UC Irvine
UC Irvine Electronic Theses and Dissertations

Title
Legal Framing and the Pursuit of Retributive Transitional Justice in South Africa

Permalink
https://escholarship.org/uc/item/00g9g7x7

Author
Raleigh, Alexandra

Publication Date
2018

Copyright Information
This work is made available under the terms of a Creative Commons Attribution-NoDerivatives License, availalbe at https://creativecommons.org/licenses/by-nd/4.0/

Peer reviewed|Thesis/dissertation

eScholarship.org Powered by the California Digital Library
University of California

UNIVERSITY OF CALIFORNIA,
IRVINE

Legal Framing and the Pursuit of Retributive Transitional Justice in South Africa

DISSERTATION

submitted in partial satisfaction of the requirements
for the degree of

DOCTOR OF PHILOSOPHY

in Political Science

by

Alexandra L. Raleigh

Dissertation Committee:
Associate Professor Daniel R. Brunstetter, Chair
Assistant Professor Yousuf Al-Bulushi
Assistant Professor Davin Phoenix

2018

© 2018 Alexandra L. Raleigh

DEDICATION

To

my fellow Black scholars

those brave souls who seek knowledge and success from

PWIs that were

neither made for you nor encourage your growth;

Your continued existence is a form of resistance.

TABLE OF CONTENTS

LIST OF TABLES

ACKNOWLEDGMENTS

I would like to thank my advisor, Daniel Brunstetter, and my dissertation committee for their invaluable support and guidance throughout my graduate career. I would also like to thank my family and friends for supporting me through the challenges of graduate school.

I would also like to thank my Olive Tree Initiative and Deconstructing Diversity Initiative students and colleagues. I have learned more from you than you could possibly imagine.

Financial support for this dissertation was provided by the Center for Citizen Peacebuilding, the Center for Global Peace and Conflict Studies, and the Department of Political Science.

CURRICULUM VITAE

Alexandra L. Raleigh

2008	B.A. in Political Science, Psychology, University of Connecticut
2014-17	Education Coordinator, Olive Tree Initiative
2015-18	Education Coordinator, Deconstructing Diversity Initiative
2018	M.A. in Political Science, University of California, Irvine
2018	Ph.D. in Political Science, University of California, Irvine

FIELD OF STUDY

International Relations and Political Psychology
Transitional Justice

ABSTRACT OF THE DISSERTATION

Legal Framing and the Pursuit of Retributive Transitional Justice in South Africa

By

Alexandra L. Raleigh

Doctor of Philosophy in Political Science

University of California, Irvine, 2018

Associate Professor Daniel R. Brunstetter, Chair

This dissertation explores the role and utility of law in the pursuit of post-conflict retributive justice in South Africa. Adopting a frame analytic approach to law in transition, this dissertation examines the ways in transitional justice stakeholders use law as an interpretive device and rhetorical capability to pursue their respective retributive justice goals. At the disciplinary level, transitional justice practitioners rely on liberal legalism to transform egregious acts of violence into discrete legal categories that are capable of condemnation by criminal law. At the organizational level, state prosecutors deploy international and domestic law frames to reconstruct human rights violations as either ordinary crimes or instances of extraordinary international criminality. At the individual level, victims of human rights abuses use liberal legalist discourse to articulate post-conflict justice demands and challenge conceptions of victimhood, citizenship, and state responsibility. This dissertation finds that law in transition can be both enabling and constraining, suggesting a need for disciplinary reflexivity when contributing to debates about the dominance of liberal legalism in transitional justice theorizing and praxis.

CHAPTER 1: INTRODUCTION

This dissertation explores the pursuit of retributive transitional justice in post-apartheid South Africa. South Africa's transition to democracy during the early 1990s has served as a case study for scores of transitional justice scholars, with such scholarship focusing predominately on the unique model of restorative justice implemented after the fall of the apartheid regime. This dissertation presents a radical re-centering of transitional justice scholarship on South Africa, shifting analytic focus from truth-telling and forgiveness to individual criminal accountability and the prosecution of apartheid-era human rights abuses. Central to this re-centering of retributive transitional justice is an exploration of the role of law – and Western liberal legalism, in particular – in shaping popular understandings of apartheid-era atrocities, the requirements of the post-conflict transition, and the place of retributive justice in the democratic period.

This dissertation looks to contribute to debates about the dominance of law in post-conflict transitions by highlighting the ways in which the Western liberal legal tradition, as an interpretive reservoir and rhetorical capability, has both enabled and constrained the pursuit of retributive transitional justice. The studies presented in this dissertation cover a variety of transitional justice stakeholders, each with their own understandings of law, justice, and the need for retribution. By exploring how transitional justice scholars, practitioners, civil society organizations, prosecutors, victims, and victims' families understand, talk about, and use law to pursuit their respective post-conflict justice goals, this dissertation dispels notions of liberal legalism as a form of Western imperialism hiding under the guise of post-conflict justice. Rather, liberal legalism, like all law, is ambiguous, contested, and deeply intertwined with the social practices of those invoking it. This dissertation highlights the ways in which law in transition can be both conservatizing and transformative, enabling and constraining.

On the one hand, the dominance of liberal legalism in contemporary understandings of post-conflict justice reflects and reinforces the broader dominance of the West in peacebuilding praxis, with such dominance working to sideline alternative conceptions of law and justice that may resonant more those living through post-conflict transitions. Liberal legalism's hegemonic grasp on transitional justice processes often works to de-contextualize and de-politicize highly complex and deeply political experiences of violence and harm, transforming egregious acts of violence into discrete legal categories that obscure the true nature of past violence. On the other hand, liberal legalism can have tremendous transformative potential, enabling often-marginalized populations to articulate their justice demands in a language that is viewed as legitimate and universal. Although reflective of Western power and dominance in the field of transitional justice, the legitimacy afforded to liberal legalist discourse may enable subaltern groups to not only secure justice for their loved ones, but work to challenge dominant notions of community, victimhood, and citizen-to-state relations in the process. The studies presented in this dissertation, in highlighting the many roles of liberal legalism in retributive transitional justice processes, suggest that debates about the role of law in transition would benefit from a more nuanced understanding of the relationships between law, power, agency, and legal consciousness.

I: The Role of Law in Post-Conflict Justice

What is the role of law in post-conflict transitions? Since the emergence of transitional justice as a field of study in the late 1980s and 1990s, scholars within this discipline have grappled with this question, a preoccupation driven, in part, by the normative foundation upon which the field was established. While the roots of transitional justice are often traced to the

Nuremberg and Tokyo tribunals established after World War II, it was only in response to the third wave of democratization that the discipline of transitional justice began to take shape. The ending of repressive regimes in Latin America and parts of Africa and Asia in the late 1970s and 1980s and the fall of the Soviet Union in 1989 forced a shift in the strategy, thinking, and raison d'être of human rights activists who had previously concentrated their efforts on documenting the human rights abuses committed by prior authoritarian regimes. Moving from an adversarial to a supportive position vis-a-vis state governments, human rights organizations began to focus on the opportunities enabled by democratic transitions, redirecting their energies towards holding previous regimes accountable for past abuses as well as aiding in the transitions to democracy. It was this shift in the purpose of human rights activists, from documentation of injustices to pathways for accountability and redress that provided the normative foundation from which the field of transitional justice was formed.[1]

At the heart of this normative foundation was a conceptualization of transitional justice as "justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes."[2] The emphasis on *legal* mechanisms to address the legacy of human rights abuses in newly democratizing countries was driven, in part, by the decline of radical Leftist social movements in the 1970s and 1980s. As Arthur notes,

> Having abandoned the Soviet Union, Cuba, and many African states as desirable models in the 1970s, many on the left turned against political ideology and toward the moral framework of human rights….Defending the rights of individuals was, in their view, the only appropriate response to the widespread abuses (and indeed, carnage) wrought by both right-wing and left-wing forms of political repression.[3]

[1] Paige Arthur, "How 'Transitions' Reshaped Human Rights: a Conceptual History of Transitional Justice." *Human Rights Quarterly* 31, no. 2 (2009): 321–67.
[2] Ruti Teitel, "Transitional Justice Genealogy," *Harvard Human Rights Journal* 16, no. 1 (2003): 69.
[3] Arthur, "A Conceptual History," 339.

By rejecting the language of class warfare that characterized much of radical Leftist discourse in the previous decade, many on the left moved to embrace the discursive framework of human rights as an alternative tool with which state violence could be analyzed and addressed.[4]

From the field's normative commitment to law as the means for pursuing justice flowed a number of claims regarding the role of law in not only facilitating, but bolstering processes of democratization, nation-building, and the establishment of a sustainable peace. Seen as a key resource for the establishment of democratic legitimacy, law – and international human rights law in particular – is said to help mediate the transitioning society's embrace of a new vision of legality, a vision informed by the democratic values of justice, objectivity, rationality, and uniformity that were likely absent during the pre-transition era. The power of law is derived, in part, from its professed ability to transcend the politics of the past and present and, in the process, assist transitioning societies in their move towards a kind of democratic governance bounded by legality and legal procedure. Through the application of formal legality and legal procedure, law in transition provides new sites of political contestation that not only absorb and mediate political conflict but help establish the democratic legitimacy that was absent or lacking in the conflict era as well.[5]

During the late 1980s and early 1990s, a series of conferences were convened to consolidate activist, expert, and academic knowledge on the challenges and requirements of the new wave of democratic transitions. The first of these conferences, sponsored by the Ford Foundation and the Aspen Institute and entitled "State Crimes: Punishment or Pardon," set out to "discuss the moral, political, and jurisprudential issues that arise when a government have engaged in gross violations of human rights is succeeded by a regime more inclined to respect

[4] Ibid, 339-340.
[5] Catherine Turner, *Violence, Law, and the Impossibility of Transitional Justice* (New York: Routledge, 2017), 19.

those rights." [6] One conference organizer, reflecting on the proceedings years later, noted that "at that time there appeared to be only two ways in which the successor regime might deal with human rights violators who had remained members of the community…arrest, prosecute, and punish or amnesty and amnesia."[7] Such reflections point to the narrow definition of transitional justice that emerged during the nascent stage of the field, a definition centered around judicial responses to human rights violations that would operate parallel to – but independent of – state-building and democratization processes. Here, the emphasis on judicial responses to human rights abuses, rooted in international criminal law, suggests a disciplinary equation of justice in transition with criminal justice in particular. Even as transitional justice research and praxis during the 1990s slowly expanded the range of mechanisms considered part of the transitional justice toolkit to include truth commissions, reparations, and other non-prosecutorial processes, the original conceptualization of transitional justice that emphasized *legal* responses as the most effective and, indeed, legitimate pathways for confronting past abuses continues to influence transitional justice scholarship and praxis today.[8]

The centrality of law to the transitional justice theorizing and praxis has increasingly come under fire from a number of peace and justice scholars. Reflecting on transitional justice as a field of study, Catherine Turner argues that the entire framework of transitional justice is paradoxical in that it seeks to remedy previous failings of law by replacing such failed laws with more law. The abusive use and discredited nature of law under pre-transition regimes creates a crisis of legal legitimacy in the transitional period. It is this crisis of legitimacy that has positioned law as "both the subject and object of change [in post-conflict transitions]: it must

[6] Alice H. Henkin, "Conference Report," in *State Crimes: Punishment or Pardon*, ed. Justice and Society Program of the Aspen Institute, (Queenstown, Maryland: Wye Center, 1989) 1, 9.
[7] Alice H. Henkin, "Preface," in *The Legacy of Abuse: Confronting the Past, Facing the Future*, ed. Alice H. Henkin (Washington, DC: The Aspen Institute, 2002), 1.
[8] As Ruti Teitel notes, even quasi-judicial mechanisms such as truth commissions and reparations are justified through the language of law. See supra note 2.

simultaneously both produce change and be changed itself."[9] The law is thus conceptualized as a means of moving transitional societies from injustice to justice, from the use of direct physical violence to the "more civilized instruments of law."[10] Turner asserts that the discipline's focus on largely legal solutions to past atrocities has promoted an understanding of post-conflict transitions as linear in nature, with the historical causes of past violence capable of being isolated and addressed by law and legal form.[11] In this way, the normative foundation of transitional justice is paradoxical, as it rests on the notion that justice for the failings of laws in the past can be secured by the enactment of new laws in the present, and thus, the securement of justice in the future.[12]

Decrying the informal annexation of international criminal justice by international lawyers, the prevalence of legalist discourse in post-conflict peacebuilding, and the overall increased legalization of the field, Kieran McEvoy provides a forceful critique of the pre-eminence of law in transitional justice. Central to his critique of the 'seductive' qualities of law in transition is the ascendance of Western, liberal human rights discourse as the 'lingua franca' of post-conflict transitions. McEvoy argues that, in justifying their post-conflict agendas using the mantle of human rights, advocates of transitional justice ultimately seek to translate the complex experiences of human rights abuses into the language of legal standards, legal certainties, and legal objectivity[13]. This process of legal translation ultimately ''thins" out the

[9] Christine Bell, Colin Campbell, and Fionnuala Ni Aolain, "Justice Discourses in Transition," *Social and Legal Studies* 13, no. 3 (2004): 309.
[10] Turner, "Impossibility of Transitional Justice," 22.
[11] Ibid, 44.
[12] Ibid, 17.
[13] Kieran McEvoy, "Beyond Legalism: Towards a Thicker Understanding of Transitional Justice," *Journal of Law and Society* 34, no. 4 (2007): 411-440.

complexities of life in conflicted societies," producing a simplified narrative of the dynamic, cross-cutting harms experienced by those in conflict.[14]

Furthermore, the professed universality of human rights talk, supported by with claims of legal objectivity work to mask the inherently political nature of human rights and post-conflict justice. According to McEvoy, the dominance of legalism in the field of transitional justice has ultimately produced a practical understanding of post-conflict justice requirements as top-down, retributive justice oriented, and necessarily state-centric. This ultimately works to distance individuals and communities from a sense of local ownership over transitional justice, resulting in what Paul Gready terms *distant justice*.[15] Far from facilitating democratic consolidation, developing a culture of human rights, and strengthening rule of law, law in transition, as currently constructed, is said to actually impede the pursuit of justice and the establishment of peace in the post-conflict period.

It is this debate over the role and utility of law in post-conflict transitions that inspired this dissertation. Rather than rejecting outright the potential power of law to address the legacies of conflict and mass violence, this dissertation seeks to ground abstract debates about law in transition by exploring the various ways in which law is actually *used* by transitional justice actors to both enable and constrain the pursuit of post-conflict justice. If, as Turner suggests, the foundational principles of transitional justice has positioned the "law as the *means*, and justice, as the *end*, of transitional justice," a better understanding of the specific functions that law performs in post-conflict transitions is necessary for scholars to even begin to evaluate whether the pre-eminence afforded to law by the discipline is justified.[16] As critical legal scholars Simon

[14] Ibid, 419.
[15] Paul Gready, "Reconceptualizing Transitional Justice: Embedded and Distanced Justice," *Conflict, Security, and Development* 5, no. 1 (2005): 3-21.
[16] Turner, "The Impossibility of Transitional Justice," 134

Halliday and Bronwen Morgan rightfully question, "How can we theorize about law's hegemonic power until we find out exactly what society does, think, feel, and *do* about law?"[17] It is this empirical gap in transitional justice theorizing that this dissertation seeks to address.

II: The Role of Law in Meaning-Making

Of all the possible functions law could serve in the aftermath of violent conflict, this dissertation is concerned with one function in particular: meaning-making. Interpretivist research from sociology, socio-legal studies, anthropology, and political science has expertly documented the centrality of law in the construction and interpretation of social life. While such research varies in its definition of law, with scholars alternating between definitions of law as a set of rules, a system of knowledge, an ideology, and a cultural code, this research is united in its conception of law as an interpretive resource that shapes an individual's understandings of the self, of social relationships, and the experience of social life more generally. Two bodies of scholarship inform the interpretivist approach law advanced by this dissertation: socio-legal research on law's constitutive effects and interdisciplinary research on legal framing. Whereas the former establishes the theoretical basis for law as a sense-making tool, the latter provides the analytical framework from which law's constitutive effects and meaning-making function can be explored.

The Constitutive Perspective on Law

Socio-legal research interrogating the intersection of law and society can be divided into two distinct perspectives on law: the constitutive approach and the instrumental approach.

[17] Simon Halliday and Bronwen Morgan, "I Fought the Law and the Law Won? Legal Consciousness and the Critical Imagination," *Current Legal Problems* 66, no. 1 (2013): 3.

These two approaches vary first and foremost in their descriptions of the causal relationship between law and society. On the one hand, the instrumental perspective asserts that the principal means by which law affects society is from the outside in, through the imposition of external legal standards, sanctions, and incentives. While law may influence society in important ways, it exists outside of the social realm, waiting to be "called into being by the primary social world in order to serve that world's needs."[18] Thus, from this perspective, law exists independent of and prior to the social practices of a given society.

On the other hand, the constitutive approach is driven by the belief that "law shapes society from the inside out," by providing individuals a set of categories and frameworks through which the world can be interpreted.[19] As Sarat and Kearns note, "*meaning* is perhaps the key word in the vocabulary of those who speak about law in constitutive terms." Law, according to constitutivists, acts as a reservoir of meaning, a cognitive lens through which perceptions, experiences, and actions of the everyday can be understood. Here, law is responsible for not only modifying social conduct, but the shaping the very identities people assume and the relationships they hold with others.[20] Conceptual legal categories such as property, due process, and rights are both explicitly and implicitly used to construct and regulate people's identities, perceptions, and modes of interacting in the world.

Writing on the role of empiricism and critical legal studies, Trubek likens law and its meaning-making functions to the notion of a societal "world view," a shared belief system that constitutes consciousness. Trubek notes that

---

[18] Robert W. Gordan, "Critical Legal Histories," *Stanford Law Review* 36, no. 1 (1984): 60.
[19] Austin Sarat and Thomas R. Kearns, "Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life," in *Law and Everyday Life,* eds. Austin Sarat and Thomas R. Kearns (Ann Arbor: University of Michigan Press: 1995), 22.
[20] Ibid, 28.

> [S]ocial order depends in a nontrivial way on society's shared 'world view.' Those worldviews are basic notions about human and social relations that give meaning to the lives of society's members. Ideals about law – what it is, what it does, why it exists – are part of the world view of any complex society….Law, like other aspects of belief systems, helps to define the role of an individual in society and the relations with others that make sense. In this way, law forms consciousness and influences outcomes.[21]

As an emergent structure of social life, law does not exist separate from social practices and identities, but is intertwined with them. As individuals find meaning in legal symbols and use such meaning as the basis for social action, such meanings hold the potential to become patterned, objectified, and institutionalized within material and discursive structures of a given society. It is the institutionalization of legal categories, symbols, and terms that enables as well as constrains processes of meaning-making in the future, with law setting the terms by which future experiences can be legitimately understood.[22]

It is important to note here that, because of the socially constructed nature of law, the rules, categories, and codes that constitute it are far from objective. While many in the Western legal tradition think of law as a body of rules that can be mechanically applied to a given case, law is more akin to an ideology or discourse, existing as a set of contested categories and symbols that may be interpreted and manipulated in a number of ways. As Merry notes, "the discourse of law is neither internally consistent nor unambiguous." For interpretivist scholars, it is precisely these "ambiguities, inconsistencies, and contradictions [that] provide multiple opportunities for interpretation and contest."[23] To fully understand the influence of law on society, the diverse ways in which individuals *interpret* law must be taken into account.

---

[21] David Trubek, "Where the Action Is: Critical Legal Studies and Empiricism," *Stanford Law Review* 36, no. 1/2 (1984): 579, 604.
[22] Patrick Ewick and Susan S. Silbey, *The Common Place of Law: Stories From Everyday Life*, (Chicago: University of Chicago Press, 1998) 39-40.
[23] Sally E. Merry, *Getting Justice and Getting Even: Legal Consciousness Among Working-Class Americans*, (Chicago: University of Chicago Press, 1990), 9.

How people conceive of law, its function, and operation is referred to as *legal consciousness*, a set of ideas that help explain and justify certain legal institutions and processes as natural and normal. Legal consciousness, like other forms of consciousness, is expressed in a multitude of ways, including the legal actions people take, the legal terms they express, and the content of what they say. Not solely a characteristic of individuals nor society, legal consciousness is can be thought of as a social practice, "part and parcel of the process whereby the subject is constituted by external sociocultural forms."[24] Legal consciousness refers not to a static stance towards law but to a dynamic series of interpretations about different aspects of law, interpretations that develop through experience.

As people interact with law and use law to construct meaning in everyday life, their legal consciousness may change, particularly if prior understandings of law conflict with the lived reality of law. In her research on legal consciousness among working-class Americans, Merry found that as plaintiffs turn to law to solve their problems, as their problems progress through the courts, their legal consciousness changed as they experienced contradictions between their expectations of law and law in action. The centrality of experience to the development of legal consciousness helps to explain why law is understood differently not only across societies, but within societies as well. How a law professor thinks and acts about law is rooted in experiences that may differ from that of a policeman. While both may be subject to the same reservoir of meaning, the way they draw from that reservoir to make sense of the world may vary considerably.[25]

The notion that law looks different to different people is an important point, one that is often not considered in debates regarding the role and utility of law in post-conflict transitions.

[24] Ibid, 5.
[25] Ibid, 5.

Those who critique the dominance of law in transitional justice theorizing and praxis tend to treat law as if it were a *thing,* a coherent system of rules that have been imposed by Western lawyers and other transitional justice entrepreneurs. While Western legalist understandings of transitional justice are certainly being imposed on many non-Western societies, often at the detriment of post-conflict peacebuilding, critics of this imposition paint Western legalism and its doctrine of human rights as a stable construct that shapes post-conflict transitions from the outside in. As a result, critical scholars paint individuals living through post-conflict transitions as passive subjects of Western law, rather than active participants whose respective interpretations of law play a fundamental role in shaping the trajectory and experience of post-conflict justice. Precisely *how* Western conceptions of law and justice are understood within and across post-conflict societies may mediate in important ways the impact of law in times of transition. This is not to dismiss the Western domination inherent in much of transitional justice practice. Law, like other ideological structures, seeks to colonize everyday life and give it substance, to capture it and hold it in its grasp, to attach itself to the solidity of the everyday and, in doing so, to solidify it further."[26]

The hegemonic power of law in both everyday life and in transitional contexts, however, depends on its ability to provide individuals with persuasive images and categories that legitimize a given social order as natural and just. While in many aspects of the everyday, law provides individuals with authoritative definitions of social life, law, as with other kinds of worldviews, derives its meaning and constitutive power from its professed affinity with the truth.[27] The interpretive openness and many layers of meaning inherent in law suggest that the hegemonic domination of law is a dynamic, often incomplete process. As Sarat and Kearns

observe, “Law does not descend on the everyday as an all-powerful outsider without encountering a lively resistance.”[28] In offering their own interpretations of social life that are guided by their own experiences with and knowledge of law, people can challenge the cultural domination of law, appropriating law “for purposes that its authors and administrators often neither completely foresee nor completely understand.”[29] Through such appropriation, the symbolic content of law may not only be resisted but altered as well, producing alternative understandings of social life that, if persuasive, may displace prior hegemonic depictions of law and provide the foundation from which new forms of social practice may emerge.

In order to address questions about the role and utility of law in transition, taking note of the legal consciousness of those living in transitional societies – how they think, talk, and act with regards to law – is a critical, but messy endeavor. Large-scale survey research on the attitudes people hold towards law are based on a flawed premise, namely, that how people think about law can be rendered explicit through direct questioning. As Merry suggests, this approach flattens legal consciousness, viewing it as a static stance rather than a dynamic construction informed by experience, context, and knowledge.[30] As legal consciousness is rendered explicit through action, any studies about the role and utility of law in transition requires a shift in focus, away from the attitudes held about law towards the ways in which people *use* law to make sense of past atrocities, define the requirements of the transition, and, most importantly, assist them in the pursuit of their respective post-conflict justice goals.

As such, this dissertation rests on a conceptualization of law as not only an interpretive framework through which the past, present, and future is constructed, but as a discursive tool that transitional justice actors may deploy to advance or block the pursuit of post-conflict justice as

[28] Sarat and Kearns, “Beyond the Great Divide,” 8.
[29] Ibid, 8.
[30] Merry, “Getting Justice and Getting Even,” 5.

well. To capture the dual functions of law, as both a source of meaning-making and a rhetorical capability, this dissertation relies on an analytical framework that is uniquely positioned to explore both, that of frame analysis. The following section provides a brief overview of this analytical framework, tracing the evolution of frame analysis from its roots in cognitive and social psychology to its contemporary use, most notably, in social movement research. This section then turns to discuss *legal framing,* a specific subset of social movement research that informs much of the research presented in the following chapters.

Frame Analysis

Interdisciplinary in nature, frame analysis has been embraced by scholars in a wide range of fields including behavioral economics, social psychology, anthropology, political science, sociology, and organizational management. Most scholars trace the origins of frame analysis to the work of sociologist Erving Goffman, who, advancing a social-psychological perspective, explored the processes by which individuals rely on expectations to make sense of routine experience such as daily interactions, advertising, and other aspects of social life.[31] To Goffman, frames were mental scripts that enable individuals to "locate, perceive, identify, and label a seemingly infinite number of concrete occurrences defined in its limits."[32] As individuals enact conventionalized social behavior during the course of routine settings such as shopping or dating, they rely on certain frames as cognitive shortcuts to make sense of the circumstances encountered. Frames thus exist to order and ascribe meaning to daily interactions, cultural norms, discourses, and other aspects of social life.

[31] Erving Goffman, *Frame Analysis: An Essay on the Organization of Experience*, (Boston: Northeastern University Press, 1974).
[32] Ibid, 21.

Building on Goffman's psychological conception of frames, framing scholars during the 1970s and 1980s emphasized the cognitive nature and problem-solving function of frames, with the framing process reduced to the activation of cognitive schemata, held in memory, to perform the interpretive task of meaning making.[33] Abelson, for example, advanced a cognitive understanding of frames, defining frames as "structures that when activated reorganize comprehension of event-based situations…[retrieving] expectations about the order as well as the occurrence of events."[34] Existing external and antecedent to the tasks that individuals come across, frames have been likened to 'cognitive boxes' that hold collections of knowledge fragments and stereotypic descriptions to make sense of future situations.[35] Derived from standardized "scripts," cognitive frames are the products of past experiences, background knowledge, personal preferences, cognitive biases, and cultural templates, and situational norms that dictate appropriate behavior in given situations. For example, a decision to stop at a red light is dependent, in part, on one's personal experience and knowledge about vehicles, traffic laws, cultural norms regarding automobile travel, and surrounding drivers' behavior.[36] In this way, scripts act as cognitive short-cuts in the storing of information, with users relying on abstract categorizations rather than numerous details to make sense of an extraordinary amount of information in very little time. Minsky, writing on the establishment of common-sense thought within society, defines a frame as "a data-structure for representing a stereotyped situation. Attached to each frame are several kinds of information. Some of this information is about how to use the frame. Some is about what one can expect to happen next. Some is about what to do if

[33] Martin Wählisch, "Cognitive Frames of Interpretation in International Law," in *Interpretation in International Law,* ed. Adrea Bianchi, Daniel Peat, and Matthew Windsor, (Oxford: Oxford University Press, 2015), 331-351.
[34] Robert P. Abelson, "Psychological Status of the Script Concept," *American Psychologist* 36, no.7 (1981): 717.
[35] Marvin Minsky, "A Framework for Representing Knowledge," in *Mind Design II: Philosophy, Psychology, Artificial Intelligence,"* ed. John Haugeland (Cambridge, MA: MIT Press, 1997), 111.
[36] Dan Simon. "A Third View of the Black Box: Cognitive Coherence in Legal Decision Making." *The University of Chicago Law Review* 71, no. 2 (2004): 511–86.

these expectations are not confirmed."[37] Frames, from a psychological perspective, then, are the cognitive means by which actors categorize and interpret matters that arise in social life.

Central to psychological understandings of cognitive frames is the largely subjective and often subconscious nature of frame deployment.[38] As cognitive frames are shaped by cognitive biases as well as schema derived from past experiences, such frames are said to produce inherently subjective patterns of understanding, rooted in the minds of individuals.[39] Lakoff and Johnson argue that cognitive frames, as subconscious conceptual systems, serve as a hidden hand "that shapes how we conceptualize all aspects of our experience, [including] how we automatically and consciously comprehend what we experience. It constitutes our unreflective common sense."[40] Triggered by social stimuli, cognitive frames are said to subconsciously enable particular understandings of the world while restricting others. Hawkins and Manning refer to this activation of cognitive frames as *keying*. According to Hawkins and Manning, "A frame is keyed by some phrase, word, or action that asserts its existence and relevance."[41] Avoiding the activation of these cognitive frames is often impossible, with frames inevitably influencing the thinking and decision-making of individuals.

The linguistic turn seen in social science and humanities research during the 1970s spread to the field of social movement studies in the early 1980s, in response to the dominance of

---

[37] Marvin Minsky, 'A Framework for Representing Knowledge' in John Haugeland (ed), *Mind Design II: Philosophy, Psychology, Artificial Intelligence* (MIT Press 1997) 111–12.
[38] Wahlisch, "Cognitive Frames of Interpretation," 334.
[39] George Lakoff and Mark Johnson, Philosophy in the Flesh: The Embodied Mind and its Challenge to Western Thought, (New York: Basic Books, 1999), 45.
[40] Lakoff and Johnson, *Philosophy in the Flesh*, 12–13
[41] Keith Hawkins and Peter K. Manning, "Legal Decisions: A Frame Analytic Perspective," in *Beyond Goffman: Studies on Communication, Institution, and Social Interaction,* ed. Stephen H. Riggins, (Berlin: Mouton de Gruyter, 1990): 215.

resource mobilization theory within the sub-field.[42] Sociology's overwhelming analytical focus on the structural conditions and resources that enabled or constrained social movement emergence, development, and progress was challenged by an increased awareness within sociology of the symbolic and social-constructionist dimensions of social movement processes. This awareness prompted social movement scholars to devote increased attention to the "cognitive mechanisms by which grievances are interpreted, given direction and consensus around the goals of political activism created."[43] Social movement scholars have subsequently explored the notion of "collective action frames," packages of meaning that exist at the level of the collectivity and work to focus attention, synthesize events, experiences, and information, and assist in the interpretation of social life. With collective action frames said to be shaped by culture, habit, and norms, social movement researchers during this time put forth a Weberian ideal type understanding of frames as the aggregation of a multiplicity of interpretive schemata around a norm, with idiosyncratic differences ignored in order to approximate the collective frame.[44]

While these early forays into frame analysis by social movement scholars dealt with the collective framing of social issues by social movement organizations and actors, such research preserved early definitions of frames as cognitive structures that determine how a situation is perceived and interpreted.[45] Tapping the into cognitive script of "demonstration" for example, allows social movement activists to access subscripts that inform appropriate action, such as

[42] Lasse Linkdekilde, "Discourse and Frame Analysis: In-Depth Analysis of Qualitative Data in Social Movement Research," in *Methodological Practices in Social Movement Research,* ed. Donatella della Porta, (Oxford: Oxford University Press, 2014), 195. 195-227.
[43] Ibid, 195.
[44] Hank Johnston, "A Methodology for Frame Analysis: From Discourse to Cognitive Schemata," in *Social Movements and Culture,* eds. Hank Johnston and Bert Klandermans, (Minneapolis: University of Minnesota Press, 1995), 218.
[45] Wählisch, "Cognitive Frames of Interpretation," 333.

placard making, marching, and responding to the police.[46] Although with social movement frame analysis has shifted focus to individual and group interpretations of contentious social issues, the cognitive sense-making aspect of framing in social movement research is often maintained, with the '"true location' of a frame is [understood to be] in the mind of the social movement participant."[47] Early sociological research concerned with collective framing by the media or social movement organization thus required scholars to penetrate the "black box" of mental life, the cognitive structures that organize perception and interpretation.

With the cultural turn sweeping the social sciences and humanities in the late 1970s, the mid 1980s and early 1990s saw a gradual move away from an explicitly cognitive understanding of frames, with social movement scholars recognizing that the framing processes of social movement actors do not take place in a vacuum, but rather, are influenced considerably by the larger political and social context they are embedded in. From the early 1990s onwards, purely cognitive conceptions of collective action frames gave way to a more interactive, constructionist understanding of the framing process. Today, social movement scholarship has increasingly rejected the notion of collective action frames as "merely aggregations of individual attitudes and perceptions."[48] Rather, collective action frames are now seen as the result of intersubjective negotiations taking place at the level of reality construction.

