ABSTRACT

Amnesty and justice are often seen as antagonistic. This study analyzes the new human rights regime emergent since the Nuremberg trials and evidenced by the discourses and practices of both domestic and international criminal courts, political transitions, and truth commissions. It presents a systematic theory of accountability, which is from the very outset distinguished from punishment. Based on discourse theory and after scrutinizing different hard cases, such as Argentina and South Africa, it attempts to address the question: *Are amnesties still a valid means to achieve peace and justice?* Although affirmative, the answer resulting from it suggests that amnesties must comply with some requirements embedded in democratic procedures of justification.

HEALING THE PAST OR CAUSING MORE EVIL?

Amnesty and Accountability during Transitions

by

Raphael Neves

May 2014

Submitted to the New School for Social Research of the New School in partial fulfillment of the requirements for the degree of Doctor of Philosophy.

Dissertation Committee:
Dr. Nancy Fraser
Dr. Andreas Kalyvas
Dr. Max Pensky
Dr. Ann Snitow

ProQuest LLC.
789 East Eisenhower Parkway
P.O. Box 1346
Ann Arbor, MI 48106 - 1346

We have witnessed a historic exemplification of the break-up of exclusion, of the self-enclosed world of the white subject of Apartheid. Mandela's leadership has exemplified the intervention of the Other by assuming a responsibility for the consequences before that responsibility has been honored by the institution of symmetrical power relations. This refusal of the moralizing vindictiveness or retaliation has allowed us to glimpse the alternative to the reversal of power relations that silence the silencer. This is the difference the Other can make, precisely because the Other insists on being a subject, not simply attacking the other's subjectivity. We should not forget, however, that it was also De Klerck's ability to *survive* the destruction of the Afrikaner way of life that allowed difference and externality rather than retaliation to come into being. What intersubjectivity postulates is that the barbarism of incorporating the other into the same, the cycle of destructiveness, can only be modified when the other intervenes. Therefore *any subject's primary responsibility to the other subject is to be her intervening or surviving other*. This perspective allows us to move beyond the critique of the thinking subject into the problem of identity as it presents itself in the psychopolitical world. It permits a differentiation between the reversal of complementary power relations and the concrete negation that breaks up fixed identity and allows survival – in effect, a negativity of nonviolence.

Jessica Benjamin, *The Shadow of the Other*

For those who, like Mandela, took the first step.

ACKNOWLEDGEMENTS

Like most dissertations, this one benefited immensely from the contributions of my family, friends and colleagues. Firstly, I want to express my heartily gratitude to my parents, Regina and Paulo, who have given me their support – and everything else – along the years. I am very indebted to both of them.

I also would like to express my gratitude to all those friends I met in this journey since my admission to the PhD program at the New School in 2006. The list is long, and I hope I am not missing anyone, but here they are: Fatma Aydin, Giuseppe Ballacci, Júlio Barroso, José Henrique Bortoluci, Jane Carey, Laura Carvalho, Rodrigo Chacon, Kalaya Chareonying, Hadas Cohen, Henry Drobbin, Chelsea Ebin, Luciano Gatti, Edward Gonzalez, Navid Hassanzadeh, Luis Herran Avila, Youseff Jai, Marina Kaneti, Margaret Klein, Marina Kuzina, Joy Lehmann, Carlos David Lozano, Genaro Lozano, Pavlina Majorosova, Kawai Mayuko, Atlee McFellin, Charles McPhedran, Erika Morillo, Roberto Nascimento, Ben Nienass, Juan Pablo Ossa, Simone Pitta, Nicole Pontes, Aleksandra Przegalinska, Jorge Romero León, Camila Ronderos, Fernando Rugitsky, Marisa Sefer, Felipe Silva, Jordan Somers, Amy Stuart, Bahar Tabakoglu, Candan Turkkan, Deepesh Vaidya, Margarita Velasco, Camila Vergara, Jacqueline Vimo, Solongo Wandan, Carlos Yescas, Amanda Zadorian, Tomer Zeigerman, Natascha van der Zwan. In addition, I am very indebted to Sebastián Guzmán, Marianna Kraszewska, Márcio Macedo, Raul Prebisch Jr. and Mauro Soares. Life

in New York without them would be certainly much tougher. Back in Brazil, I am thankful to Said Adi, Fábio Lubacheski and Leonardo Takuno for more than a decade of friendship and brotherhood.

My research was only possible due to a Fulbright Fellowship and a four-year stipend sponsored by Capes (Brazilian Ministry of Education). I also received a DAAD grant to spend two months in Germany.

I want to thank all workers at the New School, Bobst Library and Cardozo Law School who provided me their institutional support. Moreover, I thank the whole staff of the International Student Services at the New School, where I spent three years as a student worker. I am very thankful also to Nancy Shealy, the secretary of the Politics Department. I do not remember a single occasion when I asked her a favor without receiving a prompt and positive reply, a smile and lots of kindness.

I am also deeply grateful for having the privilege of sharing my thoughts and receiving feedbacks from the members of my committee, professors Andrew Arato, Andreas Kalyvas and Max Pensky. Furthermore, I must express my debt to my advisor, professor Nancy Fraser, who has always pointed out a more critical and emancipatory perspective than I would otherwise have been capable of formulating.

Finally, I want to thank Ingrid Cyfer for sharing with me the best and worst moments of this process, for sharing her intellectual and bright viewpoints after carefully reading every chapter as soon as they came out of the printer, for sharing with me all love that makes us depend happily upon each other. In this sense, this work also belongs to her.

CONTENTS

INTRODUCTION

When Jürgen Habermas published the original edition of *Between Facts and Norms* in 1992, it soon became a turning point within critical theory. Not only because Habermas abandoned his previous account of the degradation of the early bourgeois public sphere and now presented a strong defense of the rule of law, democracy and its representative institutions. But also because he reformulated the principles of popular sovereignty and human rights together with what he has called a new paradigm of law.

This new paradigm is intended to be an alternative to liberal and welfare models of legal norms. It is an attempt to bridge the gap between Habermas's theoretical understanding of contemporary societies and his pragmatic intent. According to him, "adjudication can no longer have a naive attitude toward its own social model," that is, any legal paradigm is not seen as an innocent technical understanding of law anymore, and therefore, "it invites a self-critical justification" (Habermas 1996, 393). In this sense, discourse theory presents a proceduralist paradigm that, together with other paradigms, is subject to justification as well. This new paradigm aims to provide the 'best' description of contemporary societies and promote the normative ideal of a self-determined community of free and equal citizens. Moreover, it aims to win a political contest with the liberal and welfare state paradigms. In Habermas's words: "The dispute over the correct paradigmatic understanding of the legal system, a subsystem

reflected in the whole of society as one of its parts, is essentially a political dispute" (1996, 395).

Secondly, the proceduralist paradigm can lead to an emancipatory practice insofar as it promotes citizens' private and public autonomy. This model offers a new understanding of law that can orient legal and political practices towards the promotion of both aspects of autonomy, and create a legal public sphere that is "sufficiently sensitive to make important court decisions the focus of public controversies" (Habermas 1996, 440).

Finally, one should think to whom the theory and this new paradigm are addressed. It is clear that, for Habermas, legal experts and judges have a privileged function in interpreting and applying the model. However, the affected parties of judicial decisions and rights in general, namely, citizens themselves, are the addressees in the first place. The experts must be able to translate to the whole body of citizens the hardest technicalities in order to assist them in the project of realizing, by themselves, the system of rights.

That approach to law and the proximity of critical theory with John Rawls's version of liberalism in the last works of Habermas have generated ambivalent reactions. I think that whoever engages in the research agenda set by these new developments of critical theory may become overshadowed by discussions regarding the "best" institutional design and put transcendence into jeopardy. But I will take that risk.[1]

This dissertation attempts to formulate a normative criterion to distinguish between legitimate from non-legitimate amnesties granted during political transitions.[2]

[1] Some of these reactions were included in a book edited by Michael Rosenfeld and Andrew Arato (1998). Furthermore, there is Seyla Benhabib's review of *Between Facts and Norms* (1997b). To accomplish this task I was pretty much inspired by Jean Cohen's book on the regulation of intimacy (2002). There she develops Habermas's new legal paradigm towards issues of abortion, privacy and sexual harassment. So, in terms of a methodological framework, I am very indebted to her.

[2] Regarding the difference between pardons and amnesties, I use both almost interchangeably but the former generally refers to individuals while the latter refers to a group. "In theory, amnesty

In fact, I am less concerned with specific guidelines to formulate amnesty laws or international treaties than with the reconstruction of the conditions of their legitimacy. Such theorization, as Habermas remarks, "can identify particles and fragments of an 'existing reason' already incorporated in political practices, however distorted these may be" (1996, 287). My aim, therefore, is to locate these fragments within the political practices that have accompanied transitions towards democracy since the Nuremberg trials.

Unfortunately, not much attention has been paid by critical theorists to confront the pressing problems raised by transitions and the development of international criminal tribunals.[3] In order to fill this gap and following the agenda set by Habermas, I will combine his discursive approach with democratic and legal theories. Eventually, this work relies also on comparative politics whenever it needs to address a specific case, such as South Africa's transition, to reconstruct the rationale behind it. Although the focus here is mainly on normative theorization, I think concrete examples are indispensable to grasp the historical background, political action and contexts of (in)justice involved in transitions.

The first chapter contains a discussion regarding the "duty to punish." My intention is to introduce the problem of punishment as a response to human rights violations. This is crucial because it may limit the application of amnesties insofar as it determines the sort of accountability to be administered to wrongdoers. The recent history of Argentina is a hard case that not only illustrates the tough choices – strengthen-

applies only to individuals who have not yet been prosecuted and sentenced. This differs from pardons, which are used to release convicted individuals from serving their punishment. In reality, amnesty is frequently combined with pardons, which can blur the distinction between the two practices, and in fact, some academics have begun to use the term 'amnesty' in an all-encompassing manner to describe both practices. Further distinctions can be found among the beneficiaries of amnesties and pardons, as pardons are generally given to individuals, whereas amnesty may be collective" (Mallinder 2008, 6).

[3] The special case is the pioneering work by Otto Kirchheimer (1980). Anne-Marie Smith (1987) also uses a "Frankfurt School perspective" to address the crimes of the last dictatorship in Argentina.

ing stability or promoting justice? – at stake during transitions, but also became a paragon of civil society engagement.

In the second chapter I will turn to South Africa's experience after the apartheid's regime. I try to formulate a concept of reconciliation tracing its origin back to Hegel. Moreover, I owe to Klaus Günther a very important analytical distinction between accountability and punishment.[4] From this perspective, the South African Truth and Reconciliation Commission was an institutional milestone since it was capable of holding perpetrators accountable at the same time punishment became a measure of last resort.

The third chapter analyzes more thoroughly the connection between human rights and accountability by invoking Rainer Forst's "basic right to justification." Forst upholds that human rights are constituted in a dual manner: besides a moral (and universalistic) core, they also have a political (and contextualized) dimension. Forst, together with other critical theorists, such as Seyla Benhabib, Nancy Fraser and Jean Cohen, reinforces the connection between human rights and popular sovereignty already stated by Habermas. I want to use that to point out a democratic deficit in the decisions of the Inter-American Court of Human Rights regarding a "right to truth" citizens have whenever their human rights are violated. The problem, however, is that the IACtHR reduces the right to truth to punishment. An earlier and abridged version of this chapter was published in Portuguese (Neves 2012) where, additionally, I discussed some challenges faced by the Brazilian National Truth Commission, created in 2011.

Finally, in the last chapter I will turn to the discussion on the role transnational structures of justification and accountability play during transitions. I start by reconstructing the rationale of another paradigmatic case: the arrest of general Augusto

[4] I believe the approach presented here is not very far from that of Pablo de Greiff (2002; 1996) and Max Pensky (2008).

Pinochet. Moreover, I explain the functioning of the International Criminal Court and its complementarity principle that allows the tribunal to step in whenever the domestic jurisdiction fails to hold perpetrators accountable. Together, they represent Postwestphalian institutional mechanisms of accountability. My argument attempts to make them work together with domestic structures of justification in a heterarchical way.

Barrington Moore, Jr. remarked in the preface of his marvelous book on the origins of dictatorship and democracy that "no problem ever comes to the student of human society out of a blue and empty sky." I was born in a dictatorship and started college on the tenth anniversary of the Brazilian democratic constitution, in 1998. So, my legal background and interest in understanding how legitimacy works brought me somehow close to the kind of approach Habermas develops in *Facts and Norms*. But, curiously, the idea of writing my dissertation on amnesty and accountability came to mind in a visit to Hohenschönhausen, the Stasi's prison in Berlin and now a memorial. I took a tour with a guide who was an inmate in the 1970s. He told us that, even after the fall of the Berlin Wall, some guards still live in that eastern area of the city and how he felt when he met one of his tortures one day in a supermarket. That experience really disturbed me, maybe it still does. Germans use an expression, *Aufarbeitung*, which has been commonly translated as "coming to terms with," but evokes the idea of *reprocessing*. In this sense, Adorno (1986) insists that it is necessary to reprocess the past not to wipe memory away or to "turn the page." Instead, one should bring it into consciousness. I tried to keep that nuisance awake in me while writing this book.

CHAPTER

ONE

THE DUTY TO PUNISH

> And then one day a serf boy, a little lad of only eight years old, while playing some game or other threw a stone and bruised the leg of the general's favourite beagle. "Why has my favourite dog gone lame?" "It was the boy," he was informed, "he threw a stone at it and bruised its leg." "Ah, so it was you," the general said, looking him over. "Seize him!" He was seized, taken from his mother, kept overnight in the lock-up, and at first light the next morning the general came driving out in full dress-uniform, mounted his horse, around him his retainers, dogs, huntsmen, stalkers, all on horseback. Around them the serf folk were gathered for the purpose of edification, and in front of them all the mother of the guilty boy.
> 'The boy was brought out from the lock-up. A cold, gloomy, misty autumn day, first-rate for hunting. The general ordered the boy to be undressed, he was stripped naked, shivering, out of his mind with terror, not daring to utter a sound... "Send him on his way!" the general ordered. "Run, run!" the huntsmen shouted to him, the boy set off at a run... "Tally ho!" the general howled and unleashed at him a whole pack of borzoi hounds. He hunted him down in front of this mother, and the dogs tore the child to little shreds!... I think the general was put in ward. But... what should one have done with him? Shot him? Shot him in order to satisfy one's moral feelings? Tell me, Alyosha, my lad!'
> 'Shot him!' Alyosha said quietly, raising his eyes to his brother with a kind of pale, distorted smile.
>
> Fyodor Dostoyevsky, *The Brothers Karamazov*

Amnesties suspend the obligation to prosecute and punish whoever commits an illegal act. For this reason, amnesties are in many cases a means to end hostilities between groups in conflict or to prevent future retaliations against rulers who are about to leave office. In such cases, the effect of amnesties is said to overcome the drawbacks that may result from the ordinary application of the law. Thus, for instance, during a transition towards democracy, those who support the authoritarian rule or have been engaged in a civil war may facilitate the passage from one regime to another if they

have the guarantee that they will not be punished for crimes or other breaches of the law they have committed.

In this chapter, I will discuss the arguments for not granting amnesty. My general assumption is that they are rooted in the idea according to which some crimes are so heinous that their perpetrators do not deserve to be granted any sort of amnesty. Actually, such crimes are claimed to demand the unequivocal response of punishment.

To accomplish that, the chapter begins by (1) showing the origin of the duty to prosecute and punish human rights violators. The development of the international law of human rights and the international criminal law demonstrate the efforts to "tie Ulysses to the mast," trying to stop amnesties to be an instrument at the disposal of political negotiators. Notwithstanding, an empirical analysis indicates that (2) transitions may impose certain challenges to the legal order that make it hard to match our ideal world. I will use the recent history of Argentina as a case to highlight some of the dilemmas at stake in transitions to democracy. Following these steps, I will go back to a more theoretical discussion in order to clarify (4) what kind of arguments can be given to justify punishment, not before presenting (3) a theory of punishment that attempted to deal with the legal quandary lived by Argentines right after the end of the military rule.

When confronted to perpetrators who, just like Dostoyevsky's general, committed heinous crimes, tortured and killed the innocent, we are very inclined to claim for punishment. However, does punishment in general serve only "to satisfy one's moral feelings," or it is rather a measure of social and political importance? If we answer the former question affirmatively, then there is no place for amnesty. Conversely, if we admit that the later may be correct, then amnesty is possible under certain conditions. In this first chapter I will provide a reply to those inquiries.

1.1 The Duty to Prosecute and Punish Human Rights Violations

Until the mid-1980s, the central claim of international human rights movements had been to bring human rights violations to the public sphere in order to shame repressive governments. Punishment was not on the agenda of the day.[1] However, the "naming and shaming" strategy associated to these movements changed with the fall of authoritarian regimes in Latin America in the middle of the decade. The Argentine transition had a positive impact insofar as local human rights groups pressed the elected government to prosecute and punish perpetrators. An overwhelming attention was given to criminal prosecutions and human rights advocates were drawn to the ambiguities and tensions between, on the one hand, claims for prosecutions and, on the other, the risks such prosecutions bring to the stability of newly founded democracies.

In 1988, the Aspen Institute organized a conference on state crimes which was the first attempt to develop an intellectual framework to grasp the issues faced by Argentina, Uruguay, Brazil, and other countries that suffered under military rule. The conference aimed to debate the political, moral, and legal challenges experienced by those demanding justice in the democratic transitions of the 1980s. As reported elsewhere, the central issues at stake were whether there was an obligation under international law to punish perpetrators; whether the states were obliged to establish the truth about past violations; and how to deal with past human rights abuses by military commanders (Arthur 2009, 352). According to the director of the Justice and Society Program at the Aspen Institute, Alice Henkin, "It was agreed that there was no general obligation under customary international law to punish such violators. Various international treaties, however, may require punishment expressly or by implication" (Aspen Institute 1989, 4). Participants also agreed that further study and

[1] For a sociological overview of how the dilemmas involved in political transitions reshaped human rights discourse and practice, see Arthur (2009).

analysis was needed to establish state obligations at the international level.

Diane Orentlicher, at that time a law professor at Columbia University, took this task seriously and wrote in 1991 an article that attempted to clarify the duty for accountability under international law. Orentlicher scrutinized customary law, international treaties on human rights and authoritative interpretations of them. Arguing that measures to secure human rights are "no longer subject to the broad discretion of governments," Orentlicher showed that a state's complete failure to punish repeated offenses violates its obligation under international law.

What, precisely, does international law require? In the eighteenth century, the law of nations subject to criminal punishment two categories of crimes. One comprised the crimes, such as piracy, that were viewed as a common concern of nations. The other included offenses, such as violations of the rights of ambassadors, which states were required to punish when committed by one of their citizens against a foreign national (Orentlicher 1991a, 2553). For both classes of offenses, the law should be enforced by national courts. Only in the aftermath of World War II international law took into consideration the creation of an international tribunal. Furthermore, as Orentlicher points out, Nuremberg prosecutions represented a radical innovation in international law.[2] While older principles prescribed that states ought to punish violations committed by their citizens within their territory whenever those crimes violated the rights of other states, the Nuremberg precedent addressed a state's treatment of its own citizens, imposing for the first time criminal sanctions for that. The

[2] Danilo Zolo has argued that Nuremberg became a paradigm for international criminal law, which consists in "a dual-standard system of international criminal justice ... in which a justice 'made to measure' for the major world powers and their victorious leaders operates alongside a separate justice for the defeated and downtrodden" (2009, 30). I believe that to label the international criminal law system as a sort of "victor's justice" is a mistaken generalization. There is no such elementary and undifferentiated conception of international court that Zolo assumes. I will return to this point in the last chapter. See, for instance, Greiff (1998, 88) and Marquardt (1995). The change of paradigm I refer here is the deterritorialization of international criminal justice and the "duty to prosecute," which I will explain below.

Allied Powers justified this innovation on different grounds. First, the crimes committed by Nazi war criminals could be punished by an international court because they "offended humanity itself." Second, the crimes were a menace to world peace, and as such they were also linked to war crimes already asserted by international treaties.

Until the 1990s, the predominant way to prosecute post-Nuremberg international crimes was by national courts in the territory where the violations occurred. Reflecting this pattern, the 1948 Genocide Convention,[3] which unequivocally specifies a duty to prosecute, determines in article VI that

> Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

According to this disposition, the Genocide Convention should be primarily enforced within the territory where the genocide occurred. By its nature, genocide crimes are likely to be committed with state complicity. In this case, a trial is only made possible after the overthrow of the regime responsible for the acts prevented by international law. Alternatively, the Genocide Convention mentions the possibility of being enforced by an international penal tribunal. The first court of this sort after Nuremberg was the International Criminal Tribunal for the Former Yugoslavia, established in 1993 by means of a resolution of the U.N. Security Council.[4] The Security Council, based on its prerogatives "to maintain or restore international peace and security" of Chapter VII of the Charter of the United Nations, created the tribunal to apply the Genocide Convention.

Conversely, the Convention Against Torture in 1984[5] indicates a change towards the

[3] Convention on the Prevention and Punishment of the Crime of Genocide, General Assembly Resolution 260 A (III), UN GAOR, 178^{th}, 179^{th}. plen. mtg, at 832; UN doc. E/AC 25/3 at 8 (1948), entered into force January 12, 1951 (hereinafter Genocide Convention).

[4] S/RES/827 (1993) of 25 May 1993.

[5] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment,

deterritorialization of international accountability explicitly providing for universal jurisdiction[6] (Orentlicher 2004, 1088). According to this principle of international law, any state is allowed to prosecute specific crimes regardless where they occurred, even when the prosecuting state has no link to the crime.[7] In article 5(1), the Convention Against Torture determines that states parties should take measures to establish jurisdiction over the offenses referred in its text. Among these measures to punish the crime of torture, the states parties should ensure all acts of torture are offenses under their domestic criminal laws and make them punishable by appropriate penalties, taking into account their grave nature. Furthermore, article 5(2) prescribes that

> Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offenses in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article.

Thus, in addition to those domestic measures, states parties should also extend their jurisdiction over alleged offenders who are under their territorial jurisdiction. In other words, in spite of the fact that a crime was not committed in its territory, an occurrence that would traditionally restrain the jurisdiction and punitive interest of the state, a signatory of the Convention Against Torture has the obligation to extend

General Assembly Resolution 39/46, UN GAOR, 39^{th} sess., Supp. No. 51, at 197, UN doc. A/39/51 (1985), entered into force on June 26, 1987 (hereinafter Convention Against Torture).

[6] In a general sense, "jurisdiction" means the legitimate assertion of authority to affect legal interests. It may describe the authority to make law applicable to certain persons (*ratione personæ*), territory (*ratione loci*), time (*ratione temporis*) or other situations, such as the nature of the crime (*ratione materiæ*). In this case it is called prescriptive jurisdiction. It may also indicate the authority to subject certain persons, territories or situations to judicial processes (adjudicatory jurisdiction); or the authority to urge compliance and to redress noncompliance (enforcement jurisdiction) (Scharf 2001, 71).

[7] The employment of this principle in criminal law is not new. Adolf Eichmann's prosecution was also based on the principle of universal jurisdiction together with two others. The *principle of passive personality*, which "recognizes that countries may exercise criminal jurisdiction over certain crimes committed outside their territory against their nationals." And the *protective principle*, which "recognizes that states may prosecute certain conduct committed outside their territory on the basis it threatens their national security and a limited class of other state interests" (Orentlicher 2004, 1073n93).

its own jurisdiction and strive for punishment.

The Convention Against Torture, adopted still during the Cold War, thirty-six years after the Genocide Convention, "reflects a pragmatic acceptance of the limited role of international enforcement in securing protected rights" (Orentlicher 1991a, 2563).[8] This is also the reason why the Convention Against Torture does not mention any international tribunal. Its enactment relies entirely on states parties.

Another decisive step in the direction of a legal duty to prosecute human rights violations was taken by the creation of regional mechanisms of accountability. The most important are the American Convention on Human Rights and the European Conventions for the Protection of Human Rights and Fundamental Freedoms. The application of the former by the Inter-American Commission and the Inter-American Court of Human Rights had a decisive role in the imposition of a legal duty on Latin American states to investigate the human rights violations under authoritarian regimes.[9]

It was only in 2002 that the International Criminal Court (ICC) came into force, after sixty countries ratified the Rome Statute.[10] The ICC marks the expansion of the *duty to prosecute* in regard to "the most serious crimes of concern to the international community," which are, according to article 5 of the Rome Statute,

[8] Orentlicher's article was written before the International Criminal Court brought into being. In a new assessment, she acknowledges that "the establishment of several international and hybrid courts since 1993, including a permanent international court, is emblematic of international resolve to ensure that those most responsible for crimes against the basic code of humanity do not escape punishment" (2007, 18).

[9] I will come back to this issue in chapter 3.

[10] The Rome Statute of the ICC, July 17, 1988, UN Doc. A/CONF. 183/9, reprinted in 37 ILM 999 (1998).

the crime of genocide,[11] crimes against humanity,[12] war crimes[13] and the crime of aggression.[14] International law documents, such as the Genocide Convention and the Convention Against Torture, together with the previous tribunals for Yugoslavia and Rwanda,[15] accentuated the necessity of holding those responsible for international crimes accountable.

After this brief overview of the development of international mechanisms of accountability, I want to come back to the normative justification lying underneath this process. Orentlicher's argument for the prosecution of human rights perpetrators takes into account several distinct reasons. First, because of the deterrent effects of punishment, since "it is the most effective insurance against future repression." Sec-

[11] As defined by Art. 6 of the Rome Statute, genocide means "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group."

[12] Crimes against humanity are listed in Art. 7 of the Rome Statute, which includes murder, extermination, enslavement, torture, any form of sexual violence, enforced disappearance of persons, the crime of apartheid and so forth. According to the legal doctrine, crimes against humanity have a set of common features: they are part of a widespread or systematic practice of atrocities; they ought to be punished regardless of whether they are perpetrated in time of war or peace; and their victims may be civilians or enemy combatants (Cassese 2008, 98–9).

[13] War crimes are those listed in Art. 8 of the Rome Statute. They can be broadly defined as "serious violations of customary or treaty rules belonging to the corpus of the international humanitarian law of armed conflict" (Cassese 2008, 81). The most important rules of international humanitarian law are those established by the Geneva Conventions. War crimes include willful killing; torture or inhuman treatment; willfully causing great suffering, or serious injury to body or health; extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; unlawful deportation or transfer or unlawful confinement; taking of hostages, and many others.

[14] In contrast to the other three crimes (genocide, crimes against humanity and war crimes), the ICC remained unable to exercise jurisdiction over the crime of aggression due to a compromise reached during the negotiation of the Rome Statute in 1998 (art. 5). The Review Conference of Rome Statute (held in Kampala, Uganda between May 31 and June 11, 2010) adopted by consensus amendments to the Rome Statute which include the definition of the crime of aggression and a regime establishing how the Court will exercise its jurisdiction over this crime. According to what was decided in the Review Conference, the ICC will not be able to exercise its jurisdiction over the crime until after January 1, 2017. The new edition of the article 8 of the Rome Statute says the crime of aggression "means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations."

[15] The International Criminal Tribunal for Rwanda was the first to explicitly attribute jurisdiction (art. 4 of the Statute of the ICTR) and individual responsibility that apply to internal conflicts (Gavron 2002, 105).

ond, because trials may provoke societies to reexamine their basic values to "affirm the fundamental principles of respect for the rule of law and for the inherent dignity of individuals." Last, and most important, as a result of the "complete failure of enforcement" the authority of law itself becomes impaired, "sapping its power to deter proscribed conduct" (Orentlicher 1991a, 2542).

Thus, *at first glance*, Orentlicher presents what one could call a "consequentialist" approach. Prosecution and punishment seem to be justified by the outcomes they generate: deterrence, reflection on fundamental values, and as a strengthening of the authority of law. She also points out the consequences the condemnation of such crimes have in regard to democracy:

> By demonstrating that no sector is above the law, prosecutions of state crimes can foster respect for democratic institutions and thereby deepen a society's democratic culture. Conversely, because law "is located in our myths and stories as a powerful attribute of legitimate authority," failure to enforce the law may undermine the legitimacy of a new government and breed cynicism toward civilian institutions. (Orentlicher 1991a, 2543)

Although Orentlicher does not assume a normative position openly, I believe she intends to ground what she describes as the positive expansion of international criminal law towards prosecution and punishment of perpetrators on its beneficial effects. However, if we analyze her position more thoroughly, we will notice that punishment seems to have an intrinsic value in itself.

Let us briefly introduce a distinction raised by Philip Pettit and John Braithwaite (1990) between constraints and targets. Any normative theory of punishment has to commit itself to some kind of "universal value." Theories of punishment or criminal justice have to propose a criterion for the assessment of an agent's performance, assuming that one faces a set of options which he or she must choose. The criterion invokes a valued characteristic to determine which choice is right or best. According

to Braithwaite and Pettit, the criterion is a constraint when "the agent is required to choose one of those options which exemplify the valued characteristic" (such as telling the truth, acting peacefully, and so on). On the other hand, the criterion is a target when "the agent is enjoined to choose one option over another according to how well it promotes the valued characteristic" (in this case, he or she should maximize truth or peace, even if that means he or she must tell a lie or be violent) (Braithwaite and Pettit 1990, 27).

Intrinsic retributivists believe one should punish because there is an inherent good in making the guilty suffer. For this reason, the criterion to guide agency (to punish) is a constraint (it is right to make the guilty suffer). Nevertheless, Orentlicher's view does not correspond exactly to an intrinsic retributivist. She is rather what Braithwaite and Pettit call "target-retributivist." Most retributivists refuse to provide a rationale for the desert-constraints they invoke. In other words, constraints appear in a quite arbitrary way, as in the principle of *lex talionis*, "an eye for an eye." Target-retributivists, however, identify a goal whose promotion generally justifies the fulfillment of that constraint. Orentlicher gives the rationale (deterrence, the consolidation of the rule of law and democracy) for what she considers an axiomatic constraint: the prosecution and punishment of human rights perpetrators. For her, it seems to be out of question whether punishment satisfies those ultimate demands. If, instead of a constraint, one thinks punishment as a means to attain some target, namely what "consequentialists" do, then other forms to better accomplish that target may become available to the agent.

Consider, for instance, truth commissions and similar mechanisms of accountability which does not involve punishment. A retributivist, even one who, like Orentlicher, is not willing to apply the *lex talionis* so literally cannot give up the idea that those guilty deserve to be punished accordingly. In fact, there is no option left:

> Whatever salutary effects it can produce, an official truthtelling process is no substitute for enforcement of criminal law through prosecutions. Indeed, to the extent that such an undertaking purports to replace criminal punishment (rather than to promote distinct goals that punishment cannot serve), it diminishes the authority of the legal process; it implicitly concedes that the machinery of justice is powerless to punish even those crimes that any civilized society views as most pernicious. Further, the most authoritative rendering of the truth is possible only as a result of judicial inquiry, and major prosecutions can generate a comprehensive record of past violations. (Orentlicher 1991a, 2546n32)

It is very likely that when human rights are violated and societies suffer from authoritarian regimes the search for truth is desirable or even normatively justified. Nevertheless, why "judicial inquiry" is the only way to achieve "the most authoritative rendering of the truth?" A retributivist like Orentlicher has to be able to give an indubitable answer to this question, but I do not think she can.

To be sure, Orentlicher has changed her position since "Settling Accounts" was published in 1991. Sixteen years later, she revisited her own piece and the context within which it was written in a paper published by the *International Journal of Transitional Justice*. Then she wrote: "I regret the fleeting treatment of truth commissions in 'Settling Accounts,' which I addressed this form of transitional justice principally by way of arguing that truth-telling processes should not be seen as substitute for exemplary trials." Furthermore, she says this was a response to a particular context "in which truth commissions were something presented as a 'second best' alternative to prosecution when the latter were seen to be too destabilizing" (2007, 15n9). I believe Orentlicher's position in 1991 regarding truth commissions or other alternatives to punishment was, to say the least, very ambiguous.[16] Nevertheless, she seems at this point to place emphasis on victims' agency and even agrees that amnesties may be legitimate if democratically approved. Truth commissions are now able to potentially

[16] In the same issue of the *Yale Law Journal* where "Settling Accounts" was published, lawyer Carlos Nino, who actively participated in the Argentine transition, criticized Orentlicher's view, which he named "mandatory retribution" (see below). Similarly, another author argues that Orentlicher's position demands prosecution "no matter what" (Cobban 2007, 198–9).

"engage society in an inclusive process of reckoning and repair. Truth commissions can, moreover, speak to the future through their recommendations for institutional reform" (2007, 16).[17]

Orentlicher has influenced not only the academic debate on transitions to democracy, but also the decisions by international courts regarding amnesties.[18] In the next sections, I want to discuss the theoretical basis of this "duty to punish." But, first, I want to describe an empirical case of transition to democracy and point out its challenges. Due to their character, both moral *and* political, human rights should be discussed taken into account their normative grounds and the context where their content is politically produced.

1.2 The Duty to Punish into Context: the case of Argentina

Argentina's recent history offers a sharp portrait of a dramatic process towards democracy and the difficulties in prosecuting and punishing human rights perpetrators during transitions.[19] Political instability began in the 1930s when the Argentine armed forces overthrew the elected government of President Hipólito Yrigoyen by means of an unconstitutional coup. After the deposition of Yrigoyen, Juan Perón, who was a colonel at that time, became head of the Department of Labor and had

[17] At the end of the day, Orentlicher says that amnesties could be admitted, but never on a normative basis: "[i]f asked whether I would insist on prosecutions if doing so would block a peace agreement that would end human carnage, I would respond (as I always have), 'Of course not!' Still, I would resist changing the normative default rule of international law in a way that may *encourage* the granting of amnesties to the extent they encompass atrocious crimes, at least with respect to those who bear leading responsibility for unleashing systemic violence. Norms matter: they are the indispensable foundation of the whole enterprise of combating atrocious behavior" (2007, 21).

[18] See, for instance, her legal opinion delivered as *amicus curiae* at the Special Court for Sierra Leone, Orentlicher (2003).

[19] This section will not provide a detailed account of facts that happened in Argentina. The Argentine case has been exhaustively discussed, however, I am stressing here only the most relevant facts for my argument. For a comprehensive description in English of the legal aspects of the Argentine process, see Louise Mallinder's report (2009).

a significant influence over the union movement and great support from workers. He participated in another coup to remove President Ramón Castillo from power in 1943, and was elected in 1946. After being elected for his second term in 1952, Perón himself was unseated and went to exile in Spain in 1955.

Counting on supporters from both left and right wings, Perón returned to Argentina in 1973 to become president for the third time. While waiting for Perón's arrival at the airport, members of left-wing Peronist organizations, such as the People's Revolutionary Army and the Montoneros, were shot by snipers of right-wing Peronism. Following Juan Perón's death in 1974, his third wife and Vice-President Isabel Perón assumed the presidency. Her government lasted less than two years, amidst political chaos and an annual inflation rate of 700 percent. Guerrilla groups, union leaders, and anticommunist death squads began killing each other. By the end of the 1970s, these guerrilla groups were responsible for approximately 700 assassinations (Ocampo 1999, 672). In 1974, the rate of kidnappings was about three a week, which included not only wealthy foreign businessmen, but also local shopkeepers and some working class persons. In the previous year, the newspapers reported more than 500 people kidnapped and ransoms totaling more than $50-million. The People's Revolutionary Army, a Marxist guerrilla group, received, for instance, a $14-million for Victor Samuelson, the general manager of Exxon Corporation (Kandell 1974). In 1975, the Montoneros received a $60-million ransom according to another article published by *The New York Times* (Kandell 1975) for the release of two executives, an amount equivalent to a third of Argentina's military budget in that year.

On 24 March 1976, President "Isabelita" was overthrown by a military junta, which was headed by General Jorge Rafael Videla, Admiral Emilio Eduardo Massera and Brigadier Orlando Ramón Agosti. The junta proclaimed a *National Reorganization Process* which received a widespread support from sectors of Argentine society, in-

cluding the Catholic Church, the business community, the media, and the middle and upper political classes (Mallinder 2009, 8). The 1976 Argentine coup, as happened in other countries in Latin America during the Cold War, was a result of a civic-military alliance.

Under authoritarian rule from 1976 to 1983, human rights groups claim that approximately 30,000 people disappeared (the *desaparecidos*) in Argentina (Brysk 1994, 686). The "dirty war," as it was called by the military, was put into action to annihilate not just the "subversive" oppositionists, but dissent of any kind. In fact, the officers' actions went far beyond the war on subversion and spread out with brutality and caprice against civilians. People were captured off the streets, workplaces, or from their homes, and took to military installations which became centers of torture, rape, and murder. Not to mention the "death flights," namely, airplanes and helicopters transporting political prisoners who were thrown into the sea or into the La Plata River.

