with reconciliation as community-building. Where transitional justice institutions seek to avoid destabilizing compromise or to establish legitimating political myths, these achievements are often in tension with their efforts to challenge denial and expose the extent of complicity. Where reconciliation is identified with the goal of treating the symptoms of political violence and establishing “closure,” this has been in tension with the goal of analyzing cause responsibility, promoting ongoing political reform, and a moral commitment to ongoing remembrance.

As scholars and political leaders evaluate the political role of transitional justice institutions, it will be important to consider how they negotiate these tensions in the short term. It will also be important to devote more attention to the way in which the role of transitional justice changes over time. Arguments about the role of truth commissions and war crimes tribunals are often based on the official actions and short term impact of these institutions. This is especially common with regard to claims about their role in promoting “healing.” In thinking about the long term role of transitional justice, more attention should be given to questions such as how people mobilize in response to these institutions, how historical records are made available to the public, and how the transitional justice process is revised over time.

Most importantly, this analysis suggests that transitional justice institutions function in ways that are more complex than either human rights advocates or their critics typically acknowledge. It is possible for transitional justice institutions to establish accountability, promote remembrance, and challenge denial, yet at the same time advance political myths that obfuscate responsibility, distort the legacy of political violence, and encourage people to forget potentially volatile issues. In other contexts transitional justice institutions may function primarily as tools for legitimization of state power, yet also open avenues for widening accountability, dialogue, and ongoing political reform over the long term. Understanding the role of individual transitional justice institutions, as well as the significance of expanding transitional justice advocacy, means moving beyond the poles of earnest idealism and savvy cynicism that have traditionally divided branches of transitional justice scholarship to examine the political dynamics associated with their irreconcilable goals.

104. SRIRAM, CONFRONTING PAST HUMAN RIGHTS VIOLATIONS, *supra* note 28, at 203.