Persuasion and Framing

While the goals of social movements vary across time and space, at the heart of these goals lies the issue of persuasion. Social movement actors, by reframing experiences of injustice as social issues that merit redress, seek to persuade others of the authoritative character of their

[46] Johnston, "A Methodology for Frame Analysis," 236-7.
[47] Ibid, 218.
[48] William A. Gamson, *Talking Politics*, (Cambridge: Cambridge University Press, 1992), 111.

claims. Such claims typically include a definition of the problem and the victimized group as well as causal attributions regarding blame and the nature of victimization. In addition, social movements often make claims about the preferred pathways for remedy. To be taken seriously in the public arena, social movements must persuade others of these validity of their claims. This is no easy task. As Finnemore and Sikkink note, actors seeking normative change are embedded within 'highly contested' and often diversely populated environments, with their own framing of an issue subject to competition from other actors who are offering their own, often conflicting interpretations of the same issue.[49]

Constructivist international relations research on norm promotion and persuasion as well as social movement research on collective framing has identified a number of factors that influence the persuasiveness of a given frame.[50] For a frame to resonate with an audience, it must be 1) credible and 2) salient. The perceived credibility of a proffered frame is a function of three characteristics: frame consistency, articulator credibility, and empirical credibility. For a frame to be credible, it must maintain consistency with regards to the beliefs, claims, and actions of the frame articulator. Inconsistencies between what a frame articulator believes, says, and ultimately, does will reduce the credibility of the frame and thus prove problematic for mobilization. In addition, the perceived credibility of the frame articulator is an important contributor to the resonance of a frame. Speakers with high status and perceived expertise about the issue in question are generally regarded as more credible, and thus, more persuasive.[51] Empirical credibility, the final factor influencing the perceived credibility of a frame, concerns

[49] Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change," *International Organization* 52, no. 1 (1998): 897.
[50] For a review of constructivist IR research on the subject of norms and persuasion, see Rodger A. Payne, "Persuasion, Frames, and Norm Construction," *European Journal of International Relations* 7, no.1 (2001): 37-61.
[51] Robert D. Benford and David A. Snow, "Framing Processes and Social Movements: An Overview and Assessment." *Annual Review of Sociology* 26, no. 1 (2000): 619-622.

the "apparent fit between the framings and events in the world."[52] The claims made within a frame do not have to be factual or valid, but should rest on evidence that can be pointed to as support for the frame. While the "empirical validity [of a frame] is in the eyes of the beholder," generally speaking, the more evidence there is to support a claim, the more credible a frame is, and the more widespread is its appeal.[53]

If evidence for a claim is lacking, a frame may still be able to assert an interpretation of a social issue that resonates the broader population if the frame remains salient. Three factors influence the salience of a frame: centrality, experiential commensurability, and narrative fidelity. First, for a frame to be salient, the beliefs, values, and ideas expressed by the frame must be perceived as central to the audience a social movement is seeking to mobilize. Second, salient frames are often experientially commensurate, that is, appear congruent with the lived experiences of those targeted for mobilization.[54] Heitlinger's research on feminist framings in post-Communist Czech Republic at the end of the 20th century, for example, attributes Czech women's rejection of women's equality as an important goal to pursue to the fact that some of the goals of the movement, such as paid employment, "were chosen as goals not by women themselves, but were imposed on them by the unpopular communist party-state."[55] For a frame to be salient, it must connect with the personal, everyday experiences of the target audience.

The final and perhaps most important factor that contributes to frame salience, and by extension, frame resonance, is that of narrative fidelity. For a frame to be persuasive, it must correspond with the cultural narratives, values, and dominant assumptions of the target

---

[52] Ibid, 620.
[53] James M. Jasper and Jane D Poulsen. "Recruiting Strangers and Friends: Moral Shocks and Social Networks in Animal Rights and Anti-Nuclear Protests." *Social Problems* 42, no. 4 (1995): 496.
[54] Benford and Snow "Framing Processes and Social Movements," 619-621.
[55] (1996:83). Alena Heitlinger, "Framing Feminism in Post-Communist Czech Republic," *Communist and Post-Communist Studies* 29, no. 1 (1996): 83.

audience.[56] The concept of narrative fidelity finds significant support in the constructivist international relations literature on norm promotion. Successful norm entrepreneurs, according Finnemore and Skikkink, are those that are able to link emerging norms with established ideas and beliefs.[57] Advocates of a landmine ban, for example, framed the issue with primary reference to landmines' indiscriminate effects, thereby linking the issue to debates and campaigns against weapons of mass destruction.[58] In his analysis of the framing strategies of "new racist white separatists" in the United States, Berbrier found that one of the ways in which separatists sought to improve their image and the credibility of their white supremacist claims by reframing white Americans as ethnic minorities in need of protection. By reframing whites as the ethnic equivalent to African Americans and other racial and ethnic minorities in the United States, the new racist white supremacists "tap into a cultural pluralist master frame, presenting themselves in ethnic ways, and framing their proclamations to evoke American ethnic group membership – discrimination, concern for heritage-preservation, pride, and love for one's own kind. They are banking on (their perception of) the cultural resonance of this ethnic framing strategy."[59] While tapping into the cultural myths, values, and beliefs held by a target audience does not guarantee the persuasiveness of a frame, such narrative fidelity provides a common ground for movement actors and potential constituents to meet before evaluating the persuasiveness of a given frame.

Exploring the concept of narrative fidelity further, many social movement scholars have turned to the notion of *cultural frames* to describe the broader cultural scripts that social

[56] Benford and Snow "Framing Processes and Social Movements," 619-621.
[57] Finnemore and Sikkink, "International Norm Dynamics," 906-907.
[58] Richard Price, "Reversing the Gun Sights: Transnational Civil Society Targets Land Mines," *International Organization* 52, no. 3 (1998): 628.
[59] Mitch Berbrier, "'Half the Battle': Cultural Resonance, Framing Processes, and Ethnic Affectations in Contemporary White Separatist Rhetoric." *Social Problems* 45, no. 4 (1998): 440.

movement organizations tap into to increase the resonance of their framing. Defined by Entman as "the stock of commonly invoked frames…the empirically demonstrable set of common frames exhibited in the discourse and thinking of most people in a social grouping," cultural frames are constituted by collective myths, narratives, and metaphors shared by members of a society.[60] Cultural frames are distinct from collective action frames in that the former function as *master frames* that social movement actors draw from as they construct their own framing of a given issue. In contrast to the organizational frames of a social movement, master frames are broad in interpretive scope. The interpretive flexibility of master frames enables a wide range of social movements, across a diversity of thematic issues, to frame their respective grievances using the same highly culturally resonant vocabulary embedded within a single master frame.[61]

Before moving on to the central premise underlying this dissertation, namely, that law functions as a master frame in transitional justice theorizing and praxis, two points about agency emerge from the above discussion and are worth noting. First, the interpretivist approach to frames and framing can be distinguished from the cognitive perspective in terms of the agency attributed to the framers. Despite research from cognitive psychology establishing the subconscious nature of the framing process, research from sociology, political science, and communication studies suggests that framing can also be a deliberate, strategic process that serves as a utilitarian means to desired ends. Snow and Benford's research on collective action frames has rightly emphasized the agency of framers and the creativity of frame deployment, with framing understood as conscious, deliberate signifying work by social movements to attract support, mobilize constituents, neutralize opposition, and increase the persuasiveness of their

[60] Robert M. Entman, "Framing: Towards Clarification of a Fractured Paradigm," *Journal of Communication* 43, no.4 (1993): 53.
[61] William Carroll and R.S. Ratner, "Master Framing and Cross-Movement Networking in Contemporary Social Movements," *The Sociological Quarterly* 37, no. 4 (1996): 601-625.

claims.[62] To engage in strategic framing is to make conscious decisions about how to structure information and employ specific terminology in ways that produce interpretations of a given issue that are advantageous to achieving one's goals.[63]

Second, recognizing the strategic nature of framing should not completely erase the subjective nature of the framing process, as "strategic decision-making objectifies the subjective preference."[64] That is, while strategic framing results from deliberate choices regarding the language used to describe an issue or event, those choices are interpreted subjectively, based on the way in which the strategist understands what is instrumental to their goals. Furthermore, framing does not place within a social vacuum, with framers choosing from an unlimited selection of possible frames. Rather, the framing behavior of an actor is both enabled and constrained by the broader cultural environment they are embedded. Polletta and Ho note that in this sense, "frames are both strategic and set the terms of strategic action."[65] Thus, while not all framing involves automatic activation of cognitive schema or biases, even strategic framing is an interpretive exercise that is dependent on the way in which the framer conceptualizes the options before them.

III: Law as a Master Frame

To capture the role and utility of law in post-conflict transitions, this dissertation adopts a frame analytic perspective that emphasizes law as a master frame, a cultural resource of broad interpretive scope that transitional justice actors may draw from as they pursue their respective

[62]Robert D. Benford and David A Snow, "Framing Processes and Social Movements: An Overview and Assessment," *Annual Review of Sociology* 26, no. 1 (2000): 614.
[63] Wählisch, "Cognitive Frames of Interpretation," 337.
[64] Ibid, 337.
[65] Francesca Polletta and M. Kai Ho, "Frames and Their Consequences," in *The Oxford Handbook of Contextual Political Analysis*, eds Robert E. Goodin and Charles Tilly, (Oxford: Oxford University Press, 2006), 188.

transitional justice goals. As the previous discussion on constitutive approaches to law made clear, the notion that law assists in processes of meaning-making is not new. A significant portion of constitutivist scholarship on law has documented the many ways in which law acts as an interpretive framework for social actors, influencing their understandings of reality, shaping their relationships with others, and providing the basis for action. Yet, much of this research takes place outside of the framing paradigm, leaving the need for explicit theorizing about law's master frame status largely unmet. Social movement research only recently begun systematically incorporating notions of law as a master frame into its analyses. This lack of attention to law as a master frame is problematic for social movement studies, in particular, as law often serves as a critical meaning-making institution in which the interpretive processes of social movement actors take place.[66] Framing research that does exist on law as a master frame, while limited, still offers a set of important insights for the study of law in post-conflict transitions. While the subsequent chapters in this dissertation draw extensively from this body of research, two themes are worth noting at the outset.

Legal Framing as Rights Framing

While few dispute law's status as a master frame, a review of existing literature on legal framing suggests there is no agreed upon definition of the concept. The lack of consensus is due, in part, to a tendency to invoke the notion of legal framing without providing a precise definition of a legal frame, its associated concepts or constitutive beliefs. Most social movement research on legal framing, however, carries with it an implicit understanding of legal framing as "rights framing," that is, the use of rights discourse to reframe a group's grievances as a violation of

[66] Nicholas Pedriana, "From Protective to Equal Treatment: Legal Framing Processes and Transformation of the Women's Movement in the 1960s," *American Journal of Sociology* 111, no. 6 (2006): 1723.

legal rights. Rights frames, like all interpretive frames, work to structure a social movement's claims about the nature of the problem, its causes, consequences, and solutions.[67]

Since rights frames are *master* frames, social movements have been able to adapt the concepts, categories, and beliefs embedded within the rights frame to their movement-specific goals. Whereas some social movement organizations frame their grievances as a violation of their individual rights, other social movement organizations frame their grievances as collective harms that violate the status-based rights of a group. Whether a social movement defines a grievance as a violation of individual or collective rights has an impact on the types of remedies (i.e. prognostic beliefs) proposed by the legal frame. By framing grievances as collective harms reflecting in structural modes of oppression, collective rights framing advocates for the adoption of status-conscious legal protections that address the unique characteristics and, by extension, experiences, of the victimized group. In contrast, individual rights frames' emphasis on individual harm supports advocacy efforts at securing legal remedies that focus on protecting individual rights, regardless of group status.[68]

Often, movement actors shift between individual and collective rights frames. In the reproductive rights movement in the United States, for example, movement actors first framed restrictions on reproductive health as a violation of women's collective rights, emphasizing the ways in which reproductive health, contraception, and abortion are issues exclusive to the domain of women. Under a collective rights frame, the uniqueness of womanhood and the vulnerabilities that come with it were amplified, suggesting a need for status-based legal remedies.[69] The framing of reproductive health issues eventually shifted over time, with

[67] Gwendolyn Leachman, "Legal Framing," *Studies in Law, Politics, and Society* 61 (2013): 31- 41.
[68] Ibid, 31-41.
[69] Myra Marx Ferree, "Resonance and Radicalism: Feminist Framing in the Abortion Debates of the United States and Germany," *American Journal of Sociology* 109, no. 2 (2003): 304-344.

mainstream activists "situat[ing] abortion as a matter of choice, which women, like men, should be able to exercise freely as rights-bearing citizens."[70] By framing the issue of abortion in terms of individual rights, the women's reproductive health movement shifted in the ways in which they described their constituency. Activists no longer emphasized the uniqueness of group status; rather, an individual rights frame drove activists to instead highlight the similarities between men and women, such as essential autonomy and rationality in decision-making. By downplaying the systematic biases that women face, the women's reproductive rights movement shifted from a collective rights frame to an individual rights frame, with the values of universal protection under law becoming a dominant organizing principle of the latter frame.[71]

Social movement and cultural framing research has documented the ubiquity of legal framing across disparate social movements, particularly in the United States, where rights discourse maintains high narrative fidelity with the legal culture and consciousness of society. Hull argues that because the discourse of civil rights finds support from core American values, the civil rights frame has "inspired the specific collective action frames of a diverse array of recent social movements in the United States, including the women's movement, the disability movement, the animal rights movement and the gay rights movement…"[72] It is important to note, however, that the type of legal framing found in the movements by Hull is primarily that of individual rights framing, with an emphasis on civil rights. This is a distinction that many framing scholars do not make in their research on legal framing, often using treating the civil rights frame as a master frame in and of itself. Indeed, much of the discussion of legal framing is plagued by the tendency to equate the rights frame – a generic master frame existing at the

[70] Ibid, 314.
[71] Ferree, "Resonance and Radicalism," 304-344.
[72] Kathleen E. Hull, "The Political Limits of the Rights Frame: The Case of Same-Sex Marriage in Hawaii," *Sociological Perspectives* 44 (1997): 209.

cultural level – with movement specific frames, such as the individual rights frame. In his compelling argument positioning law as a master frame, Pedriana, for example, refers to this frame both as a "rights frame" as well as a "civil rights frame."[73]

One reason for this flawed equation is the fact that a significant portion of social movement research on legal framing considers movements in the United States, a country with a strong tradition of liberal legalism that prioritizes the individual over groups and emphasizes civil and political rights over social and economic rights. This legal culture, combined with the United States' cultural distaste for anything deemed remotely communist in nature, has contributed to the primacy of the individual rights frame in American social movements. While individual rights frames may be the most successful collective action frames in America, treating the individual rights frame as a master frame is problematic in that it excludes from consideration other conceptions of rights and legality, conceptions that may vary considerable from the Western tradition.

This distinction between types of legal frames important to remember when considering debates about the role of law in post-conflict contexts. Many scholars who critique the dominance of a legal understanding of post-conflict justice base their critiques in an understanding of law as Western liberal legalism. Using "law" and "Western legalism" interchangeably, McEvoy for example paints a narrow picture of law could possibly mean.[74] Yet, just as social movement actors may choose (perhaps unwisely) to frame their grievances as violations of their collective rights, actors involved in transitional justice processes may invoke alternative understandings of rights that reflect their distinct cultural milieu. If researchers want to assess the normative role and practical utility of law in transition, they must broaden their

[73] Pedriana, "From Protective to Equal Treatment," 1725-6.
[74] McEvoy, "Beyond Legalism," 411-440.

understandings of law to consider the many interpretations law, legality, and rights that may be deployed to achieve post-conflict justice goals.

Legal Framing as a Cultural Tool and Rhetorical Capability

Socio-legal research on legal framing has not only established law as an interpretive resource, but a cultural tool and rhetorical capability as well. The raw material of a legal frame – its symbols, meanings, narratives and discourses – are often strategically deployed by actors for a number of instrumental purposes ranging from legitimizing a group's grievances to mobilizing supporters. Research on the intersection of law and organization, for example, has documented the legitimizing function of law and legal discourse at the workplace, finding that employers often try to legitimize organizational practices with reference to legal dictates that govern the workplace.[75] Such research has highlighted law's value as a dual resource, providing "instrumental incentives and penalties, on the one hand, and socially constructed legitimating scripts and schemas, on the other."[76]

Law also has been shown to confer legitimacy on social movements as well. In his seminal study of the US pay equity movement's mobilization in the 1970s and 1980s, Michael McCann found that pay equity activists drew on the legal discourse of the civil rights movement to diagnose wage discrimination as a violation of women's rights and legitimize their claims.[77] McCann argues that "rights discourse empowered women workers by enabling them to "name" – i.e. to identify and criticize – hierarchical relations in familiar, "sensible ways."'[78] By framing

[75] See, for example, Frank Dobbin and John R. Sutton, "The Strength of a Weak State: The Rights Revolution and the Rise of Human Resources Management Divisions," *American Journal of Sociology* 104, no. 2 (1998): 441-76.
[76] Pedriana, "From Protection to Equal Treatment," 1727.
[77] Michael McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization*, (Chicago: University of Chicago Press: 1994)
[78] Ibid, 65.

the notion of comparable worth in terms of rights against wage discrimination, the pay equity movement's grievances resonated with existing civil rights discourse, which in turn lead to an increase in the movement's credibility and subsequent mobilization at the grassroots level.[79] The legitimacy conferred through law has also helped human rights activists hold actors accountable, citing legal commitments and past pronouncements to "expose the distance between discourse and practice."[80] For example, by referencing the human rights provisions of the 1975 Helsinki Accords in their allegations of abuse by the Soviet Union against human rights activists, the human rights network sought to use the Accords and the legitimacy conferred through its rights discourse to shame governments and motivate them to stop the abuse.[81]

The discursive power of legal framing lies not only the frame's ability to legitimize, but transform ideas and bridge frames as well. Transnational human rights advocacy networks have used the legitimizing function of legal framing to their advantage, using legal framing to engage in *frame transformation*, the interpretive process by which existing understandings and meanings are altered and, at times, replaced by new ones.[82] In the 1970s, a network of women's and human rights organizations engaged in frame transformation as they reframed the practice of female circumcision as female genital mutilation. By reframing what was once seen as a personal medical or cultural decision as violence against women and girls, activists were able to transform the practice into a human rights violation that resonated with a broader global constituency.[83]

In addition to frame transformation, legal framing has helped human rights activists engage in *frame bridging* as well. Frame bridging refers to the linking of "two or more

---

[79] Ibid, 75.
[80] Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*, (Ithaca, New York: Cornell University Press, 1998), 24.
[81] Ibid, 24.
[82] Benford and Snow, "Framing Processes and Social Movements," 625.
[83] Ibid, 197.

ideologically congruent but structurally unconnected frames regarding a particular issue or problem."[84] The interpretive flexibility of rights frames also make such frames easy to bridge, a trait that has helped a number of human rights movements to "venue shop" their issues in the hopes that their frame will resonate more with alternate audiences. By strategically connecting indigenous rights and environmental issues, for example, indigenous activists have been able to shift the venue of a certain campaigns from the human rights arena to the environmental domain, the latter of which has proven to be more receptive to the claims of indigenous activists.[85] Because the language of human rights resonates highly with international donors and the global media, legal framing has thus helped transnational activists attract much needed funding and attention to their causes.[86]

Given that the central purpose of transitional justice is the promotion and protection of human rights, it would be reasonable to expect transitional justice actors to use legal framing to shape the post-conflict agenda in advantageous ways. Yet, little is known about the role of legal framing in shaping the trajectory of post-conflict justice. In their interactionist, actor-oriented approach to transitional justice agenda setting, Skaar and Wiebelhaus-Brahm note that depending on the power and resources of a given actor, transitional justice stakeholders often strategically "deploy their material and rhetorical capabilities to reshape their environments and advance their TJ preferences locally, globally, or both."[87] While they do not explicitly refer to law as a one of these rhetorical capabilities, research on norm diffusion and the human rights regime suggests that human rights discourse might help transitional justice stakeholders legitimize certain courses

---

[84] Ibid, 624.
[85] Keck and Sikkink, "Activists Beyond Borders," 18.
[86] Sally E. Merry, "Transnational Human Rights and Local Activism: Mapping the Middle,"*American Anthropologist* 108, no. 1 (2006): 46.
[87] Elin Skaar and Eric Wiebelhaus-Brahm, "The Drivers of Transitional Justice: An Analytical Framework for Assessing the Role of Actors," *Nordic Journal of Human Rights* 31, no. 2 (2013): 129.

of action over others.[88] Much of the existing research on legal framing, however, takes place at the theoretical level or outside of the transitional justice context. Recognizing the need to ground such abstract observations within particular case, this dissertation explores the role of legal framing in shaping the trajectory of post-conflict justice in South Africa.

It is the strategic, yet inherently subjective, nature of many framing processes that positions frame analysis as an analytical framework capable of capturing not only the role of law in post-conflict transitions, but *how* people understand law, make sense of its categories and symbols, and subsequently deploy those subjective understandings in a strategic manner. Remarking on the contested nature of law, Sarat and Kearns aptly note that often, "in the productions and reproductions of law in everyday life, law is appropriated for purposes that its authors and administrators often neither completely foresee nor completely understand."[89] Law provides the language through which the struggle for authoritative definitions of social life may take place, with both domination and resistance made possible through its symbolic ambiguities. As this dissertation demonstrates, within the context of transitional justice, this struggle over meaning may take place regarding interpretations of past atrocities, the requirements of the transition, and the role of law and post-conflict justice in establishing a sustainable peace.

IV: The Present Research

The studies presented in subsequent chapters, while diverse in subject and research focus, all seek to capture the way in which law, as a body of discourse, system of rules and symbols, and strategic resource, has worked to shape the trajectory of retributive transitional justice in South Africa since the country's transition to democracy began in 1994. Before outlining the

[88] Finnemore and Sikkink, "International Norm Dynamics," 887-917.
[89] Sarat and Kearns, "Beyond the Great Divide," 8.

specific contributions of each chapter, a brief discussion of case selection and this dissertation's primary focus on retributive justice is necessary.

The Case of South Africa

South Africa's transition to democracy is perhaps one of the most widely studied cases in the field of transitional justice. The field's obsession with South Africa's is due, in part, to the unique model of post-conflict justice implemented in the country. Eschewing the peace vs. justice dichotomy that characterized the field of transitional justice during its early years, South Africa chose to pursue a holistic approach to address the legacy of apartheid-era violence. The holistic approach, in which retributive and restorative justice was seen as complementary rather than contradictory pathways for justice, was predicated on the truth-for-amnesty scheme established by the National Reconciliation Act of 1995. The Act not authorized the creation of a Truth and Reconciliation Commission, but established the truth-for-amnesty process as an intrinsic link between the Commission and the criminal justice system as well.

For those considering testifying before the TRC, the promise of amnesty was presented as the carrot, while the threat of prosecutions was presented as the stick. Applications for amnesty, submitted to the TRC's Amnesty Committee, had the immediate effect of freezing all criminal investigations, prosecutions, and civil suits against the applicant. Whereas the granting of amnesty precluded the resumption of such legal proceedings, including the filing of civil suits against the indemnified perpetrator, the denial of amnesty enabled prosecutorial initiatives to begin again. In addition to amnesty proceedings having a direct impact on the prosecution of apartheid-era crimes, the prosecution of human rights violations is said to have had an effect on the functioning of the TRC. With amnesty fundamentally dependent on the threat of

prosecutions, the number and scope of amnesty applications was related to the successful prosecution of apartheid-era crimes. According to Pedain, amnesty applications were significantly higher amongst groups that had members that were under prosecutorial investigation or subject to civil suits.[90]

Furthermore, successful prosecutions – although limited in number – are said to have also increased the number of amnesty applications filed with the TRC. For example, the conviction of Eugene De Kock, former head of the State's notorious Vlakplaas counter-insurgency unit, provided an incentive for other members of the State Security Branch to secure amnesty, lest they become the subject of prosecution. This incentive was magnified by the fact that, during his sentencing mitigation hearing, De Kock disclosed information about other apartheid-era crimes the unit participated in. Thus, successful prosecutions such as De Kock's enhanced the credibility of the threat of prosecutions, motivated a number of Security Branch members to apply for amnesty, as well as contributed to the broader truth-telling process. Conversely, the 1996 acquittal of former defense minister Magnus Malan and other senior military officials had a negative impact on the number and scope of applications received. Varney and Sarkin argue that the failure to secure a conviction in such a high-profile case reduced the incentive for perpetrators to apply for amnesty at the TRC, thereby limiting the quantity and quality of information gleaned from other amnesty applications and hearings, information that was ultimately incorporated into the final narrative produced in the final TRC report.[91]

While the truth-for-amnesty process in South Africa was certainly unique and worth considerable analysis by transitional justice scholars, the over emphasis on the TRC and truth-

[90] Antje Pedain, "Was Amnesty a Lottery? an Empirical Study of the Decisions of the Truth and Reconciliation Commission's Committee on Amnesty," *South African Journal of Criminal Justice* 121, no. 4 (2004): 785–828.
[91] Howard Varney and Jeremy Sarkin, "Failing to Pierce the Hit Squad Veil: an Analysis of the Malan Trial." *South African Journal of Criminal Justice* 10, no.2 (1997): 141-161.

for-amnesty process within the existing literature is reflective of a narrow understanding of trials within the holistic transitional justice framework, in general, and in South Africa, in particular. Transitional justice scholars such as Alison Bisset have proceeded from a mistaken assumption that "the primary role of prosecution [in South Africa], or the threat of it, was to enhance truth seeking and create a more robust truth commission by incentivizing appearance and disclosure before the TRC."[92] Under this conception of retributive transitional justice, prosecutions in South Africa existed primarily to push perpetrators to apply for amnesty, not for the pursuit of justice in its own right. Accordingly, the role of prosecution in the South African model was to, first and foremost, enhance the efficacy and legitimacy of the TRC. The failure to pursue but a handful of prosecutions of apartheid-era crimes and the further inability to secure convictions in the few cases that went to trial is said to have ultimately undermined the work and impact of the TRC.[93] Such research tends to conceptualize the pursuit of retributive justice as a legal obligation stemming from the founding legislation of the TRC, rather than a normative endeavor worth pursuing even in the absence of the truth-for-amnesty proceedings.

To date, few transitional justice scholars have explored the pursuit of retributive justice outside of the context of the TRC.[94] One possible reason for the dearth of research on retributive transitional justice in South Africa is the small number of apartheid-era cases that have been pursued by the prosecuting authorities since 1994. Following the conclusion of the TRC in 2003, the Amnesty Committee provided the National Prosecuting Authority with a list of

[92] Bisset, Alison. *Truth Commissions and Criminal Courts* (Cambridge: Cambridge University Press, 2012), 77.
[93] Ibid; Paul Gready, *The Era of Transitional Justice: The Aftermath of the Truth and Reconciliation Commission in South Africa and Beyond* (New York: Routledge, 2011).
[94] Out of the existing research on the subject, only Ole Bubenzer has engaged in comprehensive analysis of retributive justice in South Africa since 1994. See Ole Bubenzer, *Post-TRC Prosecutions in South Africa: Accountability for Political Crimes After the Truth and Reconciliation Commission's Amnesty Process*, (Leiden: Koninklijke Brill NV, 2009).

approximately 300 individuals that the Committee recommended for prosecution.[95] Since 1994, however, only a handful of cases have been actively investigated, with even fewer making it to the trial stage.

It is the ebbs and flows of retributive justice in South Africa that this dissertation was intended to explore. Why have some perpetrators of apartheid-era human rights violations been prosecuted, while others remain free? What accounts for the handful of cases that were able to make it beyond the investigation phase? Why, despite consistent demands for justice from civil society, victims, and their family members, has the government chosen the path of impunity for past crimes? Why, despite pervasive government resistance to investigate and prosecute the perpetrators of human rights abuses, have some cases made it beyond the investigation stage, resulting in indictments and pending prosecutions? Providing a comprehensive answer to such questions is beyond the scope of this dissertation. However, the research presented in this dissertation represents a first step at understanding the role of law and legal framing in moving certain cases of human rights violations through the criminal justice process and preventing other cases from enjoying the same success.

Chapter Overview

Adopting a rather eclectic approach to the study of legal framing in post-conflict transitions, this dissertation explores the role of legal framing across levels of analysis. Such an ambitious research endeavor is enabled by a constructivist understanding of frames, broadly defined as "organizing principles that are socially shared and persistent over time, that work to

[95] Adam Yates, "Justice Delayed: The TRC Recommendations 20 Years Later," *Daily Maverick*, September 5, 2018, https://www.dailymaverick.co.za/article/2018-09-05-justice-delayed-the-trc-recommendations-20-years-later/.

symbolically to meaningfully structure the social world."[96] As a verb, framing denotes an active process, one in which "interests, communicators, sources, and culture combine to yield coherent ways of understanding the world, which are developed using all of the available verbal and visual symbolic resources."[97] As a noun, frames exist at both the individual level, in the minds of agentive actors, at the organizational level, as collective action frames, and at the societal level, as cultural frames. *Framing*, then, is the interpretive process by which individuals make sense of the world and create *frames*, packages of meaning that organize thought and give coherence to a complex world. These packages of meaning exist at the cultural level, in the form of master frames, at the organizational level, in the form of collective action frames, and at the micro-level, in the form of decision frames.

The research presented in Chapter 2 aims to address two important weaknesses in existing literature on the role of law in post-conflict transitions. First, critiques regarding the legal fetishism of transitional justice theorizing and praxis tend to be based on an implicit conception of law as the Western legal tradition found in many liberal democracies. Such critiques not only position Western legalism as law in town, but often fail to delineate what beliefs and values constitute the seemingly problematic Western legalism in the first place. Second, there is a need to ground abstract discussions about the dominance of law (and Western legalism, in particular) within specific cases, demonstrating precisely *how* such legal understandings of transitional justice shapes the trajectory of retributive justice in a given society.

---

[96] Stephen D. Reese, "Prologue – Framing Public Life: A Bridging Model for Media Research," in *Framing Public Life: Perspectives on Media and Our Understanding of the Social World,* eds. Stephen D. Reese, Oscar H. Gandy, Jr., and August E. Grant, (Mahwah, New Jersey: Lawrence Erlbaum Associates, Inc., 2001): 11.
[97] Ibid, 11.

To address these gaps in contemporary knowledge, Chapter 2 argues that the liberal legalism that dominates transitional justice research, policy, and praxis serves as a *master frame* for the field, guiding scholars' and practitioners' interpretations of past violence and shaping state responses to human atrocities of the past. This chapter begins with an explicit delineation of the organizing principles that constitute the liberal legalist frame, such as an understanding of human rights violations as instances of *extraordinary international criminality* perpetrated by *individuals* against *the entire international community.* Chapter 2 demonstrates how these fundamental beliefs of the liberal legalist frame provide transitional justice actors in the aftermath of mass atrocities with a shared language from which to interpret the violence of the past and articulate demands and programs for justice in the future. The strength, durability, and widespread reliance on this frame by transitional justice scholars and practitioners is the byproduct of transitional justice's origins in the 3rd wave of democratization, its dominance by Western liberal international human rights lawyers, and the institutionalization of the frame in international, hybrid, and domestic criminal tribunals.

While the liberal legalist master frame is often contested by post-conflict societies in which such legalism is imposed, it is often appropriated by various groups as well, particularly to legitimize and further their respective transitional justice goals. The second half of this chapter explores the dominance of – and resistance to – the liberal legalist frame in South Africa over the course of its democratic transition. On the one hand, the liberal legalist frame certainly permeated the South African transition from apartheid, with such dominance seen in the constitutionalization of individual rights in the interim and final constitutions, the legal fetishism of the Truth and Reconciliation Commission, and the post-apartheid state's superficial commitment to the pursuit of retributive justice for apartheid-era crimes. Furthermore, civil

society organizations across the ideological spectrum have deployed the language of liberal legalism as a rhetorical tool to achieve diametrically opposite goals with regards to criminal accountability, demonstrating how transitional justice actors attempt to *use* the legitimacy conferred through the liberal legalist frame to pursue their respective retributive justice goals. This permeation was enabled, in part, by the distinctly legal modes of oppression and resistance that characterized much of the apartheid-era. On the other hand, the analysis presented in Chapter 2 makes clear that liberal legalism was not the only legal doctrine present in South Africa before, during, or after the post-conflict transition. Indeed, the presence of a multiplicity of rights discourses in South Africa, such as that found in Marxism, enabled some sectors of South African society to prevent liberal legalism from completely dominating the transition. Thus, one of the main contributions of this chapter is highlighting, within the post-conflict arena, the plurality of understandings of law that are often obscured by the discipline's predilection for viewing law and Western legalism as synonymous.

Most existing discussions about the role of law in transition take place at the macro-level, considering the influence of law on both the evolution of the discipline and the pursuit of macro-level goals associated with democratization, peacebuilding, and nation-building. Enabled by an inclusive definition of frames as organizing principles that work to structure the experience of social life in meaningful ways, the research presented in Chapters 3 and 4 shift the level of analysis in which debates about the role and utility of law in transition takes place, exploring the role of legal framing at the micro-level of individual retributive justice cases in South Africa.

Adopting a strategic view of legal politics, Chapter 3 builds on existing research on legal decision-making and legal persuasion that has established the importance of framing in case progression. According to this body of research, how legal actors frame a case, law, and their

legal arguments can have an impact on the ways in which other legal actors understand the case as it moves through the justice system.[98] Chapter 3 engages with socio-legal research on framing and prosecutorial decision-making, examining the ways in which domestic and international law served as *decision frames* that facilitate state prosecutors in reframing egregious acts of violence as criminal conduct subject to prosecution. This chapter considers one case of retributive justice in particular: the prosecution of Wouter Basson, a South African cardiologist and former apartheid state official accused of planning and implementing crimes such as the mass murder of anti-apartheid detainees. While state prosecutors initially framed the Basson's criminal conduct as ordinary crimes in violation of domestic law, the framing of the charges shifted as the case progressed from the trial to appeals phase, with his conduct later framed as international crimes proscribed by international law. Discourse analysis of the legal documents filed in the Basson case as well as interviews with state prosecutors involved in the case highlights the ways in which domestic and international law serve as interpretive frames that prosecutors and other legal actors rely on to make sense of past violence as well as reframe that violence as a legal matter that falls under the jurisdiction of the courts.