The dictatorial regime began to fall mainly due to its economic fiasco and its defeat in the Malvinas War, when the military, in order to recover some domestic popularity, tried to take back the Falklands Islands (*Islas Malvinas*) from Great Britain. The government's vanquishment sealed the military ineptitude to stay in power. Afterwards, the last military junta took the precaution to enact in 1983 Law No. 22,924, *Ley de Pacificación Nacional* (Law of National Pacification), granting self-amnesty to its repressive agents in order to immunize every member of the military from prosecution before democratic elections were carried out. In addition, the government issued a report, the *Final Document on the War Against Subversion and Terrorism*, where it gives its account of the "dirty war." It stated that the fight against subversion justified the coup d'état and that any "errors" that might have been committed were "the unavoidable by-product of revolutionary insurgency" (Mallinder 2009, 16).

During the elections, two main candidates emerged. Mr. Italo Luder, a lawyer and member of the Peronist party who announced that he would not revoke the self-amnesty law. In contrast, his opponent, Mr. Raúl Alfonsín of the Radical Civic Union party, denounced the Peronist position as a pact with the military and promised to investigate human rights violations and to trial both the military chiefs who gave the orders to torture and kill "subversives" and the officers who committed the worst excesses, together with guerrilla leaders who also perpetrated human rights abuses. Alfonsín sketched what would become known as "the theory of the two demons," according to which the country suffered from both the extreme right and left. The democratically elected government for the sake of treating all with impartiality should also try revolutionary terrorism along with state terrorism. As he would recall years later, although the "violence that stained Argentina with blood during the 1970s was initiated by the terrorism of the left," the disproportionate reaction by the military, that is, "resorting to terrorist methods to combat terrorism," was unjustified. Thus, the "most atrocious acts committed by both types of terrorism had to be judged by an independent judicial body, and those found guilty had to be punished" (Alfonsín 1993, 17).

In 1983, Alfonsín was elected with 51.7% of votes. After the inauguration on 11 December 1983, the president sent drafts of bills to the Argentine Congress in order to abrogate criminal legislation enacted by the military regime, to punish the crime of torture with the same penalty as murder, to ratify the American Convention on Human Rights, to revoke military jurisdiction for crimes committed in the future by military personnel in connection with acts of service.[20] In addition to that, Alfonsín cashiered half the army generals and two-thirds of the navy admirals.

The annulment of the military's self-amnesty law brought several problems for Al-

[20] For a better account on these measures, see Nino (1985).

fonsín. First, Article 2 of the Penal Code stated that if the law changes after the criminal act, a judge should apply the most lenient law; in this case, the self-amnesty (Mallinder 2009, 27). Consequently, the government had to fight to void the amnesty law *ex nihilo*. Alfonsín did that based on two main arguments: that statutes enacted by a de facto government have only a precarious validity and that the amnesty law violated the Constitution because it concentrated all governmental power in certain organs of the Executive[21] and the law granted a privilege to the military, violating the principle of equality before the law (Nino 1985, 223).[22] The self-amnesty was finally annulled by Law No. 23,040 on 27 December 1983 with 208-2 votes in the House and unanimous approval in the Senate. This was the first bill to be passed by the Argentine Congress in eight years.[23]

Second, the law at the time when the crimes were committed determined that a military court should try the offenders. Thus, as a means of respecting what it understood to be the rule of law, the government decided not to interfere with the military jurisdiction of the Supreme Council of the Armed Forces over the crimes committed by the junta leaders. This resolution provoked a strong opposition from social movements, which objected, among other things, that the military proceeding were held in secret and did not allow the direct participation of victims (Mignone et al. 1984, 129).[24] Nevertheless, in 1984 Congress passed Law No. 23,049 stating that

[21] Since the amnesty law prevented the Judiciary from investigating the perpetrators, it violated the separation of powers. I will discuss this issue (using the transition in Uruguay as example) further in chapter 3 below.

[22] Argentina's 1853 Constitution remained valid during the military rule, although it became subordinated to the "basic aims" of the *National Reorganization Process*, that is, some "principles" established by the authoritarian regime.

[23] An article on how Argentina set up inquiry for 6,000 who disappeared (Schumacher 1983) says that there was "little resistance" from the military, which were demoralized. Human rights leaders, specially the Mothers of Plaza de Mayo, however, demanded the prosecutions to be broadened.

[24] In this sense, for some human rights lawyers, "[t]he Alfonsín government hoped that the Supreme Council – and the vast majority of the armed forces not directly involved in the human rights violations – would sacrifice a handful of military officers in order to help rebuild the integrity and prestige of the armed forces as an institution with a role in the new constitutional order. This gamble was based on an empirical assessment of the nature of the armed forces as a largely bu-

the decision of the military trial could be appealed to a civilian federal court. At the end of this stage of Argentina's transition, the Supreme Council issued a report declaring its inability and unwillingness to prosecute the junta members. Thereafter, the civilian federal court assumed jurisdiction over the junta trial in April 1985. The trial of the nine commanders in the civilian court brought the attention of the public opinion and were widely reported and debated. The verdict was issued in December 1985, and five defendants were convicted and four acquitted. One year later, the Supreme Court upheld this acquittal and reduced the convictions against two of the condemned.

Finally, Alfonsín believed that judicial investigations and proceedings should focus on the most responsible perpetrators and that they should be hold accountable as soon as possible. These measures, he argued, would be not only more beneficial to Argentine society but also more effective in preventing future violations (Alfonsín 1993, 16). For this reason, Alfonsín stated three "levels" of responsibility: those with decision-making capacity and who gave orders to commit crimes, those subordinate officers who had exceeded their illegal orders by committing "atrocious or abhorrent acts,"[25] and those who simply followed orders (Mallinder 2009, 41). Only the first two groups were, according to this view, eligible for prosecution, allowing the lower-ranking officers to rely on a "due obedience" defense.

Furthermore, Alfonsín also created the *Comisión Nacional Para la Desaparición de Personas* (National Commission on the Disappearance of Persons). CONADEP was a truth commission made up of ten independent and respected individuals, among lawyers, bishops, a journalist, a mathematician, and others, headed by the prestigious writer Ernesto Sábato. The scope of the commission was to clarify only the disap-

reaucratic institution flanked by a small fascistic fringe and a small democratic sector" (Mignone et al. 1984, 142).

[25] Thus, for Nino, "no person who tortured a prisoner or raped a woman could allege that he had an order to do so which he believed legitimate" (1985, 228).

pearances, but not to investigate other violations, such as torture, sexual violence, arbitrary detention, and so forth. Mainly because of this narrow mandate, human rights organizations, which had been invited by Alfonsín to collaborate with the commission, pressured the government and claimed for the prosecution of all perpetrators. The commission staff inspected prisons, clandestine cemeteries, and police facilities. Testimonies taken by the commission were nationally broadcasted and newspapers published its press briefings regularly. At the end, the commission produced in 1984 a report called *Nunca Más* (Never Again). The report "documented the cases of almost 9,000 persons who had disappeared; published in book form, *Nunca Más* was widely available throughout the country, was enthusiastically received, and soon became a national best-seller" (Hayner 1994, 615).

As subordinate officers who were subject to military jurisdiction would still have to face criminal proceedings, the military pressure on the government continued to mount. In December 1986, Alfonsín signed the *Punto Final* (Full Stop) law, which introduced time limits in which prosecutions could occur in an attempt to limit the efforts to hold members of the armed forces into account. The 60-day limit (to start on the day the law was promulgated) resulted in a "rush" for justice. Several courts cancelled their Christmas holidays and worked overtime to process the nearly 1,000 applications of murder, torture and other violations by lawyers working with victims and human rights organizations (Mallinder 2009, 60).

In the wake of the failed attempt to limit prosecutions, the military became anxious about the suits. The tension erupted in the Easter Uprising by the *Carapintadas* (Painted Faces), that is, military who smeared their faces with camouflage paint during the rebellion. Despite denying that a negotiation took place, president Alfonsín obtained the rebels' surrender and, subsequently, the talk of reconciliation with the armed forces began again. In his preface to the American edition of *Nunca Más*,

Ronald Dworkin expressed his concerns with Argentina's democratic regime at this time:

> The arguments I have mentioned in favor of some general amnesty are powerful and in no sense illegitimate. It is desperately important, not only for Argentina but for Latin America generally, that the Alfonsín government succeed. It is one of the few governments in the region firmly committed to constitutional democracy in our own sense, one of the few we can respect unreservedly. But it is vulnerable to a variety of economic and political forces. (1986, xxvi)

Furthermore, Carlos Nino, a lawyer who coordinated the council created by Alfonsín for the consolidation of democracy, was aware of the necessary limits on both the time and scope of the punitive actions the government could take. In order to grant some degree of justice and accountability, on one hand, and the political stability of a recently founded democratic regime, on the other, Alfonsín had to mediate both claims from the victims and the military, who retained some power and opposed the trials.[26]

Following this process, in June 1987 Argentine Congress passed the *Ley de Obediencia Debida* (Due Obedience Law), which exempted from punishment lower-ranking officers and soldiers. In addition to the political apprehensiveness generated by the military pressure, Alfonsín's government failed to resolve Argentina's severe economic crisis, prompting the president to resign on 14 May 1989.

After inauguration, Alfonsín's successor, president Carlos Menem, issued a series of pardons which set free officers who had been already convicted. In October 1989 Menem pardoned 277 people, among them generals awaiting trials, low-ranking officers involved in military rebellions and former guerrilla leaders. In December 1990, he also pardoned junta members who ruled the country during the military regime. In Ocampo's words, "with a stroke of his pen, Menem erased years of fighting for

[26] Nino (1991; 1985) objected the position according to which *all* perpetrators should be *punished*, a position he ascribed, among others, to Diane Orentlicher (1991a). For a counter-argument to Nino, see Mignone *et al.* (1984) and Orentlicher's reply (Orentlicher 1991b).

justice" (1999, 686).

It was only in 1998 that *Punto Final* and *Obediencia Debida* laws were derogated in Argentina after an intense mobilization by civil society in the mid-1990s. However, the derogation was only symbolic, since the amnesty laws were removed from the statute books without retroactive effect (Mallinder 2009, 112 ff.). After a long period of economic and political turmoil, Argentina's "never-ending game," to use Malamud-Goti's expression (1996), had a new turning point when Néstor Kirchner was elected president in May 2003. Despite receiving only 22 percent of the vote, once in office Kirchner developed a strategy to end impunity and punish perpetrators. His measures included: purging the armed forces and the police of those who have somehow took part in the dictatorship or backlashes against previous democratic governments, reforming and appointing new members to the Supreme Court, allowing the extradition of Argentine offenders abroad for human rights violations, ratifying the 1968 Convention on the Non-Applicability of Statutes of Limitations to War Crimes and Crimes against Humanity, creation of memory sites and monuments, and compensation for children of the disappeared (Mallinder 2009, 115–24). Moreover, the most important initiative taken by Kirchner was to completely nullify the amnesty laws. Law No. 25,779 promulgated on 2 September 2003 declared that *Punto Final* and *Obediencia Debida* laws were null and void, with retroactive effects. On 14 June 2005, almost thirty years after the military coup d'état, the Argentina's Supreme Court ruled by 7-1 votes.[27] that amnesty laws were unconstitutional and affirmed the validity of Law No. 25,779. This decision reopened hundreds of human rights cases. In October 2011, Alfredo Astiz, known as the "Blond Angel of Death," together with 11 other former military and police officers were convicted for their role in executing human

[27] In a 1987 verdict, the Court found amnesty laws constitutional. However, after its reformation, president Kirchner selected four of the Court's nine members. A fifth has announced his retirement; a sixth was suspended before the decision. Despite some doubts about the Court's independence, the new judges were chosen by a more open process (Economist 2005).

rights activists who were tortured at the Navy Mechanics School, known as ESMA, and then dropped from navy airplanes into the South Atlantic (Barrionuevo 2011).

1.3 A Consensual Theory of Punishment

Carlos Nino offers an interesting counterpoint to what he calls "mandatory retribution," according to which "every crime should be meted out by a proportional punishment, whatever the consequences of the policy" (1991, 2620).[28] For him, considerations of social protection, not retribution, should provide a prima facie justification for the coercive deprivation of some rights. To begin with, Nino endorses a sort of utilitarian view according to which measures that involve lesser evils are legitimate insofar as they can prevent greater ones. So, for example, a quarantine treatment may restrict someone's freedom in order to protect other members of society. However, one of the drawbacks of this argument, as Nino himself points out, is that it might allow extremely harsh measures – torture in a ticking time bomb scenario, for instance – to prevent greater harms to society. Besides that, there is another reason, which may be applied to utilitarianism in general, against the argument based solely on social protection. For Nino, a measure diminishing the overall harm that the community would suffer at the cost of selectively harming some of its members could be questioned as unfair likewise a measure increasing the national product at the cost of the worst off. Both measures, Nino argues, can be condemned for "using men only as means and not as ends in themselves" (1983, 292).

Thus, Nino prefers a "permissive variety" of retribution (1991, 2620) that takes into account the perpetrator's prior consent to undertake criminal liability and, at

[28] "Mandatory retribution" and "intrinsic retribution" (see first section of this chapter) are being used here as synonyms.

the same time, the beneficial effects of punishment, such as deterrence. In order to provide a better justification for punishment, he tries to combine a fair "distribution of benefits and burdens" which does not rely on the blameworthiness of wrongdoers, as mandatory retributivists do, without abandoning the idea of punishment as a measure of social protection.

Nino's "consensual theory of punishment" is structurally analogous to a contractual obligation that has been consented and provides a moral justification for its execution. In those social relationships that are objects of contracts, Nino argues, the validity at stake relies not on whether they represent an equitable distribution of benefits and burdens, but on whether the parties have "freely consented to the distribution involved" (1983, 293). To be sure, there has been an increasing concern to prevent huge inequalities between the parties and their bargaining, but this aims to keep the freedom of the parties in good condition. In Nino's view, only the presence of the parties' actual freedom to contract "can justify a departure from the requirement that social distribution of benefits and burdens should be equitable" (1983, 294).

Furthermore, it is a generally accepted fact, he points out, that whenever a contractual obligation has been consented it provides a moral justification for enforcing it. As an example, Nino says that when an individual enlists voluntarily in the army of a country at war, he or she shoulders a very unequal share of the burdens of protecting his or her society compared with the benefits that may be obtained. However, this inequality is barely problematic in moral terms because the person has consented to undertake the obligation of fighting (1983, 295). Similarly, although it does not involve an obligation, the law of torts recognizes that someone's consent to assume a certain risk may exonerate the other party from his or her legal duties and liabilities, as, for example, someone who accepts a lift from a drunken driver. In Nino's words, "the individual who consents to undertake some legal obligation is, in principle,

morally obliged to do the act which is the object of that obligation" (1983, 296).

Where does the analogy between a contractual obligation and punishment rest? First, punishment is not a fortuitous happening, but rather, in this consensual approach, "the product of the will of the person who suffers it," granted that "certain requirements related to the agent's state of mind are met" (1983, 297). Second, the offender does not have to agree with the punishment itself (what is, for obvious reasons, very unlikely), but to consent to the normative consequences of the illegal act, that is to say, to assume a liability to punishment. As Nino points out:

> The individual who performs a voluntary act – an offense – knowing that the loss of this legal immunity from punishment is a necessary consequence of that act consents to that normative consequence in the same way a contracting party consents to the normative consequences following from the contract. (1983, 298)

Thus, in other words, a person who commits a crime assumes a legal liability to suffer punishment and relinquishes the right not to be penalized. Moreover, the consent is given by means of the performance of the illegal act. The offender's personal belief towards the punishment, that is, whether he or she thinks that the punishment is probable, is not relevant. It is the consent to assume a legal liability that matters in this case.

Carlos Nino believed that the gap in the moral justification of punishment left by utilitarian considerations of social protection could be bridged by the agent's consent to renounce his or her immunity. Thus, as stated above, Nino can take into account the beneficial effects of punishment ("measures involving lesser harms than the harm feared") without reducing offenders to mere means to social protection (insofar as they are agents who give their "consent to the normative consequences of the act").

Both the idea of the agent's autonomy and the collective aim for social protection play the central role in Nino's consensual theory of punishment:

> If the punishment is attached to a justifiable obligation, if the authorities involved are legitimate, if the punishment deprives the individual of goods he can alienate, and if it is a necessary and effective means of protecting the community against greater harms, then the fact that the individual has freely consented to make himself liable to that punishment (by performing a voluntary act with the knowledge that the relinquishment of his immunity is a necessary consequence of it) provides a prima facie moral justification for exercising the correlative legal power of punishing him. (1983, 299)

Note that, provided that the legal framework is fair and the punishment contributes to the social good, the agent must *know* that the relinquishment of his or her immunity necessarily follows from the offense. This is important because it proscribes retroactive criminal laws (Nino 1983, 299).

Departing from other accounts that justify punishment based on moral desert, Nino demands a "subjective attitude towards punishment itself" that is neither "based on a utilitarian calculus, nor on the value of such things as freedom of choice or predictability of the future" (1983, 300). This attitude does not rely on an explicit or implicit acceptance of criminal laws, but only on the consent to the legal normative consequences of the act to be performed. As a commentator puts it, "in non-criminal forms of implicit consent one can consent to both the action (hiring a cab) and to the legal normative consequences (the obligation to pay the fare). In crime one can only consent to the legal-normative consequences" (Imbrisevic 2010, 216–7). The morally relevant consent regarding criminal law is the consent to assume the liability to suffer punishment involved in the voluntary commission of the offense with the knowledge that this liability stems from that offense. This consent, Nino says, is an irrevocable one (unless, of course, it was possible to undo the criminal deed).

1.4 Why Punish?

Different answers have been provided to the question about the grounds for pun-

ishment. Although I do not intend to answer that question, a theory of amnesty that I will outline in the next chapters has to be able to reject the retributivist argument to justify punishment. In fact, if one views punishment as the necessary consequence to moral guilt, then any sort of amnesty is excluded from the very outset. For this reason, I am sympathetic to Nino's attempt to challenge mandatory retribution and to keep punishment only when and if its effects are beneficial to society. At the same time, however, I think because Nino puts too much stress on the agent's consent as a condition for valid punishment, he runs the risk of reducing autonomy to a mere assumption that contractual theory has to make in order to be effective.

Autonomy has been at the center of the debates on punishment and criminal law for a long time. The Kantian moral idea that all persons have to be treated and respected as "ends in themselves" is shared by legal theorists, like Nino, who put social protection or other targets above punishment as well as by those who endorse some kind of moral desert and retribution. One of these authors, Antony Duff, raises a fundamental question (1991, 6): "how can we respect one's autonomy while imposing punishment on her against her will?" Duff, who, just as Nino, dismisses a purely consequentialist perspective, emphasizes the role punishment plays in addressing the offender as a rational and responsible agent. For him, autonomy is not enhanced simply by presuming the violator gave his or her consent to punishment when a crime was committed. Instead, it depends on a series of "procedural rules and principles which structure the criminal process of trial, verdict and sentence" (Duff 1991, 8).

Consequently, our focus here is on the whole process of rational attribution of responsibility by means of which someone is declared "guilty" or "innocent." This is crucial for those who understand autonomy in a dialogical fashion. In fact, Duff is capable to point out some elements in criminal trials which are essential to our analysis. The purpose of a system of law is not just that citizens obey its demands, but

"accept, as justified, the obligations which it imposes on them," he says (1991, 125). Therefore, a criminal conviction has to give more than a prudential incentive to obey. It must remind or persuade the citizens of the justice of the law's requirements. As I will show in the next chapter, those elements make the attribution of responsibility mandatory. It does not mean, however, that punishment has necessarily to follow from accountability. By means of legal attribution, the political community, the wrongdoer and the victim should engage in a rational process to give an account of the facts:

> A verdict of 'Guilty' does not simply express a judgment on the defendant's past conduct: it communicates that judgment *to him* and *to the community*; and it expresses a condemnation of this conduct which he should accept as being justified by the trial which preceded it. What makes that verdict just is not simply the fact that he did commit the offence charged, but that the charge has been proved against, and to, him by a rational process of argument in which he was invited to participate. (Duff 1991, 118 emphasis added)

In this passage, the community seems to have a "passive" role. But one could argue, stressing the democratic character of a process to hold someone accountable, that the verdict is read *on behalf of* the political community, instead of being communicated *to* it. Duff also describes the process of attribution and punishment as intertwined, what makes him a retributivist. However, as already stated, both things do not necessarily have to be connected. I believe it is possible to separate accountability from punishment, and that amnesties can suspend the latter, but not the former.

Those who advocate retribution maintain that for the most heinous crimes perpetrators *deserve* some sort of punishment. Jean Hampton (1988, 120), referring to the Dostoyevsky's quotation at the beginning of this chapter, questions whether it is ignoble, or even despicable, to block or deny the retributivist response following those crimes. How could someone resist the idea that a man who sets dogs on an innocent child and forces his mother to watch them tearing the boy into pieces should die?

On the one hand, I agree with the argument that *resentment* is a feeling directed towards a violator as a response to wrongs committed against oneself, and that the primary value defended by this passion is *self-respect* (Murphy 1988, 16). A failure to resent moral injuries experienced by me or not to feel indignation when I see other people being wronged may indicate a moral breach. In Argentina, the Mothers of Plaza de Mayo have claimed for years that perpetrators should not go unpunished. Despite some victims be portrayed as groundless and lacking objectivity,[29] actions motivated by resentment cannot be considered simply as irrational or immoral. In fact, experiences of disrespect, to which resentment is a reaction, are on the very basis of social struggles and bear the potential to become actions of political resistance (Honneth 1996).

On the other hand, I believe that to see perpetrators like Dostoyevsky's General as "not merely a performer of bad actions but himself as a morally repulsive entity," and try from that point to derive a justification for punishment (Hampton 1988, 146) is highly problematic. Retributivists usually accredit some intrinsic value to punishment or, in this case, punishment expresses opposition to what is considered to be the "evil." Following Braithwaite and Pettit (1990), I think a consequentialist theory of criminal justice is much more convincing. As already mentioned, a consequentialist theory establishes a target, and punishment may be *one among other* means to accomplish it.[30]

[29] Nino himself argues something similar when he refers to the Mothers stating: "the emotional strains various groups suffered impaired their ability to be objective." For him, this is so because some Mothers insisted that their loved ones who disappeared should be made to appear alive, thus they opposed the inspection of anonymous tombs for the purpose of identifying the corpses (1991, 2635). Notwithstanding, their denial was clearly a form to keep the struggle for justice. On 26 January 2006, the Madres de la Plaza de Mayo Association made their final annual March of Resistance around the Plaza de Mayo, in recognition of President Néstor Kirchner's measures to void amnesty laws and punish perpetrators, saying no more such marches are needed because "the enemy isn't in the Government House anymore" (Clarín 2006).

[30] For Braithwaite and Pettit, for instance, this target is to promote a notion of Republican liberty they call "dominion:" "A person enjoys full dominion, we say, if and only if: 1. she enjoys no less a prospect of liberty than is available to other citizens. 2. it is a common knowledge among

For those who regard punishment as the right response to "evil," I warn this is a dangerous argument. In his comments to Nino's theory, T. M. Scanlon points out an important aspect sustaining the defense of the Argentine military commanders and the Mothers' claim for punishment:

> Both are drawn to retributivism because each is looking for a standard safely beyond law: in the case of generals, in order to argue that whatever the law may be now, their acts were *morally* justifiable and hence unpunishable; in the case of the Madres, in order to argue that whatever the law may have been *then*, these acts were morally evil and hence deserve punishment. This common strategy suggests that in its emphasis on an extralegal standard, the rationale of retributive theory is in some tension with the idea of the rule of law. (1999, 260)

Citizens may reasonably demand from a system of law what Scanlon calls *affirmation*, namely, that it responds to the past atrocities and recognizes the victims' sense of having being wronged. It does not mean, however, that victims have a right that those who have wronged them be punished. In this sense, a justifiable legal order ought to defend citizens' rights, but it does not require that every offender be punished (Scanlon 1999, 261).

In the next chapter I will show how it is possible to combine a theory of democracy with the process by means of which citizens hold perpetrators accountable. To attribute responsibility to someone who violated the law strengthens citizens' autonomy not because of punishment, but instead because of accountability itself. Legitimacy stems from a procedure citizens follow when they establish what "counts" to hold someone accountable. The enactment of amnesties, as I will argue, may be seen as

---

citizens that this condition obtains, so that she and nearly everyone else knows that she enjoys the prospect mentioned, she and nearly everyone else knows that the others generally know this too, and so on. 3. she enjoys no less a prospect of liberty than the best that is compatible with the same prospect for all citizens" (Braithwaite and Pettit 1990, 64–5). There was a slightly change in this theory more recently. Liberty now is understood as "non-domination" and criminalization is legitimate "only as far as criminalization is not likely to do more harm than good to the cause of non-domination," see Pettit (1997). Although it is not my aim to establish such a target in this work, I believe we carry similar views insofar as we subordinate punishment to a broader criterion of freedom and democratic legitimacy.

similar to the reflexive practices in which citizens engage to define the grounds of legal attribution.

CHAPTER

TWO

RECONCILIATION AND ACCOUNTABILITY

There is no simple formula to consolidate peace and to guarantee that justice will prevail. Combining both is a political task. In this chapter I will try to show that amnesty and accountability are not mutually exclusive. In some cases, South Africa being the most notorious one, amnesty means the lack of punishment, but it does not necessarily prevent perpetrators to be held responsible for their crimes. As I will try to argue in this chapter, the reconciliation that follows from any political transition should be able to guarantee that citizens are treated as peers of the same political community. In this sense, it is their duty to address past violations as well as define, in cooperation with one another, the grounds of accountability.

Are there limits to amnesty? I think the answer is yes. The normative theory outlined here states that a legitimate amnesty should not prevent citizens from defining the grounds on which misdeeds are rationally attributed to offenders. According to this formulation, citizens are responsible for defining those acts they consider to be illegal. Furthermore, they are also responsible for establishing the limits in which

counterreasons and countermotives can be used as a justification of the violation of the norm. Citizens can enlarge those limits in order to accept a broader set of counterreasons and countermotives – such as "I violated the norm because I was following orders" or "I was compelled to act this way" – in order to punish only "big fishes," if they decide so. On the other hand, they can set very tight limits and ask for a very strict form of justification from those who did not observe the norm. For this reason, blanket amnesties, namely, those total amnesties granted to groups of perpetrators (state agents, the military, and the like) are discarded from the very outset. They violate the idea that citizens are peers by picking out one (or sometimes more) specific group and relief its members of that justificatory burden.

The chapter begins with (1) a brief explanation of the South African case. This is not intended to be an exhaustive description. I will simply lay out the most relevant facts and the accountability mechanisms of South Africa's Truth and Reconciliation Commission (TRC). In the next section, I will make (2) a further discussion of the TRC's legitimacy. Departing from Hegel's concept of punishment and how it is necessary to achieve "reconciliation," I want to suggest an interpretation of what I believe is more consistent with Hegel's intersubjective account. After that, I will (3) develop this idea as it appears in recent discussions regarding punishment, amnesty and transitions. Finally, (4) back to the South African case, I want to raise some considerations to clarify whether the institutional mechanisms of accountability and reconciliation were open enough to a full range of different (and conflicting) narratives. This is an important step to understand where the TRC's legitimacy stemmed from and whether it was able to achieve "stability for the right reasons."

2.1 South Africa's Truth and Reconciliation Commission

The year 1948 will be remembered by an unfortunate paradox in world history. On

the one hand, the United Nations General Assembly adopted the Universal Declaration of Human Rights, an attempt to guarantee human dignity and equality by means of the establishment of universal principles and rights. On the other, the National Party came into power in South Africa and started to implement apartheid's legislation. The Nationalists transformed a *de facto* oppression, whose origins date back the British rule, into a *de jure* segregation, responsible for some of the most egregious violations of the very rights that Declaration aimed to protect.

The apartheid regime was accountable for racial segregation, executions, tortures, and other forms of repression. Under the Population Registration Act (1950) inhabitants of South Africa were classified as blacks, whites, coloured (mixed) and Indians. The Group Areas Act (1950) restricted residence by racial group. Millions of blacks who were considered "superfluous" in urban areas had to be forcely resettled. The government created what they called Bantustans (tribal "homelands") where blacks were supposed to live. Millions of people were prosecuted as criminals for infringiment of pass laws, which restricted freedom of movement, place of residence and choice of occupation. Every black over age 18 had to carry a document providing he or she was elligible to live and work in a particular area. Moreover, racial groups did not have access to the same opportunities.[1] Under the Immorality Act (1957), sex between a white person and a person of another race was prohibited. On top of that, the Nationalists smashed all militant political organizations under the Suppression of Communism (1950) and Terrorism (1967) Acts. No oppositionist party was allowed and resistance leaders were sentenced to life imprisonment, such as Nelson Mandela, who served 27 years in prison.

Every transition is unique for the balance it tries to reach between attempts of estabilization and claims for justice. Nevertheless, South Africa's distinctive experi-

[1] In 1969, for instance, university enrollment was 68,500 whites in a population of 3.5 million and under 4,000 blacks out of 13 million (Howe 1970).

ence is marked not only by the inventiveness of the solutions it was able to create in order to reach that balance, but also by the accentuated democratic character of the political decisions made during that process. The negotiations among several political groups led, for instance, to a two-stage process of constitution making.[2] The so-called Multi-party Negotiating Process passed an interim constitution (Act 200 of 1993) in November 1993, which allowed a Government of National Unity and the power sharing among the strongest parties for a period of five years. It was only on 8 March 1996 that a final constitution was enacted.

The interim constitution addressed the issue of "National Unity and Reconciliation" in its epilogue. The document aimed to establish a "secure foundation for the people of South Africa" in oder to "transcend the divisions and strife of the past." During the negotiation process to approve the interim constitution, the former government led by Frederik de Klerk and the National Party, as well as the security forces, called for a blanket amnesty. Notwithstanding, many prominent jurists and human rights organizations were against any sort of amnesty. To avoid stalling the transitional process, a so-called "sunset clause"[3] postponed that decision and guaranteed job security for civil servants, police and army included, for the next years (de Lange 2000, 22). Accordingly, the interim constitution established that "to advance such reconciliation and reconstruction," amnesty should be granted in agreement with the terms to be defined by a parliament-enacted law regarding the "acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past." Following the resolutions of the interim constitution, the South African parlia-

[2] For an overview of this process, see Andrews and Ellmann (2001).

[3] In constitutional negotiations, some outcomes may be of crucial importance to one part, but unacceptable to the other. In order to solve such dilemmas, a sunset proviso is a condition that will lapse after a certain time. A sunrise clause is, conversely, a stipulation that will become effective within a determined period. Besides the amnesty clause, South Africa's interim constitution provided, for instance, that any party holding at least 20 seats in the National Assembly could claim a seat in the Cabinet (Act 200 of 1993, §88).

ment passed in 1995 the Promotion of National Unity and Reconciliation Act,[4] which shaped the legal framework for the implementation of the Truth and Reconciliation Commission.

The objective of the TRC was to address the legacy of the past and provide a picture, as complete as possible, "of the nature, causes and extent of gross violations of human rights" (TRC Act, preamble) committed from 1 March 1960 to 10 May 1994.[5] The TRC was constituted by 17 members, appointed by President Nelson Mandela, who opened up the nomination process by promoting public hearings and allowing civil society to appoint candidates. None of the commissioners were active politicians, there were representatives from all racial groups, and despite some members were lawyers, the majority was drawn from church or community service backgrounds (Dugard 1998, 293). It was presided over by the former Archbishop of Cape Town, Desmond Tutu. Compared to other truth commissions, South Africa's most proeminent characteristic was the power to grant amnesties to individual perpetrators. As pointed out by Priscilla Hayner (2000), it integrated both a quasi-judicial power with the investigative tasks of an administrative truth-seeking body, a far greater improvement over the unconditional blanket amnesties, so common in other countries, especially in Latin America. The powers of the TRC included the power of search and seizure,[6] and the power to subpoena.[7] The hearings were public unless this condition was in opposition to the interest of justice or there was a likelihood that harm would result

[4] Act 34 of 1995 (hereinafter TRC Act). This Act was amended several times. Here I am using the version updated until the Promotion of National Unity and Reconciliation Amendment Act 23 of 2003, which can be found online at: http://www.justice.gov.za/legislation/acts/1995-034.pdf [last access on 6/1/2012].

[5] The starting date coincides with the time of Sharpeville massacre. Initially, the interim constitution established that the cut-off date was 6 December 1996. Later, the Constitution First Amendment Act of 1997 changed the cut-off date to 10 May 1994 to cover the events related to the Bophuthatswana coup d'état.

[6] TRC Act §32.

[7] Id., §29.

as the proceedings were open.[8] Hayner also highlights that the investigative powers were also strengthened by "a fairly sophisticated witness protection programme"[9] and "its budget was several times larger than any other truth commission before it" (2000, 36–7). Moreover, the TRC was one of the few commissions woldwide to publish in their final report the names of those perpetrators responsible for gross violations.

The TRC was assisted by the following committees: the Amnesty Committee, the Human Rights Violations Committee (HRVC), and the Reparation and Rehabilitation Committee. When combined, they provided an institutional arrangement capable of giving an account of the facts and holding individuals responsible. It relied on the "amnesty-carrot" incentive for perpetrators to fully acknowledge their crimes. In addition, the "investigation-stick" for those violators who remained silent and could face investigations once named by victims. Finally, the "judicial sledgehammer," or the justice-driven possibility of ongoing prosecutions until amnesty is bestowed (de Lange 2000, 26).

The Amnesty Committe was almost a judicial body. It was originally composed of five members, but due to the workload it increased to nineteen. In fact, it would be more accurate to say Amnesties Committees, since they worked as several committees of three members each, all of them chaired by an active or retired judge.[10] The "amnesty-carrot" mechanism worked as an incentive for perpetrators to make a full disclosure of all politically motivated violations. The Amnesty Committee was in charge of receiving amnesty applications and later to submit them to a preliminary screening process, which could exclude those referring to circumstances lacking any political connotation or afford applicants the opportunity to explain gaps or make a further submission.[11]

[8] Id., §33.
[9] Id., §35.
[10] Id., §17.
[11] Id., §19. For a comprehensive study of the Amnesty Committee, including the analysis of its

After the foregoing examination, the Committee could grant amnesty for those actions which did not constitute a gross human right violation[12] without holding a hearing. By contrast, gross human rights perpetrators could only be provided amnesties after public hearings of which their victims were notified.[13] The violator should make a full disclosure of their deeds. Such acts had to be associated with a "political objective." The criteria employed to classify an act as "political" were drawn from the principles used in extradition law, and they included: the motive of the offender, the context where the act took place, the gravity of the act, and whether the act was committed in the execution of an order.[14] Consequently, crimes committed for personal gain or out of personal malice, ill-will or spite against the victim were not succeptible to be granted amnesty.

The Committee had discretion to evaluate whether the acts met the statutory requirements for amnesty. It is worth noting that despite the Committee could consider jointly individual applications in respect of any particular event,[15] responsability was hold on an individual basis.[16] After being granted amnesty, no person was criminally

decisions and reasons to grant or deny amnesty to applicants, see Bois-Pedain (2007).

[12] Gross violations of human rights are "the violation of human rights through (a) the killing, abduction, torture or severe ill-treatment of any person; or (b) any attempt, conspiracy, incitement, instigation, command or procurement to commit an act referred to in paragraph (a)" resulting from conflicts occurred within the temporal jurisdiction of the TRC. Such violations should also be associated with a political motive (TRC Act §1).

[13] TRC Act §19.

[14] Id., §20(3).

[15] Id., §19(5)(b).

[16] The definition of responsibility on individual, rather than collective, basis sparked controversy over the Commission. Some authors argue that when responsibility turns to be so fragmented, it fails to address injuries that cannot be "'carved out' of the past, individuated as such, attributed to a sequence, rationalised as such, initiated by an actor, initiated at all," as a consequence, there is "damage without injury." This is the way violence of economic structures, for instance, "find no register," and no perpetrator can be named (Christodoulidis and Veitch 2009, 26). Another critique adds that the Commission reduced apartheid from a relationship between the state and whole communities to one between the state and individuals. In this sense, Mahmood Mamdani (2007) points out some of gross violations that do not fit the perpetrator/victim scheme such as forced removals, pass laws, coerced labor, killing of entire communities, and argued for collective remedies. Although I agree that reconciliation should include also redistributive measures, it is necessary to keep in mind that collective attribution of guilt may run the risk of being irrational (I will come back to this point later). To be sure, governments that followed the transition

or civilly liable in respect of such violation.[17]

The Human Rights Violations Committee aimed to inquiry into gross violations of human rights and refer the victims to the Committee on Reparation and Rehabilitation.[18] The HRVC worked as a "stick mechanism," that is, in those cases where a perpetrator took a "wait and see" attitude regarding the "amnesty carrot," he or she could be targeted by a victim-driven investigation. Moreover, the HRVC "had to allow vicitims to tell their stories in the language of their choice, the aim being to record not only the truth ... but, more importantly, to restore the human and civil dignity of those victims" (de Lange 2000, 27).

