THEORETICAL AND INTERNATIONAL FRAMEWORKS

TRANSITIONAL JUSTICE IN A NEW ERA

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INTRODUCTION

This Essay offers an evaluation of the status of transitional justice at the wake of the new century and millennium.[1] Transitional justice refers to the view of justice associated with periods of political change,[2] as reflected in the phenomenology of primarily legal responses that deal with the wrongdoing of repressive predecessor regimes.[3] In the wave of post-Cold War transitions and political fragmentation, the phenomenon of transitional justice has accelerated, and appears to have become a permanent feature of our political universe.

This Essay analyzes the evolution and direction of transitional justice in the new era and makes three observations about the current directions in transitional justice developments.

Part I contends that while transitional justice is associated with a universal rights discourse, in recent decades of heightened transition, the conception of transitional justice has been closely associated with diverse Nation-building projects and related local understandings of the rule of law and legitimacy. These local conceptions, while eliding the problems of extending abstract ideas of justice, run the risk of missing the

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1. For a comprehensive analysis of the idea of transitional justice as a consideration of justice in periods of radical political change, *see* RUTI G. TEITEL, TRANSITIONAL JUSTICE (2000) [hereinafter TRANSITIONAL JUSTICE].

2. *See* GUILLERMO O'DONNELL & PHILIPPE C. SCHMITTER, TRANSITIONS FROM AUTHORITARIAN RULE: TENTATIVE CONCLUSIONS ABOUT UNCERTAIN DEMOCRACIES 6 (1986) (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., 1995) [hereinafter EMERGING DEMOCRACIES AND FORMER REGIMES]. For a discussion of non-juridical responses *see infra* Part III.

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broader power politics associated with post-Cold War globalizing transformations. The current forms of transitional justice alternate between the local and the supranational — a core tension associated with contemporary global politics.

Part II addresses the ways contemporary transitional justice reflects its association with a globalizing politics. The persistence of transitional justice, despite the new century and the passage of time, is often associated with a largely backward-looking politics. In a globalizing politics, this feature reflects a historical view of justice, rather than a broader structural reform project. Transitional justice also leads away from establishing more permanent rule of law processes and institutions, and even from law altogether, to other societal responses.

Part III addresses how the contemporary persistence and expansion of transitional justice reflect the apparent normalization of law in a period of post-conflict, despite supposed peacetime. It contends that at the end of the twentieth century, transitional justice plays a crucial role in constructing an identity politics suitable for new Nation-building. At the wake of the twenty-first century, a "steady State" phase of transitional justice is emerging — an acceleration of the phenomena of justice-seeking that is apparently associated with globalizing politics, which have tended toward conditions of heightened political instability and violence.[4] Present conditions of persistent conflict contribute to laying the foundation for a normalized law of violence. Therefore, in its most contemporary phase, the post-conflict dimension of transitional justice is moving from the exception to the norm, to becoming a paradigm of the rule of law for our time. At present, transitional jurisprudence has contributed to the normalization of an expanded humanitarian discourse. While the phenomenon has constructed a legal regime associated with pervasive conflict, it has also contributed to laying the foundation for the emerging law of terrorism. This Essay contends that this development will have complex consequences. It offers a discourse of the global rule of law apt to comprehend post-nationalist politics, yet, also, lacking in legitimacy in its derogations from peacetime liberal rule of law.

4. *See infra* nn.27-39 and accompanying text.

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I. *TRANSITIONAL JUSTICE AND THE POLITICS OF POST-COLD WAR NATION-BUILDING*

The last two decades of the twentieth century have constituted a veritable wave of political transition.[5] Post-1989, there has been a wave of democratic transitions, modernization, and transitional justice. Communism's collapse, the end of a bipolar balance of power, and the proliferation of political democratization and modernization ushered in a wave of liberalization across many regions.[6] Conflicts in East Europe, Latin America, Asia, and Africa had, to some degree, been supported by the-then prevailing United States/Soviet bipolarism.[7] These transitions, however, would not bring an end to such conflict. To the contrary, the contemporary post-Cold War period has become associated with pervasive conflicts comprised of small-scale civil wars.[8]

In the period of transition following the end of the Cold War, modernization and the rule of law were characteristic of the Nation State, and were used to legitimate the successor regime and its Nation-building project. Nevertheless, as subsequent political developments show, such abstract justice has ultimately had limited relevance to political contexts of varying sovereignty, which are characteristic of globalizing politics.[9] In these peculiar political conditions, the dilemmas at stake complicated post-Cold War transitional justice.