In this way, Chapter 3 reconceptualizes law as an interpretive frame that exists both at the individual level, in the form of decision frames, and at the organizational level, in the form of collective action frames. At the individual level, domestic and international law serve as decision frames that help prosecutors determine the ways in which criminal conduct is to be interpreted and subsequently charged. While South African prosecutors had the ability to charge Basson with international crimes at the outset, their initial reliance on domestic law as the primary decision frame through which his conduct would be understood was driven by the

[98] See, for example, the strategic account of judicial politics put forth by Lee Epstein and Jack Knight, *The Choices Justices Make,* (Washington, DC: Congressional Quarterly Press, 1997).

routinization and institutionalization of the domestic law decision frame during the apartheid-era. The elevation of domestic law from a decision frame to an organizational frame held by South African legal actors worked to transform the domestic law frame as the only legitimate interpretive framework from which criminal charges could be constructed. Reframing Basson's conduct as war crimes and crimes against humanity as the trial moved into the appeals phase was largely strategic, and did not necessarily reflect a new understanding of his conduct as a violation of international law, highlighting the role of legal frames as a rhetorical capability deployed by prosecutors to achieve their retributive justice goals, namely, the conviction of human rights violators. Ultimately, Chapter 3 demonstrates the ways in which domestic and international law, as decision frames, hold the power to shape both the way in which human rights violations are understood as well as subsequently prosecuted.

Chapter 4 continues the examination of law and legal framing at the micro-level, shifting focus from state prosecutors to the families of victims of apartheid-era violence. This chapter highlights the ways in which one such family – the Simelane family – use legal framing to make sense of the failure of the post-apartheid state to actively investigate and prosecute human rights abuses committed by the apartheid regime. Since the democratic transition in 1994, the Simelane family has lobbied the state to hold those who abducted, tortured, and likely murdered Nokuthula Simelane accountable for their crimes. In recent years, the Simelane family has reconstructed the intransigence by the state in legal terms, viewing the failure to prosecute as a violation of constitutional principles prohibiting the politicization of justice as well as their legal rights to equality. Discourse analysis of the legal affidavits filed on behalf of the Simelane family to force the state to prosecute as well as interviews with the family themselves suggests that law has served as an interpretive resource that the family draws on to give voice to their

grievances against the state. In a way, the Simelane family's long journey to secure justice for Nokuthula is akin to the legal framing behavior of many social movement organizations, as both invoke rights framing to define their grievances and motivate relevant actors to pursue necessary change.

Chapter 4 is unique in that it seeks to go beyond examining the content of the Simelane family's legal framing to assess the constitutive effects of the frames themselves. Complementing frame analysis with a performative approach to legal framing, this chapter illuminates the ways in which rights framing work to not only persuade relevant actors of the need for change, but contest and transform dominant understandings of identity, community, and citizenship in the post-apartheid era as well. By framing the failure to prosecute of their right to equality, for example, the Simelane family resists hegemonic conceptions of post-apartheid citizenship that define "good" South African citizens in reconciliatory, rather than retributive, terms. In this way, Chapter 4 looks to address the descriptive bias commonly associated with framing research, a bias that focuses on the content of a given frame rather than the constitutive nature of the framing process. Finally, this chapter also demonstrates how law, contrary to those who bemoan the legal fetishism of transitional justice, can serve as not only a rhetorical capability for those on the margins of society, but a means of resistance as well.

Together, the chapters in this dissertation work to highlight, from various angles, the legal consciousness of various transitional justice actors engaged in retributive justice in South Africa. Law is not a monolithic system of belief, but rather an interpretive framework whose utility is dependent in on how that framework is understood and deployed in the first place. In some ways, law as an interpretive frame is constraining, limiting the ways in which post-conflict actors understand the past, the requirements of the transition, and the role of justice in the future.

In other ways, law is transformative, enabling actors to overcome a number of post-conflict hurdles as they push retributive justice processes forward. Such distinctions need to be considered when evaluating the role and utility of law in transition.

CHAPTER 2:

FRAMING TRANSITIONAL JUSTICE

I: Introduction

The cross-disciplinary embrace of frame analysis and framing concepts has resulted in what Entman has termed a "fractured discipline," characterized by conceptual confusion regarding precisely what a frame is and the nature of the framing process.[99] Thus, it is particularly important to delineate exactly what conception of framing is deployed in this dissertation. This chapter delves further into the existing literature on framing, detailing the beliefs and values that constitute the organizing principles of a given frame. As the concept of *master frames* is central to the analyses presented in subsequent chapters of this dissertation, a discussion of frames' organizing principles is followed by an exploration of master frames, their distinct features, and their utility across issue areas. The chapter then connects framing research to the discipline of transitional justice, arguing that liberal legalism serves as a master frame for the field both in terms of theorizing and post-conflict praxis. After outlining the diagnostic and prognostic beliefs of the liberal legalist frame, this chapter turns to the factors that have enabled this frame to dominate the discipline. Existing research on frame resonance suggests the prominence of Western liberal peacebuilders within transitional justice institutions, as well as the institutionalization of the liberal legalist frame within tribunals and truth commissions, which has resulted in the liberal legalism often decried by transitional justice critics.

Finally, this chapter analyzes both the dominance of and resistance to the liberal legalist frame over the course of the South African transition to democracy. In South Africa, the liberal

[99] Robert M. Entman, "Framing: Towards Clarification of a Fractured Paradigm," *Journal of Communication* 43, no.4 (1993): 53.

legalist frame was indeed influential in not only shaping popular interpretations of apartheid-era violence, but the post-apartheid state's response to such atrocities as well. The structuring power of the liberal legalist frame can be seen in the constitutionalization of individual rights in the 1996 Constitution, the legal fetishism of the TRC, the state's creation of specialized prosecuting units tasked with the pursuit of retributive justice, and civil society discourse in the democratic era. This chapter argues that the dominance of the liberal legalist frame during the democratic transition was made possible, in part, by the distinctly legal modes of oppression and resistance that occurred prior to the transition. At the same time, resistance to the imposition of a purely liberal legalist frame was driven by the presence of a multiplicity of rights discourses in South Africa prior to the transition, particularly that of Marxist thought. The chapter then concludes with a discussion of the challenges and merits of a liberal legalist frame in the aftermath of mass atrocities.

II: Frame Analysis

Organizing Principles of a Frame: Beliefs and Values

Frames at all levels of analysis are comprised of a distinct constellation of beliefs, values, and goals that work to structure social phenomena in a meaningful way.[100] Whether one adopts a cultural or cognitive view of frames, a central function of frames is the structuring of social life and all of its complexity according to *organizing principles*, with such principles symbolically represented through the use of language, sentence structure, metaphors, and other aspects of discourse influenced by frame choice. These organizing principles not only allow frames to

[100] James K. Hertog and Douglas M. McLeod, "A Multiperspectival Approach to Framing Analysis: A Field Guide," in *Framing Public Life: Perspectives on Media and Our Understanding of the Social World*, eds. Stephen Reese, Oscar H. Gandy, and August E. Grant, (Mahawah, New Jersey: Lawrence Erlbaum Associates, 2001): 145.

create sense of continuity out of the chaos that is social reality, but enable observers to distinguish between different types of frames as well. Scholars looking to identify frames and engage in comparative frame analysis must first identify the organizing principles that serve as the fundamental building blocks of a given frame.

Existing research suggests frames 'organize' social life in two fundamental ways: cognitively and culturally. Cognitive frames work to structure the interpretation of social phenomena by tapping into the basic psychological biases and cognitive schemata of individuals. Kahneman and Tversky's experiment on frames and individual decision-making is perhaps one of the most frequently cited examples of cognitive principles structuring the interpretation of social life. Kahneman and Tvserky found that the manner in which a decision problem is framed (i.e. in terms of the number of lives saved or lives lost) interacts with cognitive attitudes towards risk aversion, producing distinct interpretations of social information and, by extension, the willingness to act.[101]

This dissertation is most concerned with the organizing principles of a frame that are collective and cultural in nature. Social movement scholarship suggests collective frames are constituted by two important types of organizing principles: values and beliefs. Values are seen as "modes of conduct or states of existence that are thought to be worthy of protection and promotion."[102] Reflected in the goals of social movements and the end-states they envision, core values such as justice, cooperation, and liberty are invoked by movement actors to redefine an issue or event, mobilize prospective constituents, and inspire collective action. Value amplification occurs when certain values are emphasized and promoted over others within a

[101] Daniel Kahneman and Amos Tversky, "Prospect Theory: An Analysis of Decision Under Risk," *Econometrica* 47, no. 2 (1979), 263-291.
[102] David Snow et al., "Frame Alignment Processes, Micromobilization, and Movement Participation," *American Sociological Review* 51, no. 4 (1986): 469.

given frame. Similar to value amplification, belief amplification occurs when certain beliefs, the "ideational elements that cognitively support or impede action in pursuit of desired values," are elevated over others within a given frame.[103] As organizing principles, beliefs play a particularly important role in the structuring of social life, as they work to define problems, make moral judgments, prescribe pathways for remedy, and motivate action. Two categories of beliefs identified by social movement scholars are particularly relevant for the study of framing and transitional justice: diagnostic and prognostic beliefs.

Diagnostic Beliefs

A central task of social movement actors is the persuasive transformation of an aspect of social life into a social problem in need of change. Diagnostic beliefs address questions such as: what is the nature of the problem, event, or issue? How is it defined? Beliefs in this category include judgments about the seriousness, nature and causes of a problem, issue, or event, 'stereotypic beliefs about antagonists or targets of influence,' as well as beliefs about the victimized group.[104] Diagnostic beliefs inform how actors are defined under a given frame and the extent of their centrality to an issue at hand. In determining the context of an idea, issue, or event, frames work to ascribe actors with the roles of protagonist, antagonist, and spectator. Under one frame, actors may be deemed essential to the resolution of a problem, while under another, the same actors may be characterized as peripheral to or even the cause of a problem.[105] Diagnostic beliefs often incorporate what Gamson terms an "injustice frame," beliefs about the identity of the victims of unjust actions and that are amplified by social movement actors as they

[103] Ibid, 469.
[104] Ibid, 470.
[105] Hertog and McLeod, "A Multiperspectival Approach to Framing Analysis," 144.

advocate for social, political, and economic change.[106] Causal attributions – beliefs about the cause of a problem, protagonists, and antagonists – are often subject to more rigorous debate than beliefs about the nature of the problem itself, with negotiated contestation often occurring despite agreement as to the precise nature of the harm caused.[107]

Prognostic Beliefs

Whereas diagnostic beliefs define a given problem as such, prognostic beliefs articulate a proposed solution to the problem, outlining a general plan of attack and the strategies necessary to ensure change. Prognostic beliefs answer the question "What is to be done?" Prognostic beliefs are intrinsically connected to diagnostic beliefs: the manner in which a problem is identified and characterized shapes the range of solutions and strategies that are deemed reasonable and possible to adopt.[108] Prognostic beliefs do not form in a silo, but are often shaped by the nature of solutions advocated by opponents, targets of influence, the media, and bystanders. How external actors frame an issue (i.e. engage in counter-framing) can affect the prognostic beliefs of social movement organizations by, "on the one hand, putting movement activists on the defensive, at least temporarily, and on the other hand, by frequently forcing it to develop and elaborate prognoses more clearly than otherwise might have been the case."[109] For example, Zuo and Benford found that students at the forefront of the Chinese democracy movement in 1989 were able to anticipate and deflect the state's counter-framing of the movement as "counterrevolutionary" and an "upheaval" by articulating prognoses centered around traditional Chinese cultural values such as community devotion and self-sacrifice. By

[106] William A. Gamson, *Talking Politics*, (Cambridge: Cambridge University Press, 1992), 111.
[107] Robert D. Benford and David A Snow. "Framing Processes and Social Movements: An Overview and Assessment." *Annual Review of Sociology* 26, no. 1 (2000): 616.
[108] Ibid, 616.
[109] Ibid, 617.

anticipating how opposition groups may counter frame an issue, movement actors were able to refine their own prognostic beliefs and associated movement strategies and tactics accordingly.[110]

The values and beliefs within a frame work to reflexively determine which aspects of reality are considered relevant to an issue at hand. The metaphor of a window or picture frame is frequently invoked to describe the selective function of a frames' organizing principles. Framing is akin to looking out of a window, as both are activities by which boundaries are defined, aspects of reality are selected, and one' understanding of the world is structured. Just as looking through a framed window restricts one's gaze to a certain perspective while excluding others, framing is a process that selectively identifies relevant facts that both constitute and sustain a particular reality.[111]

By defining the context of occurrence, frames determine what content is relevant to discussion of a social concern.[112] Frames do not automatically isolate the facts necessary to interpret social life; rather, users *apply* frames to events, issues, or interactions, with certain facts retrieved selectively by the organizing principles of the frame. According to Goffman, the selective power of frames assists in classification, enabling users to "locate, perceive, identify, and label a seemingly infinite number of concrete occurrences defined in its limits." An initial view of the "facts" of an issue or event subsequently narrows the range of frames that can reasonably be applied.[113] The provisional application of a frame may then require the exclusion of some facts from consideration, while causing other facts to be introduced or reinterpreted in

---

[110] Jiping Zuo and Robert D. Benford, "Mobilization Processes and the 1989 Chinese Democracy Movement," *Sociological Quarterly* 36, no. 1 (1995): 131-156.
[111] Creed, Douglas WE, Jeffrey A Langstraat, and Maureen A Scully. "A Picture of the Frame: Frame Analysis as Technique and as Politics." *The Journal of Politics* **5** (1): 36.
[112] Ibid, 143.
[113] Erving Goffman, *Frame Analysis: An Essay on the Organization of Experience*, (Boston: Northeastern University Press, 1974): 21.

light of the system of meaning that has been temporarily imposed. Once a frame is applied, it is assessed based on a "goodness of fit," with existing elements of the applied frame often reordered and reinterpreted to achieve coherence. Thus, frames themselves are often affected by the framing process, particularly when one encounters unfamiliar ideas, topics, or situations that must be transformed into the familiar.[114]

Master Frames

An important type of cultural frame relevant to the present study is that of master frames. Defined by Snow and Benford as generic frames that "provide the interpretive medium through which collective actors associated with different movements…assign blame for the problem they are attempting to ameliorate," master frames sit in contrast to movement specific frames such as the 'exploited worker frame' or 'environmental justice frame,' collective action frames that are deployed by a given social movement organization and may not be useful in other contexts.[115] Movement-specific collective action frames, also known as 'organizational frames' or 'primary frames', are often – but not always – derived from master frames.[116] Master frames are broader than movement-specific collective action frames in terms of "interpretive scope, inclusivity, flexibility, and cultural resonance….functioning as a kind of master algorithm that colors and constrains the orientations and activities of other movements."[117] The flexibility of master frames increases their appeal, as such flexibility enables a wide range of groups across thematic issues to tap into the master frame and couch their grievances in terms of the frames basic problem

[114] Hertog and McLeod, "A Multiperspectival Approach to Framing Analysis," 148.
[115] David A. Snow and Robert D. Benford, "Master Frames and Cycles of Protest," in *Frontiers in Social Movement Theory*, eds. Aldon D. Morris and Carol McClurg Mueller, (New Haven: Yale University Press, 1992), 139.
[116] John H. Evans "Multi-Organizational Fields and Social Movement Organization Frame Content: The Religious Pro-Choice Movement." *Sociological Inquiry* 67, no. 4 (1997): 454.
[117] Benford and Snow, "Framing Processes and Social Movements," 618.

solving schema.[118] Whereas the utility of movement-specific collective frames is largely movement- and organization-specific, master frames – such as the legal frames at the heart of this dissertation – have been found to resonate across time and space, their broad interpretive scope enabling a number of social movements across protest cycles to build similar collective action frames that are still "culturally resonant to their historical milieu."[119]

The adoption of master frames – elaborated master frames, in particular – often takes the form of a snowball effect, in which the prior success of a social movement, attributed to the adoption of a highly culturally resonant frame, leads subsequent movements to modify that frame and use it to the advantage of their own cause. For example, the success of the US civil rights movement in deploying an 'equal rights and opportunities' frame, a frame broad enough in interpretive scope, motivated subsequent movements such as the women's gay and lesbian, and American Indian rights movements, to proffer a similar frame in their respective campaigns.[120] Given the high threshold a master frame must meet in terms of interpretive scope, scholars have identified only a handful of master frames that are deemed broad enough in scope. Identified master frames include legal frames, injustice frames, justice frames, oppositional frames, hegemonic frames, psychosalvational frames, and choice frames.[121] Noonan's research on the mobilization of women against the Chilean state suggests 'a return to democracy frame' also holds the status of a master frame. As the subsequent section will demonstrate, liberal legalism exists as a type of master frame as well, serving as an interpretive resource (as well as a

[118] Benford and Snow, "Master Frames and Cycles of Protest," 140.
[119] William J. Swart, "The League of Nations and the Irish Question: Master Frames, Cycles of Protest, and 'Master Frame Alignment," *Sociological Quarterly* 36 (1995): 466.
[120] Robert D. Benford, "Frame Disputes," in "The Wiley Blackwell Encyclopedia of Social and Political Movements," eds. David A. Snow, Donatella della Porta, Bert Klandermans, and Doug McAdam, (Hoboken, NJ: Wiley-Blackwell Publishing, 2013): 1.
[121] Ibid, 1.

constraint) for transitional justice practitioners and participants to draw from as they make sense of past atrocities and construct plans for the future.

The flexibility of master frames is dependent, in part, on the linguistic expression of a master frame's central organizing beliefs. The manner in which a master frame is manifested discursively is dependent on whether a master frame is "elaborated" or "restricted". On the one hand, elaborated master frames are more flexible modes of interpretation, constituted by inclusive belief systems that are "syntactically flexible and lexically universalistic." The flexible organization of elaborated master frames such as the civil rights master frame enables the adaptation of the frame to specific movements, as well as the extension of the master frame to address constituents beyond the original target group. The more elaborated a master frame is, the greater its appeal and thus the greater its mobilizing potential. Restricted master frames, on the other hand, are rigidly organized, closed ideational systems that do not provide much room for interpretive discretion. As modes of interpretation, restricted master frames such as the nuclear freeze frame are "syntactically rigid and lexically particularistic," preventing their ability to resonate beyond a specific group of constituents.[122]

III: Liberal Legalism

The liberal legalist frame that dominates the field of transitional justice is derived from the liberalist master frame, a conventional rather than counter hegemonic master frame that exists as a kind of political common sense in liberal capitalist democratic countries. At the very foundation of the liberalist frame is a commitment to the equality of all individuals vis-à-vis the state. The liberal theory of equality is intrinsically connected to (negative) liberty and individual autonomy. Liberty, according to liberal theorists such as Rawls, is individual, negative, and

[122] "Master Frames and Cycles of Protest," 140.

pluralist in nature, reflecting an understanding of the person as an autonomous moral agent concerned with pursuing individual conceptions of the good.[123] An individual's enjoyment of liberty to realize his or her own conceptions of the good is prioritized to the extent that such aims and preferences do not infringe on the liberty of others. As liberalism acknowledges a plurality of conceptions of the good exist, it holds that the state should position itself according to the "maximum degree of non-interference (negative liberty) compatible with the minimum demands of social life" in order to enable individuals, as separate persons, to pursue their respective conceptions of the good.[124] Equality, then, is defined as equal distribution of negative liberty across individuals in a given society.[125]

Within the liberalist master frame, the state is understood as the 'container' of politics, with governments conceptualized as powerful agents fulfilling an adjudicative function as a plurality of groups vie for power in society. With power defined as the strategic mobilization of resources, the liberalist frame treats the distribution of power as a given, rather than a constitutive element of power itself.[126] As an egalitarian individualist frame, the liberal frame resonates strongly with Lockean principles of equal *individual* rights and majority rule. These principles are not only central to the liberal frame, but serve as the ideological basis of Western liberal democratic states.

At the center of liberal theory and practice is the law, with liberal conceptions of the nature, function, and consequences of the law rooted in a distinctly legalist framework. Indeed, the natural affinity between liberal theory and legalism and the overlap in their core tenets positions legalism as the legal ideological foundation for liberal politics. As Dossa notes, "the

[123] John Rawls, *A Theory of Justice*, (Cambridge: Harvard University Press, 1972): 27.
[124] Isaiah Berlin, *Four Essays on Liberty*, (Oxford: Oxford University Press, 1969): 47.
[125] Peter Hudson, "Liberalism, Democracy, and Transformation in South Africa," *Politikon* 27, no. 1 (2000): 94.
[126] William Carroll and R.S. Ratner, "Master Framing and Cross-Movement Networking in Contemporary Social Movements," *The Sociological Quarterly* 37, no. 4 (1996): 609.

formal split between law and morals, the primacy of individual liberty and autonomy and of right over the good, the focus on the visibly factual (distinguished from values), constitute sacral tenets of liberal legality and politics".[127] Under a liberal framework, the law seen as neutral and apolitical, with the 'presumed sanctity of the judicial torso' placing legal decision-making outside of the realm of politics.[128] Distinctly apolitical and divorced from social context, the law, according to liberalism, serves as the ultimate protector of the free market by reinforcing the status quo through unquestionable faith in the nature and purpose of the law. Universalist in nature, the liberalist frame holds democratic values such as justice, rule of law, and the protection of civil and political human rights as the standard by which individuals, groups, societies, institutions, or countries are held to.[129] As the following section discusses, liberalist beliefs regarding the state, citizenship, and human rights have significantly informed the liberal legalist frame that has dominated the study and practice of transitional justice.

But what is legalism, precisely? As the 'logical and ideological offspring of liberal ideology'[130] legalism has been referred to as a legal theory, a professional ideology, and a meta narrative of the law, as 'laws explanation of itself."[131] In her seminal book, *Legalism*, Judith Shklar defines legalism as a commitment to "the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules."[132] That is, legalism insists on the morality of conduct that conforms with rules (i.e. laws) established in the past, an insistence that positions the law as "simply *there* – if one has a moral

[127] Shiraz Dossa, "Liberal Legalism: Law, Culture, and Identity," *The European Legacy* 4, no. 3 (1999): 75.
[128] Ibid, 73.
[129] Ebru Turhan and Cigdem Bozdag, "From 'Economic Consequences' to the 'Personal Impact' Frame: Representation of Turkey in the German Media," in *Framing Violence: Conflicting Images, Identities, and Discourses*, ed. Banu Baybars-Hawks, (Newcastle: Cambridge Scholars Publishing, 2016): 101.
[130] Dossa, "Liberal Legalism," 77.
[131] Narnia Bohler-Muller, "Western Liberal Legalism and Its Discontents: A Perspective From Post-Apartheid South Africa," *Socio-Legal Review* 3, no. 1 (2007): 5.
[132] Judith Shklar, *Legalism: Law, Morals, and Political Trials*, (Cambridge: Harvard University Press, 1964): 1.

duty to obey rules, it must be the case that the rules are there."[133] This definition suggests that legalism maintains an affinity to legal formalism, which holds the law to be an objective, independent, closed logical system, derived from the existence of a legal science that makes possible to objective determination of disputes. Indeed, at the heart of legalism (and liberal legality more broadly) is the formalist, positivist view of the law as a determinable and empirical science, static and universal in nature, merely waiting to be applied by legal actors to a given case. Legalism thus depicts legal actors as mechanical decision-makers and noncontributing agents of the law, waiting on the sidelines to solve conflicts and grievances via a legal final solution.

Liberal legality's impersonal view of judges and prosecutors, captured by Montesquieu's declaration that "the national judges are not more than the mouth that pronounces the words of the law," asserts that it is the law itself, in the absence of human input, which generates decisions in the criminal justice process.[134] Legalism's emphasis on the objectivity of the law fosters a view of legal decision-makers as autonomous, rational actors working independently of one another, not subject to the influences, preferences, or opinions of other actors working with them or in other parts of the criminal justice system. Rather, each case is decided on its merits by legal decision-makers who, armed with information and the necessary objective criteria to guide their analysis, thoughtfully weigh various choices within a broader legal framework. This impersonal view of legal decision-making serves to legitimize the authority of the law and the legal status quo by promoting uncritical acceptance of the legal canon, working to silence alternative interpretations of the world in favor of legalism's 'objective' legal reality.[135]

---

[133] Robin West, "Reconsidering Legalism," *Minnesota Law Review* 88, (2003): 120.
[134] George P. Fletcher, "Some Unwise Reflections About Discretion," *Law and Contemporary Problems* 47, no. 4 (1984): 273-274.
[135] Shklar, *Legalism*, 41.

Framing violence and oppression as the violation of individual rights, with a narrow focus on political and civil rights, the liberalist frame has served as the master frame for a variety of social movements who have drawn on these principles in the creation of movement-specific frames. The civil rights frame, as with most individual rights frames, was derived from the liberalist master frame and was deployed by American civil rights activists during the 1950s and 1960s to give voice to their experiences with Jim Crow laws, widespread violence against Black communities, and the pervasive legacy of slavery in America. By depicting segregation, for example, as a violation of their *individual* rights to equal treatment before the law, civil rights activists constructed a frame that resonated with the liberal values and constitutional principles deeply rooted in American political and legal culture. The civil rights movements' emphasis on individual rights rather than collective rights reflects liberalism's prioritization of abstract individualism over social differentiation. As Albertyn and Goldblatt note, "In liberal legalism, it is differentiation which is seen to be the problem and the assumed objective is a society where equal (meaning same) treatment is the norm and where racial and sexual distinctions do not exist."[136] Thus, framing group-based discrimination as a violation of individual rights allowed the civil rights movement to construct their grievances in a manner that resonated well with the liberal values of the United States political and legal culture.

Liberal Legalism's Organizing Principles

To better understand how liberal legalism serves as the primary interpretive frame for those operating within the field of transitional justice (including peacebuilders, politicians, civil society, and the general population), it is helpful to transform the core assumptions of liberal

[136] Cathi Albertyn & Beth Goldblatt (1998) "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality," *South African Journal of Human Rights* 14, no. 2, 252.

legalism into the language of frame analysis. The organizing principles of the liberal legalist frame are comprised of diagnostic and prognostic beliefs that shape the not only the interpretation of mass atrocities, but also and the range of post-conflict justice initiatives considered necessary, and indeed, possible for addressing the legacy of human rights violations, as well as the building of a sustainable peace. While the typology of diagnostic and prognostic beliefs originates from social movement research, the following discussion demonstrates the utility of such a framework for understanding the dominance of liberal legalism in the field of transitional justice. A summary of these beliefs is listed in Table 2.1.

Table 2.1: Organizing Principles of the Liberal Legalist Master Frame

Diagnostic Beliefs	**Prognostic beliefs**
• **Nature of Harm:** Extraordinary international criminality, violation of *individuals'* human rights • **Source of Harm:** Individual perpetrators • **Victimized Group:** the entire international community	• International criminality is not beyond the reach of the law • Criminal justice is best suited to condemn international crimes • The law can transcend the politics of post-conflict reconstruction • Retributive justice is justice; superior to other forms of transitional justice

Diagnostic Beliefs – The Nature of Harm

Recall that diagnostic beliefs work to transform an aspect of social life into a social problem in need of change, defining the nature of the problem, its causes, and its consequences for a victimized group. Diagnostic beliefs also delineate the roles of various actors in causing the problem as well as bringing about a solution. As a master frame for the field, liberal legalism is constituted by three important diagnostic beliefs. First, under the liberal legalist frame, the human rights abuses that fall under transitional justice's domain are not mere examples of

ordinary crime, but instances of extraordinary evil that threaten all of humankind. Mark Dumbl refers to the international crimes of genocide, crimes against humanity, and war crimes as examples of "extraordinary international criminality," a designation that suggests that such crimes exist as substantively different forms of criminality than ordinary common crimes such as murder and rape.[137]

In addition to being more planned, systematic, and organized than ordinary crimes, international crimes are seen as unique in that the perpetrators of such crimes target victims on the basis of perceived or actual group membership. As Drumbl notes, "the attack is not just against individuals, but against the group, and thereby becomes something more heinous than the aggregation of each individual murder."[138] Under a legalist frame, it is the 'radical evil', to use Kantian terminology, embodied by international crimes that makes the ordinary crimes established under domestic law inappropriate analogues for addressing massive human rights violations. Rather, such egregious conduct belongs only to the substantive categories of international criminality outlined by international criminal law. This notion that the international crimes that fall under transitional justice's purview are qualitatively distinct from ordinary crimes has been institutionalized in the jurisprudence of international tribunals. For example, in *Prosecutor v.Celebići,* the ICTY's Appeals Chamber argued that "The cases which come before the Tribunal differ in many respects from those which ordinarily come before national jurisdictions, primarily because of the serious nature of the crimes being prosecuted."[139] Furthermore, in the *Tadić* case, the Appeals Chamber warned against categorizing international

[137] Mark Drumbl, *Atrocity, Punishment, and International Law*, (Cambridge: Cambridge University Press, 2007): 4.
[138] Ibid, 4.
[139] *Prosecutor v. Deronjić,* Case No. IT-02-61-A, para 136 (ICTY Appeals Chamber, July 20, 2005).

crimes as ordinary crimes, using this danger as justification for ICTY primacy over post-conflict prosecutions.[140]

Diagnostic Beliefs – The Victimized Group

The distinctiveness attributed to international crimes informs the second diagnostic belief of the liberal legalist frame, namely, that the victimized group is comprised of not only direct victims but the international community as a whole as well. It is the interplay between individual actions and group membership that defines international crimes works to transform such criminal conduct into something so egregious, radical, and thought-defying so as to threaten the stability of the international system. Whereas acts of criminality in the domestic sphere are often said to threaten the values, security, and rule of law of the *state*, international crimes are seen as *universal* in nature and thus attacks on the legal order of civilized nations everywhere. The expansion of victimized groups beyond actual individual survivors to include the international community at large began with the Nuremburg and Tokyo Trials following World War II.[141] The prosecution of Nazi leaders by Allied powers "cast Nazi crimes as extraordinary in their nature and thereby, understood them not only as crimes against the victims in the camps or the helpless citizens in the invaded countries, but also as crimes in which everyone everywhere was a victim."[142] Thus, a second diagnostic belief of the legalist frame works to define the boundaries of victimhood, expanding such boundaries to include those not directly affected by violence as well.

While the victimized group is broadened under the liberal legalist frame to include the international community more broadly, the liberal legalism espoused by many transitional justice

[140] *Prosecutor v. Tadić,* Case No. IT-94-1 (ICTY Appeals Chamber, Oct. 2, 1995).
[141] Drumbl, *Atrocity, Punishment, and International Law,* 4.
[142] Ibid, 4.

advocates is ultimately orientated towards the individual, shaping the frame's diagnostic belief concerning the nature of the harm experienced. Under the liberal legalist frame, the harm experienced by a *group* is reframed as violations of *individuals'* human rights. This focus on the individual as unitary, atomistic, and equal to others is undoubtedly a product of the liberalist skew to legalism that dominates transitional justice discourse. Under the common-law systems of many liberal states, the individual is held as the primary unit of analysis. Within the context of transitional justice and post-conflict societies, liberal legalism's individualistic orientation is one factor driving the use of individual victims' experiences to represent the experiences of a broader group.

Prognostic Beliefs - The Need for Criminal Justice

The prognostic beliefs of the liberal legalist frame are informed, in part, by the aforementioned conceptions of wrongdoing, wrongdoers, and victimhood. An important prognostic belief to emerge from legalism's diagnosis of human rights violations is that extraordinary international criminality considered is not beyond the reach of the law; rather, the law must play catch up to the universal norms that exist to regulate such conduct.[143] Yet, under a liberal legalist frame, not all law is created equal. Rather, there is a consistent turn towards *criminal* law to promote justice in the aftermath of human rights atrocities. As Shklar established, "The principle of legality – that there shall be no crime without law, and no punishment without crime – *is* criminal justice."[144] As the purest expression of legalism, criminal trials provide a critical pathway for addressing the immoral conduct that stems from violations of the moral rules - or laws - of humanity. In this way, transitional justice is explicitly defined as

[143] Ibid, 3.
[144] Shklar, *Legalism*, 152.

legal justice, with justice achieved through the protection and vindication of individual rights such as the right to truth, equality, and effective remedy.[145]

While rigorous international debate exists regarding the use of prosecutions in the aftermath of mass atrocities, both sides of the debate generally proceed from the fundamental assumption that the criminal prosecution of human rights violators is the best avenue for addressing violence of the past. The emphasis on retributive justice reflects one of liberalism's most enduring themes: proportionate punishment for crimes. From Locke and Kant to many liberal theorists of the modern age, a persistent tenet of liberal thinkers has been punishment as a form of retribution, justified simply by virtue of a crime having been committed. The legal traditions of many constitutional democracies are guided by the notion that all forms of accountability short of punishment are inadequate at condoning criminal transgressions.[146] Liberalism's preoccupation with punishment as 'just deserts' is only strengthened when considering extraordinary international criminality. Implicit in the complementarity principle of the ICC, in which the Court will only assert jurisdiction over national jurisdictions that are "unable or unwilling" to act, is the notion that only a purely juridical model of justice, either at the domestic or international level, is the appropriate response to human rights violations.[147] Accountability, according to the liberal legalist frame, demands punishment and nothing less.