While the HRVC dealt with victims, the Amnesty Committee handled perpetrators. As the former director of the Centre for the Study of Violence and Reconciliation points out, the TRC process was rooted in the almost bi-polar roles of, on the one hand, a "fact-finding" and quasi-judicial enterprise, and, on the other, a psychologically sensitive mechanism for story telling and healing (Simpson 1999, 19). The Amnesty Committee operated to a great extent within the boundaries of the due process. Furthermore, it sought the "formal" truth which usually stems from legal process, testimonies constrained by the legal rights of others, and objective criteria, excluding any information which cannot be proved (Simpson 1999, 20). The HRVC, conversely, was accredited for grasping information from victims' and survivors' stories and the recount of past abuses. In this sense, it sought the "substantive" truth

were able to implement, although still in an insufficient way, policies to change those structures, including affirmative actions.

[17] TRC Act §20(7). Despite amnesties prevented violators to be sent to prisons, to assume responsibility publicly, most times before the victims themselves, may be considered a sort of punishment. Robert John McBride, for example, was a member of *Umkhonto we Sizwe* (MK), the armed wing of the African National Congress, and received amnesty for the bomb attack of Magoo's Bar in Durban in 1986, when several civilians were killed and injured. After apartheid, McBride sued a local newspaper for opposing his appointment for a senior police post under the argument he was a murderer. In *The Citizen 1978 (Pty) Ltd and Others v. McBride (CCT 23/10)*, the South African Constitutional Court ruled that, despite the amnesty, the newspaper's articles were not defamatory for calling McBride a criminal.

[18] TRC Act §§14-5.

related to sociological, psychological or historical investigation, always taking into account the context where those stories had arisen, even when they produced competing versions. Thus, the result was often "a process in which either the fact-finding mission of this Committee ... [was] sacrificed in the name of being psychologically sensitive to the testifying victim, or alternatively, a process in which sharp cross examination by Commissioners ... appeared to completely negate the 'story telling' objectives of the Committe" (Simpson 1999, 19).

The Committee on Reparation and Rehabilitation was invested with the power of making recommendations regarding reparations as well as measures to rehabilitate and restore the dignity of victims.[19] These recommendations were then considered by the President, who then finally made recommendations to Parliament. As it could be expected, victims' demands varied immensly. While some aspired for symbolic reparations, such as a tombstone to remember a loved one, others demanded financial support, and finally there were victims who rejected any kind of reparation (Simpson 1999, 22).

Despite the TRC's efforts to redress past crimes, many families and victims of the agents of the apartheid regime protested that they must have brought to trial and be punished. At the Constitutional Court, the validity of the TRC Act was challenged by the Azanian Peoples Organization and the relatives of some of the apartheid's most known victims – Steve Biko, Griffith and Victoria Mxenge, Dr. Fabian Ribeiro and his wife, Florence. In the *AZAPO v. President of the Republic of South Africa,*[20] the applicants argued that section 20(7) of the TRC Act[21] was inconsistent with section

[19] Id., §25.

[20] *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others* (CCT17/96) [1996] ZACC 16; 1996 (8) BCLR 1015; 1996 (4) SA 672 (25 July 1996), hereinafter *AZAPO* Decision. Available at: http://www.saflii.org/za/cases/ZACC/1996/16.html [last visit on 12/15/2012].

[21] As already mentioned (see fn. 17 above) the TRC Act §20(7) establishes that the offender who was granted amnesty would not be "criminally or civilly liable" for such offence. In addition, in case the wrongdoer was a state servant or member of any organization, the state and the

22 of the interim Constitution, which provides individuals with the right of access to justice.[22]

The Court held the TRC Act constitutional. Chief Justice Ismail Mahomed, who delivered the opinion of the Court, acknowledged that amnesty impacts fundamental rights, since it obliterates the "right to obtain redress" for crimes. However, the Court held the constitutionality of the TRC Act and the amnesties granted to perpetrators basically on two main assumptions. First, it stated that the epilogue of the interim Constitution gave Parliament authority to make a law providing for amnesty. In fact, the epilogue declares that the Constitution promotes a "historic bridge" between "the past of a deeply divided society" and "the future founded on the recognition of human rights and peaceful coexistence." Thus, the decision acknowledged that without amnesty such bridge "might never have been erected."[23] The epilogue also determines that the "pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society," and adds:

> These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation.
> In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. (Act 200 of 1993, epilogue)

According to the Court, the negotiators of the interim Constitution sought to facilitate the transition to a democratic order, and they had to make "hard choices" and gave preference to "the reconstruction of society."[24]

---

organization were equally discharged if the amnesty were granted.

[22] Section 22 of the interim Constitution reads: "Every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum."

[23] *AZAPO* Decision §19.

[24] Id., §44-5.

The other basis for the decision rested on the definition of amnesty. Whether the amnesty should cover only criminal prosecutions or civil liability depends on the circumstances.[25] At the present case, Justice Mahomed argued, the circumstances are that the interim Constitution provides amnesty as "a facilitator of reconciliation and reconstruction." Evoking a consequentialist argument, he remembered that without the amnesty incentive covering also civil liability wrongdoers would not be encouraged to reveal the whole truth.[26] It is worth noting the decision made clear the solution provided both by the interim Constitution and the TRC Act rejected a "blanket amnesty," which is "granted automatically as a uniform act of compulsory statutory amnesia."[27] Since the Amnesty Committee granted amnesty only for those who were held responsible, South Africa's experience shows how amnesty, combined with a specific form of accountability, can serve "the purposes of effecting a constructive transition towards a democratic order."[28]

2.2 Reconciliation

In this section, I want to discuss why South Africa's TRC was endowed with legitimacy. The work of a truth commission, as its name suggests, could be understood as merely that of "fact finding." However, as Priscilla Hayner argues, its real task is "acknowledging the truth rather than finding the truth" (1994, 607). In other words, its function is to point out which facts and actions (and consequently those responsible for them) ought to be acknowledged by the state. For those who suffered from gross violations, a truth commission offers an opportunity "to remove the possibility

[25] Id., §35.
[26] Id., §36.
[27] Id., §32.
[28] Id., §32.

of a continued denial" (Hayner 2010, 21).

Hayner, the author of the most comprehensive comparative study on truth commissions, inferred some common features from the cases she analyzed. A truth commission, she says,

> (1) is focused on past, rather than ongoing, events; (2) investigates a pattern of events that took place over a period of time; (3) engages directly and broadly with the affected population, gathering information on their experiences; (4) is a temporary body, with the aim of concluding a final report; and (5) is officially authorized or empowered by the state. (2010, 11–2)

In addition, there are no prosecutions in a criminal sense, even when the identities of those who committed atrocities are revealed. Truth commissions are not empowered to punish individuals. To what extent is the work of a truth commission legitimate? Is it possible that a truth commission can attribute responsibility in a satisfactory way, despite any punishment?

There are two main arguments in favor of criminal trials over truth commissions, reminds Ronald Slye (2000). First, trials contribute to rehabilitate and socially integrate the accused by means of including them in a deliberative process. The accused are given the opportunity to explain or justify their actions, which grants even to those responsible for the most heinous crimes the dignity due any person. Second, trials are to produce better information because they are subject to the rigors of legal process and the rules of evidence. Thus, trials are, allegedly, more reliable.

According to Slye, one of the lessons of the South African transitional process is the demonstration that formal trials are not the only forums where those aims can be met, actually, they are maybe not even the best ones (2000, 173). In the public audiences promoted by the South African Truth and Reconciliation Commission, there was a considerable participation of the "accused," who applied to amnesty. While in ordinary trials the accused are placed in a defensive position, since their goal is to

escape liability, in the TRC they were driven by the amnesty-carrot to make full disclosure of their deeds. For this reason, most part of the information made public by the Commission came from the perpetrators themselves.

The assertion that facts and actions investigated by criminal trials match reality better than truth commissions should take into account the purposes of both. To avoid punishing an innocent person, it is crucial for criminal justice to have well structured and very rationalized procedures. For Slye, "the purpose of such a highly structured process is to minimize the danger of producing a false positive," at the cost of an "increased possibility of a false negative" (2000, 174). In other words, criminal procedures may lead to the conclusion that something did not happen in the eyes of law when, in fact, it did. The purpose of the TRC hearings was not to minimize the possibility of punishing an innocent, since this alternative was excluded from the very outset. Conversely, their aim was obtain from the applicant the full disclosure of crimes, otherwise the amnesty could be denied.

I think the question whether truth commissions engage offenders in a deliberative process and give them the opportunity to explain or justify their actions is a good starting point to discuss the normative grounds of South Africa's experience. The first condition truth commissions have to meet is to treat offenders as responsible agents. In other words, they have, just as ordinary trials, to assume that perpetrators are free and responsible agents, so they can be called to account for their deeds.

In response to utilitarian views according to which punishment has to promote some good for the criminal or society, Kant was the first to argue that the offender "must previously have been found *punishable* before any thought that can be given to drawing from his punishment something of use for himself or his fellow citizens" (Kant 1996, 105). For Kant, therefore, no human being can be treated "merely as a means," and there is an absolute duty to punish the guilty. Following Kant, Hegel

also justified punishment in retributive terms as a measure due to the offender. In the following passage of the *Elements of the Philosophy of Right*, Hegel states this idea more clearly:

> The injury which is inflicted on the criminal is not only just *in itself* (and since it is just, it is at the same time his will as it is *in itself*, an existence of his freedom, *his* right); it is also a *right for the criminal himself*, that is, a right *posited* in his *existent* will, in his action. For it is implicit in his action, as that of a *rational* being, that it is universal in character, and that, by performing it, he has set up a law which he has recognized for himself in his action, and under which he may therefore be subsumed as under *his* right. (*PhR,* §100)[29]

How can an injury be one's own right? This is so, for Hegel, because only by means of punishment "the criminal is *honored* as a rational being" (*PhR,* §100).

To be sure, it is not punishment per se, or any form of physical coercion, the main concern for Hegel. Only under strong metaphysical assumptions one could argue that punishment makes the criminal actually "free." Furthermore, the critique of modern state apparatuses of surveillance and incarceration (of course, Foucault comes to our mind here) offers enough empirical reasons to doubt that punishment can fulfill that reformative function.[30] I do not want to deny that Hegel occasionally relies on strong metaphysical hypothesis; but, at least regarding this point, he says that "the laws of the state cannot claim to extend to a person's disposition" (*PhR,* §94). Thus, I think to assume that Hegel aims the change of the criminal's internal disposition by means

[29] I am using the Cambridge edition (1991) of Hegel's *Elements of the Philosophy of Right*, hereinafter *PhR*.

[30] Hauke Brunkhorst insists on this point: "Neither the death penalty nor prison can be justified on behalf of the post-metaphysical reason as an honor to the criminal as a rational being" (2007, 45). Although I am indebted to Brunkhorst's analysis, I think he is too skeptical about truth commissions. At least we both agree that an "amnesty of punishment" [*Strafamnestie*] is legitimate, while an "amnesty of guilt" [*Schuldamnestie*] is not. His lecture on the peace process in Colombia can be found in German here: http://www.goethe.de/ins/co/bog/prj/vyr/vyrm/deindex.htm [last visit on 12/15/2012].

of harsh treatment, as some authors presuppose,[31] is highly controversial.[32]

Most orthodox interpretations that portrait Hegel as a retributivist rely on the passages of the *Elements of the Philosophy of Right* in the section "abstract right."[33] In fact, Hegel himself states that "the cancellation of crime is *retribution* [*Wiedervergeltung*] in so far as the latter, by its concept, is an infringement of an infringement" (*PhR,* §101). However it is necessary to remember that in the "abstract right," Hegel says that a crime corresponds to his logical category of a *negatively infinite judgment* since it negates not only the particular (a property that was violated, for instance), but also the universal, that is, one's capacity for rights (*PhR,* §95). To be sure, *crime* contrasts with other forms of "wrong," namely, *unintentional wrong*, when the universal is respected, but the particular negated (*PhR,* §§86) and *deception*, when the particular will is respected, because the deceived person has the false impression of receiving his or her right, but universal right is not (*PhR,* §§ 87). When Hegel talks about retribution, he has in mind the logical relation between two determinations which are different in appearance, but have an inner connection and identity: "the

[31] Notably Antony Duff, who stresses that the sanction ought to cause some harm in order to accomplish its communicative function: "by imposing on him some material injury which can be seen as injurious even through the eyes of egoistical self-interest, we hope to represent, and to force on his attention, the harm he has done both to others and to himself; by imprisonment, which separates him physically from the rest of the community, we give material and symbolic expression to the spiritual separation created by his crime" (1991, 260).

[32] Hegel states elsewhere that only peoples whose feeling of honor has not yet developed can equal punishment with corporal chastisements. They adopt corrective rather than retributive punishment, and citizens are treated like children, "for *corrective* punishment aims at improvement, that which is *retributive* implies veritable imputation of guilt. In the *corrective*, the deterring principle is only the fear of punishment, not any consciousness of wrong; for here we cannot presume upon any reflection upon the nature of the action itself" (2010, 128). Aside the prejudice against some peoples (the quote refers to punishment among the Chinese), Hegel points out the relation between the "imputation of guilt" by means of punishment and the "consciousness of wrong" that stems from that.

[33] Probably the most notorious example of such interpretation is that of Cooper (1971). Brooks (2012) offers a good overview of those theorists who interpret Hegel as a retributivist, but adds that despite Hegel does not reject the retributivist core presented in the section "abstract right," he determines the value of punishment in explicitly social terms, instead of individual desert, in "ethical life." For a critique of interpretations of Hegel in Germany that reduce his theory to the formula "the negation of the negation," see Wolfgang Schild's paper (2007).

punishment is merely a manifestation of the crime, i.e., it is one half which is necessarily presupposed by the other" (*PhR,* §101). Thus a breach of law committed by the criminal is self-contradictory and contains its own nullification since through the crime the perpetrator denies him or herself the right, as if by stealing someone I am denying myself the right not to be robbed.[34]

Moreover, Hegel embraces retributivism because punishment has an intrinsic value for him. This is the reason he discards punishment as a means of prevention, deterrence, correction, and the like. Hegel affirms that one who bases punishment on threat presupposes that "human beings are not free, and seeks to coerce them through the representation of an evil" (*PhR,* §99). To justify punishment this way, adverts Hegel, is identical to raising a stick to a dog. The offender is treated with respect when the crime is repudiated for the right reasons, namely, when he or she receives punishment as a result of his or her own choice, not as an external harm. In this sense, Hegel, and Kant before him, upholds the view that criminals should be treated as responsible agents.

Hegel's self-declared retributivism has led interpreters to dismiss "the necessity of distinguishing between the *concept* (the essence) of punishment and the specific *modalities* of conviction and sentencing" (Schild 2007, 173). As a concept, punishment is understood as a retribution for a crime that accounts criminals as responsible agents. However, this concept says too little regarding particular punishment in a concrete situation. Here we have to move from "abstract right" in Hegel's formulation towards "ethical life." In this section, Hegel argues that "property and personality have legal recognition and validity in civil society," therefore, their violation is a danger to society. In this sense, "an injury to *one* member of society is an injury to *all* the

[34] I believe Nino develops a quite similar argument when he states that punishment "is the product of the will of the person who suffers it" (1983, 297). However, Hegel is not subject to the same criticism against Nino (see previous chapter) precisely because he takes a further step when analyzing punishment within the "ethical life."

others" (*PhR,* §218 Remark). Then society or, as he calls it, "the injured universal" actualizes itself in the court of law taking over the prosecution and punishment to transform them into "the genuine reconciliation of right with itself" (*PhR,* §220). This notion of reconciliation [*Versöhnung*] has both an objective and a subjective aspect:

> Objectively, this reconciliation applies to the *law*, which restores and thereby *actualizes itself as valid* through the cancellation [*Aufheben*] of the crime; and subjectively, it applies to the criminal in that *his law, which is known by him* and is *valid* for him and *for his protection*, is enforced upon him in such a way that he himself finds in it the satisfaction of justice and merely the enactment of what is proper to him. (*PhR,* §220)

In this passage, it is clear that for Hegel punishment is important insofar as it can achieve reconciliation. By means of punishment, the political community annuls the crime and reaffirms the validity of its laws, while the individual is recognized as a free agent.

As employed by Hegel, the word 'reconciliation' refers both to a *process* and a *state* that results from it.[35] The process could be generally described as "overcoming conflict, division, enmity, alienation, or estrangement," and the result as "the restoration of harmony, unity, peace, friendship, or love." Thus, the basic pattern is that of "unity, division, and reunification." The outcome is a new relationship that could be described as 'higher' or more stable than the unity that preceded it (Hardimon 1994, 85).[36]

---

[35] In this interpretation, I follow Michael Hardimon (1994).

[36] In his early theological writings, Hegel affirms that crime makes the criminal depart from a "unified life," and punishment is experienced as fate: "When the trespasser feels the disruption of his own life (suffers punishment) or knows himself (in his bad conscience) as disrupted, then the working of his fate commences, and this feeling of a life disrupted must become a longing for what has been lost. The deficiency is recognized as a part of himself, as what was to have been in him and is not. This lack is not a not-being but is life known and felt as not-being" (1971, 230–1). Reconciliation here means to reestablish the unity that was sundered. For Habermas, Hegel could have relied on the unifying power of the intersubjectivity of relationships based on mutual understanding, but, instead, "he had developed the idea of an ethical totality along the guidelines of a popular religion in which communicative reason assumed the idealized form of historical communities, such as the primitive Christian community and the Greek polis" (Habermas 1990, 30).

Nevertheless, as the term 'reconciliation' could suggest, Hegel does not equate this self-consciousness of our social world with resignation.[37] To become *versöhnt* means to accept one's situation as good in its own right, not as something bad but unavoidable: "to be *versöhnt* to something is to *embrace* it" (Hardimon 1994, 87). To be sure, Hegel does not conceive the modern social world as a perfect harmony. Our obligations as family members may conflict with our interests as members of civil society, and so on. A reconciled world, however, will be able to promote the actualization (in the sense of *wirklich*) of individuality and social membership. Thus, when Hegel says that by means of punishment reconciliation applies to the criminal he means that it treats him or her as a free and responsible agent, independently that he or she may have acted otherwise. From the objective perspective, punishment promotes the reconciliation of "right with itself," since it is not merely private revenge, but the application of the law of a community the criminal belongs to. In this sense, the criminal can reunite to the community from which he or she departed when the crime was committed.

In Hegel's formulation, punishment acquires an intersubjective dimension it never had before. Furthermore, it is only within a concrete civil society that, for instance, the quality and magnitude of punishment can be determined.[38] But, contrary to

[37] As Hardimon points out, *Versöhnung* is much less frequently used in German than 'reconciliation' in English, and, besides that, it sounds "churchy." Whereas Germans are more used to employ *sich vertragen* to speak of reconciliation in a neutral way. "The root of *Versöhnung* is *Sühne*, which means 'expiation' and 'atonement"' (Hardimon 1994, 86). Still according to Hardimon, the English word 'reconciliation' has a connotation of *submission* or *resignation*, especially when used with the preposition 'to,' as in: "One becomes reconciled to the loss of a child." For Hardimon, "[o]ne can become *reconciled* to a circumstance that is completely contrary to one's wishes, but one cannot (grammatically) become *versöhnt* to it. German does have a word for this sense of 'reconciliation' – reconciliation as resignation – but it is *abfinden*" (1994, 86–7).

[38] Crime and punishment have an inner and logical connection. Hegel remarks they are comparable in terms of *value*, but are not equal in the specific character of the injuries they cause to victim and offender. Contrary to value, *specific equality* means the likeness in external aspects of two things. "The qualitative and quantitative character of crime and its cancellation," reminds Hegel, "thus falls into the sphere of externality, in which no absolute determination is in any case possible" (*PhR*, §101). On the one hand, theft and robbery are totally different from fines and imprisonment. On the other, i.e., regarding their universal character as injuries, they are comparable. This demonstrates that, despite attributing an inherent value to punishment as the cancellation of a crime, Hegel rejects *lex talionis* or a Draconian criminal system. For him,

conventional views that see Hegel as an orthodox retributivist, I believe that a more coherent understanding places the attribution of guilt – not punishment per se – at the normative core of his formulation. In this sense, accountability is, on the one hand, a non-negotiable element of justice, which is necessary to guarantee both the criminal's standing as a free and responsible agent and the actualization of the laws of the political community. On the other hand, punishment, understood as harsh treatment that can be used to accomplish a specific aim (deterrence, for instance), is a contingent outcome of practices of accountability, and is up to the citizens to decide whether and how it should be applied.

Since Hegel also reverberates the legal system of his time, he was not able to dissociate accountability (by means of which one recognizes the agent as free and responsible) from punishment (i.e., harsh treatment) more clearly. This can be noted regarding his idea of "clemency" [*Gnade*]. According to him, clemency involves the "grounds for relaxing the punishment" (*PhR* §132, Remark). Psychological conditions, momentary loss of control, passion, moral considerations, mistakes, and so forth may somehow be used to excuse the crime. "In modern terminology, we would describe these as attenuating circumstances that might provide grounds for exculpation or the reduction of punishment and that would affect the process of conviction and sentencing" (Schild 2007, 172). Notwithstanding, according to Hegel, such attenuating circumstances do not belong to the sphere of right (*PhR* §132, Remark). To take those circumstances into account means to deny the criminal inherent nature as an intelligent being (*PhR* §132, Remark).[39] This is so because for him any attempt to mitigate punishment

"[w]ith punishment, we must make qualitative and quantitative distinctions among crimes that are reflected in our penal practices" (Brooks 2012, 48).

[39] As Hegel points out in his first lectures on the philosophy of right: "we must always assume, we must pay humans the honor of assuming, that they were aware of the universal aspect of their crime. The punishment may be mitigated on the ground that the criminal was not aware of the true value of the action. But the whole gamut of mitigating circumstances should not lie within the competence of the courts; the main responsibility in this regard must belong to a higher power, the ruler" (1996, §56).

compromises accountability.

The only exception is the "right to pardon" [*Begnadigungsrecht*], which can be exercised by the sovereign. In fact, at this point he does not differ from absolutist theory[40] in stating that the sovereign has the prerogative to pardon criminals.[41] According to Hegel's formulation, however, a pardon can suspend punishment, but it does not have the power to cancel right itself. In his lectures, he pointed that the offender remains a criminal, despite not being punished:

> Pardon is the remission [*Erlassung*] of punishment, but it is not a cancellation of right [*das Recht nicht aufhebt*]. On the contrary, right continues to apply, and the pardoned individual still remains a criminal; the pardon does not state that he has not committed a crime. (*PhR* §282, Addition)

To be sure, Hegel provides a metaphysical justification to the sovereign's right to pardon when he compares this power to "a determination from a higher sphere" (i.e., religion). Moreover, he adds the sovereign's decision is totally arbitrary, namely, "ungrounded" (*PhR* §282, Addition).

One could ask then how is it possible to assert that a criminal still remains a criminal and right stands irrespective of punishment? Without punishment, according to Hegel's view, a criminal is not treated as a free and responsible agent and cannot reconcile with the community he or she belongs to. So how is it possible that pardon neither amounts to "raising a stick to a dog" nor impairs reconciliation? I think the

[40] See the *Excursus* in chapter 3.

[41] Surprisingly, Kant too is indebted to the absolutist tradition and conceives the right to pardon as an important mechanism to be used in exceptional moments, that is, to be used when the state is under risk: "If the state still does not want to dissolve, that is, to pass over into the state of nature, which is far worse because there is no external justice at all in it (and if it especially does not want to dull the people's feeling by the spectacle of a slaughterhouse), then the sovereign must also have it in his power, in this case of necessity (*casus necessitatis*), to assume the role of judge (to represent him) and pronounce a judgment that decrees for the criminals a sentence other than capital punishment, such as deportation, which still preserves the population. This cannot be done in accordance with public law but it can be done by an executive decree that is, by an act of the right of majesty which, as clemency, can always be exercised only in individual cases" (1996, 6:334).

only way to answer this question is by differentiating accountability from punishment (understood as harsh treatment). Hegel was right when he stated that criminals ought to be "honored as rational," and, therefore, deserve to be treated as free and responsible agents. He was also right when he pointed that law has to actualize itself as valid when a crime is committed. However, today we know both can be accomplished by forms of accountability (ranging from criminal procedures to truth commissions) and not by the suffering punishment provides.

2.3 Democratic grounds for accountability

If one conveys Hegel's idea to a democratic constitutional State,[42] it is correct to say that by means of processes of public justification, citizens are themselves responsible for what they consider to be the relevant individual or contextual attributions to count in criminal liability. Thus, for instance, when a judge convicts an individual of first-degree murder, he or she has to consider first those elements – such as malice, mental capacity, legal age etc. – the law regards as relevant for his or her decision.

At this "meta-level," accountability has not only legal but also strong political character. I would like to propose that amnesties, such as those granted by the Truth and Reconciliation Commission in South Africa, can be understood as decisions of the same kind. They are not purely political, in the sense of a sovereign decision located above the law, because those procedures of justification are morally and legally constrained. They are not purely legal either, since they cannot be reduced to operations of mere application of norms.

[42] Although I am aware that in some aspects Hegel's philosophy may be in conflict with the framework I use to discuss accountability and human rights, I do not think they are totally incompatible. Rawls (2000) himself considers Hegel "an important exemplar in the history of moral and political philosophy of the *liberalism of freedom*."

To say that one is "responsible" for something or someone may indicate very distinct phenomena. They range from public wrongs, such as crimes, to private ones, as torts, including social roles an individual is expected to play in relation to another person, as when we say: "he is a responsible father." Nevertheless, these different phenomena have a similar formal structure. According to Klaus Günther (2000), this general frame can be understood as an attribution of actions, omissions or consequences to someone. Indeed, this is true especially when those actions are negatively evaluated by a norm. In this case, to hold someone accountable means to attribute [*zurechnen*] the violation of the norm to a person's actions, omissions or their consequences (Günther 2000, 468–70).

Practices of responsibility are of extremely importance and without them a society would be so profoundly different from our own that "it would be difficult to recognise as a human society" (Duff et al. 2007, 288). Commonly associated with punishment, which is indeed an important instantiation of the more general practice of holding one another responsible for a wrongful conduct, such practices reflect how citizens interact among themselves. During the Occupy Movement, for instance, a usual form of protest was to carry signs stating simply "We are the 99%." More than showing dissatisfaction with the increasing gap separating the poor and the rich, these signs indicated that there was something wrong with the other 1%. In fact, protesters implicitly blamed them for the economic crisis.

As already indicated by Hegel, citizens should be able to reflexively define the grounds of accountability. In this sense, Günther says citizens hold responsibility for the accountability [*Verantwortung für die Verantwortlichkeit*][43] they expect from one

[43] Günther borrows this expression from Bauman (1997, 46). I employ both terms interchangeably along the text, although here "responsibility" refers to citizens as the *authors* of what counts or not to draw the line of the "accountability" they are *subject* to whenever they infringe their own rules. Bauman's translator preferred to repeat the terms: "responsibility of its responsibility." Maybe an alternative would be to employ the neologism "responsibilization" for *Verantwortlichkeit*.

another. One way to understand how accountability works at this communal level is to relate some shared prepolitical goods with the protection of the law. According to Duff's communitarian approach, "the central goods of the community are shared goods, so attacks on those goods are wrongs in which we share with the victim as fellow citizens" (2003, 63). Thus, the main function of criminal law is to "declare" which conducts are *mala in se* ("wrongs in itself") and violate the common good. The problem, however, with this view is that it has to assume that there are some prelegal and prepolitical values citizens should respect. Conversely, I think shared goods are politically defined and, therefore, whatever conducts that violated them are *mala prohibita* ("wrongs because prohibited"). Before we turn to more specific questions regarding political transitions and accountability, we need to briefly analyze how mechanisms of public justification generate shared expectations and motives for action.

In linguistic utterances, whenever a speaker performs an illocutionary act, he or she raises a validity claim against the hearer. The speaker claims, for instance, that what was just said is true or correct. From the hearer's perspective, the validity claim can be accepted if there are reasons that both share. In case they share them, there are no convincing counterreasons that would justify taking a negative position toward the validity claim.[44] As a consequence, intersubjectively accepted reasons justify a shared expectation of an action for those who have accepted the validity claim. This expectation, Günther says, refers to the motive for a singular action that counts as the fulfillment of the valid proposition (1998, 241).

It is the violation of the illocutionary obligation that holds a subject accountable to the community.[45] And this accountability is also extended to actions insofar as the

[44] The allegedly perpetrator has to provide justifications insofar as he or she is a peer, i.e., a member of the political community. In no way the perpetrator should be treated as an "enemy." For an account of the "criminal law of the enemy" Günther opposes to, see Jakobs (2004).

[45] Admittedly, the basis of the accountability of persons' actions rests on the intersubjective relations

subject acts against the propositional content of the shared conviction. As Günther explains:

> If I acted according to my countermotives, then I would be asked for my reasons and I would have to answer these questions for the other members who legitimately share the expectation. Being responsible means that my actions will be judged from the point of view of the shared expectation by the other members of the community – as well as by myself, who accepted the valid proposition and the illocutionary obligation inherent in the acceptance. (1998, 243)

This means that whoever is hold accountable has to provide justifications, such as a convincing counterreason to violate the shared expectation. Or, in addition, that he or she could not recognize that it was the shared expectation the one violated in a specific situation or that there were stronger countermotives that are acceptable (Günther 1998, 243). As I will try to show later, the justification of counterreasons and countermotives is of special interest for us in order to evaluate the legitimacy of democratic transitions.

Moreover, for Günther, accountability also plays an important social function. Accountability is imputed in social communications – someone holds a person accountable for something, or the person herself assumes accountability to another person. By means of this social practice of imputing responsibility to oneself or to others, an infinite flux of facts is structured and then these events can be attributed either to an *individual* or to a *situation*. Because of its structural function, accountability is a key concept in different contexts. The conception of responsibility structures social communication in terms of social problems, conflicts, risks, and damages as long as these events can be credited to a person or to some circumstances.

Criminal trials are a particular form of legal attribution, and due to criminal pro-

already present in language. As Habermas points out: "We have presupposed that ego can take up these different relations to himself only by confronting himself as a communicatively acting subject, by adopting toward himself the attitude of another participant in argumentation. He encounters himself just as he adopted a performative attitude ... The reflective relation to self is the ground of the actor's accountability" (1984, 2:75-6).

cedures those who are liable for violating the norm are informed about their guilt by means of the judge's sentencing. Antony Duff has argued that criminal punishment

> should communicate to offenders the censure they deserve for their crimes and should aim through that communicative process to persuade them to repent those crimes, to try to reform themselves, and thus reconcile themselves with those whoom they wronged. (2003, xvii)

Although Duff is correct in highlighting the communicative function at stake here, he associates that with punishment, i.e., harsh treatment. Conversely, as I have tried to show, it is the trial itself that performs the communicative function of accountability. In this sense, the conviction is more important than punishment for accountability to fulfill its social function: the wrongdoer is informed about his or her own responsibility, exempting society or other external factors from having breaching the law. Consequently, the victim is able to attribute his or her loss, suffering and pain to someone.[46]

Historically, Nuremberg marks the watershed for the individualization of the attribution of guilt at the international level. Since then, the ascription of responsibility to individual perpetrators has become a fundamental task of the international law of human rights. Nonetheless, sometimes the sharp distinction between perpetrator and victim may cover complex structures of social interaction in which crimes are embedded (Bois-Pedain 2009, 64). What will count as a reason or motive to hold someone responsible? Economic conditions, the involvement of organizations such as companies, political parties, the educational system, professional associations, the role of beneficiaries and bystanders, and so on, should be taken into account when this is the case. The challenge is to make rational accountability effective, which is a

[46] In other words, the law has an expressive function, which is "to communicate to a polity of citizens the force of the law and the law's status as a legitimate set of norms that govern one another's behavior" (Pensky 2008, 20). Pensky also agrees that the rule of law must be understood to deliver justice independent of its sanctioning power.

political task for citizens themselves.[47]

Although legal attribution corresponds to the most ordinary form of accountability, other forms of attribution may occur. Non-legal or informal attribution results from the work of specialists, such as historiographers, for instance. There can also be irrational – and very problematic – forms of attribution, such as "collective guilt," or conspiracy theories. Irrational attribution of collective historical guilt was at the very heart of the conflict in the former Yugoslavia, as Günther argues (2001, 7).

Regarding the institutional form accountability may take, Jon Elster makes an interesting analytical distinction which, although not explicitly, takes into account different degrees of rational attribution. He says we can conceptualize the institutions of justice as a *continuum*, "with pure legal justice at one end and pure political justice at the other" (Elster 2004, 84). "Pure political justice" takes place when the executive branch of the new government unilaterally and without the possibility of appeal appoints the perpetrators and decides what shall be done with them. As an example, he mentions the British suggestion, after World War II, to draw up a list of fifty or a hundred Nazi leaders who could be shot at sight. Furthermore, pure political justice usually takes the form of *show trials*, since the outcome can be predicted with certainty (Elster 2004, 84–5). Thus, pure political justice is not genuine rational accountability, but a sort of victor's justice, in which one is declared guilty disregarding his or her standing as a responsible citizen.[48]

[47] Antje du Bois-Pedain raises a very good point by arguing that the TRC succeeded in ascribing responsibility to politically motivated crimes by "breaking through the criminal-law responsibility paradigm that can so easily ground denials of responsibility by anyone beyond the reach of *this* paradigm. In this context, the very injustice of amnesty served an important communicative function. Amnesty reminded people of the fact that the human rights violations committed by the amnesty applicants took place in a social context which legitimated these acts of violence; that they were done in (many of) our names. They were therefore injustices in which others were powerfully – politically, though not criminally – implicated" (2009, 66).

[48] As an example of irrational collective guilt, Elster mentions the Morgenthau Plan. According to him the former US Secretary of Treasury, Henry Morgenthau, blamed the German people collectively for the war, and intended to set the living standard of Germany back to that of 1810 (Elster 2004, 94).

At the other end of the spectrum, Elster continues, there is "pure legal justice," which has four features. First, the laws should be as *unambiguous* as possible in order to restrain judicial discretion. Second, the judicial body should be *insulated* from the other branches of government. Third, judges and jurors should be *unbiased* and, fourth, principles of *due process*, such as the right to appeal, respect for statues of limitations, determination of individual guilt, and so on, ought to be followed (Elster 2004, 86–8). Why does Elster believe these criteria are relevant? I think it is accurate to say that it is because they make accountability rational and, more important, guarantee that offenders and victims will be treated as fellow citizens.

Finally, in the middle of the *continuum*, Elster places "administrative justice," which he equals with purges in the public administration. This indicates that, besides criminal trials followed by punishment, other forms of accountability and remedies may address past wrongs. Wherever located in the spectrum, the way transitional justice is framed results from "a series of legislative, administrative, and legal decisions" (Elster 2004, 116). As one could add, it is up to citizens or their representatives to make these choices (who will be hold accountable for what, whether there will be punishment or other measures stemming from accountability, the procedures, and so forth), granted that perpetrators and victims will be treated with due respect.

To be sure, during political transitions the attempt to promote legal attribution and punishment can promote a spiral of guilt and retribution. In these cases, amnesties have been used as a means to exchange retributive justice for peace. The waiver of legal attribution may become, for Günther, "the more pacifying solution when both parties have gone through the circle of escalation, revenge and counter-revenge, have totally exhausted themselves and the enemy, and when 'gain' and 'loss' are more or less evenly balanced" (2001, 7). This could be the case in which "a national government's decision to grant amnesty clearly reflects an overwhelming public sentiment"

(Freeman 2009, 96). As Mark Freeman points out, this happened in Lebanon's 1991 amnesty, which ended the civil war, and in Portugal and Spain[49] in the 1970s to facilitate the return to democracy.

On the other hand, in a very divided political community, where there is a sharp distinction between perpetrators and victims, winners and losers, says Günther, "an official amnesty can be the catalyst for self-help and uncontrolled vengeance by the victims" (2001, 7). This was the case of Argentina and Chile,[50] where the military enacted blanket self-amnesty laws before leaving office.