Many of the new States were fragile and lapsed into conflict

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5. Other works refer to this development as the "third wave" of transition. *See* SAMUEL HUNTINGTON, THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY (1991). Huntington focuses his analysis on the first part of phase two, as it is characterized in this Essay.

6. Earlier transitions include those in South America's Southern Cone in the late 1970's, e.g., in Argentina.

7. For a review of this third wave of transition, *see generally* HUNTINGTON, *supra* n.5. *See also* LARS SCHOULTZ, NATIONAL SECURITY AND UNITED STATES POLICY TOWARDS LATIN AMERICA (1987) (discussing geopolitics and human rights regarding U.S. policy in Central America).

8. Small-scale civil wars have become increasingly prevalent after the events of September 11, 2001. *See generally* AHMED RASHID, JIHAD: THE RISE OF MILITANT ISLAM IN CENTRAL ASIA (2002); Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U. L.J. 293 (2002).

9. *See* TRANSITIONAL JUSTICE, *supra* n.1, at 36-39 (discussing the criminal policies of various post-Soviet successor regimes toward their Cold War Communist counterparts, and the emergence of international law standards as an alternative to individual State tribunals).

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that required international supervision.[10] In the Balkans, for example, the contemporary wave of democratization was often associated with very limited constitutional stability. By the end of the twentieth century, global politics saw an acceleration in conflict management and resolution, and a persistent justice-seeking discourse. Whereas at the commencement of the human rights revolution, the framing of the problem of transitional justice tended towards universalizing human rights, this justice policy appeared to be somehow abstracted from the interests and needs of the societies of the time. By contrast, in its more contemporary applications, the post-Cold War transitions have adopted strategies that devolved upon diverse ideas of the rule of law. These strategies adhered to the varying understandings of the legitimacy of institutions involved in processes of Nation-building in the local context.

In its post-Cold War phase, transitional justice goes beyond its historical post-World War II human rights definition.[11] Transitional justice frames the dilemmas that it tries to address in terms other than sanctioning a regime, to include other diverse values of the rule of law, and to involve the community that had hitherto been left out of the transitional justice project. This move away from judgment reflects a demonstrable shift in transitional justice that is associated with the more complex and diversely felt necessities of State-building in contemporary political circumstances. Whereas, in theory, transitional justice appeared to assume its potentially limitless universal extension into the law,[12] in its late twentieth-century applications, the responses are concededly more contextual, limited, and provisional.[13] The practices of transitional justice that emerge at this time are closely associated with the rise of State-building.[14] Post-Cold War

10. An example of one such conflict requiring international supervision may be seen in the Balkans. One of the first responses to it was juridical. *See infra* n.37 and accompanying text for discussion of the Statute of the International Criminal Tribunal for the Former Yugoslavia.

11. Regarding the mid-century history of human rights, *see* Louis Henkin, *International Law: Politics, Values and Functions*, *in* 4 COLLECTED COURSES OF THE HAGUE LAW ACADEMY OF INTERNATIONAL LAW 209-26 (1989).

12. There are manifestations of this in the movement advocating universality jurisdiction.

13. For illustrations, *see* TRANSITIONAL JUSTICE, *supra* n.1, at 213-28.

14. There are isolated exceptions in the turn to international justice regarding the conflicts in the Balkans and in Rwanda. *See infra* n.37 and accompanying text.