Even those within transitional justice who advocate for alternative modes of accountability, such as truth commissions, generally agree to the desirability of prosecutions, arguing in favor of alternative mechanisms only in light of practical concerns such as weak

[145] Catherine Turner, *Violence, Law, and the Impossibility of Transitional Justice* (New York: Routledge, 2017): 136.
[146] Daniel Philpott, *The Politics of Past Evil*: *Religion, Reconciliation, and the Dilemmas of Transitional Justice*, (Notre Dame, IN: University of Notre Dame Press, 2006): 26.
[147] John M. Czarnetzky and Ronald J. Rychlak, "An Empire of Law: Legalism and the International Criminal Court." *Notre Dame Law Review* 79, no.1 (2003): 90.

justice sectors, lack of resources, or the potential destabilizing effects of such processes.[148] As Drumbl documents, the belief that criminal law reflects the type of law best equipped to condemn extreme evil existed prior to the post-World War II period. Nevertheless, Nuremberg reflected a watershed moment, with the prosecution of Nazi leadership working to institutionalize an extant desire and perceived need for criminal prosecutions. Since the 1990s, the perceived need for criminalization that was institutionalized during Nuremberg has resulted in the ascendency of courtrooms as the primary venue for the censuring of extraordinary international criminality and the extreme evil it embodies.[149] As a result, the justice of transitional justice is that of retributive justice, with other forms of justice seen as a secondary "second-best" measure in the absence of criminal prosecutions.

Prognostic Beliefs - Law as Apolitical and Neutral

Related to the prognostic belief that criminal law is the best means for achieving justice is the notion that the law can transcend the politics of post-conflict reconstruction, providing an apolitical, neutral means for the achievement of justice. According to Shklar, legalism views politics as

> not only as something apart from law, but as inferior to law. Law aims at justice, while politics looks only to expediency. The former is neutral and objective, the latter the uncontrolled child of competing interests and ideologies. Justice is thus not only the policy of legalism, it is treated as a policy superior to and unlike any other.[150]

Thus, the liberal legalist frame structures the response to egregious acts of violence through the belief that human interaction is best governed by the mechanical application of law. Translated

[148] Miriam J. Aukerman, "Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice." *Harvard Human Rights Journal 15,* (2002):40.
[149] Drumbl, *Atrocity, Punishment, and International Law,* 4.
[150] Shklar, *Legalism*, 111.

into the field of transitional justice, this assumption regarding the moral superiority of law is manifested in the pervasive privileging of legal mechanisms in the aftermath of violent conflict.[151]

As Turner observes, "rather than being held hostage to politics, the application of legal form is seen as a means of transcending existing political conflict and allowing a society to move towards a new form of governance, shielded by the formality of law and procedure."[152] McEvoy refers to the perceived neutrality of the law as one of the 'seductive qualities of legalistic analysis,' recognizing that "claims that the rule of law speaks to values and working practices such as justice, objectivity, uniformity, rationality etc. are particularly prized in times of profound social and political transition."[153] Others have argued that the ICC is "the apotheosis of 'legalism'", reflecting an institutionalization of absolute faith in the nonpolitical nature of the law.[154] Advocates of the ICC eschew critiques of the Court as an instrument of politics, instead promoting the liberal legalistic view of the Court as not only divorced from political influence, but elevated above politics.

Prognostic Beliefs - The Goals of Criminal Justice

Transitional justice's liberal legalist conception of justice as retributive justice has been bolstered by the increasingly ambitious claims made about the relationship between transitional trials and post-conflict peacebuilding more broadly. As Leebaw documents, the range of goals associated with post-conflict prosecutions has increased significantly over the years, with

[151] Padraig McAuliffe, *Transitional Justice and Rule of Law Reconstruction: A Contentious Relationship*, (London: Routledge, 2013): 28.
[152] Turner, "Violence, Law, and the Impossibility of Transitional Justice," 20.
[153] Kieran McEvoy, "Beyond Legalism: Towards a Thicker Understanding of Transitional Justice," *Journal of Law and Society* 34, no. 4 (2007): 417.
[154] Czarnetzky and Rychlak, "An Empire of Law," 61.

criminal prosecutions seen as a means of achieving macro-level goals related to political and social transformation. Advocates of transitional trials have increasingly come to view trials as criminal justice processes through which rule of law is both exercised and strengthened, citing the utilitarian goals of trials as evidence of their potential impact on rule of law.[155] McAuliffe identifies three "forward-looking" objectives of transitional trials: deterrence and prevention, social pedagogy and expressivism (i.e. delineating the values of the post-conflict society), and reconciliation. These goals are seen as forward looking in that many transitional justice practitioners link these goals to the establishment of rule of law, democracy, and a sustainable peace.[156] Rather than seen as a detriment to peace, transitional trials are now seen as a critical step in achieving peace *through* justice. Thus, the liberal legalist frame tends to position the law "as the *means,* and justice, as the *end,* of transitional justice," implying a clear, causal connection between the criminal law and the attainment of justice.[157]

VI: The Dominance of Liberal Legalism

A number have scholars have noted not only liberal legalism's presence in transitional justice discourse, but its *dominance* as well. McEvoy in particular provides a forceful account of the dominance of legalism in the field, decrying the "strongly positivistic trend of scholarship and practice [that] persists in the legal understanding of transitional justice."[158] Referred to by Sharp as a 'dominant script,' and a 'deeply embedded narrative,' [159] the liberal legalism of transitional justice has been recognized for its power to "organize discussion[s] of the past – and

[155] Bronwyn A. Leebaw, "The Irreconcilable Goals of Transitional Justice," *Human Rights Quarterly* 30 (2008): 95–118.
[156] McAuliffe, *Transitional Justice and Rule of Law,* 144.
[157] Turner, *Violence, Law, and the Impossibility of Transitional Justice,* 134
[158] McEvoy, "Beyond Legalism," 415.
[159] Dustin N. Sharp, "Interrogating the Peripheries: The Preoccupations of Fourth Generation Transitional Justice." *Harvard Human Rights Journal* 26, (2013): 150-151.

plans for the future – around the legal (as opposed to moral) concepts of guilt and innocence."[160] Importantly, the primacy of the liberal legalist frame is not without its costs. As with all frames, the beliefs and values that constitute liberal legalism's organizing principles work to reflexively determine reality by deeming certain information, actions, or policies irrelevant to the task of post-conflict peacebuilding. While the selective function of these organizing principles allows for a quicker interpretation of past atrocities and identification of potential remedies, such comes with the risk of tunnel vision. As Wählisch aptly notes with regards to framing and legal interpretation, once the interpreter fixates on a particular framing of a case at hand, blind spots may emerge and tunnel vision may ensue to preserve the "goodness of fit" of the pre-existing frame.[161]

In the context of post-conflict transitions, the rise of the liberal legalist frame and its equation with a Western liberalist understanding of justice has had the consequence of sideling alternative conceptions of justice, such as the restoration of relationships, the ending of ongoing violence, and a redistribution of wealth, that may be *more* important to pursue in the aftermath of violent conflict.[162] The marginalization of local and traditional forms of justice in favor of retributive justice achieved via international intervention demonstrates the risk posed by selective power of frames in determining which aspects of reality are relevant to the situation at hand. The legalist frame's selective focus on the *illegality* of human rights violations excludes from consideration the bystanders to international crimes, neither victims nor perpetrators but affected by the violence of the past nonetheless. As an important demographic 'to which the

[160] Laurel E. Fletcher, "From Indifference to Engagement: Bystanders and International Criminal Justice," *Michigan Journal of International Law* 26, no. 4 (2005): 1016.
[161] Martin Wählisch, "Cognitive Frames of Interpretation in International Law," in *Interpretation in International Law*, ed. Adrea Bianchi, Daniel Peat, and Matthew Windsor, (Oxford: Oxford University Press, 2015): 336.
[162] Sarah M.H. Nouwen and Wouter G. Werner, "Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity," *Journal of International Criminal Justice* 13 (2015): 163.

enterprise of international justice is directed,' bystanders exist outside of criminal trials as neither subjects nor objects, "illustrat[ing] a challenge to law as a vehicle to establish the roles (victim/perpetrator) in and responsibilities (guilt/innocence) for serious violations of international criminal law."[163] According to Fletcher, by excluding bystanders from legal liability, criminal trials dismiss an important opportunity for this critical segment of society to confront their role in past violence and engage in social regeneration.[164]

An additional consequence of the liberal legalist frame's powers of selection is the "framing out" of the social relationships and contextual realities in which individuals, as subjects of the law, are embedded. Liberalism's emphasis on abstract individualism works to foster under the liberal legalist frame an understanding of the self as divorced from others, eschewing notions of the self as produced in connection with others. As a result, liberal legalism's professed objectivity and neutrality further work to obscure the lived reality of many of its subjects, a reality defined by pervasive inequality, unequal access to resources, and discrimination on the basis of group membership. At its core, the liberal legalist frame's declaration of abstract individualism and legal neutrality works to free legal actors from any moral or social responsibility for any deleterious consequences of resulting from their legal decision-making.

Furthermore, while the organizing principles of liberal legalism may be familiar to and resonate with the practitioners of transitional justice, the liberal legalist frame often faces considerable challenges resonating with the communities that transitional justice mechanisms are implemented in. The domestic criminal justice and human rights frameworks favored by Western liberal peacebuilders are not easily transplanted across societies. While master frames hold such a status because of their easy transportability from social movement to social movement, not

[163] Fletcher, "From Indifference to Engagement," 1016.
[164] Ibid, 1034.

much is known about the viability of a given master frame across cultures. Research by Markowitz suggests that the imposition of previously successful master frames in contexts with unconducive local and political environments can lead to mobilization failures for social movements seeking to gain momentum.[165] Within the context of transitional justice, the imposition of a liberal legalist frame in societies attempting to transition out of violent conflict can (and often does) lead to ineffective peacebuilding, with the external imposition of the liberal legalist model in societies in which such a master frame does not resonate.

Despite important challenges to the dominance of this frame from scholars such as Geoff Dancy, Christopher Farris,[166] Dustin Sharp,[167] and Kieran McEvoy,[168] the liberal legalist frame has proven difficult to dislodge from the field of transitional justice in meaningful ways. Why? Applying social movement and socio-legal research on frame strength certainly helps shed light on the dominance of legalism in transitional justice discourse and praxis. An important contribution from research on social movement framing is that not all frames have equal power to define situations, prescribe remedies, and motivate action. The strength of a frame is derived, in part, by the extent to which frames are shared – cognitively and/or culturally – by the broader community. The degree to which the specific content of a frame *resonates* with the cognitive and cultural worldviews of an audience can shape the effectiveness of the frame in mobilizing action and securing change.

At the individual level, tapping into cognitive biases that are held by the majority of society contributes to the strength of a frame. Iyengar's research on the media's framing of

---

[165] Lawrence P. Markowitz, "How Master Frames Mislead: The Division and Eclipse of Nationalist Movements in Uzbekistan and Tajikistan," *Ethnic and Racial Studies* 32, no. 4 (2009): 716-738.
[166] Geoff Dancy and Christopher Fariss, "Rescuing Human Rights Law From International Legalism and its Critics." *Human Rights Quarterly* 39, no. 1 (2017): 1–36.
[167] Dustin N. Sharp, "Emancipating Transitional Justice From the Bonds of the Paradigmatic Transition," *International Journal of Transitional Justice* 9, no. 1 (2015): 150–169.
[168] Kieran McEvoy, "Beyond Legalism," 411–440.

political issues, for example, found that the episodic framing of information – in which anecdotal stories of concrete events and individuals are featured front and center – are more readily cognitively received than thematic framing which provides general overviews of an issue. Since episodic framing resonates with the cognitive biases of individuals and are thus widely shared, news stories that frame an issue via reference to anecdotes are likely to be more persuasive than those featuring thematic framing.[169] At the collective level, frame strength also depends on the degree to which proffered frames resonate with the shared values, norms, and ideas of the target audience. Benford and Snow refer to this aspect of frames as *narrative fidelity*, the extent to which a given frame aligns with the culture of those on the receiving end of the frame. The more a frame is said to correspond with the cultural narrations, norms, and values of a group, the greater the narrative fidelity of the frame, and by extension, the greater the potential for mobilization.[170]

Viewed from the perspective of collective action frames, the strength of the liberal legalist frame in transitional justice discourse and praxis is derived, in part, from the fact that many liberal beliefs and values of the legalist frame resonate with the predominantly Western and/or Western-trained architects of the field. As Sharp observes, transitional justice emerged during the third wave of democratization to 'fulfill a teleological impulse to nudge illiberal, imperfectly liberal, and newly liberal states onto a more democratic path."[171] Positioned initially "as a handmaiden to liberal political transitions,' transitional justice was envisioned by its predominantly Western forefathers as a legal vehicle by which liberal goods such as Western liberal market democracy and respect for human rights could be delivered.

---

[169] Shanto Iyengar, *Is Anyone Responsible? How Television Frames Political Issues,* (Chicago: University of Chicago Press, 1991).
[170] Robert D. Benford and David A Snow. "Framing Processes and Social Movements: An Overview and Assessment." *Annual Review of Sociology* 26, no. 1 (2000): 622.
[171] Dustin N. Sharp, "Interrogating the Peripheries," 149.

This Western liberal paradigm of democratic transitions provided the normative foundation from which the field of transitional justice was formed, profoundly influencing the scope of the field and the type of justice mechanisms deemed necessary to achieve a sustainable peace.[172] The dominance of the liberal transitional justice paradigm has, for example, narrowed transitional justice's focus on human rights, pushing economic and social rights to the margins whilst prioritizing respect for the political and civil rights favored by Western liberal human rights and mainstream human rights discourse. As Kennedy notes, this liberal view of human rights privileges the state, the individual, the civil and the political over the traditional, economic, and social.[173] These liberal features of legalism resonate strongly with many of the Western institutions working on transitional justice issues, such as the International Center for Transitional Justice (ICTJ) and the United Nations. At the same time the liberalist impulses of legalism have resonated with the primarily Western practitioners of transitional justice, the legalist aspect of liberal legalism resonates strongly with the same practitioners, most of whom are international human rights lawyers trained in the West.[174]

The dominance of legalism within transitional justice discourses has been bolstered by the devotion of significant resources to the institutionalization of legal transitional justice at the international level, by the ICC, ICTY, and other international tribunals, and at the national level, by the creation of hybrid courts and specialized prosecuting authorities tasked with the prosecution of international crimes. As Nouwen and Werner note, "[w]hilst the tribunals' physical enforcement powers may still be weak, its normative power holds sway all over the globe…international criminal law has become an important frame for the interpretation of the

[172] Paige Arthur. "How 'Transitions' Reshaped Human Rights: a Conceptual History of Transitional Justice." *Human Rights Quarterly* 31, no. 2 (2009): 321–67.
[173] David Kennedy, "The International Human Rights Movement: Part of the Problem?" *Harvard Human Rights Journal,* no. 15 (2002): 101, 111.
[174] Elizabeth Andersen, "Transitional Justice and the Rule of Law: Lessons from the Field," *Case Western Reserve Journal of International Law* 47, no. 1 (2015): 307.

world."[175] The institutionalization of liberal legalism within criminal tribunals is a critical contributing factor to the continued dominance of the legalist frame, particularly in the face of challenges by many non-Western post-conflict states. When frames such as liberal legalism are institutionalized within relatively stable institutions such as the ICC or hybrid courts, such institutions are able to exert a stabilizing effect on the frame itself.

Research from cognitive psychology on cognitive processing also sheds light on the durability of the liberal legalist frame. As cognitive shortcuts, frames provide a pathway for the quick processing of the diversity of information encountered in social life. These shortcuts work to ease the anxiety of individuals faced with overwhelming amounts of information, enabling them to make sense of social encounters by drawing on pre-existing cognitive schemas and scripts. The liberal legalist frame performs a similar function for those attempting to make sense of past atrocities and identify initiatives to prevent the reoccurrence of such violence. As Drumbl observes:

> One way for the architects of international criminal process, most of whom are Western or Western-trained, to assuage anxiety is to turn to that which is familiar to them: namely, domestic criminal and human rights frameworks in liberal states. Even though experiences with these frameworks are not easily transferable to mass atrocity, it is somehow easier to replay preexisting doctrinal frameworks rather than develop new ones.[176]

The familiarity of domestic criminal justice processes and Western human rights discourses to the practitioners of transitional justice is precisely what enables the liberal legalist frame to maintain its primacy in the field.

[175] Nouwen and Werner, "Monopolizing Global Justice," 161.
[176] Drumbl, *Atrocity, Punishment, and International Law,* 23.

V: Liberal Legalism and the South African Transition

This section considers how South Africa's transition from apartheid was increasingly viewed by both domestic and international actors from the perspective of the liberal legalist frame. Indeed, the liberal legalist frame came to dominate key aspects of the South African transition, such as the drafting of the interim and final Constitutions and the legalization of the Truth and Reconciliation Commission's operations. This section argues that in order to understand the prevalence the liberal legalist frame in interpreting past violations of human rights as well as the priorities of the transition from apartheid, it is important to understand South Africa's historical relationship with liberalism, legalism, and the liberal doctrine of individual rights.

This section does not purport to provide a comprehensive account of the history of liberalism and rights discourse in South Africa. Indeed, such a task is beyond the scope of this paper, and best left to scholars who have documented such histories such as Saul Dubow, whose work has discussed the emergence a number of competing rights regimes, including liberal, Afrikaner, and African nationalist rights regimes, over the course of South Africa's colonial history.[177] Rather, this section examines the gradual imposition of the liberal legalist frame over the course of South African resistance to apartheid and the post-apartheid transition. As the following section discusses, the legal nature of the apartheid regime positioned legal advocacy as an important and necessary form of resistance. Battles against the legal system of apartheid took place primarily in the court system, battles which contributed to the growth of a body of lawyers and legal non-governmental organizations who would come to take up important positions in the post-apartheid era.

[177] Saul Dubow, *South Africa's Struggle for Human Rights,* (Athens, OH: Ohio University Press, 2012): 11.

While the liberal legalist frame undoubtedly resonated with parts of South African society, certain sectors involved in the post-conflict transition resisted the imposition of a purely liberal legalist frame, a resistance that is rooted in the historical hybridity of rights discourses in South Africa. This section provides a nuanced analysis of both the dominance of the liberal legalist frame during the post-apartheid transition as well as resistance to such a frame, demonstrating the difficulty of imposing transitional justice's master frame in contexts in which such a frame does not entirely resonate.

Embracing Legalism, Rejecting Liberalism

In 1948, the same year the international community, under the auspices of the United Nations, ratified the Universal Declaration of Human Rights, the first apartheid government assumed power, rolling out a series of legal regulations to solidify its program of racial segregation. The apartheid system was distinctly legal and anti-liberal in nature, a regime of separation made possible by laws that provided for apartheid's myriad injustices and indignities to be inflicted on the Black population with "savage efficiency."[178] During apartheid, the doctrines of legalism and legal positivism reigned supreme, with Namibian human rights activist Anton Lubowski observing that under apartheid, "[t]he prevailing view in ruling class South African jurisprudence was a notion of the legal system as a neutral, value-free forum for the settlement of disputes by the application of principles."[179] This embrace of legal positivism and legalism worked to ensure that judges could distance themselves from the social consequences of their rulings and evade moral responsibility for their judgments. Judges during apartheid

[178] Edwin Cameron, "Judges, Justice, and Public Power: The Constitution and the Rule of Law in South Africa," *Oxford University Commonwealth Law Journal* 18, no. 1 (2018): 83.
[179] Anton Lubowski, "Democracy and the Judiciary," *Democracy and the Judiciary, Proceedings of the National Conference on Democracy and the Judiciary, Organized and Presented by the Institute for a Democratic Alternative for South Africa* 16 (1988): 14.

frequently drew on the liberal, positivist conception of judges as mechanical decision-makers and neutral arbiters of the law who decide cases on their merits. As Cameron notes, judges, "in controversial cases, judges often claimed when giving pro-executive decisions that their task was merely to give effect to the 'intention of the legislature'."[180] This judicial bias towards the apartheid state was justified by liberal legalism's representations of the law as apolitical, above politics and political considerations.

The apartheid state's decision to refuse to ratify the UNHCR in 1948 resulted in South Africa's marginalization from the international community. Importantly, the apartheid regime supported by Afrikaner nationalism, viewed the liberal human rights discourse of the West as a tool of its enemies. Apartheid leaders remained convinced that the liberal focus on individual rights served as the slippery slope into communism, as Afrikaner nationalism often conflated communism and liberal humanism, conceptualizing both as a threat to the will of God, exercised through his 'chosen' people.[181] In response to the growing internationalization of the anti-apartheid movement and the spread of rights discourse during the 1970s, the apartheid regime bolstered the minority and communal rights established within the Boer republican tradition, rights predicated on the notion of racial supremacy for the White minority population.

As Dubow aptly notes, "If there was one issue united Afrikaner and African nationalisms through most of the second half of the 20th century, and throughout the Cold War, it was a mutual suspicion of liberal ideology and of individual-based human rights."[182] Whereas the white minority saw liberal ideology as a threat to apartheid, a regime rooted in the notion of racial group supremacy, the Black majority from the 1950s to 1980s rejected liberalism and its

[180] Edwin Cameron, "Dugard's Moral Critique of Apartheid Judges: Lessons for Today," *South African Journal on Human Rights* 26, no. 2 (2017): 310.
[181] Dubow, *South Africa's Struggle*, 79-80
[182] Ibid, 14.

doctrine of individual rights as an instrument of global imperialism.[183] Placing their faith in armed struggle, the ANC during this time framed the liberation movement as anticolonial and revolutionary socialist in nature, much more concerned with economic transformation than the individual rights central to liberalism. The ANC also rejected liberal human rights discourse, in part, because the human rights record of the ANC itself was less than pristine, with the organization vulnerable to claims of torture and abuse committed in guerrilla strongholds.[184]

The liberation movement's rejection of liberalism was driven, in part, by the historical complicity of white liberals in the perpetuation of segregation and Afrikaner racism. For example, during early Cape history, South African liberals proffered what they deemed a more humane form of racism than their Afrikaner migrant counterparts, supporting initiatives such as a qualified franchise for the Black population. As Dubow notes, "The humanitarian impulses of the Cape liberals should not be overestimated: with rare exceptions, liberals were motivated more by the desire to expand the realm of citizenship and rights for white colonists rather than for Africans."[185] For liberals, the expansion of citizenship to Africans was predicated on the colonized subjects' rejection of their tribal customs and cultural traditions deemed progress-resistant. While liberals during the apartheid-era positioned themselves more firmly against racial discrimination, their alliance with big business was viewed by liberation groups (particular Marxist groups) as providing the economic foundation for apartheid, an alliance that drove liberation leaders in the 1970s to separate from white liberals and create their own resistance organizations, as Steve Biko did when he split from the National Union of South African Students to create the South African Students' Organization. For Biko, one motivation for the

[183] Ibid, 90.
[184] Ibid, 93-97.
[185] Ibid, 33.

split was the complacency of white students who often spoke against apartheid but failed to follow such rhetoric up with acts of solidarity with their Black fellow members.[186]

Eschewing liberal rights rhetoric, the liberation movement's position on human rights was informed by a variety of rights traditions existing in South Africa, with Marxist discourse particularly influential in shaping the rights rhetoric and beliefs of the ANC during the 1950s and 1960s. Marxist leaders within the ANC were particularly suspicious of human rights, viewing such a concept as "coterminous with the bourgeois freedoms that underwrote class oppression. Hostility to liberal ideology therefore meant that politics pursued in the name of common citizenship or equal rights could be dismissed as irrelevant to the 'real' struggle, or even as a covert defense of the social inequities inherent in free-market societies."[187] Thus, the ANC began to draw on Marxist rights discourses to mount a direct challenge to capitalism's relationship to liberal rights.

The Freedom Charter of 1955 reflects the influence of Marxist rights rhetoric: the Charter's demand for equal rights, for example, is considered via its relationship to the equality of national groups, a positioning that implicitly collectivized human rights and stood in contrast to the individualistic human rights detailed in the UN Universal Declaration of Human Rights of 1948. Further evidence of Marxism's influence on the ANC's conception of human rights can be seen in the plethora of second-order rights delineated by the Freedom Charter. The Charter explicitly includes individuals' rights to share in the national wealth, access housing, healthcare, and employment. Oriented primarily towards substantive rights (rather than the procedural rights of liberalism), the Charter relies on the Leninist principle of 'democratic centralism' to describe

[186] Dirk Kotze, "Navigating South Africa's Loaded Political Lexicon," *The Conversation,* June 9, 2015, available at https://theconversation.com/navigating-south-africas-loaded-political-lexicon-42791.
[187] Dubow, *South Africa's Struggle,* 74.

the methods of rights enforcement.[188] As this paper discusses in following sections, the influence of Marxist rights rhetoric on the ANC's formulation of human rights enabled a degree of resistance to the imposition of the liberal legalist frame during the constitutional negotiations of the early 1990s, resulting in a hybrid constitution reflecting not only liberal notions of human rights, but progressive second-order rights as well.

Strategic Framing, Individual Rights, and Moral Legalism

Given the ANC's historical rejection of liberalism and Western human rights discourses in favor of revolutionary socialism and anti-imperialism ideology, the argument that the liberal legalist frame dominated the South African transition from apartheid may appear misplaced. However, as the following section demonstrates, the liberal legalist frame was indeed influential in not only shaping the interpretation of apartheid-era violence, but the nature of the transition and the post-apartheid state's response to such violence as well. The dominance of the liberal legalist frame during the 1990s was enabled, in large part, by a shift in the framing of resistance to apartheid by the ANC. From the mid-1980s onward, the terms of resistance moved from an anticolonial struggle to a human rights movement, an evolution that coincided with the global rise of rights talk and liberal democracy as the prototypical languages of post-conflict transitions.[189]

It was during this time that the anti-apartheid struggle became integrated into the third phase of the international human rights movement, bringing with it an increasing recognition on behalf of the ANC that taking on the mantle of human rights would provide the movement with a strategic advantage. Thus, the invocation of rights talk in the period leading up to negotiations

[188] Ibid, 74-75.
[189] Richard A. Wilson, *The Politics of Truth and Reconciliation in South Africa*, (Cambridge: Cambridge University Press, 2001): 1.

and the drafting of an interim constitution served a number of purposes. For the growing body of civil society organizations affiliated with the United Democratic Front, rights rhetoric worked to delegitimize the apartheid state, criminalize apartheid as a crime against humanity, and demand a unitary South Africa rooted in equality and other democratic principles. For liberation movement leaders, framing apartheid as a violation of the Black majority's rights served as a catalyst for mass mobilization. This shift towards rights rhetoric was purely strategic, an uneasy acceptance of liberal values for the purposes of garnering support for the resistance movement.[190]

As rights rhetoric gained currency within the South African liberation movement, resistance to apartheid's laws became increasingly legal in nature as well, with anti-apartheid lawyers and civil society organizations relying on relying on the law and liberal legalism in particular to defeat a legal regime of segregation and oppression. As Cameron notes, this kind of resistance entailed a paradox, "for legalist approaches were an integral part of the legal fight against apartheid, since anti-apartheid lawyers employed the very doctrines and logical methods and processes of the law to combat injustice."[191] Thus, a paradox of resistance emerged in which legalist notions of the law were used to combat the strict legalism that bolstered the apartheid regime. Fighting for a conception of the law as tool of social justice, as an instrument to secure rights and justice for all, anti-apartheid activists deployed the liberal legalist notions of equality and procedural justice found in Roman-Dutch and English common law to combat the injustices of apartheid-era legalism. Yet, the legalism deployed by anti-apartheid activists and judges was

> legalism with voom; legalism employed as one component in a larger moral strategy; legalism not to limit the possibilities of the law, but to insist on its minimal safeguards and to build its processes into something beyond legalism; legalism that subordinated itself to the expressly moral ends of law.[192]

---

[190] Dubow, *South Africa's Struggle,* 88-89
[191] Cameron, "Judges, Justice, and Public Power," 83.
[192] Ibid, 84.

This kind of moral legalism described by Cameron and deployed by anti-apartheid lawyers and judges was driven by and worked to bolster a vision of the law as transformative in nature, with such transformation requiring the invocation of legal principles in new, creative, and morally profound ways.

The legacy of legal resistance to apartheid had several important implications for the nature of the post-apartheid transition. Judges and lawyers were critical to the fight for liberation, occupying a central position in the struggle against apartheid that would play out in the courts. Driven by a belief in the nobler ends of the law, lawyers used a kind of 'moral legalism' to chip away at the legal regulations sustaining the apartheid regime.[193] This created a body of public interest lawyers ready to assist in the negotiated transition and drafting of the interim and final constitutions, bringing their strong tradition of legality with them.

A second consequence of the legacy of legal resistance to apartheid concerns South African civil society. Supporting anti-apartheid lawyers were a number of non-governmental legal institutions that emerged during the 1970s and 1980s and had developed considerable experience invoking the law for the pursuit of public interest projects. Organizations such as the Legal Resources Centre, lead by human rights lawyer Arthur Chaskalson, took the apartheid state to court, directly challenging key apartheid legislation such as the Group Areas Act. Chaskelson would go on to serve as the President of the newly created Constitutional Court from 1994 to 2001. Other anti-apartheid civil society organizations that drew on rights discourses to mount legal challenges to the apartheid state include the Centre for Applied Legal Studies at Wits University, Lawyers for Human Rights, and the Human Rights Commission.[194] Under apartheid, these distinctly legalist organizations developed significant institutional knowledge

[193] Ibid, 85.
[194] Dubow, *South Africa's Struggle,* 84.

and legal expertise, attributes that would later position them to be key contributors to a number of key legal battles occurring throughout the transition.[195]

A final consequence of South Africa's history of legal resistance is that the rights discourses invoked by civil society and anti-apartheid lawyers and judges were also embraced by the broader South African public. The conception of legal rights as a weapon of resistance took root among the trade unionist movement in particular, with the movement deploying rights discourse to advance union members' workplace interests and, at times, secure significant concessions from the state following legal battles in the courts. As Wilson notes, the increased use of rights rhetoric by social, labour, and liberation movements in South Africa during this time drove a liberal equation of rights language with "positively valued 'civil society', participation in public life, and free association to pursue the politics of interest."[196] With the concept of rights gaining currency among ordinary people during the late 1980s, recourse to litigation became an increasingly valued form of resistance. Thus, despite the deformation of the law that occurred under apartheid, a powerful tradition of legality remained and disseminated across broader South African society. Consequently, during the early 1990s, as the possibility for a negotiated transition became more likely, lawyers and civil society organizations quickly prepared to build on the legalist tradition that already existed within society. [197]

As the following sections demonstrate, the legacy of legalist resistance to apartheid as well as the ANC's gradual acceptance of liberalism enabled the liberal legalist frame to dominate a number of post-conflict processes salient to the democratic transition. The dominance of the liberal legalist frame can be seen in particular, in the drafting of the interim and final

[195] Interview with Naseema Fakir, Legal Resources Centre, Johannesburg, South Africa, June 5, 2018.
[196] Richard A. Wilson, "The Sizwe Will Not Go Away: The Truth and Reconciliation Commission, Human Rights, and Nation-Building in South Africa," *African Studies* 55, no. 2 (1996): 4.
[197] Dubow, *South Africa's Struggle,* 89, 105.

Constitutions, the legal fetishism of the TRC, the involvement of legal civil society in advocating for retributive justice, and the establishment of specialized units for the pursuit of retributive justice.

Liberal Legalism and the Constitutionalization of Human Rights

Frederik van Zyl Slabbert, one of the liberal power brokers involved in the secret negotiations between the ANC and the apartheid government notes that prior to 1990, the ANC leadership as well as the apartheid government "made it quite clear that a liberal democracy was the worst possible option for a future South Africa."[198] Nevertheless, as the negotiating process evolved, the ANC gradually came to recognize the value of liberal rights discourse in advancing the interests of the Black majority during the post-apartheid era. The product of strategic calculations rather than radical idealism, the ANC's embrace of liberal rights discourse and its emphasis on individual rights was in direct response to the apartheid government's insistence on the constitutional protection of "minority rights," a demand aimed at protecting the privileges accrued by the white Afrikaner population under apartheid.[199]

Following in the republican tradition of Habermas, who sought to reconcile the uncomfortable relationship between citizenship and nationalism, South African constitutionalists during the 1990s, including those aligned with the ANC, sought to reclaim the notion of rights, rule of law, and citizenship from the ethno-nationalist politics that provided justification for the apartheid regime's limitation of rights to those outside of the white majority. Constitutionalists during this time began to draw on a notion of human rights as individualistic and pan-ethnic in nature, with the allure of such a conceptualization rooted in the presumed ability of individual

[198] Ibid, 116.
[199] Ibid, 104-107.

rights to resist forms of ethnic particularism and ethno-nationalism. This individualistic understanding of human rights as a bulwark against the limitation of rights for any one group reflected the philosophy of non-racialism espoused by the African National Congress.[200] The ANC's embrace of non-racialism and individual human rights points to a hegemonic view of South African society comprised of "individual citizens, not a society of racial communities with group representation and minority rights." [201]

With the ANC opposed to the government's attempts to secure group rights for the white minority, the ruling National Party was forced to shift their position on individual rights. The Record of Understanding signed in September 1992 marked this shift, with the apartheid government seeking other methods of power-sharing to ensure the white minority's interests. Turning towards individual rights, with an emphasis on property rights, limitations on expropriation, and liberal checks and balances, the National Party sought to safeguard the economic and social privileges established under apartheid. The notion of a democratic order, based on individual human rights and a liberal political economy, worked to reassure the white business elite that their interests would be protected.[202] As senior ANC member Ngoako Ramalthodi asserted in 2011, the 1996 Constitution "reflects a great compromise, a compromise titled in favour of the forces of against change."[203]

Nevertheless, while the liberal legalist frame came to dominate the constitutional negotiations and resulted in the inclusion of the procedural rights typically prioritized within liberal ideology, the presence of a multiplicity of rights discourses in South Africa allowed for a degree of resistance to the imposition of a purely liberal legalist frame. Indeed, Chapter 2 of the

[200] Wilson, *The Politics of Truth,* 1-2.
[201] Ibid, 2.
[202] Ibid, 6.
[203] Dubow, *South Africa's Struggle,* 117.