Despite our focus on the juridical aspects, legal attribution, as already stated, is not the only manner to hold someone accountable. An amnesty for the crimes in the former GDR, reminds Günther, would not end the process of public attribution of guilt. There are other non-legal forms of attribution that are equally rational. Historical attribution, for instance, can be found in different contexts in which there is some shared tradition or memory. However, historical attribution does not deal with normative judgments. "It stops with the attribution of causal responsibility." Conversely, legal attribution is "directed towards the individual actor, and more specifically, towards his core personality" (Günther 2001, 7).[51]

Furthermore, cases such as South Africa's TRC bring something new to this catego-

[49] Despite the fact the existence of the "overwhelming public sentiment" is controversial at least in Spain. The judge Baltasar Garzón, the same who requested Pinochet's extradition from Britain, started in 2008 to investigate the killings of 114,000 people at the hands of Franco's supporters during the 1936-1939 civil war. Later, Judge Garzón dropped the case under strong political pressure and was charged with ignoring a 1977 amnesty law (Burnett 2008).

[50] Blanket amnesties, such as those granted in Chile and Argentina in the 1970s, put a stop to any attempt to hold dictators, torturers and other human rights violators accountable. Thus, they fail the legitimacy test we are presenting here because they force citizens to accept the lack of punishment and, most importantly, they rule out any form of justification. Moreover, blanket amnesties may foster irrational attribution and deepen the cleavages of already divided societies. In essence, illegitimate amnesties constrain the self-legislation of citizens in new founded democracies. For this reason, limits to domestic amnesties have been settled by international law and by the establishment of international jurisdiction to punish those who have committed crimes against human rights. See the last chapter.

[51] It is a matte of fact that both historical and legal attribution may be intertwined. In the next chapter, I will discuss the collective and individual aspects of the "right to truth."

rization. Located somewhere in Elster's *continuum*, between administrative and pure legal justice, the TRC suspended punishment for serious crimes, as usually happens with any amnesty law. But it would be a mistake to affirm that these amnesties prevented rational individualized attribution. Despite not being taking to court in the ordinary sense, perpetrators who were granted amnesty had to make full disclosure of facts and to face their victims.

2.4 Stability for the right reasons

Our discussion on Hegel has already indicated the connection between politics and accountability. Hegel was the first to claim that the polity actualizes itself and reaffirms the validity of its norms by means of accountability. However, during transitions, "the condition of a genuine political community might be lacking" (Duff et al. 2007, 299). So, what kind of polity one may assume in order to call perpetrators into account? In this section, I will try to show how the construction of accountability mechanisms is intertwined with the formation of a reconciled polity. Moreover, I will briefly discuss the role competitive narratives played in South Africa's transition.

Once again, the TRC provides an interesting precedent. Similar to other societies in transition, it is hard to assert that both South Africans who suffered from apartheid and their perpetrators constituted a political community. "No such community existed under apartheid," and it was precisely one of the aims of the TRC "to help to constitute a public that would have normative standing to hold citizens to account" (Duff et al. 2007, 300). In other words,

> Public institutions, of which the criminal trial is one, in this sense forge the public on which they (normatively) depend. The South African case is special only in that the public, normatively understood, is nascent. This polity-creating role might be thought

> to justify some of the TRC's compromises of accountability: sacrificing full accountability, of the kind that is sought through a criminal trial, was thought acceptable for the sake of constituting a public with the standing to call the perpetrators to account, a public born out of reconciliation through mutual recognition of wrongdoing. (Duff et al. 2007, 300)

With the TRC, South Africans begun to create a political community of free and equal citizens anew. By calling individual perpetrators to account and giving voice to victims, the TRC bound citizens together as *peers*.[52]

What is more, no Sophie's choice had to be made between "corrective justice" and a "constitutional project" (Ackerman 1992, 70). In other words, South Africans had to choose neither an exclusive backward-looking and individualistic attitude regarding past wrongs, following the example of the Nuremberg trials, nor an exclusive forward-looking and systematic action towards the building of a new country, as happened in most societies along with the Third Wave. Restorative justice, namely, a form of non-retributivist justice, allowed them to attain state building and to come to terms with the past at the same time.

How may a truth commission have contributed to that task? To answer this question, we have first to look at the effects gross violations of human rights provoke among those who suffer and those who perpetrate them. In a famous study on the structure of torture, Elaine Scarry observes that physical pain is language-destroying. Quoting Virginia Woolf,[53] she states pain causes a split between one's sense of one's

[52] I am using Nancy Fraser's notion of *parity of participation*, which requires "social arrangements that permit all (adult) members of society to interact with one another as peers." In order for this condition to be fulfilled, it requires that material resources to be such in order to ensure participants' independence and voice. Secondly, it demands that institutionalized patters of culture value express equal respect for all participants and that they have equal opportunity for achieving social esteem (2003, 36). More recently, besides *redistribution* and *recognition*, Fraser added a third condition, namely, *representation* (Fraser 2005). This third element has obvious implications for societies in transition, where entire groups struggle to have access to spheres of political decision-making. For a similar approach inspired by Fraser, see Verdeja (2008).

[53] The quote is from Woolf's *On Being Ill*: "English, which can express the thoughts of Hamlet and the tragedy of Lear has no words for the shiver or the headache ... the merest schoolgirl when she falls in love has Shakespeare or Keats to speak her mind for her, but let a sufferer try to describe a pain in his head to a doctor and language at once runs dry" (*apud* Scarry 1987, 4).

reality and the reality of other persons. To have pain is to be inevitably aware of one's own condition. On the other hand, to hear that someone is in pain leads to uncertainty, to the impossibility of grasping the exact meaning of the other's pain. In torture, such split is absolute, and the lack of reciprocity, total. According to Scarry, the torturer's questions objectify the fact that "he has a world," for instance, the regime or the protection against an external enemy, "a world whose asserted magnitude is confirmed by the cruelty it is able to motivate and justify" (1987, 36). The prisoner, conversely, has nothing, he or she "has almost no voice," and the confession is "a halfway point in the disintegration of language." By means of the "betrayal" his or her world, namely, "friends, family, country, cause," and everything else one's self is made up for disappears (Scarry 1987, 29).

Thus torture has a "compensatory" function for authoritarian regimes: since the physical pain it promotes is so enormous, it confers the status of "incontestable reality" to their "highly contestable" legitimacy. Scarry also points out very perspicaciously the reason why torture has not only a *physical* but also a *verbal* aspect:

> The verbal act, in turn, consists of two parts, "the question" and "the answer," each with conventional connotations that wholly falsify it. "The question" is mistakenly understood to be "the motive"; "the answer" is mistakenly understood to be "the betrayal." The first mistake credits the torturer, providing him with a justification, his cruelty with an explanation. The second discredits the prisoner, making him rather than the torturer, his voice rather than his pain, the cause of his loss of self and world. These two misinterpretations are obviously neither accidental nor unrelated. The one is an absolution of responsibility; the other is a conferring of responsibility; the two together turn the moral reality of torture upside down. Almost anyone looking at the *physical* act of torture would be immediately appalled and repulsed by the torturers. It is difficult to think of a human situation in which the lines of moral responsibility are more starkly or simply drawn, in which there is a more compelling reason to ally one's sympathies with the one person and to repel the claims of the other. Yet as soon as the focus of attention shifts to the *verbal* aspect of torture, those lines have begun to waver and change their shape in the direction of accommodating and crediting the torturers. (Scarry 1987, 35)

Despite being a very inefficient means to gather reliable information, interrogation is crucial to invert the "moral reality of torture." It allegedly changes the nature of sheer

violence by providing the torturer with a justification at the same time it creates a fiction in which the burden of responsibility lies on the victim's shoulders.

It is this twisted reality of "absolution" and "conferring of responsibility" created by the violence of an illegitimate regime that reconciliation has to transform. First of all, reconciliation has to settle victims and perpetrators in their right places. Of course this will vary according to each case and will depend on the context. Sometimes the distinction between those fighting against authoritarian rule and perpetrators of human rights is not crystal clear. So, it is a political task to draw that line and to hold "responsibility for the accountability," as Günther says. Secondly, the reconciliation of a transitional society requires that, while dealing with the past, citizens assume the roles they will play in a newly constituted polity. They have to think of themselves as peers in order to allow the widest participation of all as possible in that political task. This is why it is not only important to hold perpetrators accountable, but also *how* this is done.

Was South Africa's TRC able to accomplish that? In addition, was it open enough to different and, to a large extent, conflictive narratives and justifications? In a very elucidative inquiry, anthropologist Richard Wilson shows how the TRC used human rights discourses to create a narrative of forgiveness and nation-building (as Archbishop Tutu portrayed it, of a post-apartheid "rainbow nation"). He compared different towns in the Vaal region in order to know whether local forums and courts, known as *imbizo* and which worked on a retributive basis, helped to adjudicate conflict. Where no such local courts exist, as in Sharpeville, violence spread out and private revenge escalated considerably. On the other hand, he describes Boipatong's local court as being able to "channel vengeance into a more mediated (although still violent) form of retribution" (Wilson 2001, 199). The TRC was commonly referred by Boipatong's residents not only as an "external" structure, together with the police

and the magistrates' courts, but also as "weak, ineffectual and a sell-out." According to Wilson, "whereas elite Africans on the Constitutional Court see the 'African community' as a site of forgiveness and benign generosity, township residents see the African community as punitive and unyielding" (2001, 208).

According to Wilson, the TRC was engaged in the definition of the community by integrating its narrative on the reconciliation of the unified nation to local witnesses' narratives of community and the liberation struggle (2001, 157). He argues that reconciliation discourses and *ubuntu*[54] were part of ANC government's efforts to centralize authority and re-establish the rule of law. A representative of the Center for the Study of Violence and Reconciliation (CSVR) expressed a similar concern during the work of the TRC by stating that "true reconciliation in South African society can only be achieved by integrating the anger, sorrow, trauma and various other complex feelings of victims, rather than by subtly suppressing them" (Simpson 1999, 21). The CSVR together with other NGOs claimed the TRC should not presume that all victims were willing to forgive. Instead, they asserted that victims had to be heard irrespective of their demands for punitive justice.

In contrast, the president of the TRC, Archbishop Desmond Tutu, was the most notorious public figure to utter the view that the truth commission was part of common efforts to unite the country. Due to his religious background, he frequently depicted the transitional process in spiritual terms, as saying that it has been "God's

[54] Religious and political leaders were not only referring to Christian values, such as forgiveness, but also to *ubuntu*, which they considered "a central feature of the African *Weltanschauung*." According to Tutu, "*Ubuntu* is very difficult to render into a Western language. It speaks of the very essence of being human. When we want to give high praise to someone we say, '*Yu, u nobuntu*;' 'Hey, he or she has *ubuntu*.' This means they are generous, hospitable, friendly, caring and compassionate. They share what they have. It also means my humanity is caught up, is inextricably bound up, in theirs. ... A person with *ubuntu* is open and available to others, affirming of others, does not feel threatened that others are able and good; for he or she has a proper self-assurance that comes from knowing that he or she belongs in a greater whole and is diminished when others are humiliated or diminished, when others are tortured or oppressed, or treated as if they were less than who they are" (Tutu 2000, 34–5). For the similarities and differences between *ubuntu* and the notion of dignity, see Cornell (2010).

intention that we should live in friendship and harmony" (2000, 212) or, to state that South Africa's experience could be replicated, that "God chose such an unlikely place deliberately, to show the world that it can be done anywhere" (2000, 228). By means of religious discourses, Tutu translated abstract moral and legal concepts, such as equal standing before the law, accountability, justice, and the like, into more ordinary notions.[55]

To be sure, the question one has to ask is whether religious discourses compromised the TRC's legitimacy. I believe they did not. During transitions, mechanisms of accountability, such as trials and truth commissions, should strengthen the rule of law and democratic procedures according to which citizens of a new and reconciled political community are treated as peers. It is very likely that in this reconciled polity, where citizens will be able to review their past and build their future, new conflicts regarding competitive narratives will emerge. As a matter of fact, discourses regarding one's conception of the good are an integrant part of the public sphere and the citizens' political life. This is why the appeal for values that are shared by some citizens, such as forgiveness and *ubuntu*, is part of public discourses by means of which participants define the grounds of their political existence.

This is not to say, however, that the state should endorse one of those values and make it binding for the rest of citizens. Or, in John Rawls's terms, it is unreasonable "to use political power to enforce our own comprehensive view" (Rawls 1993, 138). So, we have to reformulate our question: Can religious discourses from an "official" source,

[55] In contrast, while in Argentina the idea that perpetrators from both the military and left-wing groups should be held accountable was pejoratively labeled as the "two devils" theory, Tutu insisted, echoing Gandhi and with the help of his own religious account, that perpetrators ought to be respected as citizens: "Theology reminded me that however diabolical the act, it did not turn the perpetrator into a demon. We had to distinguish between the deed and the perpetrator, between the sinner and the sin: to hate and to condemn the sin whilst being filled with compassion for the sinner. The point is that if perpetrators were to be despaired of as monsters and demons then we were thereby letting accountability go out the window by declaring that they were not moral agents to be held responsible for their deeds" (Tutu 2000, 73–4).

such as those employed by the president of the TRC, Archbishop Tutu, compromise legitimacy?

I think the answer depends on how "official" the source is and what sort of constraints it imposes on citizens. During transitions, the line that separates "weak" (informal) from "strong" (within the state) publics (Fraser 1992) may become blurred due to the necessity of draining legitimacy from civil society.[56] As a consequence, some formal publics may be designed to be very porous to opinion-formation and less oriented towards decision-making. Truth commissions have a hybrid nature insofar as their work may result not only in a decision (amnesties, recommendations, accountability for perpetrators, and so forth) but also in becoming a forum, where they can accomplish their reconciliation task by giving victims their voice back.[57] In the TRC, the Amnesty and the Reparation and Rehabilitation Committees had a pivotal decision-making role while the Human Rights Violations Committee worked also as a resonance box for the victims' hearings.

Apart from this, some critics have characterized the work of the TRC as a form to pressure victims to forgive their perpetrators. Moreover, these commentators have emphasized the role played by statement-takers, who allegedly pre-structured the narrative of victims before public hearings, so they could frame their stories in terms of a narrative of forgiveness (Wilson 2001, 133). Other studies, however, concluded that "commissioners did not generally seem inclined to raise the topic of forgiveness in the absence of deponents first doing so" (Chapman 2008, 77). Even Wilson acknowledges that although in the first six months, when victims were asked in some of the HRV

[56] For an explanation of how political legitimacy is generated out of an influx of communicative power from civil society, see Habermas (1996, chap. 8).

[57] Some nongovernmental enterprises worked as truth commissions by documenting the patters of abuse of authoritarian regimes and then contributed to affirm victims' suffering. This was the case in Brazil and Uruguay, where both projects were created on the initiative of church members (Hayner 2010, 21). In these cases, the outcome generated by weak publics may call for subsequent state acknowledgement.

hearings whether they had forgiven the offender, later "victims were more subtly pressed by Commissioners to testify, to forgive and to reconcile" (2001, 119). All in all, the hearings and the accountability process were *not conditional* on forgiveness or on the acceptance of any particular worldview.

Maybe as a symptom of how different views informed this process, it is hard to find a single and monolithic definition of ideas such as "reconciliation," "truth" and "forgiveness" within the final report of South Africa's TRC. Reconciliation may demand "private encounters between victims and perpetrators"[58] and the reconciliation of victims is depicted as a "deeply personal, complex and unpredictable process."[59] But reconciliation is needed also "within and between communities and the nation as a whole."[60] At the same time, the report says, reconciliation should not be equated with forgiveness; in fact, the TRC concludes that reconciliation "does not necessarily involve forgiveness. It does involve a minimum willingness to co-exist and work for the peaceful handling of continuing differences."[61] The report also had a section entitled "Reconciliation without forgiveness," where it brought two testimonies of a "weak or limited" form of reconciliation, i.e., "without apologies by those responsible or forgiveness by victims."[62] Regarding forgiveness, the report acknowledged that it is sometimes "unrealistic" to expect for it too quickly, but it also praised those who displayed a "remarkable magnanimity and generosity of spirit" for their "willingness to forgive."[63] On the one hand, the report says, there were people who "warned against expecting too much," and argued that the TRC should hope only for "peaceful coexistence." On the other, the same report observes, others "cautioned against a too

[58] See (South Africa 1998, v. 1, chap. 5, §6), hereinafter TRC Report.
[59] Id., v. 1, chap. 5, §14.
[60] Id., §23.
[61] Id., v. 5, chap. 9, §150. Other statements that support the same idea can be found on v.1, chap. 5, §50, §52.
[62] Id., v. 5, chap. 9, §§94-7.
[63] Id., v. 1, chap. 5, §49.

limited notion of reconciliation," and supported the idea that the TRC "should not underestimate the vital importance of apologies."[64] Finally, the report itself warned "the potentially dangerous confusion between a religious, indeed Christian, understanding of reconciliation, more typically applied to interpersonal relationships, and the more limited, political notion of reconciliation applicable to a democratic society."[65] All things considered, the final report reflected the plurality and diverse backgrounds of TRC's members, without stating the last word in how citizens ought to feel and come to terms with their own experiences in the past.

In a proper way, religious views did not prevent angered victims to be heard and perpetrators to face accountability. Besides that, they carried out an important task in South Africa. As Rawls's *Political Liberalism* reminds us, "reasonable comprehensive doctrines," such as religious or metaphysical views, can help to generate an important asset, especially during transitions, namely, political stability.

According to Rawls, the stability of a well-ordered society involves two problems. First, the question whether people who grow up under just institutions can acquire a sufficient sense of justice and then comply with those institutions. This is clearly not the case when millions of people live in a segregated society, as South Africa during the apartheid regime. Although some leaders who had a crucial role in ending apartheid hold an incredible sense of fairness, democratic transition in South Africa was the result of a common effort to *create* just institutions. Second, the question whether the fair terms of cooperation among citizens can be the focus of an "overlapping consensus" (1993, 141).[66] Or, in other words, stability has also to do with how the abstract (or "freestanding," to use Rawls' terms) conception of justice can be

[64] Id., §§20-1.
[65] Id., §19.
[66] By an overlapping consensus, Rawls means "all the reasonable opposing religious, philosophical, and moral doctrines likely to persist over generations and to gain a sizable body of adherents in a more or less just constitutional regime, a regime in which the criterion of justice is that political conception itself" (1993, 15).

embedded into citizens' worldviews.

Intellectual and legal versions of national reconciliation, as Wilson points out, were "too abstract, cerebral and bloodless" (2001, 122). Conversely, the religious-redemptive approach was "the only version of reconciliation with any pretensions to reshaping popular legal and political consciousness" (Wilson 2001, 122). Archbishop Desmond Tutu, as well as other religious leaders, translated the necessity of reconciliation to constitute a political community of peer citizens as follows:

> I contend that there is another kind of justice, restorative justice, which was characteristic of traditional African jurisprudence. Here the central concern is not retribution or punishment but, in the spirit of *ubuntu*, the healing of breaches, the redressing of imbalances, the restoration of broken relationships. This kind of justice seeks to rehabilitate both the victim and the perpetrator, who should be given the opportunity to be reintegrated into the community he or she has injured by his or her offence. This is a far more personal approach, which sees the offence as something that has happened to people and whose consequence is a rupture in relationships. Thus we would claim that justice, restorative justice, is being served when efforts are being made to work for healing, for forgiveness and for reconciliation. (Tutu 2000, 51–2)

When compatible with the institutional framework of a community where members enjoy participatory parity, citizens' worldviews may help to create or maintain their allegiance to such arrangements. South Africa's TRC was to a large extent legitimate due to realizing political (as Rawls would employ the term) rather than purely religious values. Reasonable worldviews may strengthen the newly born democratic public culture, so why not?

One last thing has to be said about how "comprehensive doctrines" may enter into public discussions during transitions. The more the public political culture develops, the less stability and the "common currency of discussion" (another of Rawls's expressions) will have to rely on those comprehensive views. As he framed in one of his last works:

> [R]easonable comprehensive doctrines, religious or nonreligious, may be introduced in public political discussion at any time, provided that in due course proper political reasons – and not reasons given solely by comprehensive doctrines – are presented that are sufficient to support whatever the comprehensive doctrines introduced are said to support. (Rawls 1997, 783–4)

According to this proviso, political principles – which are consistent with the notion of accountability that has been outlined here, such as equal standing before the law, reciprocity, equal respect, and the like – have to be presented *in due course*[67] independently from comprehensive doctrines. How much time is needed? Rawls's answer is that it has to be worked out in practice.[68]

Maybe the role of theological and other worldviews was so significant in South Africa because citizens faced there the challenge to bring former colonizers and colonized into a single political community for the first time ever in history.[69] Contrary to other transitions in Latin America, for instance, political adversaries could not look back

[67] For Habermas, Rawls's proviso puts an unreasonable burden for religious citizens insofar as it allegedly demands they have the epistemic ability to reflexively consider their own religious views. Conversely, Habermas draws a line separating informal public spheres, where religious discourses form a "Babel of voices," from parliaments, courts, and other political institutions. In this case, religious discourses have to be "translated" in order to enter into the institutionalized practice of decision-making (Habermas 2008, 114–47). Although some translations do happen, I think Habermas's criticism misses an important point raised by Rawls. The proviso shows a concern not only with the role comprehensive doctrines may play in public justification, but also how this role may change *in the course of time*. Rawls, pace Habermas, is much more aware of the challenges the establishment of a new polity posits to political stability. In *Political Liberalism*, Rawls's explanation takes into account how principles of justice may be first reluctantly accepted as a *modus vivendi* and then as a constitutional consensus, which is neither deep (i.e., not grounded in certain ideas of society and person) nor wide (i.e., narrow in scope, including only the political procedures of a democratic government). Thereafter, the forces that push this constitutional consensus towards an overlapping consensus, says Rawls, occur when, for instance, political groups must enter the public forum of political discussion and appeal to other groups. In this case, they have to adjust their own comprehensive doctrines and formulate political conceptions of justice. Interestingly, Rawls mentions the Reconstruction following the Civil War as an example of how such competing groups have to work out political conceptions. See Rawls (1993, 165).

[68] Rawls alludes to the Civil Rights Movement as an example of how the proviso can be fulfilled, insofar as "they emphasized the religious roots of their doctrines, because these doctrines supported basic constitutional values – as they themselves asserted – and so supported reasonable conceptions of political justice" (1997, 786).

[69] This is pointed out by Mamdani, although he criticizes the work of the TRC as a wrongly historical account of apartheid as a "drama played out within a fractured political elite: state agents against political activists" (2007, 358).

and see a time when they were members of the same polity. Thus, people had to rely on the closest examples of forms of association they had at hand. Nevertheless, reconciliation in transitions refers less to "shaking hands with perpetrators," than treating people as free and equal citizens of the same polity. It has an egalitarian basis insofar as it reverts the unequal standing of perpetrators and victims in the previous regime. It also hands over to citizens the decision to freely determine how to deal with their wounds. In this sense, it is up to them to forgive or not.

CHAPTER

THREE

AMNESTY AND THE RIGHT TO TRUTH

The holes of oblivion do not exist.

Hannah Arendt

3.1 Human rights and discourse theory

On May 28, 1961, the British lawyer Peter Benenson published an article entitled "The Forgotten Prisoners" in the *Observer* highlighting the existence of several millions of "prisoners of conscience" worldwide, defined by him as "any person who is physically restrained (by imprisonment or otherwise) from expressing (in any form of words or symbols) any opinion which he [or she] honestly holds and which does not advocate or condone personal violence."[1] Benenson argued that the Universal Declaration of Human Rights provided that any individual should have the right to freedom of conscience, opinion and expression. By exposing the situation of imprisoned people

[1] The article can be read at: http://www.amnestyusa.org/about-us/amnesty-50-years/peter-benenson-remembered/the-forgotten-prisoners-by-peter-benenson [last visit on 29/3/2013].

in several countries, ranging from Spain, the United States and the United Kingdom to Hungary, Cuba, Indonesia, South Africa and many others, the article kicked off a campaign called *Appeal for Amnesty 1961*, whose aims were to work impartially for the release of those imprisoned for their opinions, to seek for them a fair and public trial, to enlarge the right of asylum, and to urge effective international guarantees of freedom of opinion. That campaign, launched more than fifty years ago, led to the creation of Amnesty International, one of the most important and active human rights NGOs.

At the same time, the world has witnessed the enhancement of mechanisms to prosecute and punish human rights perpetrators. Since Nuremberg and after the tribunals for former Yugoslavia and Rwanda, the International Criminal Court and its Rome Statute, the signature of treaties to prevent genocide, crimes against humanity, and so on, there is no doubt that the struggles to end impunity and put perpetrators in jail became also a cause inextricably linked to human rights discourses. However, while one may easily establish a connection between human rights and the crusade to urge governments to release – or to give a fair trial to – people who were tortured or unjustly arrested, it is more difficult to couple punishment to human rights. To be sure, one can argue that punishment may deter future violations, but this is not enough to establish an intrinsic and necessary relationship between both of them.

In recent discussions about the meaning of human rights and their implementation throughout the globe, one can find countless arguments, ranging from "cosmopolitan liberals," who strongly support human rights and humanitarian interventions (including punishment for individual perpetrators), to "statists," who believe the sovereignty of states should not be dismissed, even in cases of human rights violations. Even though it is difficult to provide a precise classification of human rights theories, whose denominations vary immensely – substantive account, justificatory minimalism, max-

imalism, political conception, discourse theory, pragmatism, and so on – the most important here is to understand whether human rights may justify punishment. In this sense, it has been argued that sovereignty and external legitimacy are conditional on states being rights-respecting. Moreover, it has been claimed that the international community has the "responsibility to protect" (R2P) individuals and enforce human rights whenever states fail to do so or violate the rights of their own citizens (Beitz 2009, 13). These changes may indicate that "a new political culture regarding sovereignty that has shifted from one of impunity to one of responsibility and accountability" (Cohen 2012, 159).

Notwithstanding, there are also critics of these new developments. For Mahmood Mamdani, humanitarianism promotes dependency and "draws on the entire history of modern Western colonialism" (2010, 55). While Western states claim to protect "vulnerable groups," he argues, they in fact try to control rival powers. In a similar way, Danilo Zolo questions the selectivity of humanitarian interventions (2009, 60). Both authors point out the democratic deficit of international institutions, particularly those in charge of sanctioning perpetrators hold liable for human rights violations.

To be sure, the nuances among the authors of the debate depend on the conception of human rights each position bears, and, therefore, to what extent violations should be tolerated. A highly controversial point concerns the question whether democracy is a human right. If the answer is yes, some authors say, then there is an international responsibility to guarantee that people have access to political participation. If the answer is negative, autocratic regimes and state sovereignty must be respected insofar as other rights are not violated. Thus it seems that human rights draw the line separating legitimate from illegitimate sanctions.

One of the most influential accounts is brought out by John Rawls's *The Law of Peoples*. For Rawls, human rights "restrict the justifying reasons for war and its

conduct, and they specify limits to a regime's internal autonomy" (2001, 79). Thus, according to Rawls, human rights are very distinct from constitutional rights, or from rights of liberal democratic citizenship. They express a class of "urgent rights," in which he includes the freedom from slavery and serfdom, liberty (but not equal liberty) of conscience, and security of ethnic groups from mass murder and genocide (2001, 79). Nevertheless, he leaves out rights to freedom of expression and association and the right to democratic participation. For Rawls, therefore, human rights are a "subset" of rights possessed by citizens within a liberal constitutional democratic regime.

What then would justify interventions against states that violate human rights? Is there an international obligation to assist those whose rights are in jeopardy? In fact, for Rawls, "liberal" and "decent peoples" do not tolerate "outlaw states" for stability reasons. The latter "are aggressive and dangerous; all peoples are safer and more secure if such states change, or are forced to change, their ways. Otherwise, they deeply affect the international climate of power and violence" (Rawls 2001, 81). *The Law of Peoples* is thought not as a body of principles to be universally accepted by all existing states; conversely, it is "an extension of liberal political morality to foreign policy" (Beitz 2000, 675). In other words, Rawls does not intend to prescribe principles of justice for nonliberal states, but to guarantee that "liberal principles of foreign policy are also reasonable from a decent nonliberal point of view" (Rawls 2001, 58).

Joshua Cohen presents an approach similar to Rawls's. For him, human rights are norms that secure individual membership or inclusion into a political society: "to be treated as a member is to have one's good given due consideration, both in the processes of arriving at authoritative collective decisions and in the content of those decisions" (2006, 237–8). This, however, does not imply a right to democracy, but to

what he calls a form of collective self-determination. For Cohen, self-determination requires that

> (i) binding collective decisions result from, and are accountable to, a political process that represents the diverse interests and opinions of those who are subject to the society's laws and regulations and expected to comply with them. ... (ii) rights to dissent from, and appeal, those collective decisions are assured for all; and (iii) government normally provides public explanations for its decisions, and those explanations – intended to show why the decisions are justified – are founded on a conception of the common good of the whole society. (2006, 233)

These requirements can be accomplished by nondemocratic societies, such as, to follow Cohen's example, one that allows a collective self-determination but has an official religion endorsed by the majority of the population. It may establish, for instance, that only the adherents of such religion can hold official positions and have special privileges, that the selection of representatives takes into account separate social groups but not competitive party elections, and the like. Thus, if democratic ideas do not have "substantial resonance in the political culture," the value of collective self-determination recommends that such society should not meet a more demanding principle of equal basic liberties to all (Cohen 2006, 234).

Cohen expects that his theory can be endorsed by the perspective of "global public reason," to the extent that membership is respected (even when democracy is not). Global public reason is global in its reach, since it applies to all political societies, and regarding its agents, inasmuch as it is presented as the common reason of all peoples. Moreover, it is presented as a reason "whose content can be shared" and that needs "to be formulated autonomously from different and conflicting religious, philosophical, and ethical traditions," so it can be shared by all. It is also public insofar as "it provides terms of argument and justification used in discussing the conduct of different political societies" (Cohen 2006, 236).

Rainer Forst points out three main critiques to the Rawlsian approach to human

rights that can be extended to Cohen's justificatory minimalism. According to him, Rawls's conception has: a moral deficit, a democratic deficit, and an equality deficit. First of all, by specifying the minimal conditions for a liberal foreign policy, Rawls "implicitly operates with a concept of unconditional respect for moral persons, who have certain rights as human beings and citizens," whose violation may justify intervention in "outlaw states." According to Forst, there is a moral content that "is not sufficiently acknowledged" (2011, 232). In addition to this, the list of human rights is so minimal that it does not even recognize some of the basic rights contained in the 1948 Universal Declaration of Human Rights, such as equal treatment of sexes (article 2), full freedom of conscience (article 18), freedom of speech (preamble) and association (article 20), and the right to democratic association (article 29). The claim that international human rights should be understood as reasonable, so that "decent peoples" would agree with them, inverts the argument: it "would not only improperly mix normative and political-pragmatic questions," but also it could be considered a paternalistic gesture coming from "outside." In Forst's words: "who is to say which rights people are entitled to other than those affected *themselves* in discourses of reciprocal justification?" (2011, 232).

Secondly, as for Rawls and Cohen, the legitimacy of a regime relies on the expression of its members' self-determination, which may correspond to the affirmation of a "comprehensive doctrine." Nevertheless, as soon as the order is challenged, and democratic rights are demanded, Forst argues, "the reasons for denying such rights by referring to the integrity of the society no longer apply" (2011, 233). To put differently, there is a contradiction in narrowing the conception of human rights as a means to avoid illegitimate intervention of "liberal societies" in "decent peoples" and, at the same time, to deny marginalized groups a human right to equal representation against those who are in power.

Third, Forst points out an equality deficit in Rawls's theory. For Rawls, well-ordered peoples have a duty to assist "burdened societies," which lack the political and cultural traditions, the human capital and know-how, material and economic resources to be well-ordered (Rawls 2001, 106). Such duty has a target and a cutoff point, namely, to raise the world's poor until they are either free and equal citizens of a reasonably liberal society or members of a decent hierarchical society (Rawls 2001, 119). Once this target is reached, the duty ceases. As Forst convincingly argues, the problem is that this view overlooks the degree to which the existing global order is a political and economic hindrance to political communities achieving autonomy and equality at the international level. A duty of assistance would require a more complex analysis of existing injustices:

> a duty (of those who have suitable means at their disposal and who benefit from existing injustices) to establish a just global basic structure in which individual members would first of all have fair opportunities to cooperate in developing rules and institutions that would be effective enough to combat (internal and external) political economic injustices. (Forst 2011, 234)

The equality deficit, therefore, is not just a problem of material goods, but also a deficit of "equal political and economic opportunities within a global system," as Forst puts it.

One could add a fourth critique to the political or minimalist account in consonance with Forst's arguments. Human rights in *The Law of Peoples* are to reflect, according to Rawls, "the two basic and historically profound changes in how the power of sovereignty have been conceived since World War II" (2001, 79). Thus, for him, it is no longer admissible that war can be used as a means of government policy (only in case of self-defense) and states are subjected to forceful sanctions and even intervention when they violate human rights.[2] Nevertheless, if one takes Rawls's idea

[2] Not only Rawls, but Joshua Cohen and Charles Beitz "place a priority on fidelity to the leading

that human rights should reflect the changes that have happened since World War II seriously, it is necessary to consider a further important transformation, namely, that individuals may now be hold responsible at the international level.

What are the implications of criminal liability at the international level? In the words of Mamdani, the International Criminal Court is nothing but "a Western court to try African crimes against humanity" (2010, 61). Alongside the transformations that took place in the second half of the last century, one could point out the tension between self-determination and responsibility:

> The Westphalian coin is still the effective currency in the international system. It is worth looking at both sides of this coin: sovereignty and citizenship. If one side reads 'sovereignty,' the password to enter the passageway of international relations, the other side upholds the promise of 'citizenship' as the essential attribute of membership in the sovereign national political (state) community. Sovereignty and citizenship are not opposites, but go together: the state, after all, embodies the key right of citizens, the right of self-determination. The international humanitarian order, in contrast, is not a system that acknowledges citizenship. Instead, it turns citizens into wards. The language of humanitarian intervention has cut its ties with the language of citizen rights. (Mamdani 2010, 54)

However, contrary to what Mamdani assumes, sovereignty and citizenship may be in opposite sides if the sovereign power impairs the citizens' status or rights. As all authoritarian experiences have proved so far, there is no necessary link between them. At the same time, the international humanitarian order has not to turn citizens into wards as a matter of course. In both cases – the exercise of the sovereign power or the use of force at the international level – what prevents citizens to become mere subjects is democratic self-rule.

---

human rights documents and the developing human rights regimes" (Baynes 2009, 14). For Cohen, his minimalist account "has to be broadly faithful to the content of the rights as laid out in the standard statements, in particular the Universal Declaration" (Cohen 2006, 238). Similarly, Beitz proposes an approach based on the human rights "practice," which includes most norms "expressed in the main international human rights instruments" (Beitz 2009, 8). One of the problems with the political account, as already stated, is that it does not even acknowledge some basic rights in the UDHR.

As stated by Seyla Benhabib, "without the right to self-government, which is exercised through proper legal and political channels, we cannot justify the range of variation in the content of basic human rights as being legitimate" (2011, 128).[3] In agreement with Benhabib, my argument takes into account a discourse theory of human rights, according to which without democratic self-rule human rights cannot be contextualized as "justiciable entitlements." Thus, if any person can now, as it were, be hold accountable before an international court applying the principle of universal jurisdiction and on behalf of human rights, then international norms and institutions have an extra burden of legitimacy. For this reason, people have to become authors of the law through "public and free processes of democratic opinion and will-formation" (Benhabib 2011, 128). To deny a human right to democracy, as minimalists do, runs the risk of assuming that sanctions can be imposed top-down, leaving human rights vulnerable to charges of being masked forms of colonialist domination.

Conversely, discourse theory proposes a scheme to bind human rights together with democracy. In its different versions, discourse theory states that democratic self-rule is conditional on basic rights such as freedom of speech, association, the right to vote, and so on. At the same time, such rights can only be contextualized, interpreted and actualized by means of a democratic process. For Kenneth Baynes, this account of human rights can be outlined as follows:

> [T]he idea in the approach of both Benhabib and Forst is to begin by identifying the speech-act immanent obligation of speakers and hearers to provide reasons in support of the validity claims raised in their respective utterances. This speech-act immanent obligation, which bears a weak 'transcendental force', is also glossed by Habermas and others as the 'right' on the part of the hearer to accept or reject the reasons presented

[3] Benhabib follows Habermas's idea of cooriginality. For her, human rights and self-government are "coeval": "the *liberal* defense of human rights as limits on the publicly justifiable exercise of power needs to be complemented by the *civic-republican* vision of rights as constituents of a people's exercise of public autonomy. Without the basic rights of the person, republican sovereignty would be blind; and without the exercise of collective autonomy, rights of the person would be empty" (2011, 128).