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transitional justice tends to use flexible understandings of the rule of law that are tied to a particular local community's political conditions.[15]

Nevertheless, the form of this transitional rule of law is thin. In weak fledgling democracies, which are characteristic of transition periods, the administration of law, and particularly criminal justice, poses difficult dilemmas to the rule of law. The relevant values in the balance in these political conditions are hardly those of the ideal rule of law, and there are often fundamental contradictions to the ordinary uses of the law.[16] Where the aim is to advance legitimacy in periods of political flux, pragmatic principles guide the policy of justice and adherence to the rule of law. The transitional jurisprudence of the time reflects a conception of imperfect and partial justice, as well as a politicized rule of law.

Post-Cold War transitional justice has been largely concerned with advancing a conception of the rule of law that is associated with the legitimacy of a country's local juridical and political conditions. The narrowing of the relevant scope of inquiry of what is otherwise an apparently boundless problem of justice, underscores the diverse politics of transitional justice. Contemporary responses have implicated local actors over international actors, as well as those in the lower echelons of power. These responses, furthermore, often depend on alternative values underlying the rule of law, besides universal rights and accountability.

Post-Cold War transitional justice eschews the aim of international accountability in favor of more contextual conceptions of the rule of law. At this time, transitional justice shifts from processes that are dependent upon the leading role of the State, to the processes that often elide it. Comparative review reveals highly divergent approaches to the rule of law, reflecting varying legal and other cultural differences. These practices reflect hy-

15. *See infra* nn.17-19 and accompanying text.

16. *See* TRANSITIONAL JUSTICE, *supra* n.1, at 36-39, 46-51. *See also* Ruti G. Teitel, *Persecution and Inquisition: A Case Study, in* TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY (Irwin P. Stotsky ed., 1993). *See* United States Institute of Peace Report re: Rwanda on the state of the Rwandan judicial system as the basis for Security Council Resolution (on file with author). *See* William A. Schabas, *Justice, Democracy and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problems*, 7 CRIM. L.F. 523, 537, 551 (1996) (citing S.C. Res. 955, U.N. SCOR, 49th Sess., 1994 S.C. Res. & Dec. at 15, U.N. Doc. S/Inf/50 (1994)).

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bridized approaches concerning legal and societal approaches to violence. This development in the direction of the devolution of State power reflects the broader political conditions associated with the post-Cold War end-of-century globalization processes.

Whereas, at first, the aims of transitional justice were the ambitious goals of establishing the rule of law and democracy, in the last decade, its aims are concededly more modest, primarily focusing on maintaining peace and stability.[17] In societies that are in political transition, a variety of conciliatory mechanisms emerged with the express aim of stabilizing those societies' internal political situations.[18] In contrast with mid-century post-war justice, these transitional processes tend to include, rather than exclude, the various political actors involved in the conflict. The commitment is to producing a joint accounting of a past conflict that would be acceptable to all, so as to offer a basis for a stable transition. One might understand this to be a preservative form of justice, which concededly sacrifices the aims of ideal justice for the more limited ones of assuring peace and stability.[19] Post-Cold War transitional policy reflects a highly limited politics intended, for the most part, less at democracy-building, than at the threshold aims of peace and stability. While as a normative matter, there may well be an expected reliance on peace as a predicate to the advancement of the rule of law and democracy, it is not evident that peacemaking alone, when it takes the form of short-term approaches to conflict management, necessarily furthers the rule of law.[20] This reflects the limited commitment of the post-Cold War agenda to the rule of law.

The commitment of contemporary transitional justice to the aim of adherence to a modicum of order reflects the apparent constraints upon political sovereignty associated with the trends of globalizing political fragmentation, and other limited political conditions. While its aims are concededly modest, the emergent

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17. *See* Ruti G. Teitel, *Bringing the Messiah Through the Law*, *in* HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA 177-93 (Robert Post & Carla A. Hesse eds., 1999) [hereinafter *Bringing the Messiah Through the Law*].

18. For a discussion of truth and reconciliation commissions, *see generally* PRISCILLA HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITIES (2001).

19. *See* TRANSITIONAL JUSTICE, *supra* n.1, at 51.

20. For related arguments, *see Introduction*, *in* HUMAN RIGHTS IN TRANSITION: GETTYSBURG TO BOSNIA, *supra* n.17, at 13-31. *See also* Ruti G. Teitel, *Millennial Visions: Human Rights at Century's End*, *in* HUMAN RIGHTS IN TRANSITION: GETTYSBURG TO BOSNIA, *supra* n.17, at 339-43; TRANSITIONAL JUSTICE, *supra* n.1, at 339-42.