1996 Constitution includes within the list of justiciable rights a number of second-generation socioeconomic rights, such as the right to food, water, housing, and healthcare. The property clause in the Bill of Rights is particularly Marxist in nature, allowing for the expropriation of land for both 'public purpose' and 'public interest,' the latter of which is defined, in part, by the South African state's commitment to land redistribution and reform.[204] Whereas a liberal legalist frame would hold individual rights to property as supreme, the history of Marxist thought within the liberation movement enabled resistance to a purely liberal legalist reading of the final Constitution.

The Liberal Legal Fetishism of the TRC

If the liberal legalist frame came to dominate the South African transition to democracy, how can the emergence of the Truth and Reconciliation Commission be justified under an interpretative frame that advocates strongly for retributive, rather than restorative justice? While liberal legalism certainly holds retribution through criminal justice to be the most appropriate response to extraordinary international criminality, liberal arguments for restorative justice such as the TRC do exist. As Daniel Philpott documents, such arguments tend to take one of two forms, both of which were present in the South African case. The first liberal argument in favor of truth commissions is a pragmatic one: in transitioning societies plagued by weak justice systems, potential spoilers of justice from the prior regime, or other characteristics that made retributive justice unfeasible, restorative justice exists as a "second best" option for addressing with past atrocities and establishing accountability.[205] Citing the risk for civil war, advocates of

[204] Edward Webster and Karin Pampallis, "Introduction: Revisiting the National Question," in *The Unresolved National Question in South Africa: Left Thought Under Apartheid and Beyond*, edited by Edward Webster and K. Pampallis, (Wits University Press: Johannesburg, 2017), 13.
[205] Philpott, *The Politics of Past Evil*, 39.

the South African TRC argued that the truth commission, particularly with its threat of retributive justice through the amnesty-for-truth scheme, would promote forgiveness and reconciliation while retaining criminal justice processes as a follow up mechanism. The second liberal argument in favor of the South African TRC was that truth commission proceedings would provide space for the "instantiation of the reciprocal, deliberative, democratic conversation between equals that, for them, is the heart of a just liberal democracy, the liberal democracy that they want[ed] to see realized in South Africa."[206] While short of retributive justice, a truth commission would reaffirm the dignity of all South Africans as rights-bearing citizens and promote a kind of alternative justice valued by the liberal tradition of deliberative democracy.[207]

While liberal justifications can certainly be found for the establishment of a truth commission, of greater importance here is the way in which the South African TRC unfolded according to a liberal legalist interpretive framework. Richard Wilson provides a forceful ethnographic account of the liberal legalism of the TRC, as he documents the tensions between a vision of the TRC, on the one hand, as an instrument of individual and social catharsis, and as a legal process committed to producing legal findings, on the other hand. This tension can be seen in the TRC's final Report, which delineated four conceptions of truth that had informed the Commission's mandate and proceedings: factual or forensic truth, personal or narrative truth, social truth, and healing and restorative truth. Yet, as Wilson observes, forensic and narrative truth were the main archetypes of truth under which the other forms of truth were absorbed. While narrative truth captured the attention of the TRC during its first year, this form of truth

[206] Ibid, 39.
[207] Amy Gutmann and Dennis Thompson, "The Moral Foundations of Truth Commissions," in *Truth v. Justice: The Morality of Truth Commissions,* ed. Robert I. Rotberg and Dennis Thompson, (Princeton: Princeton University Press, 2000) 22-44.

was later superseded by forensic truth, a legalistic notion of truth that influenced not only the operations of the Amnesty Committee, but the Human Rights Violations Committee as well. The TRC's approach to reconciliation was informed considerably by a legal-procedural narrative concerned first and foremost with the strict application of legal principles delineated in the TRC Act. The dominance of the legal-procedural narrative, legalist and positivist in nature, was made possible by the widespread involvement of lawyers and judges in the TRC proceedings. Lawyers not only assisted victims speaking before the Human Rights Violations Committee (HRVC), but represented perpetrators testifying before the Amnesty Committee as well.[208]

The Amnesty Committee proceedings were particularly shaped by a legal-procedural narrative, as the Committee was comprised largely of judges concerned with maintaining procedural fairness in the granting of amnesty applications. This legal-proceduralist reading of reconciliation positioned the workings of the Amnesty Committee as above politics, "immune to attempts to impose surrounding values and political judgments on the actions of the TRC."[209] By conducting its operations with cool, rational, and dispassionate proceduralism, the Amnesty Committee judges embodied the liberal legalist notion of legal actors as apolitical mechanical executors of neutral law. Importantly, because the TRC Act renounced retribution on behalf of victims and their families, "the TRC judges, bereft of their punitive function, were left only with legality itself. Pure proceduralism served as the organizing principle for the legalists' paradigm of reconciliation."[210] In the absence of retribution, Amnesty Committee judges embraced the proceduralism of legalism, eschewing reconciliation in favor of a legal understanding of "fairness," defined by Amnesty Committee judges as the direct application of legal statutes to the individual cases of human rights abuses that came before the Committee. Rather than focusing

[208] Wilson, *The Politics of Truth,* 47-48.
[209] Ibid, 104.
[210] Ibid, 106.

on a version of reconciliation that required a perpetrator's expression of guilt, the Amnesty Committee was more concerned with perpetrators fulfilling the legal requirements for amnesty as outlined by the TRC Act, legislation which "had already written reconciliation, remorse, and forgiveness out of the practices and decisions of the Amnesty Committee…[leading] to a discursive invisibility of reconciliation in amnesty hearings"[211]

A narrow, liberal legalistic approach to reconciliation also influenced the workings of the HRVC, particularly as it related to the interpretation of apartheid-era injustices and the classification of individuals as the primary victims of human rights violations. As Mamdani notes, "The Commissions analysis reduced apartheid from a relationship between the state and entire communities to one between the state and individuals. Where entire communities were victims of gross violations of rights, the Commission acknowledged only individual victims."[212] The first iteration of HRVC hearings focused solely on individual victims and their experiences with abuse at the hands of state agents. Importantly, not *all* individuals were prioritized by the TRC and acknowledged as 'official victims' of apartheid. Rather, the Commission prioritized the human rights violations committed by the state against members of the liberation movement and other political activists, narrowing the scope of victims testifying before the HRVC to "individual members of a fractured political elite."[213] This framing out of the experiences of the non-political elite – those with no political affiliation – meant that scores of disappearances, murders, and other human rights violations were excluded from the Commission's purview.

The dominance of the liberal legalist frame in Commission proceedings becomes especially clear when one considers the types of abuse considered by the HRVC. Recall that the

[211] Ibid, 105.
[212] Mahmood Mamdani, "Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa," *Diacritics* 34, no. 3-4 (2002): 33-34
[213] Ibid, 34.

liberal legalist frame is guided by a preoccupation with the violation of individual rather than collective human rights. The TRC's individualization of the victims of apartheid was accompanied by a narrow focus on violations of those individuals' bodily integrity rights, namely, unlawful detention, torture, and murder.[214] Proceeding from a distinction between violations of bodily integrity rights and subsistence rights, the latter concerning abuses such as coerced labor, forced removals, and economic coercion, the Commission explicitly focused on "acts or omissions that deliberately and directly inflict severe mental or physical suffering on a victim."[215]

Continuing its narrow focus on individual rights, the Commission, for example, held that the enforced transfer of a person from one area to another constituted a violation of an individual's right over one's person, but dismissed the coerced movement and labor undergirding the migrant labor system as falling outside category of bodily integrity rights. Mamdani suggests that this framing out of human rights violations against entire groups was driven by the fact that whereas bodily integrity rights violations involved *identified victims,* extra-economic forms of coercion involved unidentified individuals and groups. Focusing on identified victims enabled the TRC to provide remedy to those victims, namely, in the form of reparations. Yet, as Mamdani notes, "if the violence of apartheid targeted groups more than specific individuals, it would not be surprising if most victims of apartheid turned out to be unidentified individuals. This, in turn, would be an argument for giving reparations to communities rather than individuals."[216]

---

[214] Ibid, 34.
[215] South Africa, *Truth and Reconciliation Commission of South Africa Report Volume 1* (Cape Town: 1999): 80 para. 116.
[216] Mamdani, "Amnesty or Impunity?" 40.

Ultimately, the liberal legalist frame of the TRC had the effect of depoliticizing the egregious atrocities of the apartheid regime, divorcing the experiences of individual victims from South Africa's larger histories of colonization, systematic oppression, and abuse. Just as the liberal legalist frame holds the law as above politics, dislocated from context and history, the legal fetishism of the TRC resulted in a depoliticized and fragmented final *Report*. Indeed, the *Report* eschewed a victim-oriented narrative approach in favor of a narrow positivist, legalistic lens that emphasized single gross human rights violations. Individual experiences with human rights violations were relied on to reflect the broader experiences of entire groups, reflecting the individualistic orientation of the legal fetishism of the TRC.

Decontextualization of victim's experiences stemmed, in part, from the controlled vocabulary of Infocomm, the information processing system of the TRC itself. Data processors were tasked with transforming victim's and perpetrators' testimonies into a summary of 30 words or less, categorizing such experiences as one of 48 violations listed in Infocomm.[217] One consequence of the information processing system is that violations were treated as the same as other violations within the same category, erasing contextual differences in favor of a minimalist approach endemic to law. The final *Report* reflects this legalistic lens, with the *Report's* dearth of a central narrative further compounded by a failure to provide integrated explanations of the structural, personal, and ideological, and organizational catalysts for apartheid-era violence. Thus, the liberal legalism of the TRC resulted in a final *Report* that was comprised of individualized victims rather than a complex account of South Africa's history of colonialism, violence, and war.

[217] Wilson, *The Politics of Truth*, 46.

Specialized Prosecution Units and Retributive Justice

A final area in which the dominance of the liberal legalist frame can be seen is in the state's approach to prosecuting alleged perpetrators of apartheid-era human right violations, including those not granted amnesty by the TRC. While the TRC's truth-for-amnesty process served as a 'second best' mechanism for the pursuit of justice in South Africa, it would be wrong to state that retributive justice was entirely absent from the South African transition. Embracing the liberal legalist frame's prognostic belief that criminal law is the ideal mechanism for the condemnation of egregious acts of violence, the post-apartheid state created a number of specialized investigative and prosecuting units during the 1990s and early 2000s to hold individuals accountable for apartheid-era human rights violations.

The creation of investigative and prosecutorial units with primary jurisdiction over human rights abuses of the past suggests that the post-apartheid South African state considered criminal justice – at least at face value – as a suitable method through which such abuses could be condemned, individuals held accountable, and justice could be served. Part of the impetus for the creation of specialized prosecuting units in South Africa, Uganda, Kenya, and elsewhere is the notion that actors who comprise specialized units can be trained to develop particular expertise on the crimes that fall under their jurisdiction by repeatedly prosecuting cases that are similar in nature. Furthermore, the creation of specialized units for the prosecution of a particular class of crimes – such as gender-based violence or human rights abuses – can signal to the broader community the state's prioritization of criminal accountability for such crimes. By devoting resources and experts to the pursuit of justice for human rights abuses, for example, the state sends a message to the broader public about the range of criminal behavior not tolerated in the post-apartheid era.

The D'Oliveira Unit (1994 – 1998)

Following the confessions by members of the death squad unit Vlakplaas, the Harms Commission and subsequent Goldstone Commission initiated investigations looking into the apartheid state's use of secret hit squads. The Goldstone Commission report, published in March 1994, subsequently motivated outgoing President de Klerk to request then Attorney General Jan D'Oliveira to open an investigation into the activities of Vlakplaas and their former Commander Eugene de Kock. To achieve this end, the Attorney General established a special investigation and prosecuting unit – the 'D'Oliveira Unit' – that would go to spearhead several of the most high profile prosecutions of the post-apartheid period.

The D'Oliveira unit was comprised of prosecutors as well as investigators seconded from the South African Police Service (SAPS), a composition which allowed the team to maintain high levels of independence and efficiency as they were able to conduct their own investigations. The unit included about 20 carefully selected, highly skilled and experienced police investigators who expressed a willingness to investigate their former colleagues accused of political crimes. Several members of the investigation team investigated human rights abuses perpetrated by former state security forces, while other members focused their efforts on crimes committed by liberation movement members as well as right wing political faction members. [218] The D'Oliveira unit's investigative and prosecutorial work was responsible for the prosecution of several apartheid state agents, including former head of the Vlakplaas hit-squad Colonel Eugene

[218] Ole Bubenzer, *Post-TRC Prosecutions in South Africa: Accountability for Political Crimes After the Truth and Reconciliation Commission's Amnesty Process* (Leiden: Koninklijke Brill NV, 2009) 18-20.

de Kock as well as Wouter Basson, former head of the Project Coast, the SADF' secret biological and chemical weapons programme. [219]

Running parallel to the early stages of the TRC, successful prosecutions during this time – although limited in number – are said to have also increased the number of amnesty applications filed with the TRC. According to Pedain, amnesty applications were significantly higher amongst groups that had members that were under prosecutorial investigation or subject to civil suits.[220] For example, the conviction of Eugene De Kock provided an incentive for other members of the State Security Branch to secure amnesty, lest become the subject of prosecution. This incentive was magnified by the fact that, during his sentencing mitigation hearing, De Kock disclosed information about other apartheid-era crimes the unit participated in.[221] Thus, successful prosecutions such as De Kock's enhanced the credibility of the threat of prosecutions, motivated a number of Security Branch members to apply for amnesty, as well as contributed to the broader truth-telling process. Conversely, the 1996 acquittal of former defense minister Magnus Malan and other senior military officials had a negative impact on the number and scope of applications received. Howard Varney and Jeremey Sarkin argue that the failure to secure a conviction in such a high-profile case reduced the incentive for perpetrators to apply for amnesty at the TRC, thereby limiting the quantity and quality of information gleaned from other amnesty applications and hearings, information that was ultimately incorporated into the final narrative produced in the final TRC report.[222]

---

[219] Volker Nerlich, "Lessons for the International Criminal Court: The Impact of Criminal Prosecutions on the South African Amnesty Process," in *Justice in Transition: Prosecution and Amnesty in Germany and South Africa*, (Berlin: BWV Verlag, 2006): 65.
[220] Antje Pedain, "Was Amnesty a Lottery? an Empirical Study of the Decisions of the Truth and Reconciliation Commission's Committee on Amnesty." *South African Journal of Criminal Justice* 121, no. 4 (2004): 785–828.
[221] South Africa, *Truth and Reconciliation Commission of South Africa Report Volume 5* (Cape Town: 1999): 202.
[222] Howard Varney and Jeremy Sarkin, "Failing to Pierce the Hit Squad Veil: an Analysis of the Malan Trial." *South African Journal of Criminal Justice* 10, no.2 (1997): 141-161.

Investigative Task Unit (1994)

In August 1994, four months after the election of President Mandela, the newly appointed Minister of Safety and Security created the Investigative Task Unit (ITU) as a response to poor investigations conducted by the KwaZulu Natal Police force into allegations of political violence in the KwaZulu Natal region during before, during, and after the democratic elections. Operating at the same time as the D'Oliveira Unit, the ITU was initially given primary responsibility for investigations into the KwaZulu Police Force itself. In September 1994, this responsibility was later expanded to investigate political hit squad activity in general, with the expanded mandate to include hit squads formed from the ANC's self-defense units in the KwaZulu-Natal midlands. To ensure the independence of the ITU and provide legal supervision, the ITB was created to oversee the investigations of the ITU.[223] In many respects, the ITU's work represented a continuation of the investigations began under the Goldstone Commission (created in 1991) and the Transitional Executive Council (in place in the months prior to the 1994 April elections). The ITU was positioned outside of police ranks and controls, reporting to the Minister of Safety and Security through the ITB, which was comprised of three civilian lawyers who provided legal supervision for the ITU. The ITU's investigative work was responsible for the indictment of former Defence Minister Magnus Malan and 19 others for their roles in the creation and training of the secret hit squads.

The National Prosecuting Authority (1998-Present)

South Africa's constitution, based on the interim constitution that resulted from the negotiated settlement between the ANC and other political forces in 1994, provided an ambitious framework from which the process of nation-building and constitutionalism could

[223] Ibid, 144.

progress. Part of this framework was the creation of “a single national prosecuting authority… [that] has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings”.[224] This provision provided for the presidential appointment of a National Director of Public Prosecutions (NDPP) as the head of the prosecuting authority, as well as delineated the National Director’s responsibilities and powers over the prosecution process.[225] The National Prosecuting Authority Act of 1998 was passed by the South African Parliament to fulfill the requirements presented by Section 179 of the Constitution.

Following the creation of the NPA, all of the D'Oliveira Unit's dockets that remained unprosecuted were transferred from the D'Oliveira Unit to the new prosecuting authority's offices in Pretoria. In November 1999, the Human Rights Investigative Unit (HRIU) was established within the NPA by then Minister of Justice Dullah Omar to determine which individuals not granted amnesty by the TRC's truth-for-amnesty process would be prosecuted for past crimes and pursue such cases.[226] In addition, TRC-related prosecution dockets from regional NPA offices were transferred to this new unit. Despite the fact that many of the dockets transferred from the D'Oliveira concerned ongoing investigations, including several that had reached advanced stages, there was "strangely no consultation or cooperation between D'Oliveira and the [HRIU] team."[227] Lead by Vincent Saldanha, seconded from the Legal Resources Centre, and his deputy Brink Ferreira, a former Witwatersrand prosecutor, this working group was comprised of four lawyers, with some working full-time and others working on a part-time basis. Saldanha himself worked part-time, with no experience as a public prosecutor. Saldanha's past experience

[224] Constitution of the Republic of South Africa Act 108 of 1996, section 179(1) and section 179(2).
[225] Ibid, Section 179(1a).
[226] Bubenzer, *Post TRC Prosecutions*, 24
[227] Ibid, 25.

in the human rights sector and as an attorney representing a number of victims at the TRC informed the human rights-and victims-oriented approach the unit took towards their work. Several members of the team also had prior human rights work experience - both in the TRC and NGO-sector. As such, the unit was comprised of several team members originating from outside of the prosecution structures already established in South Africa. While this specific unit composition ensured a high degree of prosecutorial independence, the composition of the unit also meant that the unit had to appoint police to conduct investigations and NPA prosecutors to move the cases to the indictment stage. [228]

In 2000, the dockets were further transferred to the Directorate of Special Operations (DSO). In 2003, institutional restructuring continued as the Priority Crimes Litigation Unit (PCLU) was established, a specialized prosecuting division with a wide mandate including the prosecution of perpetrators not granted amnesty by the TRC. The PCLU maintained no investigative powers; as such, the unit relied on the SAPS and the DSO for the investigations of the TRC-related cases. To date, the PCLU has been plagued by a lack of resources and cooperation from SAPS, a dearth of political will to prosecute apartheid-era crimes, and executive branch interference in the workings of the PCLU. Only a handful of prosecutions have been initiated, including the prosecution of liberation movement affiliated foot soldier Buyile Ronnie Blani, a plea agreement reached with the perpetrators involved in the attempted murder of Reverend Frank Chikane, and, more recently, the indictment of police officers involved in the disappearance, torture, and murder of ANC courier Nokuthula Simelane.

The plethora of specialized prosecuting units established to pursue retributive justice for apartheid era crimes points to the South African state's interpretation of past violence as well as the appropriate response to such violence as guided by the liberal legalist frame. The

[228] Ibid, 25-29.

prosecuting units' focus on individual violations of human rights and the condemnation of such violations through criminal law reflect key organizing principles of the liberal legalist frame. Nevertheless, the failure of the state to actively prosecute apartheid era crimes, as well as the intense political interference into the workings of the PCLU with regards to apartheid-era crimes, indicate that the embrace of the liberal legalist frame may have been the product of strategic framing by the post-apartheid state rather than genuine commitment to retributive justice. Nevertheless, such strategic framing hints at the presumed necessity of pursuing individual criminal accountability for apartheid-era crimes, a necessity derived from the application of the liberal legalist frame over the course of the democratic transition.

Civil Society and Retributive Justice

The dominance of the liberal legalist frame is not limited to the actions of the South African state. In addition to the creation of specialized prosecuting units, the dominance of the liberal legalist frame over the course of the South African transition can be seen in both the public discourses and organizational actions of a number of civil society organizations involved in retributive justice processes since 1994. While the relationship between civil society and transitional justice processes remains under-theorized, a review of the literature on the subject suggests that many civil society organizations have adopted a conception of transitional justice rooted in the narrow liberal legalist frame, defining justice "in terms of a relationship with the state, individual accountability, and as delivered through institutional mechanisms and approaches."[229] According to Gready and Robins, post-conflict civil society organizations – particularly human-rights oriented NGOs – tend to position the state as the ultimate provider of

[229] Paul Gready and Simon Robins, "Rethinking Civil Society and Transitional Justice: Lessons From Social Movements and 'New' Civil Society," *The International Journal of Human Rights* 21, no. 7 (2017): 957.

justice, with justice defined at the national or global level. To secure justice, such organizations typically interact with transitional justice mechanisms in five different, but not mutually exclusive ways: persuasion/advocacy; support; mobilization/capacity-building/education; substitution/independent action; and space for modelling alternatives. Adopting a largely instrumental view of civil society within the context of post-conflict transitions, the existing transitional justice literature on civil society has focused largely on the role of national and local organizations in shaping transitional justice agenda and influencing the range of justice mechanisms that are put in place. [230]

How civil society organizations work to shape the transitional justice agenda depends, in part, on the degree to which the liberal legalist frame of the transitional justice discipline is embraced or eschewed by such organizations. In South Africa, the embrace of liberal legalist discourse provided civil society organizations with access to key discursive resources and, by extension, political opportunities to influence the nature of transitional justice following the transition. As the following section demonstrates, since 1994, two distinct discursive communities have emerged within civil society – the human rights faction and the conservative faction – with each community drawing on the liberal legalist frame in similar as well as divergent ways to accomplish their respective retributive justice goals.

The Human Rights Faction

The human rights faction, constituted by victim-oriented non-governmental institutions that emerged during the 1980s as well as new organizations created following the democratic transition, has consistently called for the prosecution of apartheid-era human rights abuses, relying on the language of liberal legalism at times to do so. Organizations such as the

[230] Ibid, 959-961.

Khulumani Group, the Southern African Litigation Centre, and the Legal Resources Centre have embraced elements of the liberal legalist frame as they attempt to put pressure on the state to pursue justice for human rights victims' and survivors. The Khulumani Group, in particular, has been the most vocal advocate for retributive justice in the post-apartheid era, with retributive justice seen as the only remaining option for justice in the face of perpetrators unwilling to provide information to victims' families about the fate of their missing or killed ones. Central to the Khulumani Group's argument in favor of retributive justice is the TRC's denial of amnesty to perpetrators accused of apartheid-era human rights abuses. According to the TRC's founding legislation, the denial of amnesty should have triggered further investigations and, ultimately, prosecutions by the National Prosecuting Authority. This line of reasoning reflects liberal legalism's emphasis on the apolitical application of the law; if the execution of the law was truly apolitical, those denied amnesty should be subject to further criminal accountability processes regardless of the political nature of those transgressions.

In 2007, the Khulumani Group, along with the Centre for the Study of Violence and Reconciliation, the International Center for Transitional Justice, and several family members of human rights victims initiated legal proceedings against the South African state and the National Prosecuting Authority specifically to challenge the constitutionality of prosecution policy amendments concerning apartheid-era crimes. Such amendments sought to provide perpetrators of apartheid-era crimes with opportunities for indemnity for prosecution in exchange for truth about their crimes. According to the applicants in the case, the prosecution policy amendments reflected an improper extension of the TRC's amnesty proceedings, "infring[ing] on the constitutional rights to dignity, life, freedom and security of the person, and equal protection

before the law."[231] While the state argued that the prosecution policy amendments would contribute to nation-building, reconciliation, development, and reconstruction, the applicants rejected such considerations, holding goals such as nation-building as "entirely irrelevant in relation to the decision whether or not to prosecute alleged criminals."[232]

Importantly, the applicants challenging the prosecution policy amendments sought to frame the prosecution of apartheid-era human rights abuses as not only of the utmost importance, but also as part of the normal application of the law and should be viewed as no different than the prosecution of instances of ordinary criminality. Richard Moultrie of the Legal Resource Centre added that "many of the factors referred to in the amended policy are irrelevant in the exercise of the ordinary discretion a prosecutor exercises to proceed with a case or not. Prosecutorial discretion must be based primarily on the question whether the case is winnable on the available evidence or on evidence that may be uncovered in the course of further investigation."[233] By drawing on values such as the equal protection before the law, administrative fairness and justice, as well as "ordinary" prosecutorial discretion, the applicants in the prosecution policy case invoked important beliefs of the liberal legalist frame. Such references reflect the liberal legalist assumption that the law should be applied in a neutral, apolitical manner, with political considerations such as reconciliation and degree of remorse considered inappropriate within the context of individual criminal accountability. According to the human rights faction, the pursuit of justice for the apartheid-era human rights abuses should be decided with reference to factors normally deployed by prosecutors exercising discretion in cases of ordinary crimes. Victims and perpetrators should be subject to equal treatment by the

[231] "Legal Challenge: Prosecution Policy is Unconstitutional," Khulumani Support Group, July 18, 2007, accessible at https://www.khulumani.net/khulumani/statements/item/15-legal-challenge-prosecution-policy-is-unconstitutional.html
[232] Ibid.
[233] Ibid.

National Prosecuting Authority as prosecutors decide whether to continue investigations and initiate legal proceedings in apartheid-era human rights cases.

The human rights faction has also made references to South Africa's obligations under international law as support for the continued pursuit of criminal justice for apartheid-era crimes, references that also reflect liberal legalism's conception of the law as depoliticized and neutral. For example, in their legal challenge asserting the unconstitutionality of the prosecution policy amendments, the Khulumani Group argued that the amendments were also "a violation of South Africa's international law obligations arising from the Covenant for Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment."[234]As with many transitional justice advocates in general, the human rights faction in South Africa, by invoking international law as support for criminal accountability, has implicitly framed its demands for justice as "universally objective and uncontroversial" rather than political or moralistic in nature, with such objectivity garnered because the demands are rooted in seemingly neutral and apolitical international human rights law. [235]

The Conservative Faction

Interestingly, the conservative faction, while consistently opposed to continuing the prosecution of the so-called political crimes, has drawn on similar liberal legalist discourse, particularly that of individual equality before the law, in making their objections. Civil society organizations representing former apartheid-era government and military officials such as the Foundation for Equality Before the Law, the Democratic Alliance, the FW de Klerk Foundation, and the Freedom Front Plus have argued that prosecutions, if they were to occur, should be

[234] Ibid.
[235] Jelena Subotić, "The Transformation of International Transitional Justice Advocacy," *International Journal of Transitional Justice* 6, (2012): 106, 118.

evenhanded, focused not only on former security force members but liberation movement members as well. An April 2016 press release by the Foundation for Equality Before the Law, for example, asserted that

> Although damning evidence is available to prosecute certain members…of the ANC for several murders…the National Prosecuting Authority have not in these cases taken any steps to prosecute the alleged offenders…In contrast, several leaders of the National Party, generals, and other former members of the Defence Force and Police were prosecuted and are still being prosecuted. We plead for equality before the law![236]

Presenting at a conference held by the Institute for Justice and Reconciliation in 2005, David Stewart, then Executive Director of the FW de Klerk Foundation, asserted that even-handed prosecutions were demanded by the constitution's principle of equality before the law. Failure to prosecute the atrocities committed by liberation forces would, according to the conservative faction, result in vengeful political trials and victors' justice.[237] The assumption implicit in such an argument is that retributive justice achieved via individual criminal accountability would be justified as central to the nation-building process only if state prosecutors ignored the political context in which atrocities were committed and sought equal accountability from both the oppressors and the oppressed. This logic reflects the prognostic beliefs of the liberal legalist frame, beliefs that conceptualize criminal justice as the apolitical application of legal rules by neutral arbiters of justice.[238] Importantly, the way in which the conservative faction framed equality before the law suggested only two courses of action would be appropriate for the National Prosecuting Authority: cease prosecutions of past human rights abuses completely, or prosecute members of the ANC for human rights abuses as well. With the ANC reluctant to

[236] Foundation for Equality Before the Law, "Press Release – Let Justice Be Done Regardless of the Consequences," April 27, 2016, accessible at https://www.samirror.com/press-release-27-april-2016.html.
[237] David Stewart, Panel Presentation at the Institute for Justice and Reconciliation Conference "The TRC: 10 Years On," (April 20, 2006).
[238] Bubenzer, *Post-TRC Prosecutions,* 106

prosecute members of its own political organization, the conservation faction's emphasis on equality before the law was aimed at convincing the state to end apartheid-era prosecutions completely.

Reviewing the use of liberal legalist discourse by South African civil society groups across the political spectrum is particularly illuminating when one considers the ways in which the liberal legalist frame and its notions of equality and mechanistic legal decision-making were deployed by both the human rights and conservation factions to achieve vastly different goals. Whereas human rights NGOs such the Khulumani Group saw equal protection before the law as legitimating the prosecution of apartheid-era crimes committed largely by apartheid state actors, the conservation faction deployed the same principle to dissuade the state from continuing the prosecution of past abuses. In this way, the role of the liberal legalist frame appears particularly malleable: the frame and its diagnostic and prognostic beliefs can be used as both an integral force for individual criminal accountability as well as a strategic resource that supports continued impunity.

VI: Conclusion

From a frame analytic perspective, the core assumptions of liberal legalism certainly constitute a master frame that has come to dominate both transitional justice scholarship and praxis. Scholars theorizing about the role transitional justice may play in the aftermath of violent conflict and practitioners advocating for transitional justice on the ground have largely proceeded from an understanding of justice as *legal* justice, achieved only through the condemnation of extraordinary international criminality by criminal justice processes. The so-called neutral, depoliticized principles of liberal legalist's conception of justice are said to not only serve as the

foundation from which the post-conflict state is to be constructed, but also measures by which the success or failure of the transition can be ascertained. Justice, under the liberal legalist frame, is positioned as the primary goal of transitional justice, with the law providing the most effective means to achieving this disciplinary goal. As Turner suggests, "in this way, justice forms an ethical horizon, a pre-determined outcome achieved through the implementation of legal rules."[239] The result is a disciplinary prioritization of legal mechanisms for responding to the traumas of the past.

A central critique of the firm hold liberal legalism has on transitional justice research and praxis is that the field's emphasis on a purely legal notion of justice prevents genuine political engagement that may contest these understanding of law and justice. As Turner notes, "inclusion and exclusion from the new political regime is shaped by the narrative of transition and the extent to which groups and individuals are willing or able to articulate their positions in the language of transitional justice."[240] With politics confined to the margins of post-conflict political life, the liberal legalist frame often works to regulate and silence different conceptions of justice that may emerge in the aftermath of mass human rights abuse. The imposition of an international blueprint for transitional justice rooted in the liberal legalist frame, a master frame that emphasizes *legal* justice achieved through the application of neutral legal rules, has the potential to not only result in mismatch between the beliefs of the master frame and the requirements of the local post-conflict context, but also a homogenization of the interpretation of justice that marginalizes and excludes those who promote an alternative definition. In this way, the liberal legalist frame may reproduce patterns of conflict, violence, and exclusion that are more characteristic of the pre-transition period.

[239] Catherine Turner, "Deconstructing Transitional Justice," *Law and Critique* 24, no. 2 (2013): 206.
[240] Ibid, 206.

One consequence of this homogenization is that liberal legalist discourse works to legitimize post-conflict actors who rely on such language, regardless of whether or not such references to liberal legalist beliefs are sincere or the product of strategic calculation. The South African state's embrace of liberal legalism and subsequent creation of specialized prosecuting agencies is emblematic of the legitimizing effect of the master frame. While a number of specialized prosecutorial organs have been created since the democratic transition to investigate and prosecute apartheid-era human rights violations, such units have suffered significantly from political interference by the executive branch and a shortage of staff and resources. If the South African state was truly interested in criminal prosecutions as a mechanism to condemn the extraordinary international criminality that plagued the state during the apartheid era, the units' independence would have been respected and sufficient resources would have been provided. Thus, the liberal legalist frame can be utilized to legitimize the post-conflict state without demanding concrete actions that fulfill the prognostic beliefs of the frame.

It is important to note, however, that while critiques of the liberal legalist frame that so dominates the field of transitional justice certainly have merit, such critiques often ignore the ways in which liberal legalist discourse can also empower individuals, enabling them to articulate their retributive justice goals, and persuade others to act in line with such goals. After all, the law exists as a fundamental discursive tool in which the post-conflict justice demands can be made. This dissertation seeks to understand the ways in which the language of liberal legalism enters the interpretive processes of various actors involved in retributive justice activities. How do actors involved in retributive justice processes appropriate the legalistic discourse of transitional justice to further their respective retributive justice goals? Similarly, how do such

actors deploy the language of the law more broadly, in ways that challenge the liberal legalistic model of transitional justice that so dominates the field?