> by the speaker. In a second step, this illocutionary 'right' is said to imply a basic *moral* right – 'the moral right to justification' (Forst) or 'the right to have rights' (Benhabib). And, in a third step, this basic moral right or 'moral principle' (Benhabib) is connected with a more extensive set of human rights (though just how extensive differs among these theorists). (Baynes 2009, 3)

It is in the third step that citizens are to elaborate a more "saturated" version of that moral right. According to Baynes this formulation reflects a "deep ambiguity" or "tension" (2009, 18) within discourse theory to the extent it provides a normative foundation for human rights *and* requires that such rights be shaped by participants engaged in public discourses. Notwithstanding, maybe this tension reflects an ambiguity inherent to human rights themselves.

Unless human rights are considered a bundle of entitlements fully given by God in a Lockean sense there will always be a gap between a "thin" normative conception of basic rights and a "thick" version that varies according to the political, historical, and social contexts they are related to. What discourse theorists do is to outline that normative conception and to show how it can be articulated with concrete human rights claims. For instance, the "discourse principle" is an attempt to provide a point of view which reflects "those symmetrical relations of recognition built into communicatively structured forms of life in general" (Habermas 1996, 109).[4] Similarly, Forst's "basic right to justification," and Benhabib's "right to have rights" are both formulations that put in evidence the grounds on which free and equal citizens will further elaborate, by means of, respectively, a "political construction" or "democratic iterations," a more substantial set of rights.

[4] Habermas has slightly changed his formulation since the publication of *Between Facts and Norms*. At that time he tried to derive from the "discourse principle" and the "legal form" a set of basic rights, which could be classified into five groups: equal individual liberties, right to grant the status of membership within a polity, rights to the legal protection of the individual, rights in which citizens exercise their political autonomy, and right to the provision of living conditions (social, technological, ecological, and so forth) (Habermas 1996, 122–31). More recently, he has emphasized the role of social struggles to actualize and specify the features of "human dignity." See Habermas (2012, ch. 2).

In the next section, I will discuss how Forst and Benhabib elaborate two different (however similar) normative approaches to human rights. Both acknowledge the distinction of what Benhabib has called the *principles of rights* and the *schedule of rights*. The former are "universalistic normative commitments that *ought* to bind the actions of the democratic legislature." Conversely, the later is "the acceptable *scope* and the *variety* of civic, political, and socio-economic rights that can vary across historical, cultural, institutional, and jurisprudential traditions" (Benhabib 2011, 139). Following that, I will try to show how those "universalistic normative commitments" may frame the claim for a "right to truth" in political transitions.

3.2 Amnesties, human rights and sovereignty

Since Kant, human rights are no longer conceived as a list of prepolitical basic rights to restrain the sovereign power. By means of what he calls the "universal principle of right," Kant introduces a procedure to make a legal order compatible with the moral law: "Any action is *right* [*gerecht*] if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law" (Kant 1996, 24). Instead of departing from a set of rights, Kant's procedure establishes conditions of generality and reciprocity ("everyone's freedom") under which legality must operate.

The weakness in the Kantian argument, however, is the metaphysical assumption behind the idea that every rational being is capable of formulating a universal law. For this reason, Seyla Benhabib offers, as an alternative, a postmetaphysical principle of right:

> [I]nstead of asking what each could will without self-contradiction to be a universal law for all, in discourse ethics we ask which norms and normative institutional arrangements would be considered valid by all those who would be affected if they were participants in special moral argumentations called discourses. The emphasis now shifts from what each can will via a thought-experiment to be valid for all, to those justificatory processes through which you and I in dialogue, and with good reasons, can convince each other of the validity of certain norms – by which I mean simply "general rules of action." (Benhabib 2004, 131–2)

It is true to say that what counts as "good reasons" could also be very problematic if it were understood as any sort of given substantive content prior to discourses or if we limited the attributes (cognitive, psychological, and so forth) one must have in order to provide justifications. But this justificatory procedure has more to do with equal participation in a dialogue than with liming the content of what can be said or restricting the participants. In fact, Benhabib has in mind that norms affecting all ought to be discursively justified by reasons that are equally applied to all. When one engages into such justificatory procedure by giving reasons to follow or turn down a rule, he or she has to take into account that others are also autonomous to accept or reject those same reasons.

Likewise, Rainer Forst's idea of a "basic right to justification" implies that no social or political order is legitimate if it cannot be adequately justified to those subject to it. As Forst indicates, human rights are "rights against unjustifiable social and political structures of domination" (2010, 718). In this sense, human rights demands can be understood as claims for justification of perceived unjust structures.

This approach originates neither from a comprehensive moral doctrine nor from a theory that restricts itself to the political. Conversely, it is a procedure of reciprocal and general justification of human rights and norms of international justice within certain contexts. As he points out, this theory addresses human rights as a moral and political construction in which resulting principles are either a list of human rights (as is the case in moral constructivism) or specific, context-related norms of a

justified basic structure of society (as is the case in political constructivism) (Forst 2011, 216). Forst argues that moral constructivism can only produce a general list of rights. Moving forward, however, with political constructivism, these rights can be concretely justified, interpreted, institutionalized, and realized in social contexts, that is, within a legally constituted political order (Forst 2011, 219).

The moral construction of human rights demands that justification follows the criteria of reciprocity and generality. Reciprocity means that no one can make a claim that he or she denies to others (reciprocity of content) and, at the same time, no one may simply protect one's own perspective, values, interests, and so forth, beyond mutual justification (reciprocity of reasons). In addition, generality means that reasons have to be shareable by all affected persons given their reciprocally legitimate interests and claims (Forst, 2010, 719–20). In other words, such rights are moral norms which claim to be strictly mutually and universally binding.

Furthermore, the political construction has "moral constructivism as its core" to the extent that there is no legitimate interpretation and institutionalization of basic human rights that violates that moral kernel. Both elements – moral and political – are complementary. Forst argues that moral rights are "directed to a political-legal authority and have to be secured in a legally binding form" (2010, 736). A "basic structure of justification," he says, is a political and legal structure that allows citizens to deliberate and decide about the social institutions that apply to them and provide the interpretation and realization of their rights.

Seyla Benhabib has also stressed the differences among moral, political and legal dimensions of human rights.[5] By reformulating Hannah Arendt's notion of "right to

[5] Although both theories of human rights converge in many aspects, Benhabib and Forst have a rather different perspective on the normative grounds of a just society. Benhabib's proceduralism follows from a "postconventional *Sittlichkeit*," while Forst stresses the role played by practical reason in different contexts. For an exchange between them addressing these issues, see Benhabib (1997a) and Forst (1997).

have rights," she insists that each person should be treated as "a moral being worthy of equal concern and equally entitled to be protected as a legal personality by his or her own polity, as well as the world community" (Benhabib 2011, 62). According to Benhabib, the first term "right" is addressed to humanity as such and evokes a moral imperative: "a *moral claim to membership* and a *certain form of treatment compatible with the claim to membership*" (2004, 56). The second use of "right" is "built upon this prior claim of membership." For her, this second use has a "juridico-civil" meaning and

> suggests a triangular relationship between the person, who is entitled to rights, others upon whom this obligation creates a duty, and the protection of this rights claim and its enforcement through some established legal organ, most commonly the state and its apparatus. (Benhabib 2004, 57)

While it remains open and indeterminate to whom the first "right" is addressed, in the second case, the "rights" are those assigned by a specific political community to its members. The former is "moral" in the Kantian sense for it concerns us as human beings as such. The latter corresponds to the juridico-civil entitlements of a contextualized polity.

Let me now turn to one of the foremost tensions at stake in political transitions, namely, the need for peace and the claims for justice. Peacebuilding commonly involves the effort to reach political and institutional stability. Notwithstanding, the obligation to prosecute human rights violators may cause newly founded democracies to crumble. This is not just a theoretical problem. Rather, it is a question frequently raised by those concerned with the consolidation of democracy. "I will warn you just once: the day one touches one of my men, the constitutional state is over," exhorted General Pinochet while preparing to turn the Chilean government over to an elected civilian president.[6] Amnesties granted in exceptional moments are mainly illegiti-

[6] Besides Chile, the same tension can be found in other cases. In Argentina, for instance, elected

mate (as I will discuss below), but what happens when the state fails to provide an adequate justification? Is there a "plan B" citizens can resort to? The main concern here are the cases of political transitions when states that cannot surrender stability fail to hold human rights violators accountable due to "pacifying" and exceptional amnesties.

* * *

Excursus

In the *Six Books of the Republic* (1576), Jean Bodin defines and analyzes the concept of sovereignty. Although the idea of sovereignty was not new at his time, Bodin was probably one of the first to connect a definition of sovereignty ("sovereignty is the absolute and perpetual power of a republic") with modern legal theory. He asserts that the power from which all the sovereign's rights and prerogatives derives is "the power of making and repealing law" (1992, 58). Only a true sovereign can enact and repeal, apply or suspend the law. Based on that, Bodin makes a full description of the "marks of sovereignty."

Among other attributes, one of the marks of sovereignty is "the power of granting pardons [*grâce*] to the condemned, ignoring verdicts and going against the rigor of the laws to save them from death, loss of goods, dishonor, or exile" (1992, 73).[7] For

president Raúl Alfonsín revoked a self-amnesty law enacted during the authoritarian regime in the first months after his inauguration in 1983. This provoked a series of military backlashes. Alfonsín was forced to give up his plans of promoting prosecutions and, furthermore, to pass two other amnesty laws. Similarly, in South Africa, Archbishop Tutu at the time of the creation of the Truth and Reconciliation Commission acknowledged: "If there were not the possibility of amnesty, then the option of a military upheaval ... [was] a very real one" (Rosenberg 1996). Even courts have acknowledged peace may be reached by crossing the boundaries of law. In El Salvador, to mention one example, the constitutional court declared the amnesty law "a manifestation of sovereignty granted by the Constitution, which prevails over all treaties and ordinary laws" (Roht-Arriaza and Gibson 1998, 871).

[7] Bodin speaks of *grâce* in Book I, Ch. 10, where he gives as examples the cases of Demosthenes and Alcibiades. Demosthenes in his speech *Against Meidias* (21.90) uses the word χάρις, which means grace, favor. In this sense, pardon applies to specific individuals and is considered a

Bodin, such power is so important, and so distinctive of sovereignty that the sovereign cannot share it with anyone else. For this reason, the "right of pardon cannot be given away without giving up the crown itself" (1992, 75).

One could think that for Bodin the sovereign power and the *jura imperii* are both unlimited. That is not true. Despite all his power, the sovereign "cannot remit a penalty established by the law of God any more than he can dispense from the law of God, to which he is subject" (1992, 76). According to Bodin, a prince, for instance, cannot forgive a premeditated murder, "who deserves death by the law of God." Nevertheless, to what extent is the sovereign bound to such law? The question is answered by Bodin himself:

> If the prince, then, does not have power to overstep the bounds of natural law, which has been established by God, of whom he is the image, he will also not be able to take another's property without just and reasonable cause – as by purchase, exchange, lawful confiscation, or in negotiating terms of peace with an enemy, if it cannot otherwise be concluded than by taking the property of private individuals *for the preservation of the state* (1992, 39, emphasis added).

In other words, Bodin admits that the sovereign may act in spite of natural laws in order to preserve the state. This happens only in critical situations when the ties to the natural law cease.

To be sure, until the eighteenth century the power to pardon was mainly understood as an ordinary act of sovereignty. Once punishment and criminal law were a form of retribution, pardon worked as more or less what modern law defines as "mitigating circumstances," that is, circumstances that may lessen the severity of the penalty (e.g. self-defense, insanity, minority, and so forth). Nevertheless, the exercise of the

sort of gift. Furthermore, Bodin alludes to Thrasybulus's amnesty [*oubliance générale*] in 403 B.C. in Athens praising him for preferring the public interest over the private (1992, 40). In *The Pelopponesian War* (8.73), Thucydides comments on that truce following the rule of the Thirty Tyrants and writes οὐ μνησικακέω, which means "not to remember wrongs done," usually translated as "to give amnesty." In this case, amnesty is related to oblivion and is commonly referred to a collectivity.

power of granting pardons started to resemble more a case of exception as a result of (a) the separation of powers[8] and (b) the advent of new theories of punishment.

(a) To the extent that the three branches of government – executive, legislative, and judiciary – were set apart with different functions, the question of where to place the power of granting pardons became more acute. Who ought to have the last word to grant pardons: the organ that enacts, applies or executes the law? John Locke tries to answer this question by handing a discretionary power to the head of the executive. Contrary to the "law-making power," which may sometimes be "too slow" to attend the public good, Locke argues that "the ruler should have a power, in many cases, to mitigate the severity of the law, and pardon some offenders; for the *end of government* being the *preservation of all*, as much as may be, even the guilty are to be spared, where it can prove no prejudice to the innocent" (1988, b. II, ch. 14, §159). However, the executive's "prerogative," which in Latin [*prærogativa*] means the attribution one has to state his or her opinion before the others or to vote first, indicates that for Locke the executive decision holds only a precarious sort of legitimacy. Such power is granted on a temporary basis, since subsequent to the executive's decision the people can "claim their right, and limit that power, which, whilst it was exercised for their good, they were content should be tacitly allowed" (§164).[9] Ultimately, the people

[8] Although his important contribution to the development of the separation of powers, Montesquieu shared the view that pardons were to be granted by the sovereign as a means of mitigation. "When there is no difference in the penalty," he writes, "there must be some difference in the expectation of pardon ... Letters of pardon are a great spring of moderate governments. The power of the prince to pardon, executed wisely, can have admirable results. The principle of despotic government, a government which does not pardon and which is never pardoned, deprives it of these advantages" (1989, Part I, b. 6, ch. 16). See also Part I, b. 6, ch. 21, "On the clemency of the prince."

[9] Emer de Vattel offers another good example of how the power of granting pardons became an exception. He states literally that it has to be employed only in special cases, which one cannot know in advance, and that it is up to the sovereign to decide: "The very nature of government requires that the *executor of the laws* should have the power of dispensing with them, when this may be done without injury to any person, and in certain particular cases where the *welfare of the state* requires an *exception*. Hence the right of granting pardons is one of the attributes of sovereignty. But, in his whole conduct, in his severity as well as in his mercy, the sovereign ought to have no other object in view than the *greater advantage of society*. A wise prince knows *how*

have the last say.

Almost a century later, the debates that led to the promulgation of the American Constitution, which put into practice the theory of checks and balances, did not eliminate the action of a supreme power in "critical moments." According to Hamilton,

> the principal argument for reposing the power of pardoning in this case in the Chief Magistrate is this: in seasons or insurrection or rebellion, there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall. The dilatory process of convening the legislature, or one of its branches, for the purpose of obtaining its sanction to the measure, would frequently be the occasion of letting slip the golden opportunity. The loss of a week, a day, an hour, may sometimes be fatal. (Federalist Paper 74)

In fact, US presidents have invoked Article 2, Section 2 of the Constitution to grant pardons or amnesties in case of conflict. Abraham Lincoln and Andrew Johnson, for instance, used it as a bargaining instrument to end the Civil War and pass constitutional amendments afterwards (Dorris 1953).

(b) Furthermore, a change regarding the role punishment plays in society had a tremendous impact on the right of pardoning. When protests against public executions in order to limit the sovereign's power started to disseminate in the second half of the eighteenth century, criminal law became more rationalized and penalties were then more regulated and proportioned to the offenses. This transformation of the so-called "economy of punishment" (Foucault 1995) implied that pardons were no longer necessary to achieve the adequate balance between wrong actions and punishment. Actually, they were not even desirable:

> [O]ne ought to bear in mind that clemency is *a virtue of the lawgiver* and not of the *laws' executor*, that it ought to shine in the legal code and not in particular judgments. To show men that crimes can be pardoned, and that punishment is not their inevitable

to reconcile justice with clemency, the care of the public safety with that pity which is due to the unfortunate" (2009, b. I, ch. XIII, §173, emphasis added).

> consequence, encourages the illusion of impunity and induces the belief that, since there are pardons, those sentences which are not pardoned are violent acts of force rather than the *products of justice*. What will be said, then, of a prince who offers a pardon, that is, public safety to an individual and, with *a private act of unenlightened kind-heartedness*, makes a public decree of impunity? (Beccaria 1995, 111–2, emphasis added)

Criminal laws should now dissuade perpetrators from committing crimes rather than merely reflect the sovereign's arbitrary will. At the same time, they should also establish a fair proportion between the harm a crime may provoke in society and the corresponding penalty that follows from it. In other words, pardons turned into a dangerous and abnormal way to suspend punishment and, therefore, to break the rule of law.

In recent years, the idea that the "state of exception" became the rule or a "paradigm of government" blurring the distinction among the legislative, executive and judicial powers (Agamben 2005, 7) might be a sound description of some extreme measures taken during political transitions. An author who, like no other, explored the relation between norm and decision, Carl Schmitt argued the exception exposes how the norm has to be suspended in order to make its application possible. In other words, because norm and reality do not share an intrinsic connection, the first may be put on hold while it is institutionalized within the later. Thus, for instance, the law that commands a crime to be punished has to be suspended in an extreme situation as a means to, paradoxically, become effective in normal cases. To distinguish when one is before the exception or the normal case is up to the sovereign.

The Weimar Constitution determined that the President of the *Reich* could suspend basic rights to restore public security and order whenever necessary. Nevertheless, Schmitt was very critical of the wording of article 48 because it evaded the sovereign decision by establishing that the *Reichtag* had the power to set those executive measures aside. Although he never addressed the clause that comes next in

that constitution, one may speculate whether Schmitt's criticism could be extended to article 49 as well: *"The President exercises the right of pardon for the Reich. Reich amnesties require a Reich statute."* Is the first case ("right of pardon") another example of sovereign power? And what about the second one ("*Reich* amnesties")? Is the constitution evading the decision one more time by establishing that the parliament has to enact a statute in order to grant amnesty?

Schmitt himself claimed for amnesty during the denazification years of post-war Germany. He wrote a newspaper article in 1949 entitled "Amnesty – The Original Form [*Urform*] of the Law" where he argues that the Cold War and the denazification turned out to be a "Cold Civil War," a war of all against all.[10] He then asks how it is possible to find an end to this civil war. The communist, he says, has a simple answer: a decision [*Entschluß*] to annihilate the other. Another answer, according to him, is amnesty. All civil wars in history that did not end in a total annihilation ceased with an amnesty by means of which not only forgetting but also a ban on rummaging the past and seeking further cause for revenge and compensation took place (Schmitt 1995, 218).

Nonetheless, Schmitt does not affirm that such a prohibition is a sovereign decision aiming to preserve the state. There is no doubt that an amnesty may have that effect, but Schmitt says amnesty is neither pardon [*Begnadigung*], nor charity [*Almosen*]. It is rather a "reciprocal act of forgetting" [*ein gegenseitiger Akt des Vergessens*] (Schmitt 1995, 219). An interpretation for this argument is that amnesty is a solution to a

[10] The article first appeared anonymously in *Christ und Welt* on 11/10/1949 during the debates that led to a general amnesty law that took effect on 31 December 1949 under Germany's Basic Law. A slightly different version entitled "Amnesty is the Power of Forgetting" was printed in another newspaper called *Sonntagsblatt* in Hamburg on 1/15/1950 under Walter Masuch's name. *Die Zeit* published a version of the article on 9/21/1950 that can be found online at: http://www.zeit.de/1950/38/amnestie-urform-des-rechts/ It was only in 1951 that the article appeared under Schmitt's name in the newspaper *Der Fortschritt*. One can find this version printed in Schmitt (1995, 218–221). For a study on the controversies regarding amnesty laws during Adenauer's government, see Frei (2002).

situation where nobody can occupy the position of the sovereign (Krapp 2005, 189). In fact, Schmitt has in mind a civil war or, as he calls it, a war among brothers [*Bruder– und Bürgerkrieg*] when he quotes the following passage of Homer's *Odyssey*:

> Now Athene spoke a word to Zeus, son of Kronos:
> 'Son of Kronos, our father, O lordliest of the mighty,
> tell me what I ask. What does your mind have hidden within it?
> Will you first inflict evil fighting upon them, and terrible
> strife, or will you establish friendship between the two factions?'
> Then Zeus the gatherer of the clouds said to her in answer:
> 'My child, why do you ask and question me in these matters?
> For was not this your own intention, as you have counseled it,
> how Odysseus should make his way back, and punish those others?
> Do as you will; but I will tell you how it is proper.
> Now that noble Odysseys has punished the suitors, let them
> make their oaths of faith and friendship, and let him be king
> always; and let us make them forget [ἔκλησιν] the death of their brothers
> and sons, and let them be friends with each other, as in the time past,
> and let them have prosperity and peace in abundance.'
> (Book 24, §§472-86, trans. Richmond Lattimore)

Schmitt makes a distinction between pardon, i.e., forgiveness, and forgetting. While the first may be considered an act of someone who is superior to the other ("like a cigarette one offers to the disenfranchised to prove his humanity," he says), the latter is mutual ("Whoever takes amnesty must give, and whoever gives it must take"). Can oblivion be achieved in reciprocal terms, as Schmitt assumes, or does it need to rely on some sort of god, as in the Greek epic, or on an external power to become effective?

I think Schmitt's convenient suggestion of an "instrumental amnesia" (Krapp 2005, 190) after the war is all but a claim to reestablish a polity on an egalitarian basis. As I have argued, reciprocity can only be achieved by means of democratically established processes of accountability. To understand amnesty as forgetting brings the false idea

that the violence a perpetrator exercised over his or her victim could vanish as if by magic or being put behind the locked doors of the past. As Hannah Arendt's report on the Eichmann's trial reminds us, totalitarian states let their opponents disappear anonymously and try to establish holes of oblivion into which all deeds, good and evil, would disappear. Nevertheless, she points out, one man will always be left alive to tell the story, making oblivion impossible (Arendt 2006, 233).

On the other hand, forgiveness demands remembrance: it is only by turning towards the past that one can forgive. In the "Abrahamic tradition," to recall Derrida's formulation, forgiveness signifies a universal urgency of memory (Derrida 2001, 28). "Pure forgiveness," argues Derrida, can neither be subordinated to strategical or political calculation, nor be institutionally mediated. In this sense, forgiveness is *unconditional*. At the same time, forgiveness holds some ambiguity to the extent it is indissociable to what is heterogeneous to it: the order of conditions, repentance, transformation, reconciliation, as well as anything that it needs to inscribe itself into law, politics, and so forth. In this sense, when effectively exercised, forgiveness seems to suppose some sovereign power: "That could be the sovereign power of a strong and noble soul, but also a power of state exercising an uncontested legitimacy, the power necessary to organize a trial, an applicable judgment or, eventually, acquittal, amnesty, or pardon" (Derrida 2001, 59).[11] I will let open the question on whether "pure forgiveness" exceeds all institution or juridico-political authority, as Derrida affirmatively assumes. Nevertheless, it seems an obvious point that some forms of institutional mediation are better than others: a truth commission is better than a blanket amnesty, stopping human rights violations is better than allowing crimes to continue indefinitely, the politics of memory is better than forced oblivion, and

[11] The translation here is slightly modified in relation to the English edition. Derrida's interview in French can be found at: http://hydra.humanities.uci.edu/derrida/siecle.html [last visit on 29/3/2013].

so on. Thus, the main problem is not to attain *forgiveness without power*, but *to prevent power from eluding the possibility of forgiveness*. I agree with Derrida that the body of the state or of a public institution cannot forgive. Moreover, like him, I believe forgiveness has nothing to do with judgment or even with the political sphere. This, however, is not incompatible with the process of public justification of one's deeds before a politically reconciled community of peers. In fact, this process allows forgiveness to remain at least a possibility.

* * *

The approach discourse theory has to human rights helps to understand why accountability ought to prevail over any *raison d'état* to grant a blanket amnesty or to impose oblivion. Such measures violate the moral core of human rights insofar as they cannot be generally and reciprocally justified. Demanding victims to accept their fate and not to ask for the reasons that caused them to have their rights violated and to suffer, as well as not holding perpetrators responsible for their crimes, is to treat them not as peers of the same political community who deserve moral respect. In fact, blanket amnesties and a deliberate politics of oblivion violate the notion of "dignity" implicit in the basic right to justification: "a person is to be respected as someone who is worthy of being given adequate reasons for actions or norms that affect him or her in a relevant way" (Forst 2010, 734). From now on legitimate transitions may count only on "postsovereign" amnesties, namely, those that can suspend punishment, but not accountability.[12]

[12] I borrowed the term from Andrew Arato. He refers to "postsovereign constitution-making" as a democratic form to enact a constitution in which the constituent power is not embodied in a single organ or instance with the plenitude of power, and all organs participating in constitutional politics are brought under legal rules (Arato 2009, vii).

Nonetheless, it does mean that stability is no longer important. On the one hand the basic right to justification circumscribes a limit for state authority insofar as it excludes a rule or action that cannot be justified. On the other, it also counts on citizens themselves to determine the content of such rights by means of participation in reason-giving processes of justification. Although human rights claims should strongly oppose any sort of authoritarian rule, they are not only oriented *against* the state, but also towards the realization of such rights *within* the state. Forst's dual-stage construction is helpful precisely because it allows a further theorization of this dynamics. In his words:

> It is the task of a state to secure human rights and to protect citizens from human rights violations by private actors such as large companies, for example. Failure to do so, either because the state decides not to act even though it could or because it is too weak, constitutes insufficient protection of human rights, though their violation is not the work of the state but of other agents. So the state is the main addressee of claims to protect rights, even though it is not the only agent who can violate them. (Forst 2010, 738)

Despite not being openly stated here, I believe Forst has a normative argument for the preservation of state institutions without which human rights may lose their terra firma and become ineffective.[13] At the same time, one should not pay a high price for it by accepting the terms of a Hobbesian state. In other words, on behalf of the stability of state institutions, one cannot sacrifice the project to enhance human rights.

Considering that the moral core of human rights encompasses only what "cannot be rejected with reciprocally and generally valid reasons" (Forst 2010, 735), the political construction is conducive to rights and institutional arrangements that are in the

[13] Although referring to a different problem, Thomas Nagel raises a similar argument by stating that without stability, "individuals however morally motivated can only fall back on a pure aspiration for justice that has no practical expression, apart from the willingness to support just institutions should they become possible" (Nagel 2005, 116).

interest of all. For this reason, social and political stability in times of transition may acquire normative importance. "Social stability counts as morally relevant," remind Amy Gutmann and Dennis Thompson, "only when it is part of what justice (or some other moral good) either now requires (because justice calls for ending or avoiding a socially devastating civil war), or because social stability is necessary to promote justice in the future, or because social stability is supportive of some equivalent moral good" (2000, 23). Nevertheless, whenever a polity is not able to promote accountability due to stability reasons or because it has no adequate institutions or resources, it may face a moral dilemma: on the one hand, it ought to provide stability and peace, on the other, it has to hold past perpetrators responsible for their crimes. How is it possible to solve this problem?

Forst argues that a "basic structure of justification" is a necessary condition for citizens to determine the rights and duties they assume before one another within a specific context. As a first step, they need political and legal structures (which include a state, of course) to allow them to justify further rights, policies, and just institutions that will affect themselves. It is precisely that "basic structure" that may be lacking during a political transition. In this case, any citizen (regarded now as a moral person) can, based on his or her "right to justification," raise a claim towards the "world community." Victims of a different state, Forst points out, "may lay claim to certain forms of respect they have been denied, as may victims of one's own state's present or past political or economic domination and oppression" (2011, 222).

Human rights discourses have gone hand in hand with an increasing expansion of both national and international mechanisms to prosecute genocide, war crimes and crimes against humanity. The proliferation of these institutions includes ad hoc international courts, such as the International Criminal Tribunals for the former Yugoslavia and Rwanda, as well as permanent ones, namely, the Inter-American and

the European Courts of Human Rights, and the International Criminal Court. Since Nuremberg, human rights have engaged in a symbiosis with the "duty to prosecute and punish" (Orentlicher 1991a) those responsible for the most heinous crimes. In fact, *these changes have taken accountability beyond the limits of the state.*

The expansion of human rights has been commonly seen as a gradual inclusion of different contents, such as T. H. Marshall's proposed division of civil, political, and social rights. In addition to that, Forst's formulation opens up a new way to think on a gradual diffusion of structures of justification. The emergence of international law, international courts and national courts applying, for instance, the principle of universal jurisdiction shows that, when certain shared expectations are violated, there are several complementary mechanisms to seek accountability from perpetrators of human rights abuses. In this sense,

> [b]oth as citizens of a state that can together with others establish institutions to oppose infringements of human rights, such as the United Nations and an international court of justice, and as moral comrades and members of a universal society, people have duties to help others who are in danger. States, international institutions, and global civil society and its various organizations are the subjects who fulfill these duties to secure human rights politically and legally. The primary goal of these efforts is to enable the victims of injustice to establish a political structure in which their basic right to justification is no longer denied and violated; thus, the goal is internal, though not in a paternalistic sense, since it primarily implies respecting every person's basic right to justification. (Forst 2011, 224)

Note that Forst avoids the criticism according to which international law and international courts are solely driven by power, imperialist interests and the like to the extent his formulation assumes a reflective aspect: once a basic right to justification is granted, citizens themselves are supposed to establish their rights and institutions. Specially in transitions, an "international basic structure" (Forst 2011, 222) may be crucial to restore social and political integrity, to hold perpetrators accountable and to assure that victims and criminals are treated as moral persons who deserve to have

their actions justified. From that point on, citizens have to take the duty of defining their institutions and rights within their specific polity. Thus, both domestic stability and (internationally provided) accountability can be asseverated.

In the next section I will show how the Inter-American Court of Human Rights has tailored a very restrictive notion of accountability in its decisions that blurs the moral and political distinction we have tried to set for the construction of human rights. For some time now the Court has adopted the opinion that any state that does not prosecute and *punish* human rights perpetrators violates the American Convention on Human Rights. The court decisions illustrate the role international law may play in societies in transition. At the same time, they provide a useful example of a democratic deficit concerning the limits an international court attempts to establish on citizens' "sovereign" decisions.

3.3 The right to truth or the duty to punish?

In the last twenty years, the "right to truth" has become part of several international instruments of human rights. The extent and content of this right may vary according to the legal instrument or the court decision applying it. The right to truth has both individual and collective dimensions. Every person has the right to know the truth about the motives and agents responsible for his or her suffering. Moreover, society in general has the right to know the truth about its past. The right to truth appeared in 1981, in the *African Charter of Human and People's Rights*, which granted that "every individual shall have the right to receive information."[14]

Another example is the *International Convention for the Protection of All Persons*

[14] African Charter of Human and People's Rights, adopted on 27 June 1981, OAU Doc. CAB/LEG/67/3 Rev. 5, 1520 UNTS 217 (entry into force in 10/21/1986), Article 9.1.

from Enforced Disappearance, which affirms in its preamble "the right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person, and the right to freedom to seek, receive and impart information to this end." Furthermore, the Article 24.2 determines the state's obligation to take appropriate measures in order to let the victims know "the progress and results of the investigation and the fate of the disappeared person."[15]

The right to truth was also outlined in the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* in 2005. Principle 22(b) indicates that the satisfaction of victims includes the "verification of the facts and full and public disclosure of the truth." It further declares in principle 24 that

> victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations.[16]

Thus the right to truth is a crucial condition to repair victims of gross violations of human rights under international law.

In 2009, the United Nations Human Rights Council adopted a resolution encouraging states to take some measures to facilitate victims and their relatives to achieve the truth about gross human rights violations. Moreover, it emphasized that "the public and individuals are entitled to have access, to the fullest extent practicable, to information regarding the actions and decision-making processes of their Government,

[15] International Convention for the Protection of All Persons from Enforced Disappearance, adopted on 20 December 2006 during the sixty-first session of the UN General Assembly by resolution A/RES/61/177 (entry into force in 12/23/2010).

[16] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by the UN General Assembly resolution 60/147 of 16 December 2005.

within the framework of each state's domestic legal system."[17]

The Inter-American Court of Human Rights (IACtHR) has based several decisions taking into account the right to truth. Although the American Convention on Human Rights (ACHR)[18] does not explicitly mention the "right to truth," the analysis of the Court's opinions reveals that it can be found in two kinds of protection laid down by the Convention:

> (i) A state's failure to disclose the fate of a person in the custody of the state constitutes inhuman treatment with respect to family members and is a continuing violation of applicable protections against such treatment. (ii) A state's failure to adequately investigate and prosecute crimes committed against a person in its custody constitutes a violation of family's right of access to justice. (Groome 2011, 177)

In both cases the IACtHR has interpreted the ACHR to demand of Latin American states a satisfactory response to gross human rights violations.

The first basis on which one can claim the right to truth is the acknowledgement by the IACtHR that a state's failure to adequately investigate human rights abuses constitute an inhuman treatment to family members and is a continuing violation of their rights. The IACtHR has expressed its opinion that it is a violation of the family's rights under the ACHR for causing them to suffer morally and psychologically. According to the Court, it is a breach of Article 5(1)(2)[19] in relation to Article 1.1

[17] Human Rights Council Resolution A/HRC/12/L.27 of 12 October 2009.

[18] American Convention on Human Rights, "Pact of San Jose, Costa Rica," adopted on 22 November 1969 (entry into force on 18 July 1978). In the Inter-American Human Rights system, both the Commission and the Court are the bodies to zeal for the observance of the Convention. Individuals and NGOs may present complaints before the Commission, whose members are elected by the General Assembly of the Organization of American States. However, only the Court may interpret and assert binding decisions regarding those states that have accepted its jurisdiction. States and the Commission can present a charge before the Court, which prosecutes only states, not individuals.

[19] The ACHR determines that: "Article 5. (1) Every person has the right to have his physical, mental, and moral integrity respected." In addition, "(2) No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."

of the ACHR.[20] The violation of the family's rights was first acknowledged in the case *Blake v. Guatemala*, when the IACtHR considered the request of the relatives of Nicholas Blake, a journalist who disappeared, to compel the Guatemalan government to investigate his whereabouts. According to the Court,

> the violation of those relatives' mental and moral integrity is a direct consequence of his forced disappearance. The circumstances of such disappearances generate suffering and anguish, in addition to a sense of insecurity, frustration and impotence in the face of the public authorities' failure to investigate.[21]

With the exception of judge Alejandro Montiel-Argüello,[22] the Court decided that the continuing suffering of family members stems from the state's failure to investigate and omission. This reasoning has been applied in several similar cases.[23]

---

[20] Article 1(1) of the ACHR reads: "The states Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."

[21] *Blake v. Guatemala*, IACtHR (ser. C) No. 36, §114 (Jan. 24, 1998).

[22] In his dissenting opinion, the judge stated that: "In actual fact, any obligation of a right produces moral and material damage which must be assessed at the reparation stage. What we have before us, then, is not a violation of a right, but the consequence of a violation." Ibid. "Dissenting Opinion of Judge Alejandro Montiel-Argüello," §§10-1.

[23] See, for instance, *Bámaca-Velásquez v. Guatemala*, Order of the Court, IACtHR (ser. C) No. 70, §§ 159-166, 230.2 (Nov. 25, 2000); *Mapiripán Massacre v. Colombia*, IACtHR (ser. C) No. 134, §§ 140-46, 335.1 (Sept. 15, 2005); *Pueblo Bello Massacre v. Colombia*, IACtHR (ser. C) No. 140, §§ 163, 296.3 (Jan. 31, 2006); *Baldeón-García v. Peru*, IACtHR (ser. C) No. 147, §§ 127-30, 218.4 (Apr. 6, 2006); *Ximenes-Lopes v. Brazil*, IACtHR (ser. C) No. 149, §§ 155-63, 262.3 (July 4, 2006); *Montero-Aranguren et al v. Venezuela (Detention Center of Catia)*, IACtHR (ser. C) No. 150, §§ 53, 160.2 (July 5, 2006); *Goiburú et al. v. Paraguay (Condor)*, IACtHR (ser. C) No. 153, §§ 95-104, 192 (Sept. 22, 2006); *La Cantuta v. Peru*, IACtHR (ser. C) No. 162, §§ 81-98, 122-29, 254.5 (Nov. 29, 2006); *Anzualdo Castro v. Peru*, Preliminary Objection, Merits, Reparations and Costs, IACtHR (ser. C) No. 202, §§ 113-14 (Sept. 22, 2009); *Chitay Nech et al. v. Guatemala*, IACtHR § 209 (May 25, 2010); and *Manuel Cepeda Vargas v. Colombia*, IACtHR § 195 (May 26, 2010). See also *Las Dos Erres Massacre v. Guatemala*, Preliminary Objections, Merits, Reparations and Costs, IACtHR (ser. C) No. 211, § 213 (Nov. 24, 2009). According to Groome (2011, 179), the same reasoning can also be found in the decisions of the *European Court of Human Rights* (ECHR). In *Cyprus v. Turkey*, ECHR 1 (2001), the ECHR concluded that Turkey's omission in investigating the whereabouts of people under its custody during military operations in 1974 in northern Cyprus violated the family's rights under Article 3 of the European Convention on Human Rights, which reads: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

The second reason to grant the right to truth rests upon the state's obligation under international law to guarantee access to justice and to allow the victims as well as their families to be heard by a judge. In *Blake v. Guatemala*, the IACtHR found that Mr. Blake's relatives had an enforceable right under Article 8(1) of the ACHR.[24] The violation derives from "the right to effective remedy, from the obstruction and delay of *the relevant criminal process*."[25] The Court pointed out that after ten years of Blake's death the case was still pending within the national jurisdiction.