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discourse has nevertheless contributed to the expansion of transitional justice, with implications for its prospective normalization, as discussed in Part III.

II. *TRANSITIONAL JUSTICE AND THE POLITICS OF GLOBALIZATION*

Important normative questions arise in the interaction of transitional justice and globalization. At what level should the relevant decision-making regarding transitional justice occur? The move towards local and even privatized justice associated with the State-building discussed above is in tension with the potential for a broader conception of justice associated with transnational politics. Ultimately, the local focus of post-Cold War transitional justice offers a partial perspective on the consequences of the broader global conflict.

The current evolution of the transitional justice discourse, as it is associated with globalizing politics, implies a complex interaction of the international, national, and local. In the present dynamic political context, multiple alternative forms of transitional justice emerge, involving a range of international, transnational, national, and private settlements. Further, there has also been a distinct privatization of the transitional response, involving devolution to new political actors, juridical and alternative,[21] such as civil society — including churches, human rights groups, and other transitional non-State actors — to its relegation to private parties, whether through litigation or other alternative strategies.[22] These processes related to globalization, at least in part, reveal the interconnectedness of the present political decision-making, and the marked lack of guiding normative principles. Thus, actions relating to transitional justice have increasingly been taken independently of the State, often destabilizing ear-

21. On the growing role of transnational networks, *see* Martha Finnemore & Kathryn Sikkink, *International Norms Dynamic and Political Change*, 52(4) INT'L ORG. 887, 907 (Peter Gourevitch & David A. Lake eds., 1998). *See also* MARGARETH KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS (1998).

22. An example of an alternative strategy is the contemporary proliferation of lawsuits against multinational corporations. *See generally Developments in the Law*, 114 HARV. L. REV. 1957 (2001); STATE RESPONSIBILITY AND THE INDIVIDUAL: REPARATIONS IN INSTANCES OF GRAVE VIOLATIONS OF HUMAN RIGHTS (Albrecht Randelzhofer & Christian Tomuschat eds., 1999) (discussing the problem of the relationship between State and individual responsibility); Guillermo O'Donnell, *Democracy, Law, and Comparative Politics*, *in* 36(1) STUD. IN COMP. INT'L DEV. 736 (2001) (on file with author).

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lier determinations. This phenomenon is illustrated in the high-profile extradition case of General Augusto Pinochet.[23] The international response to this case exceeds, by far, its individual merits, and underscores the broader significance of universality jurisdiction in the current transformation of juridical sovereignty and globalization.[24]

This phenomenon is likely to accelerate.[25] In a world that is increasingly economically, technologically, and politically interdependent, profound questions arise at the intersection of the principles of jurisdiction and sovereignty. The problems of transitional justice discussed here resonate more generally as to the direction of the rule of law in globalization politics — i.e., how to shape projects pertaining to law reform and justice in light of the growing international interconnectedness and interdependence. Given these forces, the normative question is whether it is best to move in the direction of decentralization of juridical power and accommodation of outside forces to local structures, or, instead, to centralize authority and judicial power.[26]

There are other problematic consequences in the interaction of transitional justice and globalization. To the extent that transitional responses have, for the most part, been limited and localized, they have tended to miss the broader dimensions associated with the bipolar power relations of the last decades, as well as with economic and political globalization. Contemporary transitional justice is being renegotiated at the same time as debates are being waged on globalization-related economic reforms. The coincidence of these developments makes the increase in the disparities associated with the free market economy readily apparent,[27] even as there has been an increasing resort to

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23. *See* Regina v. Bow Street Metropolitan Stipendiary Magistrate *ex parte* Pinochet Ugarte, [1998] 3 W.L.R. 1456 (H.L. 1998), *reprinted in* 37 I.L.M. 1302 (1998); *Ex parte* Pinochet Ugarte (No. 3), [2000] 1 A.C. 147 (discussing State immunity/retroactive effect of Extradition Act 1989).