For prosecutors tasked with the prosecution of apartheid-era crimes, the embrace of liberal legalism as an interpretative frame is at the very core of their professional ideology. Rather than having to choose between a liberal legalist frame and alternative conceptions of justice, human rights prosecutors face a different kind of question: should the charges to be levied against human rights perpetrators be constructed with reference to domestic law or international law? As Chapter 3 demonstrates, domestic and international law reflect two variants of the liberal legalist frame. How do prosecutors decide which variant to draw on as they construct charges as alleged human rights abusers? What are the implications of invoking a domestic law frame over an international law frame?

Chapter 4 takes a different approach to the dominance of liberal legalism, exploring the strategic use of the frame as well as resistance to the frame by the family members of victims of human rights abuses. While the liberal legalist master frame is often contested by post-conflict societies in which liberal legalism is frequently imposed, the frame is often strategically appropriated by victims families as well. Analysis of the Simelane family's pursuit of justice for Nokuthula Simelane, who was abducted, tortured, and likely killed by the apartheid regime's security forces, suggests that the liberal legalist frame can serve as strategic discursive resource for victims' families to put pressure on the state to initiate legal proceedings, as well as challenge understandings of citizenship that have emerged in the post-conflict era. In this way, rather than marginalizing victims from genuine political engagement, liberal legalism may provide marginalized communities with opportunities to contest hegemonic notions of citizen-state relations in the post-conflict period.

CHAPTER 3:

CHARGING DECISIONS AND LEGAL FRAMING

I: Introduction

This chapter examines legal decision-making within the context of transitional justice trials in South Africa, with focused analysis on the decision-making processes of prosecutors involved in the criminal prosecution of Wouter Basson, a South African cardiologist and state official accused of planning and implementing crimes such as the mass murder of anti-apartheid detainees and "enemies of the state." The *Basson* case offers fertile ground from which to explore the power of prosecutors to determine the *nature* of charges against an alleged perpetrator, a decision which has normative and practical consequences for the post-conflict pursuit of justice. Initially, the state charged Basson with, *inter alia*, six counts of the conspiracy to murder, charges which related to the planning and facilitation of murders that took place abroad. The conspiracy charges against Basson were framed as ordinary crimes (i.e. murder) proscribed under domestic law. Following the quashing of those six charges by the trial judge on jurisdictional grounds, the state ultimately appealed to the Constitutional Court. In the state's appeal, the nature of the charges shifted dramatically, with prosecutors invoking international customary and human rights law to justify jurisdiction over crimes committed abroad.

Why did domestic law dominate the framing of the charges during trial and appeals phase? What prompted a shift in the framing of the charges during the appeals phase, with the conduct of Basson framed as international crimes prohibited by international law? To answer these questions, this chapter applies a frame analytic approach to legal decision-making in the *Basson* case over time. As an interpretivist method to study legal decision-making, frame

analysis considers how individual phenomena, concepts, and ideas are interpreted, categorized, and structured into a decision frame that determines what content is relevant to the decision at hand. Importantly, frame analysis requires a sensitivity to the broader environment in which decision-making is embedded, the organisational and legal context in which decisions are taken, and the methods of interpretation and meaning-making of prosecutors themselves.

As decision frames reflect the interplay between the history and politics of a given time, this chapter offers a micro-frame analysis of the *Basson* case over time, examining variation in the (re)construction of Basson's alleged conduct as the case progressed from the trial phase to the appeals phase. Supported by semi-structured interviews with state prosecutors involved in each stage of the case, this chapter demonstrates the utility of frame analysis in retributive justice research, particularly as it relates to the domestic prosecution of international crimes and the indirect enforcement of international law. A comparative analysis of the social surround, decision field, and worldviews of the prosecutorial teams across the *Basson* trial and the subsequent appeals process demonstrates how contextual, organisational, and individual factors interacted to fundamentally shape the divergent framing of Basson's conduct.

This chapter argues that domestic and international law served as *decision frames*, working to structure the interpretation of Basson's human rights violations as either instances of ordinary domestic criminality or extraordinary international criminality. The consistent framing of Basson's alleged conduct as ordinary crimes proscribed under domestic law despite democratic South Africa's embrace of international criminal law resulted from the routinisation and institutionalisation of the domestic law frame during the apartheid era. While the codification of human rights norms in the Constitution of the Republic of South Africa created an important shift in the decision field of South African prosecutors, this shift was mediated by

the background experiences of the individual prosecutors themselves. In addition, the framing behavior of other actors involved in the *Basson* case, combined with shifts in venue from the trial court to the Constitutional Court, influenced the type of frame deployed by the prosecution team. Frame analysis offers an important opportunity to better understand the decision-making processes of human rights prosecutors as they construct charges against human rights offenders.

The remainder of this chapter is structured as follows: Section II places the discretionary decision to charge perpetrators within the context of the indirect enforcement of international law; Section III details the frame analytic approach to legal decision-making, discussing the organizing principles of the domestic and international law frames; Section IV provides an overview of the *Basson* case as it progressed from the trial to appeals phase; Section V explores why the domestic law frame dominated most of the legal proceedings; Section VI explores the factors that contributed to the emergence of an international law frame; and Section VII offers some concluding remarks.

II: Domestic Human Rights Trials and the Decision to Charge

While the scope of prosecutors' discretionary powers has expanded in recent years, this paper is concerned with one type of discretionary decision: the decision to charge. While certainly not absolute, a prosecutor's ability to determine the laws that are said to criminalise the conduct in question is a discretionary power derived, in part, from the fact that domestic transitional justice trials and the human rights violations they seek remedy for often exist at the intersection of domestic and international law. On the one hand, domestic prosecutions of human rights abuses can be carried out vis-à-vis reference to domestic statutes and legislation, with the charges against the accused determined in light of domestic prohibitions on acts such as rape,

assault, and murder. On the other hand, the same criminal behavior can often be interpreted with reference to international criminal law prohibitions on conduct such as war crimes, crimes against humanity, and genocide. These crimes are referred to as international crimes, conduct that is so egregious it threatens the fundamental values – and interests – of the entire international community.

In addition to differences in scale and gravity, international crimes differ from ordinary crimes with regards to jurisdiction to criminalise certain conduct and enforce the law. States maintain jurisdiction to enforce domestic criminal law in response to all criminalised acts that take place within its territory, regardless of the nationality of the offenders. International law's principle of non-interference restricts a state's exercise of extraterritorial jurisdiction - the extension of national criminal jurisdiction to matters taking place beyond the territory of a state - to situations in which there is a real and substantial link between the state and the conduct in question.[241] A state's authority to punish violations of its national law that take place abroad requires a direct link between the given conduct and the prescribing state.

In contrast, the threat posed by international crimes to the international legal order empowers states everywhere to prosecute such conduct, even in the absence of territorial or nationalistic links to the crime. International crimes are said to violate *jus cogen* norms and target the shared humanity of civilized nations, a notion reflected in the customary international law principle of universal jurisdiction. As threats to the constitutive values of humanity, "international crimes are not domestic matters" and as such, are subject to universal jurisdiction, giving all states – including third party states with no special link to the crime - the authority to prosecute and punish perpetrators of genocide, crimes against humanity, war crimes, and

[241] United Nations Charter, Art. 2 no. 1,. See also Maziar Jamnejad and Michael Wood, "The Principle of Non-Intervention," *Leiden Journal of International Law* 22, no. 2 (2009): 345–381.

torture.[242] Whereas states that assert jurisdiction based on territorial or nationality links do so for the sake of domestic rule of law, states that invoke universal jurisdiction are said to act on behalf of the international community as a whole.

In the aftermath of widespread human rights violations, state actors pursuing individual criminal accountability often face an important set of questions regarding the characterization of the charges to be brought against an offender. Should the given conduct be framed as ordinary crimes proscribed by domestic law? Or should the charges be framed as international crimes criminalised under international law? That is, what system of law will be invoked by domestic courts to justify the prosecution of human rights perpetrators and, if necessary, the state's jurisdiction over the offense? These questions speak, in part, to the relationship between the decision to charge and the indirect enforcement of international criminal law, as the prosecution of international crimes by domestic courts reflects one indirect pathway for international criminal law to be upheld. Direct enforcement of international law involves international actors litigating before international and hybrid courts and tribunals. As Werle notes, even with the creation of the International Criminal Court, "direct enforcement of international criminal law through international courts will remain the exception" rather than the rule, as the jurisdictional limits on the Court and its principle of complementarity position domestic justice systems as the pre-eminent arbitrator of human rights disputes.[243]

With domestic courts at the helm, the post-conflict prosecution of human rights violations as international crimes rather than ordinary crimes is made possible by the complete or modified incorporation of international criminal law at the domestic level. Non-incorporation exists at the opposite end of the spectrum from complete incorporation, with states refraining from

[242] Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law,* (Oxford: Oxford University Press, 2014), 74.
[243] Ibid, 77.

incorporating international criminal law into domestic law at all. Under the non-incorporation method, states prosecute international crimes such as crimes against humanity with reference to "ordinary" criminal laws. Rather than prosecuting systematic rape as a war crime, for example, domestic courts engaging in non-incorporation would prosecute the crime as sexual assault under domestic law.

In contrast, the complete incorporation of international law takes place by conforming domestic law completely to the substantive law codified in the ICC Statute and elsewhere, typically occurring in common law states where the legal system allows for criminality to be based on written and unwritten (i.e. customary) law without the need to implement new legislation. Directly applying customary international law, referring to relevant provisions and principles of international criminal law in conjunction with domestic regulations, and copying verbatim the offenses proscribed by international law into domestic law are several of the ways in which the complete incorporation of international law can occur.

Complete incorporation of customary international law may also occur via selective amendments to existing criminal codes or self-contained codification outside of the regular criminal code.[244] The punishment of Nazi-collaborators during World War II by France reflects the direct application of international customary law in the absence of national criminal law provisions. New Zealand has also pursued complete incorporation by referring to the Rome Statue's definition of genocide in its International Crimes and International Criminal Court Act 2000. It is important to note that although in cases such as New Zealand, international criminal law is formally incorporated into domestic law, the substantive origin of the new domestic laws are rooted in the "parent norms" of international law.[245]

[244] Ibid, 149.
[245] Ibid, 150.

Modified incorporation involves the integration of international legal norms into a state's criminal justice system while preserving distinct features of the national legal culture. This allows for formal documentation of state understandings regarding the scope and interpretation of international criminal law, as states may choose to include in domestic laws certain crimes established under customary international law but not included in the ICC Statute. Finland's approach to international law is emblematic of the modified incorporation approach: under the Finish Criminal Code, international crimes have been punishable since 1995, but the elements of those crimes are defined in a different manner than as outlined in the ICC Statute.[246] Many states have also adopted national laws that criminalise international crimes without reference to customary international law or the Rome Statute, thus preserving national interpretations of international crimes while indirectly enforcing international law.

In states that have pursued complete or modified incorporation of international law, prosecutors maintain the ability to charge perpetrators of human rights violations with international crimes rooted in international law. Yet, even in such states, there exists considerable variation in the prosecution of human rights violations as international crimes. Many states remain hesitant to invoke customary international law in the absence of corresponding domestic legislation, even when enabled by constitutional provisions. As Dugard observes, "Most states…will not try a person for an international crime unless the conduct has been criminalised under municipal law," even when domestic legal systems do not require such corresponding legislative action.[247] As such, when domestic human rights prosecutions do occur, they are often pursued with reference to ordinary crimes established under domestic law.

[246] Finland: Penal Code, Ch. 11 (1996).
[247] John Dugard *International Law: A South African Perspective* (2011) 155.

However, domestic prosecutions of international crimes are not as rare as one may have thought, with prosecutions of international crimes implemented by a number of states since the late 20th century, such as Rwanda, Spain, Canada, and Argentina. What explains such variation in the domestic prosecution of international crimes? In South Africa, as with many other states, the power to frame charges with reference to international law is vested within the prosecutorial organ. The centrality of prosecutors to the decision to charge suggests that the decision-making processes of individual prosecutors are a useful starting point for the analysis of human rights prosecutions.

III: Frame Analysis and Legal Decision-Making

This chapter adopts an interpretive, frame analytic approach to the framing of the charges in the *Basson* case. Interpretive approaches to legal decision-making such as legal framing have emerged as a rejection of the positivist perspective of the decision-making process, with the latter viewing legal cases as discrete entities, with decisions about individual cases made in isolation from other cases and independent of external forces and constraints. Positivist approaches often conceptualize legal decision-makers as autonomous, rational actors, guided by formal rules and armed with the necessary information to thoughtfully weigh choices in accordance with the relevant laws.

Interpretivist scholars argue that perceptions of the legal process as made up of discrete cases with decision points capable of isolation ignores the reality of legal decision-making. Instead, a legal decision "is often the product of different officials acting at different times making decisions serially."[248] Cases are decided within the context of decisions already made,

[248] Keith Hawkins, *Law as a Last Resort: Prosecution Decision-Making in a Regulatory Agency*, (New York: Oxford University Press, 2002), 32.

decisions to be made in the future, and decisions about other cases (real or hypothesized).[249] Prosecutorial decision-making in practice, therefore, reflects the culmination of decisions made by actors other than prosecutors at earlier stages in the criminal justice process. The positivist focus on the relationship between formal rules and decision-outcomes produces a mechanistic picture of legal decision-making, excluding important processes of sense-making that undergird discretionary decisions. Positivism's focus on such as statutes, case law, and policy directives excludes form consideration the role of non-legal rules and influencing factors such as organisational norms, economic constraints, or the broader political climate. Legal decision-making does not occur in a vacuum. As such, scholars must address the wider social, economic, and political contexts such decisions are made in.[250]

To address the blind spots of the positivist perspective, several socio-legal scholars have called for the development of interpretivist frameworks that can capture the dynamic nature of the legal decision-making process. Inspired by Erving Goffman's work on framing in everyday life,[251] Keith Hawkins and Peter Manning have developed a variant of frame analysis that enables researchers to explore the interpretive and classificatory practices of individual legal actors as they make decisions. Rather than viewing decision outcomes as mechanically produced by rational decision-makers, decision outcomes are instead viewed as the product of interplay between systems of meaning that provide work to provide understandings of the social world.[252]

---

[249] Robert M. Emerson, "Holistic Effects in Social Control Decision-Making," *Law and Society Review, 17*, no. 3, (1983): 425-55.
[250] Keith Hawkins, *Law as a Last Resort*, 29-30.
[251] Erving Goffman, *Framing Analysis: An Essay on the Organization of Experience, (*New York: Harper and Row, 1974).
[252] See, for example, Keith Hawkins, "On Legal Decision-Making," *Washington and Lee Review 43*, no. 4, (1986): 1161-1242; Peter K. Manning, "The Social Reality and Social Organization of Natural Decision-making," *Washington and Lee Law Review 43*, no. 4 (1986): 1291-1311; and Keith Hawkins and Peter K. Manning, "The Contexts of Regulation: The Impact Upon Health and Safety Inspectorates in Britain," *Law and Policy 12*, 2 (1990): 103-136.

A framing approach to legal decision-making in the *Basson* case, then, is concerned with the way in which systems of shared values imbue seemingly objective concepts such as evidence, rules, and prosecuting guidelines with meaning. The interpretivist perspective does not ignore the role of formal rules that are intended to guide prosecutorial decision-making. Rather, what matters is how decision-makers ascribe meaning to such rules, perceive the relevancy of the rules, and ultimately interpret the requirements of the decision in question. Frame analysis is intended to capture such interpretive dynamics by capturing the interaction between available decision-frames, the immediate decision-making environment in which such frames are deployed, and the broader environment in which a case is embedded.

Decision Frames

A frame analytic approach to prosecutorial decision-making positions decision frames as "the means by which the everyday world is linked with the legal world."[253] Frames inform how prosecutors understand the features of a particular case, and the relevant rules and principles that guide such understandings, linking the facts of a case and guiding criteria to legally mandated outcomes such as sentences, rulings, or judgments. For legal decision-makers, frames help ascribe meaning to aspects of a case, dynamically classifying some material as relevant to decision-making while excluding others from view.[254] Rather, facts and frames are reflexive, as frames "both constitute 'reality' and they selectively identify the facts that sustain a social reality."[255] An initial view of the facts of a case narrow the range of frames that can reasonably be applied. The provisional application of a frame may then require the exclusion of some facts

[253] Keith Hawkins, *Environment and Enforcement: Regulation and the Social Definition of Pollution,* (Oxford: Clarendon Press, 1984).
[254] Keith Hawkins and Peter K. Manning, "Legal Decisions: A Frame Analytic Perspective," in *Beyond Goffman: Studies on Communication, Institution, and Social Interaction,* ed. Stephen H. Riggins, (Berlin: Mouton de Gruyter, 1990): 203-234.
[255] Ibid, 213.

from consideration, while causing other facts to be introduced or reinterpreted in light of the system of meaning that has been temporarily imposed.

The framework utilized here is rooted in the belief that prosecutorial decision-making, like other forms of legal decision-making, is an intrinsically interpretive practice subject to "the social context that surrounds legal decision-making, the field in which the decision is set and viewed, as well as the interpretive and classificatory processes of individual decision-makers."[256] Thus, frame analysis of the charges brought against Basson eschews individualistic accounts of the decision-making process, instead favoring an interactive framework that captures dynamics between the broader environment, a decision-maker's immediate organisational and legal context, and the cognitive worldview of the decision-maker themselves.

To date, there exists no systematic research on the decision frames employed by prosecutors as they exercise their discretionary powers within the context of transitional justice. One goal of this chapter is to fill in this gap, providing a preliminary examination of the decision frames deployed by prosecutors as they construct criminal charges in the context of transitional justice trials. Central to the argument made here is that the nature of frames employed by prosecutors is contingent on decision-makers' perceptions about the causes of human rights violations, the role of human rights prosecutions, the prosecutor, and prosecutorial discretion in the broader criminal justice system and post-conflict transition. How a prosecutor understands these concepts influences the decision frames invoked by prosecutors as they decide the nature of charges to be brought against a perpetrator.

The Law as a Decision Frame

At the heart of the analysis presented here is the notion that domestic and international law are not merely bodies of formal rules that are applied mechanically by legal actors, but

[256] Hawkins, *Law as a Last Resort*, 30.

institutional decision frames that prosecutors rely on to organize and interpret information related to a given case. According to Hertog and McLeod, institutional frames "exist to order human behavior in ways that advance organisational goals including the reduction of uncertainty in inputs and outputs, organisational survival and growth, and efficiency in task completion."[257] Institutional frames are "socially organized and sanctioned frames" that are explicitly and implicitly prioritized by an organisation, deployed with such great frequency that the application of institutional frames becomes habitual, seemingly common sense. Change often occurs from building tension between individually held frames and institutional frames, with the degree of consensus an important area for investigation.

The notion that the law serves as the interpretive frame ungirding the decision-making processes of prosecutors builds on existing social movement research on the constitutive effects of the law and its relationship to social life. Legal discourse and norms have been found to constitute an important feature of a social movement's interpretive tactical toolbox. At the organisational level, activists have drawn on legal rights discourses to define and legitimize grievances, articulate demands for change, and mobilize constituents.[258] Pedriana argues that the undeniable salience of the law to the interpretive work of social movements has elevated the law to the position of master frame, that is, a cultural frame that resonates with across social movements, with the ability to drive mobilization around a diversity of issues.[259] The law constitutes as an important interpretive tool at the individual level as well, as the injustice frames

[257] James K. Hertog and Douglas M. McLeod, "A Multiperspectival Approach to Framing Analysis: A Field Guide," in *Framing Public Life: Perspectives on Media and Our Understanding of the Social World*, eds. Stephen Reese, Oscar H. Gandy, and August E. Grant, (Mahawah, New Jersey: Lawrence Erlbaum Associates, 2001): 141, 144.
[258] [258] See, for example, Michael McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization,* (Chicago, University of Chicago Press, 1994); and Francesca Poletta, "The Structural Context of Novel Rights Claims: Rights Innovation in the Southern Civil Rights Movement, 1961-1966). *Law and Society Review 34* (2000): 367-406.
[259] Nicholas Pedriana, "From Protective to Equal Treatment: Legal Framing Processes and Transformation of the Women's Movement in the 1960s," *American Journal of Sociology* 111, no. 6 (2006): 1725.

of social movement organisations circulate beyond the movement's domain and are deployed by ordinary people to make sense of everyday experiences. Anna-Maria Marshall has found that the legal sexual harassment frames espoused by women's rights social movements serve as one of many interpretive frameworks available to women, for example, as they reinterpret interactions at work as unjust. Constructivists furthermore have noted the important function of the law in the construction and interpretation of social relationships outside of the legal sphere, with legal concepts such as property, contracts, and due process structuring individuals' understandings of everyday experiences.[260]

Within the context of post-conflict human rights trials, both domestic and international law exists as potential interpretive frames through which human rights atrocities can be understood, their consequences defined, and their remedies prescribed. Underlying both frames is the diagnostic belief that egregious human rights violations are indeed crimes, although the nature of those crimes is subject to debate. Furthermore, both frames share the prognostic belief that criminal law exists as the ideal mechanism by which egregious human rights abuses should be condemned. Finally, both frames hold *individuals* responsible for criminal conduct, promoting a focus on individual agency that is derived from the Western liberal legalist tradition which holds the determination of individual culpability through prosecution as a necessary step in remedying criminal conduct.

The similarities between domestic and international law frames, however, end there, as each frame conceptualizes the nature of criminality in diverse ways. Indeed, international law and domestic law frames are better described as extraordinary international criminality and ordinary domestic criminality frames, respectively. Whereas ordinary criminality falls under the

[260] Anna-Maria Marshall, "Injustice Frames, Legality, and the Everyday Construction of Sexual Harassment," *Law and Social Inquiry 28*, no. 3: 2003, 659-689.

domain of the domestic law frame, the international law frame concerns itself with what Drumbl has termed "extraordinary international criminality," a designation that suggests that such crimes exist as substantively different forms of criminality than ordinary common crimes such as murder and rape.[261] Differences in scale and gravity aside, international crimes are seen as especially heinous in that the perpetrators of such crimes target victims on the basis of perceived or actual group membership, with such targeting.[262] Under an international law frame the egregious acts of violence embodied by international crimes makes ordinary crimes established under domestic law inappropriate analogues for addressing massive human rights violations. Rather, such egregious conduct belongs only to the substantive categories of international criminality such as crimes against humanity, war crimes, and genocide, as outlined by international criminal law.[263]

To understand the divergent ways in which domestic and international law serve as interpretive frames in the reconstruction of conduct as criminal, consider the way in which the crime of rape is framed and prosecuted under domestic and international law frames. Under a domestic law frame, rape is seen through the lens of ordinary criminality, with rape representing a violation of the generally accepted social norms found in society. Under a domestic law frame, rape is a deviant act that transgresses the norms of a society, with domestic law functioning to manage such deviance on behalf of the state. In contrast, an international law frame constructs rape as a crime against humanity, reflecting a violation *jus cogen* norms regulating sexual violence and bodily harm. Rape is transformed from an instance of ordinary criminality to that of extraordinary international criminality, with the massive scale and gravity of the offense now relevant features to consider when interpreting the crime.

---

[261] Mark A. Drumbl, *Atrocity, Punishment, and International Law*, (Oxford: Oxford University Press, 2007): 4.
[262] Ibid, 4.
[263] Ibid, 1-21.

Condemnation of rape is confined within the borders of a nation-state, rather than universally condemned by the broader international community. Importantly, while an international law frame may find systematic rape to be a violation of jus cogen norms, such criminal conduct more often than not actually reflects an *affirmation* of social norms established at the domestic level, with "participation….often a matter of obeying official authority, not transgressing it."[264] Perpetrators of international crimes are often captivated by the social norms established by conflict entrepreneurs, with violent acts such as rape constructed as banal, rather than deviant acts.[265] Often, these conflict entrepreneurs are state actors, creating another distinction between ordinary criminality and extraordinary international criminality. Under the domestic law frame, the state punishes violations of ordinary criminal law; under an international law frame, it is often "the entire apparatus of the state [that] urges the violence and can even go so far as to sanction nonparticipation."[266] Thus, rapists under a domestic law frame are seen as disconnected from the state and broader society, while those who commit rape as a crime against humanity often maintain a strong bond with the state and society.[267]

In addition to constructing divergent interpretations of the crime of rape and those who perpetrate such crimes, the application of a domestic or international criminal law frame can also have a practical impact on the prosecution of cases. Frames work to define aspects of reality as relevant to interpreting a given event, issue, or problem while "framing out" information deemed irrelevant to the decision at hand. [268] Domestic and international law frames provide powerful examples of frames' powers of selection and amplification, as both require the identification of information that is "legally relevant" to the prosecution of a crime. The application of a legal

---

[264] Ibid, 24.
[265] Laurel E. Fletcher, and Harvey M. Weinstein. "Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation," *Human Rights Quarterly* 24, no. 3 (2002.): 605.
[266] Drumbl, *Atrocity, Punishment, and International Law*, 33.
[267] Ibid, 33.
[268] Manning and Hawkins, *"Legal Decisions,"* 212.

frame creates a basis from which information can be presented and subsequently interpreted by other legal actors. The manner in which evidence is collected and a prosecution case file is constructed is dependent on the type of legal frame applied.[269] Whereas rape under an ordinary criminality frame requires the collection of evidence to establish proof of the *actus reus* of the violence, the extraordinary international criminality frame expands the requirements of substantive proof of guilt to include proof of the systematic or widespread nature of the offense.[270]

Importantly, identifying the decision frames employed by prosecutors does not guarantee the frame is embraced by others as the authoritative interpretation of the criminal conduct at hand. Frames are not always agreed to nor do they produce equal consequences when applied to a given case. Rather, frames often compete with a multiplicity of alternative frames employed by other actors, with some frames often imposed by those with more power. As such, an analysis of the power and authority that accompanies particular frames is an important component of frame analysis.[271] Here, the necessity of analyzing decision frames within the context of a prosecutor's broader environment becomes apparent, as events in the surrounding context may effectively silence the courses of action prescribed by the frame at hand. To capture the impact of broader environmental dynamics on the framing behavior of prosecutors in the *Basson* matter, two additional levels of analysis must be considered: the surround and the decision field.

The Surround

The surround is the setting where "both the predictable and the unexpected happen," the social, political, and economic backdrop against which individual decision-making and criminal

[269] Hawkins, *Law as a Last Resort*, 57.
[270] Drumbl, *Atrocity, Punishment, and International Law, 35*
[271] Manning and Hawkins, *"Legal Decisions,"* 214.

justice bureaucratic activity occurs. [272] While the surround is unbounded, constituted by contextual facets at the local, national, and international level, prosecutors may perceive the surround as having an immediate and local character. Despite no strict borders, the surround is not immutable. Shifts in political, economic, and social aspects of the surround can lead to changes in both the decision field of a prosecutor and the decision frame applied in a given case, although this influence is often realized in subtle ways. [273] For example, the political climate and balance of power of a transitioning state often shapes the formulation of the prosecuting policies that constitute part of the decision field, policies that influence the range of actions that prosecutors view as possible and reasonable when making decisions in specific cases.[274]

The surround is not open to bureaucratic control by the criminal justice system. That is, a prosecutor's relationship to the surround is one characterized by reaction, as the justice system attempts to respond to events and problems as they emerge. When surround changes do occur, legal actors may react by in one of two ways. A prosecutorial organ may change criminal justice policies and communicate those changes to peripheral actors such as the police. Additionally, individual prosecutors may modify their own decision-making according to perceived changes in the surround.[275] As such, events in the surround should be understood as analytically distinct from organisational reactions to those events, as events in the surround take on meaning as organisations interpret the event and respond accordingly, with the media playing an important role in the communication and interpretation of events. [276] To properly account for variance in the prosecutorial framing of human rights charges, one must consider how the prevailing social, political, and economic climate shapes the interpretive practices of prosecutors themselves.

---

[272] Hawkins *Law as a Last Resort*, 48.
[273] Ibid, 30.
[274] Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, (Norman, Oklahoma: University of Oklahoma Press, 1991).
[275] Hawkins, *Law as a Last Resort*, 49-50.
[276] Manning, "The Social Reality and Social Organization of Natural Decision-making," 1310.

The Decision Field

Legal decisions are not merely the product of interactions taking place in the surround. Rather, legal decision-making is an organisational activity, "a function of the institutional structures that produce the objective constraints, as well as the social representations by which such practices are validated, objectivated, and granted the status of truth."[277] Embedded within the surround, the decision field refers to the legally and organisationally defined setting in which prosecutorial decision-making activity occurs. At the formal level, the institutional rules, objectives, and resources of a prosecutor's office reflect one aspect of their immediate decision-making environment. Ideas about the prosecutorial body's mandate and the means to achieve its mandate are expressed as official policies and directives, determined in part by existing laws. Criminal procedure codes that define crimes and punishments as well as constitutional provisions that endow prosecutorial organs with independence and a range of discretionary powers are key to shaping the boundaries of the decision field and the range of prosecutorial powers that exist within those boundaries.[278] For some states, the construction of criminal charges is constrained by the type of legal of the host state and the constitutional provisions governing the adoption of international law. Reference to international crimes contained in the ICC statute in domestic legislation (i.e. modified incorporation), for example, is not possible in states with constitutional provisions prohibiting the domestic application of customary international law in the absence of corresponding implementing legislation.[279]

[277] Ibid, 1305-1306.
[278] Verónica Michel, "The Role of Prosecutorial Independence and Prosecutorial Accountability in Domestic Human Rights Trials," *Journal of Human Rights* 19, no. 1, (2017): 1–27.
[279] Werle and Jessberger, *International Law,* 147.

In addition to legal bureaucratic structuring, organisational policies are potential sources of influence within the decision field, as official prosecuting policies embody the values and working assumptions of those operating at the centre of the organisation. Expectations about organisational goals and the means to achieve them can also be expressed formally through the adoption of specific performance indicators, reward structures, and formal incentives for meeting desirable levels of organisational activities. Decision field constraints also include internal organisational matters such as level of resources and staffing limitations, both of which are important parts of the decision field. The decision field is also characterized by organisational culture, including norms, expectations, values and goals, all defined in occupational terms. Examples of norms found in the organisational culture are reflected in sentiments such as "Don't rock the boat," or "Keep your head down."[280] Whereas some offices are characterized by strong team spirit, other offices are run by prosecutors with a more autonomous mentality, valuing individual over group values. New prosecutors must learn these unwritten rules and norms of the profession, more broadly, as well as those of their own office. [281]

Unlike the surround, the field can be acted on and changed by individuals. Changes in the decision field can impact the frame relied on by decision-makers to make sense of a specific task or event. For example, introducing new prosecution policies at the formal level can shape the way a case is understood, and subsequently addressed, by prosecutors.

Similarly, the introduction of new prosecution policies can prompt reactions from the public, with the potential to change the broader surround. While decision-fields are capable of change, Hawkins and Manning argue that the field remains relatively stable in the criminal justice

[280] Peter K. Manning, '"Big Bang" Decisions: Notes on a Naturalistic Approach', in *The Uses of Discretion,* (ed.) Keith Hawkins, (Oxford: Clarendon Press, 1992). 251.
[281] Kay L. Levine and Ronald F. Wright, "Prosecution in 3-D," *Journal of Criminal Law and Criminology 102,* no.4 (2013): 1146.

system, ultimately "anchored by the fixed occupational roles and tasks sanctioned by the legal bureaucracy and the routine ways in which people make sense of what they encounter."[282] Analysis of the *Basson* case finds assertions about the relatively stability of the criminal justice system to be true even in the case of transitioning states, finding that the decision-field of prosecutors, established prior to the democratic transition, maintained stability even within the context of non-routine crimes such as human rights abuses.

IV: The *Basson* Prosecution

This section provides an overview of the *Basson* prosecution, briefly detailing the evolution of the case and various actor's arguments as the case progressed from the trial to the appeals phase.

Initial Charges

Wouter Basson, a cardiologist colloquially referred to as "Dr. Death," was indicted in 1999 in the Pretoria High Court on 67 counts, with charges ranging from 229 murders and conspiracy to murder as well as the manufacturing, possessing, and dealing of drugs and fraud for personal enrichment totaling R36 million. As the head of the South African Defense Forces (SANDF) biological and chemical program called "Project Coast" from 1981 to 1995, Basson oversaw the planning and execution of a number of mass murders committed by clandestine units of the SANDF. According to the original charges, these murders included the mass murders of South West African People's Organisation (SWAPO) detainees in Namibia as well as ANC members declared "enemies of the state" in Namibia, Swaziland, Mozambique, London, and elsewhere. The majority of these offenses were alleged to have been committed prior to

[282] Hawkins, *Law as a Last Resort*, 50.

1994. In addition to overseeing the development of programs to reduce the growth of the Black population, Basson allegedly provided the secret SANDF units with the poison used to murder their victims, administered sedatives to victims prior to their murder, as well as personally participated in some of the murders.[283]

The state prosecutors, in constructing the conspiracy charges against Basson, relied on a domestic law frame to justify South African jurisdiction over murders committed abroad. South African common law does not include the criminalization of conspirators as accomplices to a crime, and as such, the Riotous Assemblies Act was designed to fill this gap in the law. Drafted long before South Africa's democratic transition, the Act was initially designed to prosecute enemies of the apartheid state.[284] Under the Section 18(2) of the Act, conspirators are held criminally liable for the offense conspired to, regardless of whether the crime was actually committed or not. The Act holds that conspiracy to commit murder attached just as much criminal liability to the conspirators such as Basson as the crime of murder itself.[285] According to the trial prosecutors, Basson was charged with conspiracy because the actual conspiring took place in Pretoria, thus falling under the South African courts' jurisdiction and under the jurisdiction of South African domestic law.[286] By drafting the conspiracy charges against via reference to domestic legislation, the state prosecutors implicitly framed the egregious acts of violence as instances of ordinary criminality.