Furthermore, in the decision, the Court explicitly assumed it had an extended interpretation of the ACHR:

> This Tribunal considers that Article 8(1) of the Convention must be given *a broad interpretation based on both the letter and the spirit of this provision,* and must be appreciated in accordance with Article 29 (c) of the Convention, whereby none of its provisions shall be interpreted as precluding other rights or guarantees that are inherent in the human personality or derived from representative, democratic form of government.[26]

In doing so, the Court recognized the right of Mr. Blake's family to have his disappearance "effectively investigated," and, besides that, "to have those responsible prosecuted." Then, the Court continues, the perpetrators should receive "the relevant punishment," and the relatives had to be compensated.[27]

As Mr. Blake's relatives did not initiate any judicial action, the IACtHR affirmed that it could not rule that they were deprived of judicial protection granted by the Article 25 of the ACHR.[28] Notwithstanding, the Court acknowledged the violation of

[24] Article 8(1) of the ACHR reads: "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature."

[25] *Blake v. Guatemala*, fn. 21 *supra*, §88 (emphasis added).

[26] Ibid. §96 (emphasis added).

[27] Ibid. §97.

[28] Article 25(1) of the ACHR reads: "Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that

this right in many other cases.[29] Thus, according to the IACtHR, a state disregards the right to judicial protection granted by the ACHR if it does not investigate, judge and punish those responsible for gross violations of human rights.

Blake shows how the right to truth, in the opinion of the IACtHR, is part of the right to have access to a judicial process. In *Blanco-Romero et al. v. Venezuela*, the IACtHR stated that Venezuela was unable to prosecute those responsible for the disappearance of three men in 1999 and this fact violated the right to truth:

> The Court does not consider the right to know the truth to be a separate right enshrined in Articles 8, 13, 25 and 1(1) of the Convention, as alleged by the representatives, and, accordingly, it cannot find acceptable the state's acknowledgement of responsibility on this point. The right to know the truth is included in the right of the victim or of the victim's next of kin to have the relevant state authorities find out the truth of the facts that constitute the violations and establish the relevant liability through appropriate investigation and prosecution.[30]

By including the right to truth within the broader conception of the right to have access to justice, the IACtHR requires that a state should investigate gross violations of human rights and, in addition to that, take punitive measures. In other words, the Court acknowledges that "the families of victims not only have the right to know the truth but also have the right to know that justice has been done" (Groome 2011, 184).

When referring by the first time to the right to truth in the case *Bámaca-Velásquez v. Guatemala*, the IACtHR recognized the individual dimension of this right. The Court mentioned a previous report issued by the Inter-American Commission on

---

violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties."

[29] See, for instance, the cases cited on fn. 23 *supra: Ximenes-Lopes v. Brasil*, §§262-4; *Bámaca-Velásquez v. Guatemala*, §§195, 230; *Mapiripán Massacre v. Colombia*, §§195-241; *Pueblo Bello Massacre v. Colombia*, §§169-212; *Baldeón-García v. Peru*, §§139-69; *Montero-Aranguren et al. v. Venezuela*, §§53; *Goiburú et al. v. Paraguay*, §§111-33; *La Cantuta v. Peru*, §§81-98.

[30] *Blanco-Romero et al. v. Venezuela*, IACtHR (ser. C) No. 138, §62 (28 November 2005).

Human Rights and reinforced that the right to truth is "the right of the victims' next of kin to know what happened to their loved ones." Furthermore, the Court also asserted that "the right to the truth has a collective nature, which includes the right of society to 'have access to essential information for the development of democratic systems.'"[31]

In the words of the concurring opinion of judge Sergio García Ramírez in *Bámaca-Velásquez*, the IACtHR has granted "a legitimate demand of society to know what has happened, generically or specifically, during a certain period of collective history," specially during authoritarian regimes when "the channels of knowledge, information and reaction characteristic of democracy are not operating adequately or sufficiently."[32] Nevertheless, the right to truth can be enforced by the IACtHR only through its individual dimension:

> In the Court's judgment to which this opinion is associated, the Court has confined itself to the individual perspective of the right to the truth, which is the one that is strictly linked to the Convention, because it is a human right. Accordingly, in this case, this right is contained or subsumed in another that is also a subject of this judgment: that corresponding to the investigation of the violating facts and the prosecution of those responsible. Thus, the victim – or his heirs – has the right that the investigations that are or will be conducted will lead to knowing what "really" happened. The individual right to the truth follows this reasoning, which is supported by the Convention and, based on this, by the Court's recognition in its judgment.[33]

The Court, therefore, admits society's interest in clarifying the facts and holding perpetrators accountable. However, due to the stipulations in the ACHR, only individuals – victims or their families – are entitled to the right to truth.

This interpretation has led the Court to have a very critical view on other forms of accountability, such as truth commissions. In *Almonacid Arellano et al. v. Chile*, the IACtHR ruled that "the 'historical truth' included in the reports of the above

[31] *Bámaca-Velásquez v. Guatemala*, fn. 23 *supra*, §197.
[32] Ibid., Concurring Opinion of judge Sergio García Ramírez, §19.
[33] Ibid., §20.

mentioned Commissions is no substitute for the duty of the state to reach the truth through judicial proceedings."[34] In this case, the Court quoted the report of Chile's National Commission for Truth and Reconciliation, created by the elected president Patricio Aylwin in 1990, which recommended that "for the sake of achieving national reconciliation and preventing the recurrence of such events it is absolutely necessary that the government fully exercise its power to mete out punishment."[35]

The most remarkable case is that of Uruguay. After a 12-year dictatorship that started in 1973, the legislative passed an amnesty law called *Ley de Caducidad* (Expiry Law) in 1986. The amnesty was part of an agreement among political parties and the armed forces held in 1984 to facilitate the transition to democracy. As a result, the state relinquished the exercise of penal actions by military and police officials, excluding crimes committed for personal gain and those judicial proceedings that had already started before the law was enacted. Moreover, the law determined that courts should request the opinion of the executive branch regarding whether the law was applicable or not for judicial proceedings to continue.[36]

In 1988, the constitutional court upheld the law's constitutionality and declared that the legislative intent was to confer an "authentic amnesty" on the security forces. In the following year, a referendum with nearly two million voters confirmed the validity of the amnesty law. Approximately 56% of the electorate supported the law. Twenty years later, on October 19, 2009, the constitutional court reversed its previous decision and declared the law unconstitutional in the *case of Nibia Sabalsagaray*. In that occasion, the Uruguayan court asserted that the amnesty violated the separation of powers since the Expiry Law assigned that judicial investigations could take place

[34] *Almonacid Arellano et al. v. Chile*, IACtHR (ser. C) No. 154, §150 (26 September 2006).

[35] Ibid. A similar argument can be found at: *Zambrano Vélez et al. v. Ecuador*, IACtHR (ser. C) No. 166, §128 (4 July 2007); *Anzualdo Castro v. Peru*, fn. 23 *supra*, §180; *La Masacre de las Dos Erres v. Guatemala*, fn. 23 *supra*, §232.

[36] For an overview of the historical background of Uruguay's transition, see *Gelman v. Uruguay*, IACtHR (ser. C) No. 221, §§144 ff. (24 February 2011).

only under the executive's authorization. Besides that, the sentence considered the referendum an inappropriate measure for, although popular sovereignty may derogate the laws sanctioned by the legislative, it cannot cover a law flawed in its origin for violating the separation of powers. On October 25, 2009, the amnesty law was submitted to another referendum. Again, the law received the endorsement of the majority: 52% of the voters.

It was only in 2011 that the IACtHR ruled Uruguay's amnesty law violated the American Convention on Human Rights for not allowing the investigation, prosecution and punishment of those who killed and were responsible for the disappearance of María Claudia García Iruretagoyena de Gelman, a 19-year-old pregnant woman who was kidnapped in Buenos Aires and taken to Montevideo by members of Operation Condor. Similarly to previous cases, the Court decided that amnesties are illegal because they prevent states to prosecute and punish perpetrators. Nevertheless, the Court now had to address the fact that Uruguay's law had been approved twice by referendum within two decades. According to the IACtHR,

> [t]he democratic legitimacy of specific facts in a society is limited by the norms of protection of human rights recognized in international treaties, such as the American Convention, in such a form that the existence of one true democratic regime is determined by both its formal and substantial characteristics, and therefore, particularly in cases of serious violations of nonrevocable norms of International Law, the protection of human rights constitutes a impassable limit to the rule of the majority, that is, to the forum of the "possible to be decided" by the majorities in the democratic instance, those who should also prioritize "control of conformity with the Convention," which is a function and task of any public authority and not only the Judicial Branch.[37]

Thus, the Court assumes that the outcome of the "substantial" aspect of democracy, namely, the majority's decision, overstepped the "formal" limits established by the international law, which have to be observed by all branches of the state, not only the judiciary.

[37] Ibid. §239.

Nevertheless, the Court did not take into account that "the protection of human rights" is to a great extent also a democratic task. To be sure, majorities should not deny the basic right to justification to any individual or minority group. It might also be argued, as the Uruguayan constitutional court does, that the separation of powers cannot be abolished by democratic decisions, an argument that has more to do with a republican form of government than with "the protection of human rights" itself. But the main question is left without a clear answer: how to challenge the legitimacy of an amnesty that was twice confirmed by direct popular vote?

I think the only reasonable answer lies in the distinction we made between accountability and punishment. On the one hand, the Court is correct by stating that some limits ought not to be crossed. The majority does not have the right to suspend investigations and prevent perpetrators from being hold responsible. In this sense, to protect human rights means to treat both victims and violators with due respect and make the latter try to justify their actions before other citizens. On the other, punishment can only derives its legitimacy from a democratic decision. When the parliament or people themselves decide that a punishment will follow from an action they consider illegal, this is legitimate precisely because this belongs to the realm of what is "possible to be decided."

In this section, I tried to point out, based on the decisions of the IACtHR, that there is an individual and collective "right to truth" subsumed in some dispositions of the ACHR. First, the victim's relatives have the right not to have their suffering aggravated by the deliberated lack of information concerning their loved ones. Second, victims and families have the right to be heard by a judge and to have access to criminal courts in order to prosecute and have human rights perpetrators punished.

The problem, however, is to reduce the right to truth to a duty to punish. There are many ways to accomplish the need for accountability implied in the right to truth. The

several examples of truth commissions worldwide have demonstrated that it is possible to satisfy the moral claim for truth by means of different political arrangements. International courts as well as other international organizations are cardinal to realize the construction of human rights, but they should not prevent citizens themselves to participate in that process. To establish the limits of accountability and the way it is going to be implemented is in itself a political task.

In an essay on the public use of history, Jürgen Habermas argues that criminal justice and the work of historians are both complementary. They face the same question of accountability, but in different ways. While the criminal judge is interested in ascertaining guilt, the historian is looking for explanations for the facts. Despite the differences, both have to take a common political dimension into account:

> How we decide questions of accountability for crimes not only depends on the facts, but also on how we view the facts. How much responsibility we ascribe to persons and how much to historical circumstances, where we draw the boundaries between individual freedom and constraint, guilt, and innocence – these decisions depend on the particular pre-understanding with which we approach the events. The hermeneutic ability to recognize the true scope of responsibility and complicity for crime varies with our understanding of freedom: how we value ourselves as persons, and how much we expect from ourselves as political actors. An ethical-political discourse of collective self-understanding raises just this pre-understanding as a topic of discussion. How we see the distribution of guilt and innocence in the past also reflects the present norms according to which we are willing to accord one another mutual respect as citizens of this Republic. (Habermas 2001, 36–7)

A compromise of mutual respect, as well as the definition of the boundaries for accountability and its effectiveness is a task for the citizens of a democratic polity to decide. Certainly, accountability can be achieved by criminal trials, but other alternatives should be left open to citizens.

CHAPTER
FOUR

AMNESTIES AND TRANSNATIONAL STRUCTURES OF ACCOUNTABILITY

> The peoples of the earth have thus entered in varying degrees into a universal community, and it has developed to the point where a violation of rights in *one* part is felt *everywhere*.
>
> Kant, *Perpetual Peace*

4.1 Universal Jurisdiction and the Complementarity Principle

In September 1973, Chilean president Salvador Allende was overthrown by a military junta led by General Augusto Pinochet. The new government adopted measures of exception such as the state of siege, abolition of the Congress by decree, banned labor and leftist groups. By the end of 1977, thousands had been killed, tortured or disappeared by the regime. In 1978, General Pinochet issued a blanket amnesty. The Decree Law 2,191 granted amnesty to "all persons who ... committed crimes during the state of siege between 11 September 1973 and 10 March 1978." After the democratization, Pinochet was also endowed with a lifetime seat in the Chilean Senate, which gave him state immunity.

The successor government of Patricio Aylwin did not rescind the amnesty, but created the National Commission on Truth and Reconciliation. The Commission's task

was to investigate the truth about human rights abuses. According to Roht-Arriaza and Gibson (1998), the Commission issued a report with individualized information of a large number of cases of disappearances and deaths, and identified the responsible groups for these acts. The Commission was prevented from examining cases of human rights violations whose victims survived (such as torture) and it was restricted from identifying the individuals responsible for the crimes. Despite having its constitutionality challenged twice, the Chilean amnesty law was held constitutional and consistent with international law by the Supreme Court of Chile (Roht-Arriaza and Gibson 1998).

On July 1, 1996, an association of Spanish prosecutors filed charges against former dictator Augusto Pinochet and other Chilean leaders in the interests of seven victims of Spanish descent who had been killed or "disappeared" during the authoritarian regime.[1] The claim relied upon "universal jurisdiction."[2] On October 16, 1998, Pinochet was arrested in London, a fact that seems to have changed the practice and the normative grounds of international law. His extradition was requested by a Spanish magistrate on charges of murders of Chilean and Spanish citizens (Krauss 1998). Notwithstanding, the warrants were quashed on the ground that Pinochet enjoyed immunity from criminal process as former head of state. However, in an appeal to the House of Lords, it was ruled that the former dictator "was not immune in respect of conduct that constitutes an international crime" (Orentlicher 2004, 1076). In a different appeal, British magistrates considered the question whether the charges submitted by Spain constituted crimes under British law. They ruled that in order to send Pinochet to Spain, extraterritorial torture, that is, torture committed outside the United Kingdom, should be an extradition crime under both British and Spanish

[1] For a more detailed account of the proceeding of the Pinochet case in Europe, see Orentlicher (2004, 1070–89) and Falk (2006).
[2] See Chapter 1, fn. 6 and 7.

laws at the time the extradition was sought.

Under this condition of double criminality, the applicability of the principle of universal jurisdiction became much narrower. In fact, the United Kingdom ratified in 1984 the Convention Against Torture. Anticipating the entry into force of this convention, the United Kingdom enacted Section 134 of the Criminal Justice Act 1988 on September 29, 1988. This meant that extraterritorial torture became a violation of British law only after that date. Despite dozens of charges against Pinochet, the only alleged act of torture after 1988 involved a 17-year-old girl, who died after electric shocks administered by the Chilean police in 1989 (Guardian 1999). After having been placed under house arrest in Britain, the former dictator was released in March 2000 on medical grounds without facing trial.

The principle of universal jurisdiction, when effective, may be a great challenge to Westphalian states. And here I mean it challenges not only weak, but mostly powerful states. In 1993, Belgium implemented a war crimes law based on the Geneva Conventions. Under the principle of universal jurisdiction, neither the complaints nor the accused needed to be Belgian citizens for the investigation and prosecution to start. This rule made possible that two years later a group of Rwandans living in Belgium filed a complaint against people accused of genocide. In 2001, four Rwandans went to trial. After that, a group of Palestinians living in Lebanon filed a complaint against Ariel Sharon for his alleged role in the 1982 massacre of hundreds of refugees by Christians militiamen in the Sabra and Shatila camps outside Beirut. In addition, a group of Iraqis brought a complaint against former President George H. W. Bush, Vice President Cheney, Secretary of State Colin Powell and general Norman Schwarzkopf for their alleged roles in one attack in Bagdad, where at least 200 civilians were killed in 1991. After being under the pressure of NATO, the Belgium's government decided to change the law. The new legislation has a much more restrict jurisdiction,

requiring that either the victim or defendant are a Belgian national or resident. Even then, the federal prosecutor may reject a complaint if he or she deemed it "manifestly without grounds" and any NATO or European Union official gets automatic immunity (Frankel 2003).[3]

Perhaps the Pinochet Case was so paradigmatic because it signalizes a convergence of two "streams of justice," to use Kathryn Sikkink's (2011) expression. The first stream began as the international prosecutions at the Nuremberg and Tokyo Trials, and continued when the UN Security Council decided to create the ad hoc tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), in 1993 and 1994, respectively. The second stream embraces the domestic prosecution of individual perpetrators in Greece (1975), Portugal (1976), and Argentina (1985). As a matter of fact, the Pinochet Case was a foreign prosecution (Spain), made possible by a principle of international law (universal jurisdiction) enforced by a domestic court (United Kingdom). The peak of this trend seems to be the treaty that led to the creation of the International Criminal Court (ICC) in 1998.[4]

During the Rome Diplomatic Conference, three options were considered regarding the ICC's jurisdiction. According to Germany's proposal, the ICC would have automatic jurisdiction over the core crimes in the Rome Statute. The second option was a South Korean proposal that gave jurisdiction if any of the four states involved were party of the ICC's statute: the territorial state, the state of nationality of the accused, the state of nationality of the victim or the state with custody of the accused. The third option, defended by the United States, would require consent of the state of

[3] Just to give another famous example: in the United Kingdom, after the Pinochet case, an arrest warrant was issued against Israeli Foreign Minister Tzipi Livni for her role in orchestrating Israel's military offensive against Hamas in the Gaza Strip in 2008 (Haaretz 2009). This caused a diplomatic incident and the new conservative cabinet elected in 2010 approved a Police Reform and Social Responsibility Act 2011 amending the previous legislation. Now, the Director of Public Prosecutions, who is appointed by the Attorney General, has the power to veto over private applications for arrest warrants (Quinn 2011).

[4] For an overview of the structure and functioning of the ICC, see Schabas (2001).

nationality of the offender as a precondition for the exercise of jurisdiction over war crimes and crimes against humanity, but not for genocide (Scharf 2001, 77). The final document (Article 12) adopted a "take it or leave it" package which was presented in the last hours of the Conference as an attempt to mediate these divergences.

One way to understand the source of legitimacy of the ICC jurisdiction is through the *delegation of authority* by the state that has jurisdiction over the crime. The ICC can assert jurisdiction with the consent of either the state of nationality of the accused or the state where the crime occurred. For example, in the case that a national of state A commits a crime against humanity in the territory of state B, then the ICC would be able to exercise jurisdiction over the suspected perpetrator only if either state A or state B were a party to the Rome Statute. This represents ordinarily accepted forms of jurisdiction since any state has jurisdiction over its nationals and over crimes that happened in its territory. Party states, therefore, transferred their authority to the ICC.

The United States strongly opposed the ICC with the argument that it would allow the prosecution of its citizens even in the case the country did not sign the Rome Statute. Nevertheless, as Diane Orentlicher points out, key actors at the Rome Diplomatic Conference countered the United States' position against the ICC jurisdiction over citizens of non-party states by emphasizing the authority of the territorial states to make their own law applicable to non-nationals (2006, 218).

It seems that the ICC is not intended to be a global or postnational court, that is, to exercise jurisdiction whether states delegated authority to it or not. Conversely, the Rome Statute determines that its jurisdiction is *complementary* to those of the party states (Preamble and Article 1 of the Rome Statute).[5] This means that the states are

[5] The Bureau of the Assembly of States Parties (ASP) Hague Working Group defines positive complementarity as "all activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Rome Statute, without involving the Court in capacity building, financial support and technical as-

given primacy to prosecute,[6] and only in case they are "unwilling or unable to carry out the investigation or prosecution" that the legal proceedings are admissible before the ICC.[7]

In the debates that led to the signature of the Rome Statue, a representative of the German delegation affirmed that under the system of complementarity, the countries "did not surrender their national sovereignty."[8] The ICC cannot proceed if another state that has jurisdiction is pursuing the crime at hand. Moreover, the Assembly of States Parties has emphasized the preference for prosecution by national courts as a means of enhancing "mutual efforts to combat impunity." In this sense, the ICC is "a court of last resort."[9] However, this is only part of the story.

In addition to states' delegation, the authority of the Court derives also from the application of *universal jurisdiction*. A common explanation is that some crimes are considered so abhorrent that any court, including the ICC, is authorized to prosecute them. Whoever carries out genocide, war crimes and crimes against humanity[10]

---

sistance, but instead leaving these actions and activities for States, to assist each other on a voluntary basis," available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP8R/ICC-ASP-8-51-ENG.pdf [last visit on 2/22/2014]. The principle of complementarity also aims to solve a crucial problem: the conflict between jurisdictions. A national court and the ICC could claim otherwise to have both cognizance of the same particular case.

[6] The principle of complementarity has engendered some criticism because it could result an unfair distribution of the "burden of compliance" on weak states for what is a global public good (Freeman 2009, 97). Nonetheless, domestic trials can promote the principles the ICC represents in more long-lasting ways. In addition, it is plausible to argue that states where crimes occurred are more likely to access witnesses and gather evidence. This is the position, for instance, of the International Center for Transitional Justice. See the report on complementarity the ICTJ prepared for the Review Conference of the Rome Statute: http://ictj.org/sites/default/files/ICTJ-RSRC-Global-Complementarity-Briefing-2010-English.pdf [last visit on 2/22/2014].

[7] In contrast to the tribunals for former Yugoslavia and Rwanda, which had primacy over national courts.

[8] Speech delivered by Erzard Schmidt-Jortzig: http://www.un.org/icc/speeches/616ger.htm [last visit on 6/13/2010].

[9] See the report of The Bureau of the Assembly of States Parties (ASP) *supra*, fn. 5, p. 21.

[10] During the Rome Diplomatic Conference, no agreement was reached on the definition of the crime of aggression. This happened only in 2010 (see above on footnote 14, chapter 1). For Richard Goldstone, former prosecutor of the UN Tribunals for former Yugoslavia and Rwanda, adding the crime of aggression to the Court's jurisdiction would politicize even more the ICC (Goldstone 2010). I will come back to the issue of politicization of courts in the last section of this chapter.

is deemed *hostis humani generis*, that is, enemy of all mankind (Orentlicher 2007, 2557).[11] The crimes themselves are considered a threat to international peace and security, even when committed in an internal conflict. Thus, the international community as a whole is authorized to supplement or even displace ordinary national laws of territorial application with international laws that are universal and unbounded in their geographical scope (Sadat and Carden 2000, 407). This principle of universal jurisdiction is based "without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction."[12] Therefore, it is the *nature of the crime* that makes the law that asserts its condemnation peremptory (*jus cogens*).

Thus, there is a certain ambiguity regarding the nature of the ICC. Its authority originates from states, but, simultaneously, it claims to have the power to apply some of its decisions globally, irrespective of a state being part of the Rome Statute. This is somehow reflected by the way the ICC jurisdiction may be activated: (a) when a crime is referred by a state party; (b) when it is referred by the Security Council in accordance with Chapter VII of the Charter of the United Nations, or (c) by the ICC Prosecutor's proprio motu.[13]

(a) If a state refers the crime to the Court, it no longer has authority to void or

[11] Unlike Orentlicher, I argue that universal jurisdiction stems from the decentralization of the structures of justification far beyond the limits of national or international courts. By means of universal jurisdiction, any court can be addressed to provide those mechanisms of accountability. Thus, international law can finally leave behind the ancient Roman law notion of *hostis humani generis*. Nobody is the enemy of all mankind. The reason for universal jurisdiction lies on a claim for justification.

[12] The Princeton Principles on Universal Jurisdiction (1.1), available at: http://lapa.princeton.edu/hosteddocs/unive_jur.pdf [last visit on 2/22/2014].

[13] Article 13 of the Rome Statute determines that: "The Court may exercise its jurisdiction with respect to a crime referred to in Article 5 in accordance with the provisions of this Statute if: (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with Article 14; (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with Article 15."

defer the proceedings. Uganda's president Yoweri Museveni, for instance, referred the crimes committed in Northern Uganda to the ICC in 2003. However, almost four years later, a ceasefire agreement with the Lord's Resistance Army was reached and Museveni affirmed his commitment to the 2002 Amnesty Act, which granted amnesty to guerrilla members engaged since 1986 in war or armed rebellion against the government.[14] Notwithstanding, because of the referral and its acceptance by the ICC, the terms of the amnesty may be considered invalid before the international law.

Because the jurisdiction of the Court is complementary to those of party states, it is also possible that an amnesty may be acknowledged by the ICC when, after investigation, a state decides not to prosecute. Article 17(1)(b) of the Rome Statute determines that a prosecution is inadmissible when:

> The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.

If one follows the more permissive interpretation of amnesties, there are at least three issues that have to be taken into account. First, the act of amnesty must not prevent a diligent investigation to gather evidence and provide an account of the facts. Second, there should be a real possibility for deciding between amnesty and prosecution. The amnesty cannot be automatic, but rather it has to be granted under a proviso. Finally, the decision to pardon should not result from an unwillingness or inability to carry out a genuine prosecution. The state is not allowed to shield perpetrators from justice (Robinson 2003, 500).[15]

[14] See Article 3 of the Amnesty Act, 2002, available at: http://www.c-r.org/our-work/accord/northern-uganda/documents/2000_Jan_The_Amnesty_Act.doc [last visit on 2/22/2014].

[15] Nevertheless, it still very controversial among jurists whether the Rome Statute allows domestic amnesties. For an overview of this debate, see Chigara (2002), Gavron (2002), O'Shea (2002), Roche (2005), Newman (2005) and Mallinder (2008). It is important to notice that the Statute for the Mechanism for International Criminal Tribunals, created by the UN Security Council (Resolution 1966/10) to carry out some essential functions of the ICTY and ICTR – as enforce-

(b) Not only a state party, but also the UN Security Council has the right to refer a crime to the Prosecutor. But in the case that the Prosecutor decides not to proceed, the Pre-Trial Chamber, which is composed of no less than six judges, may review the decision and request that the Prosecutor reconsider, according to Article 53(3)(a). In fact, the Security Council initiative is conditional upon the Prosecutor's acceptance. Even if the Prosecutor is questioned by the Pre-Trial Chamber, he or she has the last word.[16]

The Articles that regulate the roles played by the Security Council and the Prosecutor were one of the most polemical issues during the diplomatic meetings of the Statute-making process. India vehemently opposed the Security Council's right to trigger the ICC, arguing that it constituted "a violation of sovereign equality, as well as equality before law, because it contains an assumption that the five veto-wielding states do not by definition commit the crimes covered by the ICC Statute."[17]

On the other hand, the United States pushed towards a more vigorous role for the Security Council. The US ambassador at the United Nations indicated that view in the following terms:

> The Council's mandatory Chapter VII powers will be absolutely essential to the work-

ment of sentences, protection of victims and witnesses, and so on – provides the possibility of pardon and commutation of sentences. Article 26 of the MICT Statute reads: "If, pursuant to *the applicable law of the State in which the person convicted by the ICTY, the ICTR, or the Mechanism is imprisoned*, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the Mechanism accordingly. There shall only be pardon or commutation of sentence if the President of the Mechanism so decides on the basis of the *interests of justice* and the *general principles of law*" (my emphasis). Thus, it is a mistake to affirm that the suspension of punishment on an individual basis (pardon) after the conviction is illegal under international law whatsoever.

[16] In case the Prosecutor decides not to proceed based solely on the "interests of justice" (see below), the Pre-Trial Chamber can obligate the Prosecutor to continue with the prosecution.

[17] Statement by Dilip Lahiri, the head of the Indian delegation at the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. Available at: http://www.un.org/icc/speeches/616ind.htm [last visit on 6/13/2010]. India also opposed the triggering competence of the Prosecutor, for considering it a usurpation of the sovereign authority of the states.

> ings of the Court – not only for enforcement but also to ensure the true universality of its jurisdiction and powers. From the point of view not only of law but also of vital policy, the Court must operate in coordination – not in conflict – with the Security Council and its role and powers under the UN Charter.[18]

The US was concerned with a possible threat to its peacekeeping operations. Despite having unsigned the Statute, the US could face a situation in which one of its citizens, an Army commander for instance, might be liable to trial if he or she were to violate international laws in the territory of a state party.

For this reason, the Security Council was also granted the right to defer any investigation or prosecution by the ICC for twelve months, and such a deferral may be renewed (Article 16). Legal scholars argue that this could be a tool to enact de facto amnesties. However, others like Jessica Gavron point out that it is only a delaying mechanism, "to prevent the Court intervening in the resolution of an ongoing conflict by the Security Council" (2002, 109).[19]

(c) The Prosecutor may also initiate an investigation on his or her own. In deciding whether to pursue a prosecution, the Prosecutor must take into account, among other things, the "interests of justice." Furthermore, it is necessary to consider all circumstances, including "the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime," in conformity with Article 53(2)(c) of the Rome Statute. According to Robinson, the "interests of justice" must be broadly interpreted (2003, 488). They extend beyond

[18] Statement by Bill Richardson, available at: http://www.un.org/icc/speeches/617usa.htm [last visit on 6/13/2010].

[19] The exercise of universal jurisdiction by the ICC depends on the consent of the state where the crime occurred or the state of nationality of the suspect, as we mentioned above. However, this exercise is unrestrained when the Security Council refers a crime to the ICC. In this case, investigations and prosecutions may be held regardless the approval of any state. In order to prevent any further prosecutions, the United States threatened to veto all UN peacekeeping mandate renewals unless the Security Council passed Resolution 1422 (July 2002), which automatically defers any investigation or prosecution of cases "involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation." The resolution also states the Council's intent to renewal the 12-month deferral "as long as may be necessary."

retributive criminal justice, and should include, for instance, the notion of restorative justice (Kiss 2000). Moreover, it is possible to think of a situation in which the Prosecutor may consider not prosecuting all offenders (only "big fishes") or in which the prosecution may provoke the government's collapse (Orentlicher 1991a, 2548). It is hard to envision precisely what the ICC's position would be in this case, but a necessity exception should be "very carefully and narrowly construed" (Robinson 2003, 496). Whenever the Prosecutor decides neither to investigate nor prosecute based solely on the "interests of justice," the Pre-Trial Chamber may review the decision. In this case, as determined by Article 53(3)(b) and (c), the Prosecutor's decision not to proceed is effective only if confirmed by the Chamber.

The institutional design of the ICC and the application of universal jurisdiction by national courts may indicate a new trend in international politics. It is still too early to detail how these changes will affect state sovereignty and human rights, what enhances the need for more theoretical analysis. For Sikkink, "what is emerging is a decentralized but interactive system of accountability for violations of core political rights with fragmented enforcement, which is primarily undertaken by domestic courts" (2011, 18). In this sense, those structures of accountability will work as "backup institutions," as she perspicaciously remarks.

Now, I want to address the role of international mechanisms of accountability from a normative perspective. In the next two sections I will discuss the tension between the local and the global contexts of justification. We have to go back to Kant and how Jürgen Habermas have tried to reformulate his cosmopolitan project. Finally, I will try to show how discourse theory may contribute to reinforce the "interactive system of accountability" Sikkink calls for and point out some risks it might bring to democracy.

4.2 The Constitutionalization of International Law

In his "Idea for a Universal History" of 1784, Kant observes that if one examines the free exercise of the human will on a large scale, it is possible to discover a "regular progression among freely willed actions." In this sense, the task nature has set for mankind is that of establishing a society in which "freedom under external laws would be combined to the greatest possible extent with irresistible force." In other words, adds Kant, this task means to found a "perfectly *just civil constitution*." The antagonism already present in mankind is gradually replaced by public coercive law governing relations among individuals, which allows the freedom of one to coexist with the freedom of all others (45-6; Ak. 8:22).[20]

Furthermore, the same "unsociability" that leads human beings to live within a law-governed civil state may take nations from a "lawless state of savagery" to a "federation of peoples" [*Völkerbund*]. According to Kant, practical reason requires us to stand under this cosmopolitan condition where a *"united power and the law-governed decisions of a united will"* replace war and insecurity (47; Ak. 8:24).

Nine years later, Kant publishes the essay "On the Common Saying: 'this may be true in theory, but it does not apply in practice,'" where he still asserts that "universal violence" make people submit to the "coercion which reason itself prescribes," i.e., by means of public law, and to enter into a "civil constitution." Kant upholds that, at the international level, states must join a cosmopolitan constitution. Nevertheless, he now raises a restriction:

> [I]f such a state of universal peace is in turn even more dangerous to freedom, for it may lead to the most fearful despotism, distress must force men to form a state which is not a cosmopolitan commonwealth under a single ruler, but a lawful *federation* under

[20] I will use the page numbers of the Hans Reiss edition (Kant 1991) followed by the volume and page numbers of the *Akademie Ausgabe* (Ak.). The English translation may appear slightly different from that of Reiss' edition without further notice.

> a commonly accepted *international law* [*Völkerrecht*]. (90; Ak. 8:310-1)

As Thomas McCarthy reminds us, in this essay there is still the very strong idea of a federation of nation states under a rule of international law (2002, 246). To be sure, Kant argues that all the individual states would voluntarily submit to the power of that "universal state of nations" [*allgemeinen Völkerstaat*] and all would obey its "coercive laws" (92; Ak. 8:312-3). Here Kant uses the term *Zwangsgesetzen* to indicate that this "state of nations" is not the loose, voluntary federation that he will bring about later (McCarthy 2002, 271n15).

It was in 1795, inspired by the Peace of Basel between France and Prussia, that Kant first published "Perpetual Peace." In this essay, Kant makes a very important shift by endorsing a more "achievable" goal:

> This federation does not aim to acquire any power like that of a state, but merely to preserve and secure the *freedom* of each state in itself, along with that of the other confederated states, although this does not mean that they need to submit to public laws and to a coercive power which enforces them, as do men in a state of nature. (104; Ak. 8:356)

Thus, the substitute he finds for a "world republic," which might not be realized, is a confederation. However, it does not mean Kant simply rejected a world republic to any extent. In fact, as McCarthy points out, "while a federal union of distinct peoples under a global rule of law remained the rational ideal, its distance from the real was increasingly emphasized and the more practicable goal of a loose confederation of sovereign states took center stage" (McCarthy 2002, 244).

By means of a (con)*federation of peoples* [*Völkerbund*], Kant wants to avoid a drawback he pointed out himself, namely, that if the nation states lose their sovereignty to give rise to an international state that may impair the respective forms of life (i.e., the "nations" or "peoples") within these political communities (102; Ak. 354). Moreover, it is noteworthy that in his 1784 essay, Kant uses the term *Völkerbund*, but to

express a federal union with a "united power." In the 1790s, the same institutional form is designated as *Völkerstaat* or "state of nations," and *Völkerbund* means a more achievable arrangement of a league of nations.[21]

Thus, the role coercion plays in the Kantian cosmopolitan project changes insofar as he becomes more "realist." To be sure, this modification stirs some tension into his theory since this new cosmopolitan condition relies on the consent of states, not on a league of states with coercive powers. On his previous account, Kant had spoken of a "great political body" on which states may count to guarantee a "cosmopolitan condition of general political security" (49; Ak. 8:26). Later, he not only replaces that by a confederation, but also adds the idea of a cosmopolitan law, understood as a right to hospitality regarding both states and individuals.[22] This ambiguity did not go unnoticed in new formulations of cosmopolitanism inspired by Kant.

For Jürgen Habermas, Kant's idea of a cosmopolitan order must be reformulated in order to be consonant with a global situation that has changed. To be sure, Habermas points out that the cosmopolitan idea itself has not stood still, but, conversely, has been implemented in many different ways since, for instance, the founding of the United Nations, the European Union, the World Trade Organization, and so forth. Habermas puts forward a reformulation of Kant's proposal, which he considers to be inconsistent in three main aspects.

First, Kant conceives a federation of nations that respects the sovereignty of states.

[21] See McCarthy (2002, 271n13).