24. *See generally* PRINCETON PROJECT ON UNIVERSAL JURISDICTION OF THE PROGRAM IN LAW AND PUBLIC AFFAIRS OF PRINCETON UNIVERSITY'S WOODROW WILSON SCHOOL OF PUBLIC AND INTERNATIONAL AFFAIRS, PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION (2001), *available at* http://www.princeton.edu.

25. *See infra* nn. 31-40.

26. *See generally* JOSEPH STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS (2002). For a discussion of the effect of globalization on the third world, *see* Tina Rosenberg, *Globalization*, N.Y. TIMES, Aug. 18, 2002, at 28.

27. For a discussion of current tensions in the globalization of the market, *see generally* STIGLITZ, *supra* n.26.

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transitional justice discourse.[28] Whatever reform transitional justice-seeking implies, it is limited and determinate, and couches the economic question in terms of human restitution for known past losses.

Post-Cold War transitional justice has, in large part, displaced broader reform projects, and appears to represent a move away from progressive politics. The direction in the recent decade is one of compromise and resignation. Weak and failed States accept the difficulties of extensive political and institutional change and turn, instead, to alternative management strategies, such as religion and medicine, as ways of treating the effects of past violence.[29] This orientation is also seen in the persistent emphasis in transitional justice on a historical, rather than prospective, orientation of society — on the emphasis on preservation and record-keeping, which put off robust reforms for the future.[30] The direction also reflects the diminished expectations of law and politics, associating post-Cold War transitional justice with a globalizing politics.

III. *TRANSITIONAL JUSTICE AND THE POLITICS OF THE SECURITY STATE*

Finally, the turn of the century and the new millennium are associated with the expansion and normalization of transitional justice. Post-Cold War transitions have given way, almost imperceptibly, to political fragmentation, weak States, civil wars, terrorism, and the perception of a fairly constant state of conflict.[31] The greater present potential for exposure of the civilian population gives the sense of heightened conflict, and at least adds to the significance of the attendant response. At present, the phenomena historically associated with extraordinary political con-

28. For a discussion of some of the contradictions, *see* Robert Meister, The Politics and Political Uses of Human Rights Discourse: A Conference on Rethinking Human Rights (Paper presented at a Columbia University Conference, Nov. 8-9, 2001) (on file with author).

29. For an insightful discussion of psychological strategies as ways of treating the effects of past violence, *see generally* MARTHA MINOW, BETWEEN FORGIVENESS AND VENGEANCE: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE (1998).

30. *See* HAYNER, *supra* n.18, at 17, 133-69.

31. For a more comprehensive discussion of law and politics in the political context of the post-September 11, 2001 world, *see generally* Ruti G. Teitel, *Humanity's Law: Rule of Law for the New Global Politics*, 35 CORNELL INT'L L.J. 355 (2002) [hereinafter *Humanity's Law*].

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ditions have increasingly become a reflection of cycles of apparently perpetual conflict and post-conflict circumstances. Transitional justice has a close relationship to these present political circumstances, where the discourse is directed at preserving a minimalist rule of law associated with the preservation of a threshold order in conditions of heightened political violence.

Contemporary political developments have spurred the normalization of the transitional rule of law, the integration and regularization of transitional institutions and processes. The evolution of a steady-State transitional justice is evident in the present deployment of the "humanitarian" regime, the old law of war, which, in the contemporary moment, has expanded and merged with the law of human rights.[32] Ultimately, this development is problematic, because the jurisprudence associated with political flux is, by its character, associated with a higher degree of politicization and irregularity than would ordinarily be acceptable in liberal democracies.