Prior to the trial's commencement, Basson's defense team took exception to the conspiracy charges on the basis that the Riotous Assemblies Act did not apply beyond the

[283] Chandre Gould and Marlene Burge, "Wouter Basson Trial Notes," *Centre for Conflict Resolution, University of Cape Town*, October 4, 1999, available at http://www.geocities.ws/project_coast/01.html
[284] Mia Swart, "The Closest South Africa Came to Nuremberg? The Wouter Basson Prosecution," *Heidelberg Journal of International Law 68*, no. 1 (2008): 216.
[285] Ibid, 211.
[286] Interview with Jan D'Oliveira and Torie Pretorius, Pretoria, South Africa, November 30, 2017; Interview with Anton Ackermann, Hermanus, South Africa, December 19, 2017.

borders of South Africa. The defense argued that Section 18 (2) was not intended to criminalise offenses *outside of South Africa.* As the conspiracy charges were related to crimes committed abroad, the defense argued that such crimes were not justiciable in South Africa. Furthermore, the defense claimed that any crimes that took place in Namibia were covered by Namibian amnesty and thus not open to prosecution, even under Namibian courts. The High Court judge agreed with logic of the defense's exception, quashing six of the eight conspiracy charges on the basis of his interpretation of the Criminal Procedure Act which prohibits domestic prosecutions of crimes committed on foreign soil.[287] Commenting on the successful prosecution of former policeman Eugene de Kock on the same conspiracy charges three years prior, Judge Hartzenberg admonished the state for "creating a new crime" with no legal foundation.[288] In April 2002, After 30 months of proceedings featuring over 140 state witnesses and costing the state millions of Rand, Basson was acquitted on all the remaining counts.

Request for Appeal

Following Basson's acquittal, the prosecution team appealed to the Supreme Court of Appeal (SCA), which dismissed the appeal on June 3, 2003 on procedural and substantive grounds. State prosecutors lead by Advocate Ackermann – now part of the newly constituted National Prosecuting Authority – subsequently appealed the SCA's decision to the Constitutional Court, continuing on three grounds of appeal: 1) the dismissal of the conspiracy charges; 2) the exclusion of evidence presented in bail proceedings from the criminal trial; 3) the High Court's

[287] Gould and M Burge, "Wouter Basson Trial Notes."
[288] Ibid.

acquittal of the remainder of the charges laid against Basson.[289] In granting the state leave to lodge an appeal, the Chief Justice instructed the state prosecutors as well as the defense team to address several preliminary issues raised by the state's application for appeal including the issue of double jeopardy and the defendant's right to a fair trial. The Court also requested both parties address the relevance of South Africa's international law obligations to the preliminary issues raised.[290]

In its judgment granting the state leave for appeal, the Court too deployed a domestic law frame, relying on liberal legalist discourse to explain how the quashing of the conspiracy charges gave rise to a constitutional matter. The Court wrote:

In our constitutional state the criminal law plays an important role in protecting constitutional rights and values. So, for example, the prosecution of murder is an essential means of protecting the right to life, and the prosecution of assault and rape a means of protecting the right to bodily integrity. The state must protect these rights through, amongst other things, the policing and prosecution of crime. The constitutional obligation upon the state to prosecute those offenses which threaten or infringe the rights of citizens is of central importance in our constitutional framework.[291]

Positioning the state as the protector of individual rights and constitutional guarantees, the Court declared that the quashing of the conspiracy charges reflected an "impediment to the performance by the state and the prosecuting authority of their duties to protect fundamental rights under the Constitution."[292] As such, the matter fell within the Court's jurisdiction. Through their syllogistic reasoning, the Constitutional Court justices also implicitly framed

[289] *S v Basson* 2004 no. 1, SA 246 SCA.
[290] *S v Basson* 2005 no. 1, SA 171 (CC) par. 16.
[291] *S v Basson 2005* (12) BCLR 1192 (CC).The State's Submissions, heard on October 6, 2004, par. 31-32
[292] Ibid, para 33

Basson's conduct as analogous to instances of ordinary criminality such as murder, rape, and assault. While the judgment alludes briefly to the state's obligations under international law to prosecute international crimes such crimes against humanity and war crimes, these obligations are framed as secondary to those imposed by the domestic law frame.[293] Thus, the domestic framing of the charges against Basson continued to dominate the discourse surrounding the disputed charges, albeit with an emerging challenger, that of international law.

The State's Appeals Argument

The prosecution, in appealing to the Constitutional Court, was not seeking a judgment from the Court with regards to the guilt or innocence of Basson on the conspiracy charges. Rather, the Court was tasked with the decision to permit the state to bring renewed charges of conspiracy against Basson in a new trial. Adopting a rather scattershot approach to argue that the trial judge erred in the quashing of the conspiracy charges, the appeal's team – now lead by state Advocate Wim Trengove – invoked both a domestic law frame as well as an international law frame to define the issue presented before Constitutional Court. The domestic law frame built on the same line of reasoning established by the trial prosecutors, with Advocate Trengove's team arguing that the conduct in question fell under the jurisdiction of South African courts by virtue of the Riotous Assemblies Act. In addition, state prosecutors also declared jurisdiction was established by another form of domestic legislation, namely the South African Defense Forces Act, which enabled South Africa to extend extra-territorial (not universal) jurisdiction over acts criminalised by domestic law and committed by armed forces abroad.

As a final justification for jurisdiction over the offenses, the state drew on customary international law and argued that the target offenses were indeed considered criminal at the time

[293] Ibid, para 37 – 38.

they were committed, and thus, justiciable under South African law sans specific legislative incorporation by the South African parliament.[294] The state spent considerable effort trying to persuade the Court that the crimes committed by Basson were not merely domestic crimes, but the international crimes of crimes against humanity and war crimes, criminalised by customary international law at the time they were committed and not subject to ordinary jurisdictional prescriptions.

V: Frame Analysis & the Charges Against Basson

A frame analytic approach to the *Basson* matter suggests that to better understand the dominance of the domestic law frame, particularly on behalf of the state, it is necessary to examine aspects of the social surround and decision field that may have enabled or constrained the range of decision frames deemed reasonable to apply by prosecutors assigned to the *Basson* case. This section engages in a comparison of South Africa's political climate with regards to international law prior to and after South Africa's democratic transition, arguing that the state's historical hostility towards international law proved to be a critical factor that bolstered the dominance of the domestic law frame in *Basson* matter.

International Law Pre- and Post-Transition

Prior to 1994, the South African state actively excluded human rights debates and action by the United Nations with regards to the racial policies of the apartheid state. Successive apartheid governments proved to be increasingly hostile to the United Nations and international human rights conventions, evidenced by international law receiving no recognition in South

[294] Swart, "The Wouter Basson Prosecution," 217.

African constitutions prior to the Interim Constitution proposed in 1993.[295] National courts adopted a "positivistic, insular, and sometimes antagonistic stance towards international law."[296] For example, while South Africa was party to The Hague Regulations of 1907 and the Geneva Conventions of 1949, the state refrained from signing the 1977 Additional Protocols. This refusal was driven by Protocol I's application to armed conflicts such as those fought by liberation movements in South Africa, conflicts pursued in the name of self-determination against racist regimes. As international human rights norms diffused, South Africa became the site of an important battle between human rights and domestic jurisdiction. In the face of the new international law of human rights, it was the "old law of state sovereignty and absolute respect for domestic jurisdiction that guided and shaped" post-apartheid South Africa's approach to international law.[297] This antagonistic political climate, Dugard notes, "undoubtedly influenced the attitudes of legislators, judges, and lawyers," as international law was perceived as "an alien and hostile legal order."[298]

In 1994, the transfer of power to the Black majority reflected a dramatic shift in the social surround, with state authority now vested in a political organisation that had, since the mid-1980s, deployed international law and human rights rhetoric to delegitimize the apartheid regime and defend individuals in the face of human rights violations.[299] South Africa in 1994 appeared to be turning a corner, embracing rather than rejecting international law and its protections of human rights. Resulting in part from the dramatic shift in the balance of power towards the ANC, the ratification of the Constitution in 1996 formalized and codified the new political climate that

[295] Constitution of the Republic of South Africa, Act 200 of 1993 (Interim Constitution). The Interim Constitution has been repealed.
[296] Dikgang Moseneke, "The Role of Comparative and Public International Law in Domestic Legal Systems: A South African Perspective," *Middle Temple and SA Conference: Comparative Law*, (2010): 63.
[297] Dugard, "International Law," 77.
[298] Ibid, 77.
[299] Saul Dubow, *South Africa's Struggle For Human Rights*, (Athens, Ohio: Ohio University Press, 2012), 88-90.

came to define the social surround. Indeed, the first chapter of the Constitution upholds "human dignity, the achievement of equality and the advancement of human rights and freedoms" as fundamental values of the newly democratic state.[300]

Under the Constitution, international treaties become part of South African law only after ratification by Parliament and the passing of domestic legislation, with the exception of technical and administrative treaties of which only ratification is necessary.[301] Bilateral and multilateral international agreements of which South Africa was party to during the apartheid era remained binding on the Republic when the new Constitution came into force. While international treaties require some form of legislative incorporation to be enforced, customary international law under the new Constitution is automatically incorporated into South African law, unless it conflicts with the Constitution or national legislation. Thus, the Constitution advances a mixed approach to international law, with South Africa assuming a dualist approach to international treaties whilst assuming a monist approach to customary international law.[302] The international law provisions within the Constitution deal directly with the hierarchical position of international law, as the Constitution requires the interpretation of legislation to favor interpretations consistent with international treaty or customary law. Furthermore, the Constitution requires the Court to consult both binding and non-binding instruments of international law when applying the Bill of Rights. Adopted within a context of an internal struggle and motivated by Western liberal notions of universal individual rights and liberal democracy, the Constitution certainly reflected an evolution in the state's attitude towards and treatment of international law and its associated principles, as human rights and racial equality became protected by constitutional

[300] The Constitution of the Republic of South Africa, 1996, Chapter 1.
[301] Dugard "International Law," 474
[302] Erika De Wet, "The 'Friendly but Cautious' Reception of International Law in the Jurisprudence of the South African Constitutional Court: Some Critical Remarks," *Fordham International Law Journal* 28, no.6, (2004): 1535.

provisions. A reading of the Constitution suggests that international law in South Africa was no longer viewed as a threat to state sovereignty, but critical to the establishment of a liberal democratic state, evidenced by the courts increasing willingness to invoke international human rights law in judgments, such as in the death penalty case *S v. Makwanyane.* [303]

Importantly, these changes within the social surround shaped the decision-field in which the *Basson* case prosecutors operated, as the complete incorporation of customary international law outlined in the Constitution expanded the range of criminal charges available to state prosecutors as they constructed the charges against Basson. International crimes established under customary international law, such as that of genocide and crimes against humanity, could now be prosecuted in domestic courts, regardless of the jurisdictional elements of the case and in the absence of incorporation via domestic legislation. This created a new type of discretionary power afforded to South African prosecutors, namely, the decision to charge perpetrators of human rights violations with ordinary domestic crimes or extraordinary international crimes.

The Politics of Institutionalized Decision Frames

At first glance, attention to the dynamics in the social surround and decision field of South African prosecutors working on the *Basson* case seems to suggest that by 1999, when the case began, state prosecutors would be ready to embrace the international law frame as they constructed the charges to be brought against Basson. Yet, as the history of the trial demonstrates, this did not occur, as domestic legislation was relied on to frame the alleged conduct during the initial trial phase. Why? Here, existing social movement and media studies research on the durability of collective frames is helpful to understand the persistence of the domestic law frame throughout the *Basson* legal proceedings. Such research finds that collective

[303] Ibid, 1535.

frames are developed over an extended period of time by a number of social actors, each contributing to the corpus of social knowledge that the frames are based on. As such, these frames are particularly resistant to change, even in light of new information.

In addition, the stability of cultural frames is derived from their communicative function. Because actors are dependent on such frames to interpret social life and engage in action, the stability of cultural frames ensures this communicative function can continue to be performed.[304] Collective frames are also often institutionalized in social organisations such as a prosecutorial agency, with frames working to foster social order and enable social interaction. As relatively stable structures, institutions themselves work to stabilize frames that are adopted. Hawkins notes that institutional frames such as the legal frames that dominate the criminal justice sector are "more resistan[t] to change and alteration…because they are institutionalized, ceremonially maintained, and ritually displayed in concert with other symbols, routines, and displays of authority which are associated generally with longevity and endurance and the state."[305]

Socialization processes further reinforce the stability of institutional frames, as frames are taught to new members in order to ensure the frame's position as the authoritative source for interpretation is maintained.[306] It is through "repeated contact, [that] the individual comes to absorb the frame employed by the organisation and to see the world in terms of that frame."[307] Such routinisation transforms collective frames into "deep frames," second-nature modes of interpretation that transcend thematic issues and are embedded within and further solidified by

[304] Hertog and McLeod, "A Multiperspectival Approach to Framing," 143-4.
[305] Manning and Hawkins, "Legal Decisions," 213.
[306] Stephen D. Reese, "Prologue – Framing Public Life: A Bridging Model for Media Research," in in *Framing Public Life: Perspectives on Media and Our Understanding of the Social World,* eds. Stephen Reese, Gandy, Oscar H. and Grant, August E., (Mahawah, New Jersey: Lawrence Erlbaum Associates, 2001): 15.
[307] Hertog and McLeod, "A Multiperspectival Approach to Framing," 143.

organisational practices prescribed by the frame.[308] Here, framing intersects with power, as particular power relationships and institutional arrangements work to establish and bolster certain frames as seemingly common sense ways of making sense of the social world. To understand the persistent of the domestic law frame in the *Basson* case, one must look at the degree to which the domestic law frame was institutionalized and bolstered by existing power relationships.

Indeed, South Africa's historical hostility towards international law firmly institutionalized the domestic law frame within South Africa's criminal justice sector. With most white South Africans perceiving international law as irrelevant and unfairly implemented, domestic law for most of South Africa's apartheid leaders served as a shield, "a means of protecting South Africa against the encroaching values of the latter half of the twentieth century."[309] With power vested in the apartheid state, a collective actor with an incentive to keep international law out of domestic courts, the domestic law frame became a means to fulfil to the asymmetric interests of the state.[310] The apartheid regime possessed the resources and strategic alliances necessary to impose the domestic law frame as the only legitimate frame to apply, resulting in the elevation of domestic law to the position of common sense. Hence, domestic law became the deep frame that South African prosecutors were socialized to embrace, the institutional background against which the decision-frames of prosecutors were constructed.

The state's animosity towards international law and human rights, combined with the exclusion of the apartheid regime from international organisations and law-making conferences, constrained the type of legal training available to South African advocates, judges, and other

[308] Martin Wählisch, "Cognitive Frames of Interpretation in International Law," in *Interpretation in International Law,* eds. Andrea Bianchi, Daniel Peat, and Matthew Windsor, (Oxford, Oxford University Press: 2015), 335.
[309] Dugard, *International Law,* 20-21
[310] Lesley Greenbaum, "A History of Racial Disparities in Legal Education in South Africa," *John Marshall Law Journal* 3, no. 1, (2009): 15.

legal actors. While many lawyers in South Africa actively fought against the system of apartheid, most South African lawyers at the time the transition had never received formal training on international criminal law and customary international law. The type of legal education provided to lawyers has a critical impact on the manner in which lawyers understand their role as legal practitioners as well as the actions deemed necessary to fulfil that role.[311] In the case of the *Basson* trial, Advocates Ackermann and Pretorius had been trained and ultimately socialized to accept the South African legal system as "a world of territorial limits."[312] According to Advocate Trengove, "international law was beyond the lived experience of most prosecutors. They didn't live international law. They lived domestic legislation."[313] Only if extra-territorial jurisdiction (not universal jurisdiction) was explicitly outlined in domestic legislation would the Court even contemplate pursuing a case that occurred abroad.

The common-sense status of the domestic law frame becomes clear in the reaction of the trial prosecutors regarding the possibility of framing the charges against Basson as international crimes. Advocate Pretorius noted that

> If at that stage, you would have told me to frame the charges in terms of customary international law, I would not have been able to do so. I could do murder, terrorism, conspiracy, all of that…When evidence of the first atrocities came to the fore, if my boss said to me, 'Okay, Torie, I don't want murder or conspiracy or terrorism. I want something under customary international law,' I would have told my boss, 'Are you mad?' [Laughing][314]

According to Advocate Pretorius, the Basson matter highlighted a gap in his training with regards to international criminal law, prompting him to return to university and earn a master's degree in international law after the trial ended. Prior to this additional legal training, however,

---

[311] [311] Nicola Whitear-Nel and Warren Freedman, "A Historical Review of the Development of the Post-Apartheid South African LLB Degree – With Particular Reference to Legal Ethics," *Fundamina Pretoria* 21, no. 2 (2015): 238.
[312] Interview with Anton Ackermann, Hermanus, South Africa, December 18, 2017; Interview with Torie Pretorius and others, Pretoria, South Africa, December 1, 2017
[313] Interview with Wim Trengove, November 17, 2017
[314] Interview with Torie Pretorius and others, Pretoria, South Africa, December 1, 2017

he lacked the analytical tools and educational background to even consider framing the charges based on international law. Thus, South Africa's history of prioritizing domestic law over a seemingly hostile international law ensured that the generation of advocates educated and socialized during the apartheid era would continue to embrace the domestic law frame of ordinary criminality even after the transition to democracy. The institutionalisation of the domestic law frame constituted an important, stable feature of the criminal justice system's decision field, maintaining a hold on the decision-making of South African legal actors long after the democratic transition.

Importantly, the dearth in international law expertise, and by extension, the dominance of the domestic law frame, did not change overnight. As Advocate Pretorius remarked:

> Once you get such a big change in the country, the bench, the lawyers that are sitting at the top, the judges, they don't change immediately. So in the initial cases, you still get [legal officials] that are part of the old system. They came up in the old system….The bench is not immediately into [international law]. It's like the prosecutors. You've got to grow into that sort of thing.[315]

Thus, while structural changes during post-conflict transitions may occur rather quickly, changes in the favored decision-frames of legal officials occurs much more slowly. While changes in South Africa's social surround and decision field may have resulted in a political climate and legal system more willing to embrace international law, such structural changes required time to filter out to the level of individual legal actors. The institutionalisation of the domestic law frame at the organisational level transformed the frame into that of a habit.[316] Interviews with the trial prosecutors suggests that distinctions were not made between political crimes such as the

[315] Ibid.
[316] Interview with Mia Swart, Pretoria, South Africa, November 28, 2017.

human rights violations committed by Basson and ordinary crimes such as murder.[317] With principles of territoriality and state sovereignty at its core, the domestic law frame was firmly affixed to the institutional practices of South Africa's criminal justice system. Three years after the constitutionalization of international law, state prosecutors' reliance on domestic legislation to criminalise international crimes reflects the strong hold the that domestic law frame had on the meaning-making activities of the legal actors involved in the trial.

Case Specific Factors: Early Framing

Case-specific factors also contributed to the pervasive influence of the domestic law frame in the *Basson* trial. As an interpretive approach, frame analysis regards decision-making as a dynamic process that is affected by both the decisions that came before it and the anticipation of decisions that be taken by other actors in the future. While individual cases proceed linearly across the criminal justice system, decision-making by legal actors such as prosecutors is hardly a linear process at all. One of the implications of this nonlinearity is that the framing behavior of actors in the early stages of a trial can strongly influence the types of frames that emerge as the case progresses. How the initial investigating team frames criminal conduct during the early stages of a case, for example, has been shown to have an impact on the manner in which prosecutors during the trial phase interpret and weigh the evidence collected by the investigation team.[318]

It is important to note that the human rights violations attributed to Basson were not the original focus of the criminal investigation when it began at the end of 1991. The investigation into Basson's conduct was first pursued by National Intelligence (NI), who sought to establish

[317] Interview with Torie Pretorius and others, Pretoria, South Africa, December 1, 2017.
[318] Renze Salet, "Framing in Criminal Investigation: How Police Officers (re)Construct a Crime," *The Police Journal* 90, no. 2, (2017): 128-142.

connections between his multi-million RAND renovation of his home and front companies in which Basson was personally invested in. Following the revelations of the Goldstone Commission, a commission of inquiry tasked with the investigation of township massacres and other intense violence wracking the country, the Office for Serious Economic Offences (OSEO) took up the investigation, building on the NI's work to further investigate the financial affairs of Project Coast. It was the OSEO that formulated the bulk of the fraud charges to be levied against Basson, with the investigation into human rights violations occurring much later by the trial prosecutors as part of the Special Investigative Unit (SIU), after the focus on economic crimes had already been established.[319]

The OSEO's initial focus on the fraud charges had the effect of solidifying the domestic law frame as the *prevailing frame* of the case, that is, the most common frame relied in a given situation. In the context of legal cases, prevailing frames are often established actors involved in the early stages of a case, by initial officers receiving a crime call or by the investigative team responding on the ground to the scene of the crime. [320] Fraud is at its core an instance of ordinary criminality, a violation of social norms sanctioned first and foremost by the state via domestic legislation. The OSEO's early concentration on the financial crimes of Basson created the interpretive foundation from which the human rights violations would be subsequently viewed. Indeed, as the human rights allegations came to light after the fraud investigation gained steam, fraud and the domestic law frame had already been imposed on the investigative work conducted later on by the SIU.

[319] Marlene Burger and Chandre Gould, "A Tangled Web," in *Secrets and Lies: Wouter Basson and South Africa's Chemical and Biological Warfare Programme,* (Cape Town: Zebra Press, 2002). Kindle edition.
[320] Justin Wedeking, "Supreme Court Litigants and Strategic Framing," *American Journal of Political Science* 54, no. 3 (2010): 620.

Case Specific Factors: Counter Framing

While the domestic law frame was bolstered by the OSEO's initial investigations into fraud, the continued dominance of the domestic law frame as the case progressed is best explained existing sociological and socio-legal research on *counter-framing*, a process that occurs when an actor attempts to "rebut, undermine, or neutralize a person's or group's myths, versions of reality, or interpretive framework."[321] Importantly, counter-frames are distinguished from competing frames in that a counter-frame is deployed *after* the initial frame, advocating an alternative position on the issue than the one presented in the prior frame. Competing frames, on the other hand, are encountered simultaneously. Because counter-frames seek to counter the persuasive effects of the earlier frame, counter-framing is an inherently strategic, agentive process. [322] Social movement research has explored the emergence of framing contests between movements and opposition groups, with such contests taking place within complex arenas characterized by a plethora of social actors, each attempting to regulate the interpretation of an issue or event according to their respective frames' organizing principles.[323] The presence of a multiplicity of actors, each proffering their own interpretation of a given issue, is not ignored by social movement organisations; rather, social movements have been shown to adjust their own framing behavior in response to the counter-framing attempts by other stakeholders.

Recognizing the strategic nature of counter-framing, socio-legal scholars concerned with legal decision-making have used frame analysis to understand the utility and impact of counter-frames in legal argumentation. The justice system arena is populated by a multiplicity of actors (i.e. judges, lawyers, witnesses, respondents, plaintiffs, interest groups, policymakers) with their

[321] Robert D. Benford, *Framing Activity, Meaning, and Social Movement Participation: The Nuclear Disarmament Movement*, PhD Thesis Department of Sociology, University of Texas, Austin, 1987): 75.
[322] Dennis Chong and James Druckman, "Counterframing Effects," *The Journal of Politics* 75, no. 1 (2013): 2.
[323] See, for example, Charlotte Ryan, *Prime Time Activism: Media Strategies for Grassroots Organizing*, (Boston: South End Press,1991).

own preferred frames of a given issue or case. The sequential nature of the legal system creates several opportunities for counter-frames to emerge and effect the framing behavior of other elites.[324] Wedeking, for example, has investigated how petitioners and respondents before the US Supreme Court respond to the framing behavior of one another as well as that of lower courts. He finds that the framing decisions of lower courts "exert a powerful influence on what frames petitioners select, suggesting that petitioners are not unconstrained in their ability to offer a new frame and herestethically manipulate the dimension of conflict."[325] Lower courts, ruling in favor of a particular framing of an issue, can force petitioners to engage in counter-framing, rebutting the line of arguments established in the lower court's preferred frame. Yet, this counter-framing can often work against petitioners. When the prevailing frame of an issue becomes "embedded in a legal decision, it becomes difficult for other legal actors to reframe the argument [vis-à-vis an alternative frame] because they are forced to address a legal argument that uses unfavorable terms and conditions." [326]

In the *Basson* case, the prosecution team, in their appeals argument before the Constitutional Court, was forced to respond to the counter-framing of both the trial judge and the defense team, counter-framing that was rooted in a domestic law frame. During the initial trial, the defense objected to the conspiracy charges, citing indemnity for activities in Namibia, as per the general amnesty declared shortly before Namibia was granted independence from South African occupation on June 7, 1989. The defense team also argued that jurisdictional constraints negated the applicability of the Riotous Assemblies Act, as the crimes conspired to were intended to be committed or were committed abroad. The defense's counter-frame proved to resonant with the judge, who was educated and appointed during the apartheid era, thus

[324] Wedeking, "Supreme Court Litigants," 628.
[325] Ibid, 628.
[326] Ibid, 623.

reaffirming the strictly territorial perspective of the domestic law frame, as well as an interpretation of Basson's alleged human rights abuses as ordinary criminality falling outside of South African law's grasp.[327]

In the state's heads of argument before the Constitutional Court, the appeal's team's initial argument with regards to the quashed conspiracy charges dealt *directly* with the counter-frame established by the lower court. Since the defense's counter-frame was constructed relying on the language of domestic law and its principle of territorial sovereignty, such discourse was naturally present in the appeal's team's efforts to rebut the counter-frame. To counter the lower court's counter frame, Advocate Trengove and colleagues too relied on the domestic law frame, asserting the applicability of South African common law in Namibia as well as the criminalization of the alleged conduct under the Defense Act of 1957 and prosecutable by Section 47 of the Military Discipline Code.[328] Thus, the state's initial argument, constructed to dismiss the defense and trial judge's interpretation of Basson's conduct as not justiciable, relied on a similar domestic law frame of ordinary criminality to reconstruct his conduct and counter the defense team's interpretation of reality, albeit while invoking different legislation to do so. As such, the dominance of the domestic law frame of ordinary criminality continued into the first half of the state's legal brief before the Constitutional Court.

VI: Strategic Framing and the Emergence of an International Law Frame

The second half of the state's argument regarding the quashed charges, however, marked the introduction of an international law frame on behalf of the state prosecutors, the first time in the three years since the Basson matter began. What enabled the emergence of an alternative

[327] Swart, "The Wouter Basson Prosecution," 216-217.
[328] Ibid, 222.

frame at that point in time? Two important, case specific factors changed between the initial framing of the charges during the trial phase and the reconstruction of those charges during the appeal's phase: the lead prosecutor arguing on behalf of the state and the judicial setting in which the arguments would be heard.

While Advocates Ackermann and Pretorius served as the lead prosecutors for the state during the trial phase and request for appeal to the Constitutional Court, Advocate Trengove took over as lead prosecutor once the state was granted leave for appeal. Advocate Trengove is a South African advocate with the same legal training as Ackermann and Pretorius, but vastly different experience practicing law. Initially a corporate lawyer, Advocate Trengove graduated from Pretoria University, a far right university at the time, with no human rights training. However, he became involved in human rights litigation during the late 1970s and early 1980s, working on cases ranging from women's right to vote in Kwa Ndebele to the representation of lower-level ANC cadres accused of terrorism by the apartheid courts. In 1995, Trengove represented the accused in the death penalty ban case, the first case heard before the newly created Constitutional Court, an experience which required him and other members of his team to "learn a bit of constitutional law very quickly."[329] From there, Trengove joined the Legal Resources Centre full-time as the head and only member of their Constitutional Litigation Unit, a move empowered, in part, by the swift changes in the political climate brought on by the democratic transition.

According to Trengove, the necessary work of dismantling of the apartheid regime meant that "constitutional challenges were the order of the day," with a number of unconstitutional pieces of legislation in need of revoking in light of the Constitution.[330] Trengove remarked that:

[329] Interview with Advocate Wim Trengove, Johannesburg, South Africa, November 17, 2017.
[330] Ibid.

The big, big difference between [Legal Resources Centre] experience and the apartheid experience was that under the apartheid experience the scope for progressive action by law was so extremely limited, the tiny little cracks [in the system] were so few and far between that the problem was to find them. Suddenly, in 1994, the opportunities were so overwhelming that the real difficulty was to find a way of choosing what to do and what not to do, because there were fantastic cases to be had all over the place.[331] Trengove took advantage of these "little cracks," opportunities in the new system, going on to act as representation for perpetrators seeking amnesty before the Truth and Reconciliation Commission as well as a consultant for the Truth Commission itself.

The massive structural changes in the social surround with the election of Nelson Mandela and the handover of power to the Black majority also created an opportunity for Trengove, with his "solidly anti-government" legal expertise accrued whilst working on human rights issues for over 20 years, to switch sides and work *for* instead of against the government, in defense of the progressive policies of the reconstituted state. Subsequently, Trengove was tapped to lead the National Prosecuting Authority's appeal before the Constitutional Court, providing another opportunity for him to apply his background expertise in human rights and constitutional matters.

For Trengove, the move to frame Basson's conduct with reference to international crimes established under international criminal and customary law was an obvious – and purely strategic – decision.[332] From his perspective, the Basson case at that stage was focus on "quite a mundane jurisdictional issue." Framing the charges as international crimes enabled Trengove and the state to overcome the jurisdictional issues that plagued the case from the very beginning. The changes

[331] Legal Resources Centre, *Oral History Interview*, November 27, 2007, 8, available at http://www.historicalpapers.wits.ac.za/inventories/inv_pdft/AG3298/AG3298-1-184-text.pdf [332] Interview with Advocate Trengove, Johannesburg, South Africa, November 17, 2017.

to the surround and decision field with regards to the status of international law in South African courts enabled Trengove to establish not only the criminalization of the alleged offenses at the time they were committed, but South Africa's extra-territorial jurisdiction over Basson's conduct as well. Advocate Trengove's familiarity with human rights law made him particularly open to the strategic use of the international law frame to achieve the state's goals, namely, another opportunity to prosecute "Dr. Death."

Importantly, the appeals team's decision to use an international law frame to describe Basson's conduct before the Constitutional Court did not appear out of thin air. Rather, the change in venue from the High Court to the Constitutional Court provided an opening for the international law frame of extraordinary criminality to not only emerge, but resonate as well. Research on human rights framing has documented to relationship between the reframing of an issue and changes in the intended audience of the new frame. By strategically reframing indigenous rights as an environmental issue, for example, indigenous activists have been able to shift the venue of a certain campaigns from the human rights arena to the environmental domain, the latter of which has proven to be more receptive to the claims of indigenous activists.[333] Social movement researchers too have explored audience effects; the existing literature suggests that the target audience serves as a significant contextual factor driving the reframing of collective action frames. McAdam's study of the framing behavior of American civil rights activists noted the influence of changes in target audience – from segregationists, the media, the government, and fellow citizens – on the framing activities of the movement.[334] Such research on audience effects suggests that in addition to the change in the lead prosecutor, a change in venue, and by

[333] Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*, (Ithaca, New York: Cornell University Press, 1998): 1-38.
[334] Doug McAdam, "The Framing Function of Movement Tactics: Strategic Dramaturgy in the American Civil Rights Movement," in *Comparative Perspectives on Social Movement Opportunities, Mobilizing Structures, and Framing*, (Cambridge: Cambridge University Press, 1996).

extension, in the target audience, served as an important contextual factor that drove the Trengove's reframing of Basson's conduct with reference to international law.

The first reference to international law in *Basson* matter was made, however, not by Advocate Trengove, but by the Constitutional Court in their instructions to the state prosecutors prior to the submission of their heads of argument. Requesting the state prosecutors to consider South Africa's constitutional obligations with respect to international law, the Constitutional Court's instructions opened the door for a strategic reframing of the charges with reference to international criminal and customary law. These instructions, combined with the Constitutional Court's increasing reliance on international law in its judgments since 1994 and the greater background experience with human rights law possessed by several of the justices sent a signal to the prosecuting team about the relevance of an international law frame to the prosecution of Basson. With a change in judicial venue and target audience and subsequent prompting by the Constitutional Court, an alternative framing of the charges as extraordinary criminality emerged as a legitimate possibility.

VII: Conclusion

The apartheid state's hostility towards international law proved to be an indelible aspect of the post-apartheid social surround, a hostility that had tremendous impact not only on the decision field of South African judicial actors, but on their decision frames as well. By promoting a political climate that was explicitly anti-international law and, in particular, anti-human rights protections, in favor of domestic jurisdiction and unquestionable state sovereignty, the apartheid state essentially prevented international law and related legal norms from entering the decision field of legal actors. Furthermore, the routinisation and institutionalisation of a

domestic law frame within the justice sector resulted in the exclusion of international law training from South African law schools, further reinforcing the prioritization of a domestic law frame in the aftermath of apartheid. Finally, at the individual level, the knowledge, beliefs, and background experiences of the individual prosecutors involved in the *Basson* matter influenced the interpretation of Basson's conduct vis-à-vis domestic, rather than international, law.