[22] In *The Metaphysics of Morals*, Kant distinguishes the right of a state [*Staatrecht*], the right of nations, or as we call it today, international law [*Völkerrecht*], and the cosmopolitan right of world citizens [*Weltbürgerrecht*]. The latter concerns the status of individuals qua individuals, rather than as citizens of states. Pauline Kleingeld points out that Kant says virtually nothing about the *institutionalization* of cosmopolitan law. Since Kant almost equates *Recht* (rights, rightful law) with the use of necessary coercion (Ak. 6:231-2) and that there is no "world republic" to enforce cosmopolitan law, the question whether and how individuals and states can self-legislate and apply it remains. Kleingeld attempts to provide an answer that goes beyond Kant's own text and argues that individuals may appeal for protection of a national legal order (either their own or a foreign one), which resembles the functioning of universal jurisdiction (Kleingeld 1998, 81–5).

For Habermas, cosmopolitan law must be binding on the individual governments, and the "community of peoples must be able to ensure that its members act at least in conformity with the law through the threat of sanctions" (Habermas 1998, 179). The second inconsistency is that Kant regarded the bounds of national sovereignty as inviolable. Thus, Kant "conceived of the cosmopolitan community as a federation of states, not of world citizens" (Habermas 1998, 180). Since cosmopolitan rights are rights attached to every person qua human being, the implication is that individuals now assume a double role and are liable both at the international and national levels. Habermas says that such rights must be implemented even despite the resistance of national governments, thus "international law's prohibition of intervention is in need of revision" (Habermas 1998, 182). Finally, Habermas believes the stratification of world society, which includes poor countries, undemocratic governments as well as other power inequalities, and globalization require a new understanding of the concept of "peace." Peace is a process, he says, which must satisfy the real conditions for a peaceful coexistence among groups and peoples. Peace policies must "influence the internal affairs of formally sovereign states with the goal of promoting self-sustaining economies and tolerable social conditions, democratic participation, the rule of law, and cultural tolerance" (Habermas 1998, 185). In a nutshell, for Habermas, international institutions are necessary to fulfill the cosmopolitan order, which includes that human rights be translated "into a system of positive laws with legal procedures for their application and implementation" (Habermas 1998, 201).

Afterwards, in 1998, Habermas makes a diagnosis of the effects of globalization in democratic societies in his essay "The Postnational Constellation." The idea that societies are capable of self-control and self-realization had been accomplished until the end of the last century by nation-states. Nevertheless, globalization, which he characterizes as the "increasing scope and intensity of commercial, communica-

tive, and exchange relations beyond national borders," together with capital flows throughout the financial markets of the globe may endanger the capacity for "democratic self-steering within a national society" (Habermas 2001, 66–7). I am not going thoroughly into Habermas's description of how this process has affected the social and systemic integration of our societies. But an additional remark is important. He interprets the advent of different forms of "governance" at the regional and global levels, such as the UN, the EU, WTO and the like, as attempts to close "efficiency gaps" opened up insofar as the nation-states lose their autonomy. At the same time, he acknowledges that such institutional arrangements may suffer from "legitimation gaps." The heart of the problem is to equate new levels of institutionalization to counter the "disempowering effects of globalization" with new forms of discursively processes of opinion- and will-formation structured beyond nation-states. Examined from this perspective, the project of the European Union is, for Habermas, very promising insofar as it might combine functional integration with political action, although it is still necessary to broaden its democratic grounds.

The need for further institutionalization of cosmopolitan norms became even more pressing in the face of an armed conflict in Europe. Almost a month after NATO forces started bombing the Federal Republic of Yugoslavia in March 1999 during the Kosovo War, Habermas published an article in the newspaper *Die Zeit*. "War is here," he reminds his German readers as the text begins. How to legitimize the use of force against a sovereign state without the authorization of the Security Council prescribed by international law? Habermas recalls that, since the Security Council was blocked from acting, NATO appealed to the "moral validity of international law – and to norms for which no effective and universally recognized instances assure their application and enforcement" (Habermas 1999, 269). It happened as if the politics of human rights could be justified in light of the low level of institutionalization of

cosmopolitan law by *anticipating* the legal order it wants to promote. This puts an immense threat insofar as "norms remain restrictive expressions of force, however moral they may be in their content," warns Habermas. This is why he calls for more institutionalization of a legal international order:

> A systematic legalization of international relations is not possible without an established set of procedures for resolving disputes. It is precisely the institutionalization of legal procedures that will protect the juridically-tamed manner of dealing with violations of human rights from both a dedifferentiation of the law and an unmediated moral discrimination against "enemies." (Habermas 1999, 268)

This is a dramatic plea for realizing, once and for all, the project of a cosmopolitan legal order. The ambiguity here lies in a law that should constrain states and protect individuals but has not been sufficiently institutionalized. At this point, Habermas believes the fears of a world state prompted by Kant could be displaced by something even worse: a blurred, indistinct zone between law and morals. He is aware that insufficient institutionalization could be used to transform cosmopolitanism into a tool of dehumanization – a "struggle against evil," as Carl Schmitt saw it. Contrary to that, Habermas formulates another arrangement: a functioning Security Council, the binding jurisprudence of an international criminal court, and a representative organ of world citizens as a supplement of the General Assembly. If that is not achievable in the short run, at least "neighboring democratic states should be allowed to rush to provide emergency help as legitimated by international law" (Habermas 1999, 271).

More recently, Habermas came up with a better alternative, whose original formulation is not his, namely, the *constitutionalization of international law*.[23] He is very

[23] For the UN Charter as a world constitution, see Fassbender (1998).

indebted to Hauke Brunkhorst[24] for helping to find a way out of that dilemma.[25] And the answer starts by disconnecting statehood from constitution. A "state," remarks Habermas, is a "complex of hierarchically organized capacities available for the exercise of political power or the implementation of political programs" (Habermas 2006, 131). In other words, the state is the locus of administrative power. On the other hand, a "constitution" sets a "horizontal association of citizens by laying down the fundamental rights that free and equal founders mutually grant each other" (Habermas 2006, 131). Why is this distinction so important? Because Habermas believes that classical international law, despite the lack of a supranational world state, is already a kind of constitution since "it creates a legal community among parties with formally equal rights" (Habermas 2006, 133). Indeed, the UN differed from the League of Nations by, among other features, tying the aim of securing peace with that of promoting and encouraging the respect for human rights and fundamental freedoms (UN Charter, Article 1.3). Since then, international law cannot be considered just a law *between* states, but also a legal system to protect individuals.

Habermas argued in an interview after 9/11 that we live in an era of transition and ambivalence, from classical international law to what Kant had anticipated as a state

[24] Brunkhorst asserts that "democratic constitutions" do not have to be "state constitutions." According to him, federal unions, like the United States before the Civil War and the European Union today, have certain state-like elements but should not be equated with states: "The ideal type of a modern (democratic or non-democratic) constitutional regime seems to be an organization of systems of states (federations or confederations) *and* citizens (peoples), whereas the sovereign nation state now appears as a marginal and (as we have seen during the period of the World Wars) not very stable case of a modern regime" (Brunkhorst 2008, 495). I can hardly see though nation states as merely "marginal" cases of statehood.

[25] Eventually, the threat of a world state seems ungrounded, concludes Habermas. Three misleading conceptual ideas led Kant to equate the constitutionalization of international law to the risks of a "universal monarchy" and to seek a surrogate to the idea of a world republic as a model for the cosmopolitan condition. First, the French republic that served Kant as a model for a democratic constitutional state suggested that sovereignty is indivisible. Second, Rousseau's Republicanism implied that state and constitution are intertwined since they are created coevally from the will of the people. And third, the two constitutional revolutions of the eighteenth century misguided contemporaries and later generations to associate the creation of a republican constitution to a mythical foundation and a state of emergency (Habermas 2008, 314–7).

of world citizenry (Habermas 2003, 38). His suggestion then takes into consideration a reference to both collective and individual actors. Unlike other cosmopolitan projects, Habermas thinks the construction of a "world society without government" as a multilevel system.[26] At a *supranational* level, Habermas locates a world organization that could perform circumscribed functions of securing peace and promoting human rights (Habermas 2006, 136). At a second and lower *transnational* level, states may address issues related to what Habermas calls a "global domestic politics," which involves coordination to solve ecological issues, to combat organized crime, international trafficking of drugs and arms, and other systemic problems.

If the distinction between two different layers of norms has the advantage of limiting the aspirations of a "cosmopolitan constitution" by restricting its scope, it has the drawback of oversimplifying the task of making those norms legitimate. To be sure, Habermas acknowledges that the level of legitimacy varies according to the sort of norm at stake:

> Luckily, the level that must be achieved in order to satisfy these functional requirements is not unfeasibly high. If the international community limits itself to securing peace and protecting human rights, the requisite solidarity among world citizens need not reach the level of the implicit consensus on thick political value-orientations that is necessary for the familiar kind of civic solidarity among fellow-nationals. Consonance in reactions of moral outrage toward egregious human rights violations and manifest act of aggression is sufficient. Such agreement in negative effective responses to perceived acts of mass criminality suffices for integrating an abstract community of world citizens. The clear negative duties of a universalistic morality of justice – the duty not to engage in wars of aggression and not to commit crimes against humanity – ultimately constitute the standard for the verdicts of international courts and the political decisions of the world organization. (Habermas 2006, 143)

A question we may ask is: does Habermas really think that when one is confronted with acts of "mass criminality" such agreement on the "negative duties of justice" world citizens have before one another arises so easily? Moreover, when these negative

[26] Both Held (1995, 272–3) and Archibugi (2000, 146) advocate a world parliament and a sort of global monopoly of force.

duties are violated who grants legitimacy to the positive measures that unfold from them? A multileveled world order is mistaken as an empirical description and "weirdly apolitical as a project" (Cohen 2012, 81).

The application and enforcement of human rights, a commentator remarks, will remain "politically explosive," that is, "even the universal prohibition on aggressive war and genocide will undoubtedly continue to ignite deep controversy" (Scheuerman 2008, 487). Why do I insist on this point? Because during transitions, particularly when human rights are under serious risks, any government, court, or institution claiming to decide on the terms of a peace agreement or where to draw the line separating accountable from non-accountable actors is in need of democratic legitimacy and some "rudimentary elements of modern statehood" (Scheuerman 2008, 487). Discourse theory has made clear that democratic legitimacy stems from a deliberative process of legislation by means of which statutes can meet with the assent [*Zustimmung*] of all citizens (Habermas 1996, 110). This discursive procedure is neither founded on a sovereign decision (Schmitt) nor on a state of exception (Agamben). Instead, it lies on the very way practical questions are addressed by free and equal members of a political community. Thus, the establishment of democracy and a human rights regime during transitions should not be understood as something *external* and *alien* to that criterion of legitimacy, but as a process that *relies* itself on such discursive procedure to be valid. In other words, the more the choices to be made (who is accountable, how to celebrate the peace agreement, and so forth) count on citizens' self-determination, the more legitimate is the transition.

4.3 A Transnational Dialogue: from *demoi* to *judices*?

The critique raised against Habermas does not, however, invalidate the contribution that discourse theory has to offer to the debate on the global rule of law. The dilemma faced in political transitions between, on the one hand, the need to enact human rights and, on the other, the need for stability helps to show the limits of that formulation. At the same time, however, this tension allows us to reformulate the cosmopolitan project starting with some of its assumptions.

The *justificatory universalism*, as Benhabib calls it, of which Habermas is a proponent, has two basic assumptions. A *moral principle* that "all human beings, regardless of race, gender, sexual orientation, physical ability of bodily, ethnic, cultural, linguistic, and religious background are entitled to equal moral respect." And, from this moral status everyone has, a *legal status* originates: "all human beings are entitled to certain basic human rights, including, minimally, the rights to life, liberty, security and bodily integrity, some form of property and personal ownership, due process before the law and freedom of speech and association, including freedom of religion and conscience" (Benhabib 2011, 11). Although these two assumptions appear in different formulations, both are present in any discursive account as well as in some cosmopolitan models.

As discussed above, the UN Charter and international human rights treaties that followed the 1948 Declaration added to the moral personality of each individual a legal personality. Today, even stateless persons bear effective rights as legal persons. Thus, even Hanna Arendt's famous objection that human rights have no cash value for stateless persons has become very questionable (Brunkhorst 2005, 146).[27]

[27] Every person is entitled with human rights under international law and, because of that, nobody is in a "gray zone" outside the law. By way of illustration, a signatory of the *Convention on the Reduction of Statelessness* is supposed to grant nationality to a person born in its territory. Text available at: http://www.refworld.org/docid/3ae6b39620.html (last visit on 1/30/2014).

This led to significant changes in international law. Sovereignty understood as "absolute and perpetual" (Bodin) authority over a particular territory has been bound to certain rules and needs to be reformulated. There is no going back to the "Westphalian model." According to that model, the subjects of international law are exclusively states and their sovereignty, by means of bilateral or multilateral treaties, is the only source of international norms. Moreover, there is no "jurisdiction" to interpret or enforce international law – only states have the full right to resort to war or other coercive measures to protect their own rights and interests. In contrast to that, the new model put into effect by the UN Charter acknowledged as subjects of international law not only states but also international organizations and, more recently, individuals. It also created a set of peremptory rules (*jus cogens*). Finally, the right of states to resort to war has been limited to self-defense (Zolo 1997, 95–6).[28]

Another way to see this distinction is to recall the debate concerning the nature of the relation between domestic and international law. On the one hand, the dualist theory rests on the idea that each state regulates the relation among individuals by means of domestic rules while international law regulates the relation among sovereign states. One of the formulators of this view, the German jurist Heinrich Triepel, asserted that in order to be domestically valid, international law ought to be internalized by mechanisms of ratification established in accordance with, e.g., a state constitution (Triepel 1923, 95). Domestic and international law are independent orders, so an international norm can bind individuals only when it is first consented and absorbed by their respective state. Dualism (or pluralism, if one considers there are several independent state orders) is a good expression of the traditional concept of sovereignty,

[28] As a matter of fact, Danilo Zolo argues that both models still coexist. Following some of the steps of Carl Schmitt (2003), he is very critical of the model inaugurated by the UN Charter and offers a realist attempt to reformulate the Westphalian paradigm. For another realist approach that is neither connected to Schmitt, nor nostalgic of the Westphalian order, see Scheuerman (2011).

understood as non-interference in internal affairs of a state.

On the other hand, monist theory is based on the primacy of one sphere (domestic or international) over the other. Hans Kelsen, the most known proponent of this trend, affirmed that both national and international law form a unitary legal system. If one gives primacy to domestic law, then international norms are assimilated as an integrant part of domestic law and, in fact, there is no international law, but just an "external state law" (Kelsen 1926, 293). This raises an enormous difficulty regarding the legal coordination among different sovereign states. Eventually, the supremacy of the domestic law of one state renders the supremacy of other states impossible. "If God is the supreme authority, there is not but one God," compares Kelsen reminding us the theological origin of sovereignty. Kelsen, then, endorses the second alternative, namely, the primacy of international law. To take this step, he has to reformulate the original concept of sovereignty. In fact, Kelsen is responsible for providing sovereignty with a strong legal meaning. International law coordinates trade among states, the conditions of validity and application of treaties, sets the limits among territories and so forth. Instead of a "supreme power" (where "power" denotes the capacity to bring about an affect), external sovereignty means "the legal authority or competence of a state limited and limitable only by international law, and not by the national law of another state" (Kelsen 1944, 36). Alongside this legal definition, internal sovereignty stands for the capacity the state has to enact and implement its own laws. As Jean Cohen summarizes it, the concept of sovereignty is a negative one, and involves the claims to *supremacy* (no competitors to rule or exercise jurisdiction over the inhabitants of a polity) and *autonomy*, that is, non-subordination to foreign authorities.[29]

[29] Cohen addresses the dualist-monist debate (2012, 29–45) and points out that sovereignty must also be understood as a relational concept – it involves mutual construction and containment. Sovereignty is certainly no longer the old absolutist and Westphalian conception it used to be, but it is still part of the "object-language" of political actors, and retains some epistemological

And here begin the divergences among discourse theorists. Not because there have been much doubt casted upon the equal respect due to each person as a being capable of communicative freedom, much less in relation to the rights that moral principle entails. The problem lies in how each author attempts to reconcile the monism implicit in this new post-Westphalia order with the requirement of not only moral, but a *political* construction of human rights. Habermas tries to solve this problem by isolating two subjects – peace and protection of human rights – from the political agenda as if, for them, it was possible to maintain a certain monism implicit in the cosmopolitan ideal. Nevertheless, this seems to be a bad alternative.

Monism is a necessary consequence of a hierarchical relation of norms that emanate ultimately from a single source of validity. Kelsen was able to replace the authority at the top of this hierarchy by his *Grundnorm* or, in the case of international law, a fundamental norm to authorize the validity of norms created by treaties (*pacta sunt servanda*). Notwithstanding, discourse theory has the advantage of deriving the validity from a procedure of justification instead of the *Grundnorm*, a metaphysical authority or a will embodied in an ethical unity (the nation, for example). While assuming certain moral requirements, this procedure is only actualized insofar as citizens govern themselves through political and legal institutions.[30]

One might describe the ICC as a higher court, a necessary supranational jurisdiction to interpret and apply the international criminal law that protects the "citizens of the world."[31] But this view seems to rely on a naïve portrait of criminal justice, at least

---

function as an explanatory ordering principle of the international society: "Sovereignty is a legal, normative, epistemological as well as political concept, but it is not reducible to a bundle of rights or prerogatives. Instead, sovereignty is the unifying and self-identifying claim of a polity regarding the supremacy and autonomy of its legal order, the self-determination of its political system, and its status as the ultimate authority in its respective domain of jurisdiction and as an equal recognized under international law with a hand in making that law" (Cohen 2012, 66).

[30] See previous chapter.

[31] A good example of a previous attempt to achieve that is Hans Kelsen's outline of a covenant for a "Permanent League for the Maintenance of Peace." He acknowledged that a "world state" was unattainable, and then elaborated a cosmopolitan legal system centered on an international

as far as transitions are concerned, and can lead to a depoliticization when it comes to human rights. Conversely, one could delegitimize the ICC and other international courts such as those for former Yugoslavia and Rwanda by casting doubt upon their ability to interpret and enforce human rights impartially. In this sense, they are no more than an epiphenomenon of world politics – a kind of "victor's justice" – always maneuvered by hegemonic powers. I think, however, it is possible to combine the cosmopolitan ideal of human rights protection without losing ground to that sort of criticism. Furthermore, states will keep the important role they have had so far in granting legitimacy to international law withouth receding to the old Westphalian paradigm.

Ruti Teitel, who has immensely contributed to understanding this new global regime, coined the expression "humanity's law" to describe this non-sovereignty-based normativity where humanitarian law, international human rights law and international criminal law overlap one another. The global legal order is no longer concerned exclusively with state security, but with human security, the security of peoples and persons. Moreover, she points out that in the fragmented context of global politics, many non-state agents – private parties, non-governmental actors and transnational institutions – play a growing role in the production of international law.[32] This pro-

court, which would be competent to decide *any* dispute between the members of the League and to decide on *whether a member violated the covenant*. To support that, Kelsen argued that in the field of international relations, the majority principle is applied only in the procedures of international courts and that is not considered incompatible with the sovereignty of a state. Furthermore, treaties of arbitration have proved to be very effective. Finally, he added, looking at the history of law, the establishment of courts precedes the creation of legislative bodies (Kelsen 1944, 20–1). Interestingly, Kelsen also elaborated some "Treaty Stipulations Establishing Individual Responsibility for Violations of International Law" where he envisioned that the Council – the executive organ of the League – would have the "right to pardon" those individuals sentenced by the Court (Kelsen 1944, 148).

[32] "International criminal law processes appear to play a particularly important role in globalization because they enable a degree of reconceptualization of the public and private realms. International criminal law has significant constructive potential because international criminal enforcement introduces substantial flexibility into the characterization of conflict situations. Further, the expanded enforcement associated with the international law of armed conflict enables the transformation of traditional understandings of responsibility in the international sphere from

voked an "interpretive turn" in international law: from a mere epiphenomenon of international politics, it is now necessary to pay attention to the way this emerging legal regime may shape policymaking. This does not mean, however, that "humanity's law" is a hierarchically constituted cosmopolitan order. For her, humanity law inserts and diffuses itself as an interpretative practice: "it rules from within, through interpretation, rather than from above" (Teitel 2008, 674).

Put differently, for Teitel there is no ultimate interpretive authority of humanity's law.[33] Civil society actors and especially "adjudicative fora" may add new meaning to the new global rule of law:

> The judicial enterprise – particularly its comparativist dimensions – gains a significant new foundation if we assume the common ground of "humanity law" and a horizontal interpretative dialogue between domestic and international tribunals – in a world of multiple regimes, where there isn't centralization or monopoly or hierarchy of interpretive authority, and where interpretive legitimacy pertains to nonstate actors as well. (Teitel 2008, 695)

Teitel joins other authors who have pointed out the advent of a "global community of courts" (Slaughter 2003) or a "dialogue" among courts, the three branches (executive, legislative and judiciary) and within the legal community. Courts review the product and reasoning of other courts, "not because any court is superior to another, but because each court, in exercising its universal jurisdiction, must take notice of the emerging transnational jurisprudence for its decisions to be transnationally accepted" (Reichman 2001, 47).

Seyla Benhabib has also emphasized the idea of a dialogue that goes beyond the boundaries of the nation state in transnational public spheres of communication and action. She has addressed particularly the issue regarding immigrants and how they

---

the national to the international, and from the collective to the individual" (Teitel 2001, 373). Unlike her, I have serious doubts that international criminal law addresses conflict situations with "substantial flexibility."

[33] Conversely, for Kelsen, only the opinion expressed by the competent authority is "legally relevant" (Kelsen 1945, 161).

can engage in "democratic iterations" that relate to their status in the country they live in (Benhabib 2011, 144). As an example, Benhabib refers to the way Arizona's immigration law was challenged by human rights groups and immigrant advocacy in American courts. The federal government defended the idea that immigration policy could only be regulated by a federal law. Surprisingly, she says, the federal government received the support of the Mexican government in action:

> The fact that Mexican and other Latin American governments can be parties to a lawsuit along with the US government in an American Federal Court is indicative of the reality of transnational public spheres. Although this process of democratic iteration will reach some decisional closure at some future point, through the actions of the US Supreme Court or the adoption by the US Congress of an immigration Bill, this moment of decision, far from being one of finality, will lead to new and further democratic iterations. (Benhabib 2011, 145)[34]

Nevertheless, I think it is quite puzzling that Benhabib picks this lawsuit as an exemplar case of democratic iteration. It is certainly very significant that other governments, which are somehow affected by a state law in the US, may take part on this specific issue. Immigration, as a matter of human rights, concerns more than one single polity and calls for a dialogue among "communities of conversation," as she argues.[35] But I am afraid too much emphasis and enthusiasm have been put on

[34] Other countries that supported the petition of Mexico as *amici curiae* ("friends of the court") are: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Paraguay, Peru and Uruguay. Briefs and petitions can be found at: http://www.nilc.org/USvAZamici.html [last visit on 2/4/2014].

[35] "Democratic iterations take place in overlapping communities of conversation consisting of what can be named the 'demotic community,' that is, all those who are formal citizens and residents of a jurisdictional system, and other more fluid and unstructured 'communities of conversation' that often involve international and transnational human rights organizations, such as Amnesty International, various UN representative and human rights monitoring bodies, and global activist groups such as Médecins Sans Frontières. Democratic iterations are not concerned with the question, 'which norms are valid for human beings at all times and in all places?' but, rather, with questions such as: 'In view of our moral, political and constitutional commitments as a people, our international obligations to human rights treaties and documents, what collective decisions can we reach which would be deemed both just and legitimate?' Democratic iterations aim at democratic justice. They mediate between a collectivity's constitutional and institutional responsibilities, and the context-transcending universal claims of human rights and justice to which such a collectivity ought to be equally committed" (Benhabib 2011, 151–2).

participation in judicial interpretation and application of norms, but not in discourses of lawmaking justification.

Milan Kuhli and Klaus Günther (2011) wrote a fascinating paper on discourse theory and judicial lawmaking that may shed some light on this discussion. They start by referring to the ideal types of *justification* and *application* discourses.[36] In modern societies and at a postconventional level of justification, norms ought to be open to criticism by all those subjected to them in order to be valid (Fraser 2010, chap. 4). For those action norms that appear in the legal form, justification may encompass almost an unlimited set of arguments, including moral, ethical-political and pragmatic reasons (Habermas 1996, 159–62). On the other hand, in application discourses, it must be determined which of prima facie valid norms is the most *appropriate* to a situation, described as exhaustively as possible in all its relevant features.[37] In other terms, the distinction, as Habermas puts it, is the following:

> In legal discourses of application, a decision must be reached about which of the valid norms is appropriate in a given situation whose relevant features have been described as completely as possible. This type of discourse requires a constellation of roles in which the parties (and if necessary government prosecutors) can present all the contested aspects of a case before a judge who acts as the impartial representative of the legal community. Furthermore, it requires a distribution of responsibilities according to which the court must justify its judgment before a broad legal public sphere. By contrast, in discourses of justification there are in principle only participants. (Habermas 1996, 172)

The same differentiation has been used to distinguish the communicative role played by a constitutional court from that played by a legislative body.[38]

[36] For Kelsen, there is no difference between application and creation of law since both are constitutive of a "legal" fact: "a fact to which the law attaches certain consequences (duties, rights, sanctions), the fact and accordingly its consequences, are 'created' by the judicial decision; and it is only as a legal fact that it counts" (Kelsen 1944, 47).

[37] See Günther (1993, 30) and Habermas (1993, 38).

[38] "The legitimating reasons available from the constitution are given to the constitutional court in advance from the perspective of the application of law – and not from the perspective of a legislation that elaborates and *develops* the system of rights in the pursuit of policies. The court reopens the package of reasons that legitimated legislative decisions so that it might mobilize

That said, Kuhli and Günther observe that a judiciary might engage in lawmaking without presenting arguments of a justificatory sort. Thus, a court can "announce a new norm" – in this case they prefer to use the term norm *identification* instead of norm *application*. Notwithstanding, they argue that the work of the International Criminal Tribunal for the former Yugoslavia (ICTY) has a lawmaking character and that the court has engaged in a discourse of norm justification.

The ICTY was created in 1993 by the UN Security Council in response to mass atrocities committed in the Balkans in the 1990s.[39] The jurisdiction of the court covers "serious violations of international humanitarian law" (Article 1 of the Statute of the ICTY), which include: "Grave breaches of the Geneva Convention of 1949" (Article 2), violations of the laws or customs of war (Article 3), genocide (Article 4) and crimes against humanity (Article 5).[40] As remarked by Kuhli and Günther, the Statute does not precisely fix the court's jurisdiction, "it gives a floor, but is vague about the ceiling" (2011, 1264). Although the Secretary-General claimed that the "application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law,"[41] it is up to the ICTY to decide whether an international humanitarian law is "beyond any doubt" part of the customary international law. Moreover, just to give another example, Article 3 lists the violations of the laws or customs of war, but states that the ICTY's jurisdiction *is not limited to* such violations.

At the time the ICTY was created it was the first international court to appear after Nuremberg and there was little existing jurisprudence it could rely on. Fur-

---

them for a coherent ruling on the individual case in agreement with existing principles of law; *it may not, however, use these reasons in an implicitly legislative manner that directly elaborates and develops the system of rights*" (Habermas 1996, 262, my emphasis).

[39] SC Res. 808, UN Doc. S/RES/808 (1993) of 22 February 1993.

[40] The Statute of the ICTY (hereinafter "Statute") was elaborated by the UN Secretary-General Boutros Boutros-Ghali under the request of the Security Council, and approved by the Security Council Resolution 827, UN Doc. S/RES/827 (1993) of 25 May 1993.

[41] UN Doc. S/25704 of 3 May 1993, § 34.

thermore, the norms of customary international law are "elusive and vague," as Kuhli and Günther remind us, so part of the task of an international court is to identify these indeterminate customary norms. In this case, the court is not trying to answer a prescriptive question of whether a norm is valid. Conversely, it tries to answer "the (more or less) *descriptive* question of whether a norm is already acknowledged in the international community" (Kuhli and Günther 2011, 1266). So, what kind of discourse one observes within the ICTY?

In the *Kupreškić Case*, the ICTY made a decision concerning an attack of the Bosnian Muslim village of Ahmići by Bosnian Croats in April 1993. The defense alleged the assault was a form of *belligerent reprisal* since there had been attacks by Muslim forces in the region since 1992. The doctrine of belligerent reprisal is used to justify, within the context of an armed conflict, an action of retaliation by one of the parties in order to stop an adversary from violating international law (Kuhli and Günther 2011, 1268).[42]

The ICTY had to decide whether the attack – that included Muslim civilians as targets – could be justified as a belligerent reprisal. It concluded first that state practice, which characterizes a customary law, did not support that all reprisals against civilians are prohibited. In fact, some countries, such as the United States, did not even ratify the Additional Protocol I to the Geneva Conventions. Nevertheless, the court ruled that "the treaty provisions prohibiting all reprisals against civilians and civilian objects *has* become customary law because the requirement of humanity dictates that it *should* become customary law" (Kuhli and Günther 2011, 1271). In this sense, the court invoked Article 1(2) of Additional Protocol I in its decision and

[42] In addition, the reprisal has to be reasonably proportionate to the prior illegal act committed by the adversary, it must stop as soon as the unlawful act has been discontinued and it must be taken for the purpose of enforcing compliance with international law (Kuhli and Günther 2011, 1269). Finally, the Additional Protocol I to the Geneva Conventions (Article 51[6]) states that "Attacks against the civilian population or civilians by way of reprisals are prohibited."

stated that:[43]

> [T]his Clause clearly shows that principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent. The other element, in the form of *opinio necessitatis*, crystallizing as a result of the imperatives of humanity or public conscience, may turn out to be the decisive element heralding the emergence of a general rule or principle of humanitarian law. (*apud* Kuhli and Günther 2011, 1271)

According to the court, although state practice is "scant or inconsistent," to condemn reprisals against civilians is an imperative derived from considerations of humanity. The ICTY also added an argument from effectiveness, remarking that punishment of war crimes and crimes against humanity is a more effective means to defer unlawful acts of warfare.

For Kuhli and Günther, there are two types of reasons here: "practical arguments considering the effectiveness of reprisals relative to effectiveness of courts" and "purely moral arguments" with regard to the inhumanity of attacking civilians. So, "[t]here are not the kinds of reasons that bear on the task of identifying existing international law. They are reasons from a discourse of norm justification. Effectively, the ICTY is arguing that customary law in this instance should be *created*" (Kuhli and Günther 2011, 1272).

To be sure, the ICTY counted on the provisions of the Additional Protocol I, namely, the "principles of humanity" and "public conscience," as norms that are *already given*.

[43] Article 1(2) reads: "In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the *principles of humanity* and from the dictates of *public conscience*" (my emphasis). This paragraph is taken from the "Martens Clause," named after the Russian diplomat who had proposed it for the preamble for the 1899 Hague Convention II. Since it is not possible for any codification to be complete at any given moment, the Martens clause prevents the assumption that anything which is not explicitly prohibited by the relevant treaties is therefore permitted. Furthermore, it should be seen as a dynamic factor proclaiming the applicability of the principles mentioned regardless of subsequent developments of types of situation or technology (see the commentary of the International Committee of the Red Cross to Additional Protocol I on http://www.icrc.org [last visit on 2/8/2014]).

However, they are given in such a way that lacks a determinate meaning. As Kuhli and Günther observe, these norms require courts and concrete cases of violation to define them: from a historical point of view, moral learning processes depend on experiences of injustice. Everything considered, the *Kupreškić Case* brings up the following relevant features: (1) The ICTY referes to an ongoing public discussion regarding human rights violations; (2) The court participates in that public debate with a concrete case by introducing new definitions of the "principles of humanity" and "public conscience;" (3) The ICTY's decision, as any other judicial decision, is subject to public criticism. This is especially important, say Kuhli and Günther, where a court has engaged in a discourse of norm justification, so NGOs, for example, could be given the opportunity to participate as *amici curiae* in the proceedings; (4) The lawmaking process of international law takes into account moral norms and integrate them into a web of legal principles and rules; (5) Judges "are only one participant among others." Despite the legally binding decision, the new rule has to be contested publicly in an ongoing discourse of justification (Kuhli and Günther 2011, 1276–7).

The obvious problem with this account is that it risks replacing the *demos* by judges and legal experts.[44] It is true that in many cases, especially regarding domestic lawmaking, the legislative body may refrain from detailing some issues and remove them from the political process in order to delegate their specification to more insulated institutions, such as courts. Nevertheless, within a context of political change, discourses of justification are as necessary as ever to grant legitimacy to the process of rebuilding political institutions. Sometimes, because of the magnitude of human rights violations, citizens are called out to discuss accountability at a meta-

[44] I am unsure whether the lack of transnational institutions of democratic legislation (a world parliament, for instance) made discourse theorists look for legitimacy elsewhere. Are they somehow "seduced" by the way courts may interact with one another and willing to interpret that as a form of deliberation? Moreover, because judges make binding decisions, they are not simply "one participant among others," as Kuhli and Günther describe.

level ("What is a valid excuse not to be punished?" "Where to draw the line between 'big' and 'small' fishes?" and so on) before holding perpetrators responsible on an individual basis.[45] Not acknowledging that may raise a suspicion of *legalism*, namely, the isolation of law from its social and political contexts to fulfill some sort of ideological role.[46] Since the very act to look back to past events may bring politics into play, so does the interpretation and application of law:

> In transitional periods ... the debate about past normality takes on a contested, political aspect. How to deal with the routine spying by citizens of one another, shooting at those wishing to escape, or systematic liquidation of political opponents? How to judge the actions of individuals living and working in a 'criminal' normality (*Unrechtstaat*): how much 'heroism' is needed? What about (mere) passivity? And last but not least – can those who have not lived under such conditions judge? (Koskenniemi 2011, 179–80)

Koskenniemi is very aware of the limits of international law to come to grips with heinous crimes and how its symbolism may have different effects before a domestic audience. When Slobodan Milošević was brought to the ICTY to stand trial, he remarks, it oscillated ambivalently between the wish to punish an individual responsible for a humanitarian disaster and the danger of producing a show trial (Koskenniemi 2011, 171).[47] The more the decisions taken during the transitional process relies on

[45] Of course South Africa comes to our mind here. But let us think about another example of how the judicial system itself has to be rebuilt. After the genocide of more than half million Tutsis, the new Rwandan government would have to put over 100,000 Hutus in the dock (Kritz 1995, xxiii). Estimations say it would take more than a century to prosecute them. The solution was to rely on "community courts" called *gacaca* to deal with major crimes such as murder and assault (but not rape). The crimes had to be classified into four different categories according to the perpetrator's involvement: ranging from people who planned or instigated the crimes to persons who committed offenses against property. It took a decade for the *gacaca* system to accomplish its work to provide some sort of accountability for 2 million cases (BBC 2012). In addition, the UN Security Council created the International Criminal Tribunal for Rwanda to prosecute the most responsible for the genocide.

[46] The main reference is the well-known work by Judith Shklar (1986), where she analyzes the Nuremberg and Tokyo trials. Many criticisms she raises are addressed to Kelsen's positivism. Although I thought this work very inspiring, I do not believe one can raise the same arguments against a theory of law inspired by discourse theory.

[47] Milošević died in 2006, almost five years after being transferred to The Hague, shortly before the completion of his trial. His death was a major blow to the tribunal's reputation. For a good

justification discourses, including to rechannel[48] as much as possible the deliberation among courts to a public sphere open to citizens, the more legitimate is the result.

On the other hand, it would be naïve to think that a polity fractured by gross violations of human rights can find its path towards reconciliation without the aid of transnational institutions. The point is to elaborate a criterion of validity that allows strengthening such institutions and moving away the risks of illegitimate interference, new forms of imperialism and so forth. Is there an alternative to a hierarchical and monistic international law centered on criminal courts? Can one think of polycentric, heterarchical and dualistic forms of accountability? While, for Kant, cosmopolitan law was not clearly backed by sanctions, its contemporary reformulations emulate some features of domestic legal systems. It may be true that "Cosmopolis" is, as Nadia Urbinati observes, "inspired first of all by the prospect of military intervention and coercion" (2003, 74). Nevertheless, the international law of human rights does not necessarily work in the same way as basic rights that can be enforced within the constitutional democratic state. If accountability were not equated with coercion, then human rights could keep a safe analytical distance from international criminal law. Human rights, accountability and democracy should reinforce, not compete with, one another.

As already pointed, humanitarian law, international human rights law and international criminal law have become intertwined in the past decades. Perhaps it is time to look back and see whether this interconnection has been trivialized. To be sure, the ICC and the spread of universal jurisdiction may contribute immensely to deter future violations of human rights, and they certainly help to guarantee some fairness to the extent they attempt to combat impunity. Notwithstanding, because these tribunals

account of the politics surrounding the creation and functioning of the ICTY and the ICTR, see Peskin (2008).