Overall, there is a clear increase in the discourse of transitional justice, seen in particular in the form of post- conflict law, the rise of humanitarian law, and the return to international judgment, reflected in the creation of international tribunals,[33] as well as in the spread of universal jurisdiction.[34] A post-conflict legalist discourse is now diffusing worldwide.[35] A vivid illustration of the normalization of transitional jurisprudence is seen in the expansion of international criminal justice represented by the International Criminal Court ("ICC"), the new international institution established at the end of the twentieth century,[36] and preceded by the *ad hoc* international criminal tribunals convened to respond to genocidal conflicts in the Balkans and

32. For a discussion of this development *see id.*

33. *See* Leila Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381 (2000) (discussing the prospective role of the International Criminal Court ("ICC") and its likely interaction with domestic transitional justice). *See also* Gwen Young, *Amnesty and Accountability*, 35 U.C. DAVIS L. REV. 427 (2002)

34. *See* Richard J. Wilson, *Prosecuting Pinochet: International Crimes in Spanish Domestic Law*, 21 HUM. RTS. Q. 927 (1999) (discussing implications of universality).

35. *See generally Humanity's Law*, *supra* n.31 (elaborating on this current development).

36. Rome Statute of the International Criminal Court, U.N. Doc. No. A/CONF.183/9* (1998), art. 126, *available at* http://www.un.org/law/icc/statutw/romefra.htm [hereinafter Rome Statute].

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Rwanda.[37] The ICC can be understood to symbolize the entrenchment of the exceptional Nuremberg Nazi War Crime Tribunals as a model for the creation of a standing international war crimes tribunal to prosecute war crimes under the international law of conflict.[38] The establishment of the ICC, based on the expanded humanitarian regime, is also a sign of the normalization of post-conflict law as the global rule of law.[39] International humanitarian law, as applied by the ICC, allows a form of regime accountability, even where it may be elided within the State.[40] Nevertheless, these developments do not necessarily represent an overall advancement in international rule of law, as its effects are more complicated.

The present normalization of transitional justice seen in the application of conflict-related law in relative peacetime, as well as of international, over national justice, occasions a number of dilemmas clearly reflected in present foreign policymaking. These phenomena have been alluded to above, particularly with regard to expanding the continuum of choices in transitional justice, which are available as a result of the interdependencies associated with global politics. The use of the expanded humanitarian rights scheme as a basis for intervention, and the problematizing of war and aggression, cause new and ever-changing transitional justice dilemmas to come to the surface, and throw into balance the aims of justice and peace. The transitional rule of law debates set the stage for this sort of balancing of critical values of the rule of law. These contradictory tensions

37. *See* Statute of 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, *annexed to* Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, U.N. Doc. S/25704/Annexes (1993); Statute of International Criminal Tribunal for the Former Yugoslavia, U.N. Security Council Res. 827, U.N. SCOR, 48th Sess. Annex, 3217th mtg., U.N. Doc. S/RES/827 (1993), *amended by* U.N. Security Council Res. 1166, U.N. SCOR, Annex, U.N. Doc. S/RES/1166 (1998); Statute of International Tribunal for Rwanda, U.N. Security Council Res. 955, 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 a discussion of the expectations of the *ad hoc* international criminal tribunals, *see Bringing the Messiah in Through the Law*, *supra* n.17, at 177-93. *See also* Jose Alvarez, *Crimes of State/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 379-85 (1999) (discussing the limits on international tribunals).

38. *See* Rome Statute *supra* n.36, pmbl.

39. *See* Rome Statute *supra* n.36.

40. *See supra* nn.35-39 and accompanying text (discussing the advantages of international criminal law).

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and effects are already evident in the current foreign affairs policymaking.[41]

Some of the present uses of an expanded post-conflict transitional justice discourse, and in particular the changes in the discourse associated with expanding the law of war, are manifestly problematic. It is becoming clear that contemporary developments in the expansion of the humanitarian law regime will have a two-fold significance, which is both constraining and enabling of conflict, with mixed consequence for peace and stability in the international order. Thus, whereas historically, humanitarian rule of law emphasized minimal constraints on the conduct of war, the current expansion of the humanitarian regime goes beyond the limits on waging war to address its justification,[42] thereby appearing to add bases for the justification of possible legitimate intervention.[43] To illustrate, there are already precedents in the reliance upon the international humanitarian regime to justify the North Atlantic Treaty Organization ("NATO") intervention in Kosovo,[44] as well as in the debates concerning the potential American intervention in Iraq.[45] Given these two-fold ramifications, simultaneously constraining and enabling of warfare, the present expansion of the humanitarian discourse will have contradictory effects on international rule of law.[46]

There is also an interaction between the changes in the law and in warfare. Even where transitional justice would have a

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41. *See, e.g.*, Vaclav Havel, *Kosovo and the End of the Nation-State*, *in* N.Y. REV. OF BOOKS (June 10, 1999) (on file with author).