[48] I thank Rainer Forst for suggesting me this word.

rely on criminal procedures and are designed to carry out sanctions, sometimes they may also fail to deliver accountability (e.g., when the defendant, like Milošević before being handled to the ICTY, is out of reach or when a state has not acknowledged their authority). The exclusive focus on punishment has hindered institutional creativity to think about other ways to hold perpetrators liable.[49] In addition, the establishment of structures of accountability, other than criminal courts, does not necessarily require a lot of consent and may evade the veto of powerful states.

To be sure, in a Postwestphalian frame, taking political communities organized into states as the exclusive agents of justice is unattainable.[50] The world has become a huge network of interdependent relations and a global public sphere has developed. Decisions taken in one continent may affect the destiny of people living in another one. Not to mention the drawbacks: for instance, how hostilities among military powers (think about the Cold War) have defined conflicts and mass atrocities worldwide. Notwithstanding, it is also necessary to acknowledge that, at the domestic level, social cooperation and the institutionalization of structures of justification cannot be equaled on the global level. Some skeptics even say that international organizations

[49] Two examples of how this could be accomplished are the creation of a permanent international truth commission (see Scharf 1996) or domestic truth commissions working together with the ICC as a carrot-stick mechanism (see Roche 2005). Lustration and the suspension of a perpetrator's right to association are also forms of punishment beyond incarceration that not only protect insipient forming institutions, but also prevent former criminals to use the spoils of their deadly games (Greiff 1996, 104).

[50] For a critique of the Westphalian model from the perspective of justice, see Fraser (2010, chap. 2). I also borrow from her the problematization of *misframing* questions (see above on p. 66). In a Poswestphalian world, together with first-order questions of justice – namely, those involving its substance – arguments about justice also concern second-order, meta-level questions. The former regards the "what" of justice, and includes issues of economic inequalities, recognition of identity differences and so on. The latter addresses the proper frame within which to consider first-order questions. "Who" counts as a subject of injustice? Besides that, whenever there is a lack of institutions where controversies about the "who" can be democratically settled, justice becomes a matter of "how" to set the frame of the dispute. Those are not easy problems, and I do not believe they can be entirely answered in theoretical terms. But I think theory can, at least, come to the aid of questioning. With that in mind, the following issues have been commonly raised during transitions: *What are the measures to promote political reconciliation? Who is to be hold accountable and who are the victims to receive some redress? How to allow citizens to answer such questions?*

cannot be democratic at all (Dahl 1999).

The mediation of both domestic and global levels has to start by avoiding the reduction of one or the other. The basic right to justification, Rainer Forst insists, lies at the core of justified domestic as well as transnational basic structures:[51]

> A transnational approach differs from a globalist view in considering particular political contexts as contexts of justice in their own right and in constructing principles of justice for the establishment of just relations between autonomous political communities. It differs from statist views by starting from a universal right and by considering the global context as an essential context of justice. (Forst 2011, 259–60)

Thus, there is a *monistic* "moral cosmopolitanism" that is a starting point to evaluate various contexts of justice as contexts of justification. In this sense, moral rights and duties apply to every member of the "human moral community" (Forst 2011, 261). Still at a noninstitutional perspective, this is what justifies a universal commitment to those victims of human rights violations who lack structures of accountability and redress.

The next step is the realization of that moral right in a *political* context. Forst upholds that the *primary political context* "is the context of a particular, 'domestic' society and its basic structure, a context into which (in the normal case) persons are born as citizens, that is, where they find themselves situated as members of a historically situated political community and order" (2011, 261–2). In this context, citizens are the subjects of immediate legal and political authority and power.

Forst then introduces another distinction: *minimal* and *maximal justice*. The former requires basic rights and institutions necessary for the exercise of the right to political justification, such as personal liberty, right to political participation, and so on. They create a *minimally just discursive basic structure*. Maximal justice, on the other hand, is the result of justificatory discourses made possible by that first

[51] On the basic right to justification, see chapter 3 above.

structure, which includes details of economic production and distribution, the legal system, the educational infrastructure, and the like. "Minimal justice calls for a *basic structure of justification*, maximal justice for a *fully justified basic structure*" (Forst 2011, 262).

The leading intent here is to formulate a principle of *minimal transnational justice* concerning economic inequalities and lack of resources to establish a justified democratic order within a polity with equal political standing before the world community. Unfortunately, issues of accountability, redress and transitional justice have not been paid too much attention by critical theorists, including Forst. Nevertheless, his account helps us to understand the role transnational mechanisms of accountability should play in an interdependent world. First, it allows us to keep the *moral monism* that we inherited from Kant and is on the basis of any claim to justice, of any request for accountability and redress, regardless of state boundaries. Second, it results from that a *political dualism* that acknowledges the importance of citizens' self-determination. This grants a plurality of concrete contexts of justification that are heterarchically related to one another.

Gross violations of human rights put a threat not only to world peace. They correspond to the elimination of any possible form of dialogue and prevent the establishment of any basic structure of justification whatsoever. The perpetrators of these crimes may be held accountable by a variety of jurisdictions not because they are "enemies of mankind." Accountability in these cases means the initial stage to reconstruct what was once destroyed or to build anew a reconciled polity. It is in this sense that we should understand the development of international institutions, such as the ICC, or domestic ones, such as courts working under the universal jurisdiction principle: they provide a minimally just structure of justification. This happens not because skilled judges are capable of interpreting international law through applica-

tion discourses. In fact, accountability itself – in its many different concrete forms – provides a (still minimal) structure of justification. As a result of that, victims can regain their political and legal standing and perpetrators are hold responsible as subjects of law. Although punishment might have deterrent effects, it is secondary, as the only two convictions by the ICC since it came into force in 2002 indicate. For the same reason amnesty is not per se a problem, provided that it does not jeopardize accountability.

CONCLUSION

More than a decade ago, Ruti Teitel coined the expression "transitional justice" to describe a large array of legal responses in contexts of political transformation. She referred not only to criminal justice, but also to historical, reparatory, administrative and constitutional forms of justice (Teitel 2000). I agree with that approach and think the debate in the last years became somehow reduced to the criminal aspect only. Thus, the main implication that follows from the theoretical assumptions outlined here is that it is necessary to redeem other perspectives.

Argentina witnessed a heinous dictatorship and handled to bring wrongdoers to the criminal bench due to the effort of its civil society. On the other hand, the South African transition became a paradigmatic shift for demonstrating that instead of corrective justice centered on sanctions, a political community may decide to build its democratic future based on the account of truth and restorative justice. Most importantly, the TRC did not equate amnesty with oblivion.

Nevertheless, my aim here was not to pick a "one-size-fits-all" solution, but to uphold that both possibilities are capable of reaching a fairly acceptable degree of legitimacy. This conclusion is only possible if one makes an analytical differentiation between accountability and punishment. To use a well-known distinction introduced by Ronald Dworkin in legal theory, accountability is a matter of principle and has to do with treating people as free and equal members of the same political community.

Punishment and amnesty are matters of policy that can be used aiming at a specific target, such as – but not limited to – deterrence or stability.

My reconstruction of domestic and transnational structures of accountability does generate a number of questions retributivist authors have to confront. Why should we simply assume that punishment is the only way to revert the unequal standing of perpetrators and victims of a former regime? As I outlined earlier in this study, a truth commission may equally accomplish that task. Criminal law has its own limitations to address past violations, largely it tends to focus solely on individual actions. What if other circumstances (economic, cultural, and so forth) are required to give a full account of the past? Are there other forms to attain accountability in such contexts? Admittedly, the connection between human rights and punishment does not seem to be as tight as retributivists assume. The risk of subsuming accountability to punishment is to delegitimize other institutional mechanisms developed at the local level, to raise the perception of an external interference and to produce the demagogic claim that perpetrators are now the victims. Amnesties may still be valid as long as they do not impair accountability.

This work also tried to put into operation normative concepts and, by means of comparative analysis, probe how sound they are in relation to the dilemmas faced during political transitions. The second implication of it is that the idea of human rights put forward by different trends within discourse theory seems to be adequate to avoid the drawbacks of instability and injustice. Transitions must be subordinated to what Rainer Forst has called the "basic right to justification," or the "right to have rights," as in the way Seyla Benhabib reformulates Arendt's expression. Both are very demanding criteria of legitimacy and function here to circumscribe a limit for state authorities and their attempt to promote stability. On the other hand, they also count on citizens themselves to specify and implement the mechanisms of accountability or

amnesty. Transitions ought to achieve legitimacy through accountability and political reconciliation, rather than being based on decisions driven by force tout court.

Furthermore, this study is a modest attempt to indicate some prospects concerning transnational structures of accountability. Beyond domestic contexts, the existent mechanisms to hold perpetrators responsible comprise already emancipatory forms of accountability. Thus, a last implication of this work is not to provide an "ideal" theory, but to point out how the normative assumptions presented here may produce effects through established and institutionalized practices. To be sure, this task has to be accomplished by those subject to the terms of the political transition, and not exclusively by experts or legal practitioners. Eventually, to cross the exhaustive bridge leading to political transformation is an enterprise citizens must accomplish on their own.

BIBLIOGRAPHY

Ackerman, Bruce A. 1992. *The Future of Liberal Revolution.* New Haven: Yale University Press.

Adorno, Theodor W. 1986. "What Does Coming to Terms with the Past Mean?" In *Bitburg in Moral and Political Perspective*, edited by Geoffrey Hartman, 114–29. Bloomington: Indiana University Press.

Agamben, Giorgio. 2005. *State of Exception.* Chigaco and London: University of Chicago Press.

Alfonsín, Raúl. 1993. "'Never Again' in Argentina." *Journal of Democracy* 4 (1): 15–19.

Andrews, Penelope, and Stephen Ellmann, ed. 2001. *Post-Apartheid Constitutions: Perspectives On South Africa's Basic Law.* Johannesburg; Athens: Witwatersrand University Press; Ohio University Press.

Arato, Andrew. 2009. *Constitution Making Under Occupation: The Politics of Imposed Revolution in Iraq.* New York: Columbia University Press.

Archibugi, Daniele. 2000. "Cosmopolitical Democracy." *New Left Review*, no. 4: 137–50.

Arendt, Hannah. 2006. *Eichmann in Jerusalem: A Report on the Banality of Evil.* New York: Penguin Books.

Arthur, Paige. 2009. "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice." *Human Rights Quarterly* 31 (2): 321–67.

Aspen Institute. 1989. *State Crimes: Punishment or Pardon.* Queenstown: Aspen Institute.

Bauman, Zygmunt. 1997. *Postmodernity and Its Discontents*. New York: NYU Press.

Baynes, Kenneth. 2009. "Discourse Ethics and the Political Conception of Human Rights." *Ethics & Global Politics* 2 (1): 1–21.

BBC. 2012. "Rwanda Genocide Courts Shut down." *BBC*, June 18, sec. Africa. http://www.bbc.co.uk/news/world-africa-18490348

Beccaria, Cesare. 1995. *On Crimes and Punishments and Other Writings*. Cambridge; New York: Cambridge University Press.

Beitz, Charles R. 2000. "Rawls's Law of Peoples." *Ethics* 110 (4): 669–96.

———. 2009. *The Idea of Human Rights*. Oxford; New York: Oxford University Press.

Benhabib, Seyla. 1997a. "On Reconciliation and Respect, Justice and the Good Life: Response to Herta Nagl-Docekal and Rainer Forst." *Philosophy & Social Criticism* 23 (5): 97–114.

———. 1997b. "Review of Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy. by Juergen Habermas." *The American Political Science Review* 91 (3): 725–26.

———. 2004. *The Rights of Others: Aliens, Residents, and Citizens*. Cambridge; New York: Cambridge University Press.

———. 2011. *Dignity in Adversity: Human Rights in Troubled Times*. Cambridge; Malden: Polity.

Bodin, Jean. 1992. *On Sovereignty: Four Chapters from "The Six Books of the Commonwealth"*. Cambridge; New York: Cambridge University Press.

Bois-Pedain, Antje du. 2007. *Transitional Amnesty in South Africa*. Cambridge; New York: Cambridge University Press.

———. 2009. "Communicating Criminal and Political Responsibility in the TRC Process." In *Justice and Reconciliation in Post-Apartheid South Africa*, edited by François du Bois and Antje du Bois-Pedain, 62–89. Cambridge; New York: Cambridge University Press.

Braithwaite, John, and Philip Pettit. 1990. *Not Just Deserts: A Republican Theory of Criminal Justice*. Oxford; New York: Clarendon Press; Oxford University Press.

Brooks, Thom. 2012. *Hegel's Political Philosophy*. 2nd ed. Edinburgh: Edinburgh University Press.

Brunkhorst, Hauke. 2005. *Solidarity: From Civic Friendship to a Global Legal Community*. Cambridge, MA: MIT Press.

———. 2007. "Violencia, democracia y reconciliación." In *Las víctimas frente a la búsqueda de la verdad y la reparación en Colombia*, edited by Guillermo Hoyos Vásquez, 31–48. Bogotá: Pontificia Universidad Javeriana.

———. 2008. "State and Constitution – A Reply to Scheuerman." *Constellations* 15 (4): 493–501.

Brysk, Alison. 1994. "The Politics of Measurement: The Contested Count of the Disappeared in Argentina." *Human Rights Quarterly* 16 (4): 676–92.

Burnett, Victoria. 2008. "Spanish Judge Drops Probe into Franco Atrocities." *New York Times*, November 19, sec. World/Europe. http://www.nytimes.com/2008/11/19/world/europe/19spain.html

Cassese, Antonio. 2008. *International Criminal Law*. 2nd ed. Oxford; New York: Oxford University Press.

Chapman, Audrey R. 2008. "Perspectives on the Role of Forgiveness in the Human Rights Violations Hearings." In *Truth and Reconciliation in South Africa: Did the TRC Deliver?*, edited by Audrey R. Chapman and Hugo van der Merwe, 66–89. Philadelphia: University of Pennsylvania Press.

Chigara, Ben. 2002. *Amnesty in International Law*. London: Longman.

Christodoulidis, Emilios A., and Scott Veitch. 2009. "Reconciliation as Surrender: Configurations of Responsibility and Memory." In *Justice and Reconciliation in Post-Apartheid South Africa*, edited by François du Bois and Antje du Bois-Pedain, 9–36. Cambridge; New York: Cambridge University Press.

Clarín. 2006. "Las Madres de Plaza de Mayo Realizaron La Última Marcha de La Resistencia", January 27.

Cobban, Helena. 2007. *Amnesty after Atrocity? Healing Nations after Genocide and War Crimes*. Boulder: Paradigm Publishers.

Cohen, Jean L. 2002. *Regulating Intimacy: A New Legal Paradigm.* Princeton, N.J.: Princeton University Press.

———. 2012. *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism*. Cambridge; New York: Cambridge University Press.

Cohen, Joshua. 2006. "Is There a Human Right to Democracy?" In *The Egalitarian Conscience: Essays in Honour of G.A. Cohen*, edited by Christine Sypnowich, 226–48. Oxford; New York: Oxford University Press.

Cooper, David E. 1971. "Hegel's Theory of Punishment." In *Hegel's Political Philosophy - Problems and Perspectives; a Collection of New Essays*, edited by Z. A. Pelczynski, 151–67. London; New York: Cambridge University Press.

Cornell, Drucilla. 2010. "Is There a Difference That Makes a Difference between uBuntu and Dignity?" *SA Public Law* 25 (2): 382–99.

Dahl, Robert. 1999. "Can International Organizations Be Democratic? A Skeptic's View." In *Democracy's Edges*, edited by Ian Shapiro and Casiano Hacker-Cordón, 19–36. London; New York: Cambridge University Press.

De Lange, Johnny. 2000. "The Historical Context, Legal Origins and Philosophical Foundation of the South African Truth and Reconciliation Commission." In *Looking Back, Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa*, edited by Charles Villa-Vicencio and Wilhelm Verwoerd, 14–31. London: Zed Books.

Derrida, J. 2001. *On Cosmopolitanism and Forgiveness*. London; New York: Routledge.

Dorris, Jonathan Truman. 1953. *Pardon and Amnesty under Lincoln and Johnson*. Chapel Hill: University of North Carolina Press.

Duff, R. A. 1991. *Trials and Punishments*. Cambridge; New York: Cambridge University Press.

———. 2003. *Punishment, Communication, and Community*. New York: Oxford University Press.

Duff, R. A., Lindsay Farmer, Sandra Marshall, and Victor Tadros. 2007. *The Trial on Trial*. Vol. 3. Oxford; Portland, Or.: Hart Publishing.

Dugard, John. 1998. "Reconciliation and Justice: The South African Experience." *Transnational Law & Contemporary Problems* 8: 277.

Dworkin, Ronald. 1986. "Introduction." In *Nunca Más: The Report of the Argentine National Commission on the Disappeared*, xi–xxviii. New York: Farrar, Straus, Giroux.

Economist. 2005. "Argentina's Courts: Justice or Politics?", June 23.

Elster, Jon. 2004. *Closing the Books: Transitional Justice in Historical Perspective*. New York: Cambridge University Press.

Falk, Richard A. 2006. "Assessing the Pinochet Litigation: Whither Universal Jurisdiction?" In *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law*, edited by Stephen Macedo, 97–120. Philadelphia: University of Pennsylvania Press.

Fassbender, Bardo. 1998. "The United Nations Charter as Constitution of the International Community." *Columbia Journal of Transnational Law* 36 (3): 529–619.

Forst, Rainer. 1997. "Situations of the Self: Reflections on Seyla Benhabib's Version of Critical Theory." *Philosophy & Social Criticism* 23 (5): 79–96.

———. 2010. "The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach." *Ethics* 120 (4): 711–40.

———. 2011. *The Right to Justification: Elements of a Constructivist Theory of Justice*. New York: Columbia University Press.

Foucault, Michel. 1995. *Discipline and Punish: The Birth of the Prison*. 2nd ed. New York: Vintage Books.

Frankel, Glenn. 2003. "Belgian War Crimes Undone by Its Global Reach." *Washington Post*, September 30.

Fraser, Nancy. 1992. "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy." In *Habermas and the Public Sphere*, edited by Craig J. Calhoun, 109–42. Cambridge, Mass.: MIT Press.

———. 2003. "Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation." In *Redistribution or Recognition? A Political-Philosophical Exchange*, by Axel Honneth and Nancy Fraser, 7–109. London; New York: Verso.

———. 2005. "Mapping the Feminist Imagination: From Redistribution to Recognition to Representation." *Constellations* 12 (3): 295–307.

———. 2010. *Scales of Justice: Reimagining Political Space in a Globalizing World*. New York: Columbia University Press.

Freeman, Mark. 2009. *Necessary Evils: Amnesties and the Search for Justice*. New York: Cambridge University Press.

Frei, Norbert. 2002. *Adenauer's Germany and the Nazi Past: The Politics of Amnesty and Integration*. New York: Columbia University Press.

Gavron, Jessica. 2002. "Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court." *The International and Comparative Law Quarterly* 51 (1): 91–117.

Greiff, Pablo De. 1996. "Trial and Punishment: Pardon and Oblivion. On Two Inadequate Policies for the Treatment of Former Human Rights Abusers." *Philosophy & Social Criticism* 22 (3): 93–111.

———. 1998. "International Courts and Transitions to Democracy." *Public Affairs Quarterly* 12 (1): 79–99.

———. 2002. "Deliberative Democracy and Punishment." *Buffalo Criminal Law Review* 5: 373–93.

Groome, Dermot. 2011. "The Right to Truth in the Fight Against Impunity." *Berkeley Journal of International Law* 29 (1): 175–99.

Guardian. 1999. "New Pinochet Court Challenge Adjourned", March 24.

Günther, Klaus. 1993. *The Sense of Appropriateness: Application Discourses in Morality and Law*. Albany: SUNY Press.

———. 1998. "Communicative Freedom, Communicative Power, and Jurisgenesis." In *Habermas on Law and Democracy: Critical Exchanges*, edited by Michel Rosenfeld and Andrew Arato, 234–254. Berkeley: University of California Press.

———. 2000. "Verantwortlichkeit in Der Zivilgesellschaft." In *Das Interesse Der Vernunft: Rückblicke Auf Das Werk von Jürgen Habermas Seit "Erkenntnis Und Interesse"*, edited by Jürgen Habermas, Stefan Müller-Doohm, and René Görtzen, 465–85. Frankfurt am Main: Suhrkamp.

———. 2001. "The Criminal Law of 'guilt' as Subject of a Politics of Remembrance in Democracies." In *Lethe's Law: Justice, Law and Ethics in Reconciliation*, edited by Emilios A. Christodoulidis and Scott Veitch, 3–15. Oxford; Portland, OR: Hart Publishing.

Gutmann, Amy, and Dennis Thompson. 2000. "The Moral Foundations of Truth Commissions." In *Truth v. Justice: The Morality of Truth Commissions*, edited by Robert I. Rotberg and Dennis Thompson, 22–44. Princeton, NJ: Princeton University Press.

Haaretz. 2009. "Foreign Ministry Outraged over UK Arrest Warrant against Livni." December 14. http://www.haaretz.com/news/foreign-ministry- outraged-over-uk-arrest-warrant-against-livni-1.2191

Habermas, Jürgen. 1984. *The Theory of Communicative Action*. Boston: Beacon Press.

———. 1990. *The Philosophical Discourse of Modernity: Twelve Lectures*. Cambridge, MA: MIT Press.

———. 1993. *Justification and Application: Remarks on Discourse Ethics*. Cambridge, MA: MIT Press.

———. 1996. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. Cambridge, MA: MIT Press.

———. 1998. *The Inclusion of the Other: Studies in Political Theory*. Cambridge, MA: MIT Press.

———. 1999. "Bestiality and Humanity: A War on the Border between Legality and Morality." *Constellations* 6 (3): 263–72.

———. 2001. *The Postnational Constellation: Political Essays*. Studies in Contemporary German Social Thought. Cambridge, MA: MIT Press.

———. 2003. *Philosophy in a Time of Terror: Dialogues with Jürgen Habermas and Jacques Derrida / [interviewed By] Giovanna Borradori*. Chicago: University of Chicago Press.

———. 2006. *The Divided West*. Cambridge; Malden: Polity.

———. 2008. *Between Naturalism and Religion: Philosophical Essays*. Cambridge; Malden: Polity.

———. 2012. *The Crisis of the European Union: A Response*. Cambridge; Malden: Polity.

Hampton, Jean. 1988. "The Retributive Idea." In *Forgiveness and Mercy*, by Jean Hampton and Jeffrie G. Murphy, 111–61. Cambridge; New York: Cambridge University Press.

Hardimon, Michael O. 1994. *Hegel's Social Philosophy: The Project of Reconciliation*. Cambridge; New York: Cambridge University Press.

Hayner, Priscilla B. 1994. "Fifteen Truth Commissions — 1974 to 1994: A Comparative Study." *Human Rights Quarterly* 16 (4): 597–655.

———. 2000. "Same Species, Different Animal: How South Africa Compares to Truth Commissions Worldwide." In *Looking Back, Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa*, edited by Charles Villa-Vicencio and Wilhelm Verwoerd, 32–41. London: Zed Books.

———. 2010. *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*. 2nd ed. London; New York: Routledge.

Hegel, G. W. F. 1971. "The Spirit of Christianity and Its Fate." In *Early Theological Writings*, translated by T. M. Knox and Richard Kroner, 182–301. New York: Harper.

———. 1991. *Hegel: Elements of the Philosophy of Right*. Cambridge; New York: Cambridge University Press.

———. 1996. *Lectures on Natural Right and Political Science: The First Philosophy of Right*. Translated by Peter Wannenmann, J. Michael Stewart, and Peter C. Hodgson. Berkeley: University of California Press.

———. 2010. *The Philosophy of History*. Translated by J. Sibree. Rockville: Wildside Press.

Held, David. 1995. *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance*. Stanford: Stanford University Press.

Honneth, Axel. 1996. *The Struggle for Recognition: The Moral Grammar of Social Conflicts*. Cambridge, MA: MIT Press.

Howe, Marvine. 1970. "Blacks in South Africa Developing a New Awareness." *New York Times*, July 12.

Imbrisevic, Miroslav. 2010. "The Consent Solution to Punishment and the Explicit Denial Objection." *Theoria* 25 (2). http://www.ehu.es/ojs/index.php/THEORIA/article/view/636

Jakobs, Günther. 2004. "Bürgerstrafrecht Und Feindstrafrecht." *Onlinezeitschrift Für Höchstrichterliche Rechtsprechung Zum Strafrecht*, no. 3: 88–95. http://www.hrr-strafrecht.de/hrr/archiv/04-03/hrrs-3-04.pdf

Kandell, Jonathan. 1974. "Kidnapping a Lucrative Crime in Argentina; In Classic Style Guerrillas Include Women Striking Twice." *New York Times*, May 29.

———. 1975. "Financier in Argentina Seized Again; Paid $1-Million Ransom First Time." *New York Times*, August 1.

Kant, Immanuel. 1991. *Kant: Political Writings*. 2nd ed. Cambridge; New York: Cambridge University Press.

———. 1996. *The Metaphysics of Morals*. 2nd ed. Cambridge; New York: Cambridge University Press.

Kelsen, Hans. 1926. "Les Rapports de Système entre le Droit Interne et le Droit International Public." *Recueil des Cours*, no. IV: 227–331.

———. 1944. *Peace through Law*. Chapel Hill: The University of North Carolina Press.

———. 1945. *General Theory of Law and State*. Cambridge, MA: Harvard University Press.

Kirchheimer, Otto. 1980. *Political Justice: The Use of Legal Procedure for Political Ends*. Westport, Conn: Greenwood Press.

Kiss, Elizabeth. 2000. "Moral Ambition within and beyond Political Constraints. Reflections on Restorative Justice." In *Truth v. Justice: The Morality of Truth Commissions*, edited by Robert I. Rotberg and Dennis Thompson, 68–98. Princeton, NJ: Princeton University Press.

Kleingeld, Pauline. 1998. "Kant's Cosmopolitan Law: World Citizenship for a Global Order." *Kantian Review* 2: 72–90.

Koskenniemi, Martti. 2011. *The Politics of International Law*. Oxford; Portland, OR: Hart Publishing.

Krapp, Peter. 2005. "Amnesty: Between an Ethics of Forgiveness and the Politics of Forgetting." *German Law Journal* 6 (1): 185 – 195.

Krauss, Clifford. 1998. "Britain Arrests Pinochet to Face Charges by Spain." *New York Times*, October 18.

Kritz, Neil J. 1995. *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*. Washington, D.C.: United States Institute of Peace Press.

Kuhli, Milan, and Klaus Günther. 2011. "Judicial Lawmaking, Discourse Theory, and the ICTY on Belligerent Reprisals." *The German Law Journal* 12 (5): 1261–78.

Locke, John. 1988. *Two Treatises of Government*. Cambridge; New York: Cambridge University Press.

Malamud-Goti, Jaime E. 1996. *Game Without End: State Terror and the Politics of Justice*. Norman: University of Oklahoma Press.

Mallinder, Louise. 2008. *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide*. Oxford; Portland, OR: Hart Publishing.

———. 2009. "The Ongoing Quest for Truth and Justice: Enacting and Annulling Argentina's Amnesty Laws." http://papers.ssrn.com/sol3/papers. cfm? abstract_id=1531759

Mamdani, Mahmood. 2007. "Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa." In *Identities, Affiliations, and Allegiances*, edited by Seyla Benhabib, Ian Shapiro, and Danilo Petranovich, 325–61. Cambridge; New York: Cambridge University Press.

———. 2010. "Responsibility to Protect or Right to Punish?" *Journal of Intervention and Statebuilding* 4 (1): 53–67.

Marquardt, Paul D. 1995. "Law Without Borders: The Constitutionality of an International Criminal Court." *Columbia Journal of Transnational Law* 33: 73 – 148.

McCarthy, Thomas. 2002. "On Reconciling Cosmopolitan Unity and National Diversity." In *Global Justice and Transnational Politics*, edited by Pablo De Greiff and Ciaran P. Cronin, 235–74. Cambridge, MA: MIT Press.

Mignone, Emilio F., Cynthia L. Estlund, and Samuel Issacharoff. 1984. "Dictatorship on Trial: Prosecution of Human Rights Violations in Argentina." *Yale Journal of International Law* 10: 118–50.

Montesquieu. 1989. *The Spirit of the Laws*. Cambridge; New York: Cambridge University Press.

Murphy, Jeffrie G. 1988. "Forgiveness and Resentment." In *Forgiveness and Mercy*, by Jean Hampton and Jeffrie G. Murphy, 14–34. Cambridge; New York: Cambridge University Press.

Nagel, Thomas. 2005. "The Problem of Global Justice." *Philosophy & Public Affairs* 33 (2): 113–47.

Neves, Raphael. 2012. "Uma Comissão da Verdade no Brasil? Desafios e Perspectivas para integrar Direitos Humanos e Democracia." *Lua Nova: Revista de Cultura e Política*, (86): 155–86.

Newman, Dwight. 2005. "The Rome Statute, Some Reservations Concerning Amnesties, and a Distributive Problem." *American University International Law Review* 20 (2): 293–357.

Nino, Carlos. 1983. "A Consensual Theory of Punishment." *Philosophy & Public Affairs* 12 (4): 289–306.

———. 1985. "Human Rights Policy of the Argentine Constitutional Government: A Reply." *Yale Journal of International Law* 11: 217–30.

———. 1991. "The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina." *The Yale Law Journal* 100 (8): 2619–40.

O'Shea, Andreas. 2002. *Amnesty for Crime in International Law and Practice*. New York: Springer.

Ocampo, Luis Moreno. 1999. "Beyond Punishment: Justice in the Wake of Massive Crimes in Argentina." *Journal of International Affairs* 52 (2): 669–89.

Orentlicher, Diane F. 1991a. "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime." *The Yale Law Journal* 100 (8): 2537–2615.

———. 1991b. "A Reply to Professor Nino." *The Yale Law Journal* 100 (8): 2641–43.

———. 2003. "Amicus Curiae Brief Concerning the Amnesty Provided by the Lomé Accord Submitted in the Case of The Prosecutor v. Morris Kallon SCSL-2003-07." http://www.sc-sl.org/LinkClick.aspx?fileticket= u0qVGu09CTE%3D&tabid=195

———. 2004. "Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles." *Georgetown Law Journal* 92 (6): 1057–1134.

———. 2006. "The Future of Universal Jurisdiction in the New Architecture of Transnational Justice." In *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law*, edited by Stephen Macedo, 214–39. Philadelphia: University of Pennsylvania Press.

———. 2007. "'Settling Accounts' Revisited: Reconciling Global Norms with Local Agency." *International Journal of Transitional Justice* 1 (1): 10–22.

Pensky, Max. 2008. "Amnesty on Trial: Impunity, Accountability, and the Norms of International Law." *Ethics & Global Politics* 1 (1-2): 1–40.

Peskin, Victor. 2008. *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation*. Cambridge; New York: Cambridge University Press.

Pettit, Philip. 1997. "Republican Theory and Criminal Punishment." *Utilitas* 9 (1): 59–79.

Quinn, Ben. 2011. "Former Israeli Minister Tzipi Livni to Visit UK after Change in Arrest Law." *Guardian*, October 4, sec. World. http://www.theguardian.com/world/2011/oct/04/tzipi-livni-arrest-warrant

Rawls, John. 1993. *Political Liberalism*. New York: Columbia University Press.

———. 1997. "The Idea of Public Reason Revisited." *The University of Chicago Law Review* 64 (3): 765 – 807.

———. 2000. *Lectures on the History of Moral Philosophy*. Edited by Barbara Herman. Cambridge, MA: Harvard University Press.

———. 2001. *The Law of Peoples*. Cambridge, MA: Harvard University Press.

Reichman, Amnon. 2001. "'When We Sit to Judge We Are Being Judged' - The Israeli GSS Case, Ex Parte Pinochet and Domestic/Global Deliberation." *Cardozo Journal of International and Comparative Law* 9: 41–103.

Robinson, Darryl. 2003. "Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court." *European Journal of International Law* 14 (3): 481–505.

Roche, Declan. 2005. "Truth Commission Amnesties and the International Criminal Court." *British Journal of Criminology* 45 (4).

Roht-Arriaza, Naomi, and Lauren Gibson. 1998. "The Developing Jurisprudence on Amnesty." *Human Rights Quarterly* 20 (4): 843–85.

Rosenberg, Tina. 1996. "Recovering from Apartheid." *New Yorker*, November 18.

Rosenfeld, Michel, and Andrew Arato, ed. 1998. *Habermas on Law and Democracy: Critical Exchanges*. Berkeley: University of California Press.

Sadat, Leila, and Richard Carden. 2000. "The New International Criminal Court: An Uneasy Revolution." *Georgetown Law Journal* 88 (3): 381 – 474.

Scanlon, T. M. 1999. "Punishment and the Rule of Law." In *Deliberative Democracy and Human Rights*, edited by Harold Hongju Koh and Ronald Slye, 257–71. New Haven: Yale University Press.

Scarry, Elaine. 1987. *The Body in Pain: The Making and Unmaking of the World*. New York: Oxford University Press.

Schabas, William. 2001. *An Introduction to the International Criminal Court*. Cambridge; New York: Cambridge University Press.

Scharf, Michael P. 1996. "The Case for a Permanent International Truth Commission." *Duke Journal of Comparative & International Law* 7: 375–410.

———. 2001. "The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position." *Law and Contemporary Problems* 64 (1): 67–117.

Scheuerman, William E. 2008. "'All Power to the (State-Less?) General Assembly!"' *Constellations* 15 (4): 485–92.

———. 2011. *The Realist Case for Global Reform*. Cambridge: Polity.

Schild, Wolfgang. 2007. "The Contemporary Relevance of Hegel's Concept of Punishment." In *Hegel on Ethics and Politics*, edited by Robert B. Pippin and Otfried Höffe, 150–79. Cambridge; New York: Cambridge University Press.

Schmitt, Carl. 1995. "Amnestie Oder Die Kraft Des Vergessens." In *Staat, Großraum, Nomos. Arbeiten Aus Den Jahren 1916 Bis 1969*, 218–21. Berlin: Duncker & Humblot.

———. 2003. *The Nomos of the Earth in the International Law of the Jus Publicum Europœum*. New York: Telos Press.

Shklar, Judith N. 1986. *Legalism: Law, Morals, and Political Trials*. 2nd ed. Cambridge, MA: Harvard University Press.

Schumacher, Edward. 1983. "Argentina Sets up Inquiry for 6,000 Who Disappeared." *New York Times*, December 17.

Sikkink, Kathryn. 2011. *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*. New York: W. W. Norton & Co.

Simpson, Graeme. 1999. "A Brief Evaluation of South Africa's Truth and Reconciliation Commission: Some Lessons for Societies in Transition." In Centre for the Study of Violence and Reconciliation. wiredspace.wits.ac.za /jspui/bitstream/10539 /8084/1/HWS-383.pdf

Slaughter, Anne-Marie. 2003. "A Global Community of Courts." *Harvard International Law Journal* 44 (1): 191–219.

Slye, Ronald. 2000. "Amnesty, Truth, and Reconciliation. Reflections on the South African Amnesty Process." In *Truth v. Justice: The Morality of Truth Commissions*, edited by Robert I. Rotberg and Dennis Thompson, 170–88. Princeton, NJ: Princeton University Press.

Smith, Anne-Marie. 1987. "State Terror In Argentina. A Frankfurt School Perspective." *Praxis International* 6 (4): 477–87.

South Africa. 1998. *Truth and Reconciliation Commission of South Africa Report*. Cape Town: The Commission.

Teitel, Ruti. 2000. *Transitional Justice*. Oxford; New York: Oxford University Press.

———. 2001. "Humanity's Law: Rule of Law for the New Global Politics." *Cornell International Law Journal* 35: 355–87.

———. 2008. "Humanity Law: A New Interpretive Lens on the International Sphere." *Fordham Law Review* 77: 667.

Triepel, Heinrich. 1923. "Les Rapports Entre Le Droit Interne et Le Droit International." *Recueil Des Cours*, no. 1: 73–119.

Tutu, Desmond. 2000. *No Future Without Forgiveness*. Johannesburg: Rider.

Urbinati, Nadia. 2003. "Can Cosmopolitical Democracy Be Democratic?" In *Debating Cosmopolitics*, edited by Daniele Archibugi and Mathias Koenig-Archibugi, 67–85. London; New York: Verso.

Vattel, E. 2009. *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury*. Indianapolis: Liberty Fund.

Verdeja, Ernesto. 2008. "A Critical Theory of Reparative Justice." *Constellations: An International Journal of Critical & Democratic Theory* 15 (2): 208–22.

Wilson, Richard A. 2001. *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State*. Cambridge; New York: Cambridge University Press.

Zolo, Danilo. 1997. *Cosmopolis: Prospects for World Government*. Cambridge, MA: Polity.

———. 2009. *Victors' Justice: From Nuremberg to Baghdad*. London: Verso.