42. This is the 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 HONOR OF JEAN PICTET (Swinarsky ed., 1984). On *jus ad bello*, *see* MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 21 (1977). The new emphasis on humanitarianism as a justification of war appears to be a problematic throwback to the pre-Reformation view of the law of war.

43. *See Humanity's Law*, *supra* n.31, at 380-87 (contending that the new emphasis on humanitarianism in the justification of war poses a problematic return to pre-Reformation legal regimes).

44. *See* THE INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, KOSOVO REPORT (2000).

45. Press Release, Security Council Hears From 53 Speakers in Two Days on Iraq's Disarmament; Some Stress Iraq Has Not Cooperated, Most Say Inspectors Need More Time, SC/ 7687, Security Council 4717th mtg. (Mar.12, 2003); *see also* Sarah Left, *Security Council Debates Iraq Issue*, GUARDIAN UNLTD., Feb. 14, 2003, *available at* www.guardian.co.uk/Iraq/story/02763,895894,oo.html.

46. On some of the contradictions, see *Humanity's Law*, *supra* n.31.

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clearly positive effect on restraining the waging of war, the changes in modern warfare, and, in particular, the possibility of aims of mass destruction and terrorism, have already spurred changes in the humanitarian legal regime. The expanded regime enables the enforcement of humanitarian rights violations with complex consequences for foreign policy. Reliance on this expanded discourse goes a long way towards eviscerating the distinctions between war and peacetime, combatants and civilians, law and its exception. There is evident potential for the slide from a normalized transitional justice, to a permanent regime of conflict, laying the predicate for the contemporary campaign against terrorism.

What is evident is a clear shift in the uses of current post-conflict law. Yet, transitional justice tends to be backward-looking, responsive always to the last conflict, and, therefore, not capable of ensuring prospective security. Further, principles apt at guiding exceptional post-conflict situations, are not necessarily adequate in addressing the move to politics as a matter of course. However, in the present transition away from the modern State theory to the politics of globalization, the post-conflict branch of transitional justice offers a source of needed authority, as it guides situations of heightened political fragmentation associated with global politics.

Finally, the developments in the normalization of post-conflict transitional justice reflect a contemporary conflation of human rights law, criminal law, and the law of war. They also reflect a threat to the integrity of human rights law and the loss of an independent juridical scheme for those seeking to challenge State action threatening individual human rights. An extension of a humanitarian regime does not necessarily allow accounting for lapses in State behavior. Nevertheless, resistance to the normalization of transitional justice is difficult, since in the present globalizing politics, which is challenging to nationalism and State authority, this regime offers an important alternative source of legitimization.

CONCLUSION

This Essay has analyzed the contemporary transitional justice associated with the new era. It has proposed that the phenomenon be explored along three dimensions relating to post-

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Cold War, globalization, and security-State politics. The Essay began by exploring the nature of post-Cold War legal responses to a pronounced political shift that is associated with the politics of Nation-building. It contended that the critical move in post-Cold War transitional justice involved policymaking through a range of diverse local approaches associated with various experiments in Nation-building. While contingent upon a local contextual understanding, trends in transitional justice of hybridization and fragmentation in law and sovereignty, reflect more general dimensions of interconnectedness, associated with contemporary political conditions and circumstances of a globalizing politics. Transitional justice offers a limited response to some of the political and economic challenges raised by globalization.

Finally, the Essay identified the contemporary phenomenon of the normalization of transitional justice, seen in the current expansion of the humanitarian regime. What has long been conceived of as an exceptional post-conflict rule of law, has now become the norm, reflecting that we are living in times of ongoing conflict and security concerns, and that this comprehensive discourse is apt to formulate foreign policymaking in the current international affairs.

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