There is enormous value in developing a better understanding of prosecutorial decision-making in transitional trials, particularly as it relates to the enforcement of international criminal law. First, charging decisions are intrinsically related to pursuit of "forward-looking" macro-level goals attributed to transitional trials, specifically the goals of deterrence and social expressivism.[335] Regarding social expressivism, the type of offenses selected for prosecution can send a strong signal regarding the status of such crimes within the broader legal framework the criminal proceedings are embedded in. At the international level, decisions made by the ICC's Office of the Prosecutor regarding the types of charges to pursue can have significant normative power. In the ICC's *Lubanga* case, for example, the decision to exclude charges of sexual violence against children from the prosecution's case and instead focus on child soldier recruitment sent a signal that the ICC did not find sexual violence to be a main priority for the Court.

In response, the Women's Initiative of Gender Justice highlighted the importance of the Prosecutor's discretionary power to select the particular charges against those who are accused of human rights violations. The NGO argued that the failure to prosecute certain types of crimes such as sexual violence would reduce the deterrence capacity of the Court and could "send the

[335] Padraig McAuliffe, *Transitional Justice and Rule of Law Reconstruction: A Contentious Relationship,* (New York: Routledge, 2013), 146-154.

signal that such crimes can continue to be committed with impunity."[336] In contrast, the narrow focus on child soldier recruitment in the *Lubanga* trial "was a strong signal of the new position of the crime in the corpus of international justice – it was no longer a crime tacked onto other, more serious charges, but the sole focus of one of the most anticipated trials in international criminal law history."[337] While the *Lubanga* case took place at the international level, the normative impact of charging decisions remain relevant at the domestic level, particularly in states in which human rights violations were committed with the urging or backing of the state.

At the domestic level, the charging decisions of domestic prosecutors contributes not only to the indirect enforcement of international law, but the evolution of international law as well. Charging decisions are embedded within and intimately related to broader court practices, legal practices that are critical to the development of international criminal law jurisprudence and praxis. Domestic prosecutions of international crimes constitute vital practices that contribute to the ever-evolving system of international criminal justice. In particular, such domestic prosecutions are critical to the ever-evolving interpretations of customary international law. As a body of international law defined vis-a-vis state *practice,* customary international law is intrinsically tied to the legal decision-making of domestic actors. A better understanding of the framing processes that underlie the charging decisions made in human rights trials helps document such micro-contributions to the development of customary international law. The failure of the *Basson* prosecutors during the initial trial to frame Basson's egregious conduct as human rights violations protected under international law reflects a missed opportunity for a newly democratic South Africa to contribute to this body of law. The importance of

[336] Letter from Brigid Inder, Executive Director, Women's Initiative for Gender Justice to Luis Moreno Ocampo, Prosecutor, International Criminal Court, August 2006, available at http://www.iccwomen.org/news/docs/Prosecutor_Letter_August_2006_Redacted.pdf accessed January 11, 2018
[337] Julie McBride, *The War Crime of Child Soldier Recruitment* (The Hague: T.M.C. Asser Press, 2013), 145.

demonstrating South Africa's commitment to international law is further compounded by recent controversies regarding South Africa decision to withdraw from the International Criminal Court. While recent statements by the government suggest that South Africa may remain a signatory of the Rome Statute, the charging decisions of domestic prosecutors reflect an important pathway for South Africa to reaffirm its commitment to international criminal justice.

Finally, the manner in which human rights violations are framed has an important influence on the historical narrative that is constructed by transitioning societies in the aftermath of violent conflict. As interpretive devices, frames possess the power to select and amplify certain aspects of an issue or event while dismissing other aspects of reality as irrelevant to its interpretation. Within the context of human rights prosecutions, international and domestic law frames perform the same selective function, enabling prosecutors to classify certain information as, say, evidence while framing out noise. A consequence of this function is that the evidence introduced at trial, the testimonies given, and arguments interact to produce a particular reading of the past that is derived, in part, from the manner in which the charges were framed. To frame a death as a murder embeds that crime within an entirely different historical narrative than a death framed as a crime against humanity, and prosecutors – such as those in the *Basson* case – are key actors in the construction of that narrative. The domestic law frame of ordinary criminality often forces a de-politicization of human rights violations, isolating them from broader harms rooted, at times, in the very structuring of society. In this way, the domestic law frame perpetuates the marginalization of the voices transitional justice seeks to uplift. Identifying the factors, such as legal training, that contribute to the destabilization of the domestic law frame and the increased resonance of the international law frame may, in turn, create space for alternative narratives of the past to emerge.

CHAPTER 4:

THE PERFORMANCE OF LEGAL FRAMING

I: Introduction

As the previous chapters suggest, legal framing occupies a central role in post-conflict transitions. Chapter 2 established that the law – the liberal legalist frame, in particular – shapes the way transitional justice as a field is studied and practiced, the way atrocities are interpreted and remedied. Chapter 3 demonstrated the ways in which domestic and international law serve as decision frames with the power to shape the way human rights violations are understood and subsequently prosecuted. Together, both chapters highlight the role of the law as a powerful interpretive tool for scholars, peacebuilders, and prosecutors considering retributive transitional justice processes. While important contributions to transitional justice scholarship, it can be argued that the previous chapters, like much of framing research, suffer from 'descriptive bias,' that is, an emphasis on elucidating the content of frames rather than the framing process itself. Such an approach, according to Benford, contributes to "a rather long list of types of frames [that has] detracted from more interesting analyses of framing processes and dynamics."[338] While identifying the content of the specific types of legal frames invoked by various actors involved in transitional justice processes is an important endeavor, a primarily descriptive approach to legal framing and retributive transitional justice is undesirable for two primary reasons.

First, focusing solely on the content of the legal frames reinforces a misguided view of frames as static entities that exist independent of the contexts in which they are deployed. According to the interactionist perspective developed first by Goffman, framing is a dynamic

[338] Robert D. Benford, "An Insider's Critique of the Social Movement Framing Perspective," *Sociological Inquiry* 67, no. 4 (1997): 414.

process in which frames are subject to continuous construction and reconstruction by actors and their audiences.[339] While master frames such as the law exist as "relatively stable configuration[s] of ideational elements and symbols" the ways in which the grammar of a master frame is drawn on, packaged, and used by social actors is context-specific.[340] Social movement research has demonstrated that through the process of constructing a movement-specific frame derived from a master frame, social movement actors engage in a recursive process in which the content and nature of the frame may be altered through the construction process. Far from fixed entities, frames are dynamic constructions that may themselves be changed through the framing process.[341]

Secondly, such a descriptive approach would treat the legal frames used by the transitional justice actors as mere tools of persuasion, akin to material resources that exist independent of the social identities of the actors invoking a given frame. This utilitarian view of frames as persuasive resources subject to actor manipulation to achieve various goals ultimately leads to a theory of agency characterized by an "excessive voluntarism."[342] Viewing legal frames as external interpretive tools that can be used or discarded at will obscures the emergent and contingent character of frames and the framing process. According to Crossley, "frames are not objects or utensils in the objective world, which agents can pick up and use like tools. They are constitutive aspects of the subjectivity of social agents which those agents cannot get behind or detach themselves from." [343] Rather than viewing social identities as merely existing prior to the framing process, conditioning the range of legitimate frames available to social actors, this

[339] Erving Goffman, *Frame Analysis: An Essay on the Organization of Experience*, (Boston: Northeastern University Press, 1974).
[340] Marc W. Steinberg, "Tilting the Frame: Considerations on Collective Action Framing from a Discursive Turn," *Theory and Society* 27, no. 6 (1998): 846.
[341] Benford, "An Insider's Critique," 414-420.
[342] Nick Crossley, *Making Sense of Social Movements*, (Philadephia: Open University Press, 2002): 141.
[343] Ibid, 141.

chapter views social identities as also the product of the framing process. Building on work by social movement scholars such as Hunt et al. and Creed et al., this chapter holds identity construction as inherent in framing processes.[344] As Hunt notes, through the process of framing, individuals and groups are linked and identities are created, solidified, and embellished. By identifying and making claims about the protagonists and antagonists of a given issue, their interests, and how these issues should be addressed, frames contribute to the construction of new shared interpretations of social life as well as the emergence of new social identities.[345]

The constitutive nature of the framing process is particularly important to note when considering the construction and use of *legal* frames. In his exploration of the constitutive character of legal frames, Pedriana conceptualizes the law as one of the primary mechanisms of meaning-making in everyday life, with legal institutions seen as important sites for the interpretation and construction of both social grievances and identities.[346] Rather than viewing the law as merely a set of interpretive tools, constitutivists such as Pedriana as well as Sarat and Kerns note the way in which notions of legality have permeated a range of settings outside of legal institutions, with the law serving as the basis for constructing and understanding social relationships and social boundaries in a diversity of contexts ranging from the workplace and schools to the home.[347] In addition, because the "law may be the source of new expectations for existing relations," legal frames are not only constitutive but potentially transformative as

[344] Scott A. Hunt, Robert D. Benford, and David A. Snow, "Identity Fields: Framing Processes and the Social Construction of Movement Identities," in *New Social Movements: From Ideology to Identity,* eds. Enrique Larana, Hank Johnston, and Joseph R. Gusfield, (Philadelphia: Temple University Press, 1994); W.E. Douglas Creed, Maureen A. Scully, and John R. Austin, "Clothes Make the Person? The Tailoring of Legitimating Accounts and the Social Construction of Identity," *Organization Science* 13, no. 5 (2002): 475-496.
[345] Hunt et al. "Identity Fields," 18.
[346] Nicholas Pedriana, "From Protective to Equal Treatment: Legal Framing Processes and Transformation of the Women's Movement in the 1960s." *American Journal of Sociology* 111, no. 6 (2006): 1722.
[347] Austin Sarat and Thomas R. Kearns, "Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life," in *Law and Everyday Life,* eds. Austin Sarat and Thomas R. Kearns (Ann Arbor: University of Michigan Press: 1995), 21-63.

well.[348] Through legal framing, aggrieved groups have the opportunity to deploy existing legal categories and concepts in new or alternative ways. When such reframing is codified by the courts, social and political identities and relationships may be transformed, demonstrating the power of legal frames to foster change beyond a given social movement or struggle.

It is important to note that while the constitutive effects of legal framing have been established by a number of social movement scholars, the transformative potential of legal frames – and rights frames, in particular – is disputed. As a social movement strategy, legal framing does not guarantee success in the public, political, or legal realms nor transformation of existing legal relationships. In addition to being unsuccessful, some law and society scholars go as far as to suggest that legal framing may actually exert a negative impact on the transformative possibilities of a social movement. Bernstein for example, argues that at times, through interactions with the law, the transformative potential of a given social movement is lost.[349] Bernstein considers specifically the conservatizing effect of legal engagement on queer social movements, finding that "although legal change is crucial to ending state interference in lesbian and gay lives as well as granting benefits and protection, the law does little to alter dominant norms, particularly when compromise is used to further legal change."[350] Such compromise between activists and legal structures tends to preserve, rather than challenge, dominant norms associated with the condemnation of homosexuality. Other legal scholars have noted similar conservatizing effects of the law within the American Civil Rights Movement, arguing that by framing issues of racism and discrimination in terms of equal treatment before the law and

[348] Lisa McIntyre, *Law in the Sociological Enterprise: A Reconstruction,* (Boulder, Colorado: Westview, 1994), 113.
[349] Mary Bernstein, "Gender, Queer Family Politics, and the Limits of Law," in *Queer Families, Queer Politics: Challenging Culture and the State,* eds. Mary Bernstein and Renate Reimann, (New York: Columbia University Press, 2001): 420-446.
[350] Ibid, 422.

individual rights, the civil rights movement failed to address the nationalized nature of racial hierarchies in American society.[351]

Within the context of justice for human rights victims, similar criticisms of legal discourse and rights talk in particular have emerged. Kesselring, for example, suggests that "the narrow vocabulary of the language of human rights…is negative in the sense that it only tells us what we do *not* want for the future."[352] Similarly, Wendy Brown argues that translating experiences with violence into the language of the law is ultimately reductionist, with "the injury…thereby rendered intentional and individual, politics is reduced to punishment, and justice is equated with such punishment on the one hand and with protection by the courts on the other."[353] Jean Comaroff and John Comaroff share Brown's critique of the law, viewing the process of legalization and the discursive transformation of grievances into the language of rights as a catalyst for individualizing not only collective violence but the citizen as well.[354] Yet, as Kesselring ultimately acknowledges, "under specific social and political conditions, the law not only individuates but also has the potential to help create a collective," suggesting the language of the law can have both a conservatizing and transformative effect on those deploying it.[355] The present study seeks to further investigate these claims.

II: The Present Study

To better understand the constitutive effects and transformative potential of legal frames in retributive transitional justice processes, this chapter explores the use of legal framing from

[351] See, for example, Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?*, (Chicago: The University of Chicago Press, 1991).
[352] Rita Kesselring, *Bodies of Truth: Law, Memory, and Emancipation in Post-Apartheid South Africa,* (Stanford: Stanford University Press, 2017): 6.
[353] Wendy Brown, *States of Injury: Power and Freedom in Late Modernity,* (Princeton: Princeton University Press, 1995): 27-28.
[354] Jean Comaroff and John Comaroff, "Reflections on Liberalism," *Social Identities* 9, no. 4 (2003): 466.
[355] Kesselring, *Bodies of Truth,* 21.

yet another perspective: the families of victims of apartheid-era human rights abuses. Facing a post-apartheid state reluctant to actively pursue retributive justice for the victims of apartheid-era crimes, a number of victims' families have turned to legal processes such as judicial inquests and High Court appeals to put pressure on the state. In such cases, many victims' families have framed the failure to pursue retributive justice as a violation of their legal rights, drawing on the language of the law as an interpretive resource as they construct their grievances against the state. In recent years, one South African family, the Simelane family, has been at the forefront of the push for the prosecution of apartheid-era human rights violators. In 1983, while working as a courier for the ANC's armed wing, Nokuthula Simelane was abducted, tortured, and disappeared by the apartheid regime's security forces.

Since Nokuthula's disappearance, her sister, Thembisile, along with other members of her family have been engaged in a long-running battle with the post-apartheid state to actively investigate Nokuthula's case and prosecute the perpetrators denied amnesty before the Truth and Reconciliation Commission. After unsuccessful appeals to the National Prosecuting Authority, the family took their battle for justice to the High Court, seeking a ruling from the Court that would force the NPA to make a decision regarding Nokuthula's case. In the affidavits filed before the Court, the Simelane family frame the failure to actively investigate Nokuthula's case and prosecute those denied amnesty before the TRC using the language of legal rights. Specifically, the lack of justice for Nokuthula has been framed by the family as a violation of constitutional principles, a breach in constitutional commitments, a transgression of legitimate political authority, and a violation of their right to equality. As instances of micro-mobilization, bottom-up efforts by the Simelane family, supported by NGOs such as the Foundation for Human Rights, reflect attempts to generate consensus about the post-apartheid State's failure to

pursue criminal prosecutions as well as mobilize changes in the State's treatment of apartheid-era human rights cases. Just as social movement organizations rely on rights frames to diagnose their grievances, convince constituents to mobilize, and motivate relevant actors to foster productive change, the Simelane family has relied on the language of the law to make sense of state inaction and prompt changes in the National Prosecuting Authority's treatment of apartheid-era human rights violations.

Through a frame analysis of the legal affidavits filed on behalf of the Simelane family in 2015 as well as semi-structured interviews with Nokuthula's sister, Themsibile Simelane, and her legal representatives, this chapter develops a constitutive perspective on legal framing in retributive transitional justice processes, building on socio-legal scholarship that has explored the constitutive effects of the law on individual and group identities, as well as the relationship between people and the state. How does framing the failure of the state to pursue retributive justice for Nokuthula through the language of the law work to shape the identity of the plaintiffs and the broader community of families looking for justice for their loved ones? Similarly, what are the constitutive effects of such legal framing on the relationship between victims' families and the post-apartheid state? How does legal framing, with its emphasis on state responsibility and legal rights, work to reinforce or transform notions of state responsibility and rights-bearing citizenship in the democratic era? By drawing on legal discourse to construct their grievances against the state, does the Simelane family's legal framing work to reinforce or transform hegemonic conceptions of South African identity, citizenship, and citizen-to-state relationships?

A Performative Approach to Legal Framing

To capture the constitutive effects of legal framing and avoid the descriptive bias endemic to framing research, this chapter adopts performative approach to the framing behavior of the Simelane family. The understanding of performativity advanced here is rooted in the speech act theory of J.L. Austin and subsequently developed by scholars such as Jacques Derrida and Judith Butler. Austinian speech act theory conceptualizes performative utterances as those speech acts that, rather than simply describing an already existing reality, work to construct reality through the uttering process.[356] The original examples of performative utterances provided by Austin include saying "I do" in a marriage ceremony or "I bet" in a game of poker.[357] According to Austin, "if a person makes an utterance of this sort, we should say that is *doing* something rather than merely *saying* something."[358] By saying "I do," an actor does not describe a marriage, but creates and participates in it. Thus, a performative approach to communication is concerned less with what a particular utterance *means* than what a particular utterance *does*. While the theory of performativity advanced here is informed by an Austinian conception of speech acts, it draws its primary inspiration from contemporary research on the performative dimensions of citizenship and rights claiming.

Karen Zivi's work on the performative dimensions of rights-claiming is particularly useful to the analysis presented here. According to Zivi, rights claims such as "I have the right to equality" are fundamentally political activities, with the political character of rights claiming extending beyond the instrumental value of rights discourse in the realm of politics. Rather, rights claiming is, at its core, a political practice with constitutive and transformative

[356] J.L. Austin, *How to Do Things With Words*, (Cambridge, Mass.: Harvard University Press, 1975).
[357] Ibid, 6.
[358] J.L. Austin, "Performative Utterances," in *Philosophical Papers*, eds. J.O. Urmson, and G.J. Warnock, (Oxford: Clarendon Press, 1979): 235.

dimensions.[359] A performative approach shifts focus from whether or not a particular rights claim reflects legal or moral reality to what is done in and by making a claim. As a practice of persuasion as well as a social and political practice, rights claiming, like legal framing, is contextual, inextricably linked with the identity and political subjectivities of those making such claims.

Recognizing the performative character of rights-claims forces a reconceptualization of citizenship as well. Whereas traditional conceptualizations of citizenship portray citizenship as a relatively stable legal institution defined by rights and centered around a relationship with the state, a theory of performativity suggests that citizenship, because it is constitutive of rights, is inherently unstable, contestable, and something that must be exercised, enacted, and thus performed.[360] According to Isin, since the 18th century, beginning in Euro-America, the dominant group associated with modern citizenship is that of able-bodied, propertied, white, Christian, rational, heterosexual, autonomous males, an association that has had the natural effect of disqualifying from citizenship those that exist outside of this dominant group.[361] Historically, other social groups such as the poor, Black, queer, and non-Christian were perceived as "not capable of fulfilling the duties of citizenship and hence acting as citizens." [362]

A performative approach to citizenship holds the struggles and rights claims of those on the margins of society as not only the part of the process of securing rights, but as a performance of citizenship as well, one that begins to challenge the hegemonic constructions of citizenship at a given point in time. Because "a performative perspective considers citizenship as anything but

---

[359] Karen Zivi, *Making Rights Claims: A Practice of Democratic Citizenship*, (Oxford: Oxford Univeristy Press, 2012): 176.
[360] Gurchathen Sanghera et al., "'Living Rights,' Rights Claims, Performative Citizenship and Young People – The Right to Vote in the Scottish Independence Referendum," *Citizenship Studies* 22, no. 5 (2018): 540-555.
[361] Engin Isin, "Performative Citizenship," in *The Oxford Handbook of Citizenship,* eds. Ayelet Shachar et al. (Oxford: Oxford University Press, 2017): 502-503.
[362] Ibid, 503.

stable," the subject positions of those making rights claims to the characteristics of citizenship are open to a change in status, from the subaltern to a "more livable position."[363] It is precisely because citizenship is both unstable, contestable, and constitutive of rights and that citizenship is performed – and potentially transformed – in and through the process of making rights claims. Citizenship marks a status within society that is dependent on not only the nature of rights, but who is included in the rights-bearing regime in the first place. As such, "performative citizenship signifies both a struggle (making rights claims) and what that struggle performatively brings into being (the right to claim rights)."[364] It is through the process of making rights claims that not only citizenship is enacted but possibly transformed as well.

It is important to note that while the performative approach to rights claims and citizenship focuses on the constitutive effects of such rights talk, this approach by no means holds claim-making as sufficient to bring rights or rights-bearing subjectivities into being. Indeed, simply uttering that "I have the right to equal protection" does not necessarily guarantee that such rights will be secured. As performative speech acts, rights claims vary in extent of their constitutive powers, with such variance rooted in the intelligibility of the claim. The intersubjective process of world making inherent in speech acts requires performative utterances to be intelligible or comprehensible. For speech acts to have an effect on the world, they must be understandable by others, with the degree to which a speech act is comprehensible dependent on its reference to existing norms, beliefs, and values that structure the social world in which such speech acts are embedded.[365] According to Austin, by citing and repeating social norms and conventions that already permeate social life, performative utterances are potentially

[363] Ibid, 503.
[364] Ibid, 506.
[365] Zivi, *Making Rights Claims*, 18.

felicitous.[366] This felicity or uptake may increase with repetition, with the effect or force of an utterance resulting from what Butler terms 'sedimentation,' repeated references to pre-existing, authorized norms, codes, and conventions.[367] In addition to sedimentation, the force of an utterance also results from *perverse iterations,* processes of citationality that, while rooted in existing social norms, may contest and transform those cultural constructions as they are deployed. As Zivi notes, such subversive citations can occur when familiar norms and gestures are cited in new contexts or when such utterances are misunderstood by target audiences. Indeed, because referenced conventions are ever-evolving, open to a range of interpretations, and not always explicitly identifiable, the generative effects of perverse reiterations are often unintentional and unpredictable, beyond the control of speakers themselves.[368]

To take a performative approach to legal framing in South Africa means to treat the rights claims of the Simelane family as more than constative utterances, as more than mere statements of fact that refer to an extant legal or moral reality. Indeed, a performative perspective re-conceptualizes rights claims in terms of their force or effects, understanding such claims as "bringing into being new rights and new subjectivities that did not necessarily exist prior to the process of claims making."[369] As this chapter will demonstrate, by framing the failure to pursue retributive justice as a violation of their right to equality, the Simelane family does more than make constantive utterances that reflect the legal truth of such claims. Rather, the family's rights claims have a generative force, with each utterance carrying with it the power to challenge pervasive conditions of political death and established hierarchies of victimhood in South Africa. The Simelane family's rights claims to equality also work to challenge the hegemonic,

[366] J.L. Austin, *How to Do Things With Words.*
[367] Judith Butler, *Excitable Speech: A Politics of the Performative,* (New York: Routledge, 1997).
[368] Zivi, *Making Rights Claims,* 187.
[369] Ibid, 183.

reconciliation-oriented conceptions of citizenship that positions those seeking retributive justice for apartheid-era crimes as strangers within their own state, "not capable of fulfilling the duties of citizenship and hence acting as citizens."[370] A performative approach to legal framing in the Simelane case thus allows for an analysis of not only the content of rights claims made as they engaged in legal framing, but the performative effects of such claims on the positionality of victims' families in the post-apartheid state.

Analyzing the intelligibility of the Simelane family's rights claims is also an important endeavor, as the very intelligibility of their claims to equality is what enables the construction of new social codes, worldviews, and modes of living and relating to one another. While critics of rights discourse are skeptical of the ways in which rights talk may work to further entrench liberal inequalities rather than disrupt disciplinary power, a performative approach to the Simelane case suggests that by referencing traditional liberal norms of state responsibility and equality before the law in new ways, such subversive citations actually may actually empower victims of human rights abuses and their families, and allow for alternative ways of thinking and being with regards to victimhood and citizenship to emerge. By supplementing a description of the legal frames invoked by the Simelane family with a performative analysis of the legal framing process, this chapter aims to reinforce the dynamic and constitutive nature of framing, refocusing scholarly attention to framing as a verb, rather than its noun counterpart.

The remainder of this chapter is structured as follows: Section III provides a brief overview of the Simelane family's pursuit of justice; Section IV delineates the content of the nationalistic legal and collective rights frames that were relied on to construct the legal affidavits filed on behalf of the family in the High Court; and Section V discusses such legal framing from

[370] Isin, "Performative Citizenship," 503.

a performative perspective, focusing on what is *done* in and by the legal framing process. Finally, Section VI offers some concluding remarks.

III: The Long Road to Justice for Nokuthula

In 1983, Willem H. Coetzee, then commander of the apartheid state's Soweto Intelligence Unit, was alerted to an arranged meeting between Nokuthula Simelane, a courier, and other members of the MK, the African National Congress' armed wing. Upon hearing of such plans, Coetzee passed the information up the chain of command to the overall commander of the Soweto Security Police Force, Brigadier H. Muller, who subsequently ordered the abduction of Nokuthula, with the intention of turning her into a state operative. Coetzee thus gathered a group of seven Security Police officers to execute Muller's orders, assisted by a member of the MK turned agent of the apartheid state (known as an *askari*). The group of police officers abducted Nokuthula, placed her in the trunk of a police car, and transported to a secret operational office where she was continuously interrogated and tortured by Security Branch officers. After several days, Nokuthula was transferred to a secluded farm in the North West province, where she was kept, interrogated, and tortured for approximately four to five weeks. Lead by Coetzee, the group of Security Police tortured Nokuthula to the extent that she was beyond recognition. Subjected to electric shocks, simulated drownings, sleep deprivation and other atrocities, Nokuthula's condition deteriorated to the point that she could no longer stand.

To this date, the fate of Nokuthula remains unknown. After her abduction, she never returned to Swaziland, where she was a student at the local university. Statements made by the perpetrators and witnesses to the police in 1996 as well as before the TRC's Amnesty Committee suggest Nokuthula was likely murdered by Security Branch officers, but such statements were

not investigated seriously by the post-apartheid state. Importantly, the TRC Amnesty Committee granted several of the perpetrators amnesty with respect to Nokuthula's abduction and torture, but declined to grant amnesty to Coetzee and two other officers with respect to the torture because the applicants failed to make a full disclosure of all relevant facts, as required under the TRC Act of 1995. According to the Act, those denied amnesty would be subject to criminal prosecutions.[371]

With her death still unconfirmed and her remains never found, Nokuthula thus joined the hundreds of liberation fighters who were "disappeared" during the apartheid era. Facing a recalcitrant post-apartheid state with little political will to investigate and prosecute apartheid-era crimes, many families of the disappeared have little faith that justice will be served and the fate of their loved ones will be known. Nokuthula's family, however, refused to rest. Since her disappearance, the Simelane family conducted their own investigations into her disappearance. They reviewed border crossing records and inquired with ANC offices in neighboring countries such as Swaziland and Botswana. After several of the perpetrators were denied amnesty by the TRC in May 2001, the family contacted the newly constituted National Prosecuting Authority (NPA) a number of times in the hopes of persuading the prosecuting organ to launch criminal proceedings against those denied amnesty. Supported by NGOs such as the Foundation for Human Rights and the Legal Resources Centre, the family met with members of the NPA's Priority Crimes Litigation Unit (PCLU) in 2005, urging the state to take the steps necessary to begin prosecuting those responsible for Nokuthula's disappearance. The PCLU responded to the Simelane family's demands by claiming, *inter alia,* insufficient evidence, restrictions posed by the statute of limitations, a lack of resources, and a 2005-2008 moratorium on prosecuting apartheid-era crimes. The moratorium was self-imposed by the NPA following the introduction

[371]The Promotion of National Unity and Reconciliation Act, No. 34 of 1995.

– and subsequent appeal – of a new controversial prosecuting policy allowing indemnity from prosecution in exchange for full disclosure by the perpetrators of apartheid-era crimes.

In 2005, supported by NGOs including the Centre for Violence and Reconciliation, the International Center for Transitional Justice, and the Khulumani Group, the Simelane family – lead by Nokuthula's sister Thembi – and other victims' families successfully appealed the controversial prosecuting policy all the way to the Constitutional Court. The moratorium ended in December 2008, when the Court struck down the new amendments to the prosecuting policy as unconstitutional and constituting a backdoor to amnesty. Despite this accomplishment, the National Prosecuting Authority has continued to delay in investigating and prosecuting Nokuthula's case. Since reopening the docket to the case in 2010, little to no real progress has been made by the NPA, and attempts to contact the NPA by the family and their legal representatives have gone unanswered. In 2015, the Simelane family took the NPA and South African Police Services (SAPS) to court, launching an appeal before the High Court to compel the NPA and SAPS to take the necessary steps to finalize any investigations related to the case and make a decision to prosecute or open a judicial inquest within 30 days. While the appeal was withdrawn on the condition that the NPA open Nokuthula's case, the contents of the appeal shed light on the ways in which the Simelane family interpreted the State's failure to pursue justice for Nokuthula.

IV: The Simelane Family's Legal Framing

The Simelane family's 2015 request for intervention reflects a distinctly legal framing of the Simelane family's grievances against the post-apartheid state. In their appeal before the High Court, the Simelane family framed the State's failure to investigate and prosecute apartheid-era

human rights abuses as a transgression of legitimate political authority established by the 1996 Constitution as well as a violation of the family's legal rights to equality. The Simelane family's claims against the state reflect the two distinct types of legal frames: nationalistic legal frames and equal rights frames. This section explores the content of those frames, exploring the ways in which both frames work to diagnosis the issue at hand and prescribe courses of action to remedy the situation. In order to overcome the descriptive bias of framing research, descriptions of the nationalistic and collective rights frames are followed by an analysis of such frames performative effects.

Nationalistic Legal Framing

At its core, nationalistic legal framing reflects a normative understanding of the law as neutral, nonpartisan, and separate from politics, an understanding rooted in the liberal legalist tradition fostered in the United States and other liberal democratic states. By defining grievances as national harms derived from the structure of the government itself, nationalistic legal framing proposes legal remedies that provoke structural changes in the organization of the state.[372] Nationalistic legal framing is rooted in the belief that citizens in a democratic society have the right to a State that does not politicize the pursuit of justice, transgress "the boundaries of…legitimate political authority" [373] or fail to hold those accountable for criminal acts that threaten rule of law. While nationalistic legal framing is not limited to the United States, such framing draws on core liberal legalist values in American political culture. For example, right-wing movement actors in the United States have deployed nationalistic legal framing to counter the collective rights frames proffered by the LGBTQ community, with conservatives accusing

[372] Gwendolyn Leachman, "Legal Framing," *Studies in Law, Politics, and Society* 61 (2013): 37-41
[373] Ibid, 37.

judges of "overreaching," engaging in judicial activism, and violating the principle of majority rule in a democratic system. Thus, undergirding nationalistic legal framing is a liberal legalist ideology that conceptualizes legal actors such as judges as impersonal, apolitical executors of a neutral system of rules. While Leachman argues that nationalistic legal framing occurs primarily to oppose the politicization of action taken by the judiciary or the legislature, the framing behavior of the Simelane family suggests that this kind of legal framing can be used to criticize actions taken by the executive branch as well. Indeed, in the Simelane case, nationalistic legal framing was invoked to denounce a range of actions (and inaction) on behalf of the post-apartheid executive branch, namely, the Office of the President, the Ministry of Justice, and the National Prosecuting Authority.

The Simelane family's nationalistic framing of retributive justice in South Africa is evident in the extensive references to the politicization of the National Prosecuting Authority and its prosecuting policies regarding apartheid-era human rights cases. Importantly, accusations regarding the politicization of the National Prosecuting Authority and police services reflect the liberal legalistic ideology that conceptualizes legal actors as mechanistic decision-makers who are supposed to neutrally apply the law. In the Supporting Affidavit submitted by Nokuthula's mother, Sizakele Simelane asserts that the suffering of her family "has been heightened by the duplicitous conduct of the police and prosecutors who out to have upheld the rule of law, but acting at the behest of politicians, deliberately blocked Nokuthula's case from going forward…"[374]

Allegations of such political interference in the prosecutions of apartheid-era crimes are rampant in the affidavits filed before the court on behalf of the Simelane family. With an entire

[374] *Nkadimeng v. National Director of Public Prosecutions* (2015) Case Number 3554, Supporting Affidavit of Sizakele Ernestina Simelane, par. 12.

section of the founding affidavit entitled "Political Constraints," the founding affidavit submits that political "constraints and pressures have served to shape the approach to policy of [the police and prosecuting authority] and their responsible officials in relation to the so-called political cases….Such political pressure made it extremely difficult, if not impossible, for them to carry out their responsibilities under the law."[375] Directly attributing the inaction of the police and prosecutors to political interference by the executive branch, the legal documents filed on behalf of the Simelane family question the very legitimacy of the South African state given its inability to fulfill its state duties. The founding affidavit further calls the legitimacy of the State into question by framing the failure to pursue Nokuthula's case as a violation of a constitutional obligation codified Section 27 of the Constitution. According to this clause, "all constitutional obligations must be performed diligently and without delay." The NPA and SAPs failure to actively investigate Nokuthula's disappearance, initiate a prosecution or officially decline to prosecute the case and refer the matter to a judicial inquest constitute, according to the founding affidavit, a violation of constitutional obligations outlined in Section 27, a violation which erodes "social trust" in the government and the likelihood of "accountable governance."[376]

Importantly, the nationalistic legal frame invoked by the Simelane family goes beyond allegations of political interference to describe the failure of the State to actively pursue retributive justice as a form of betrayal, a characterization that speaks volumes about the presumed relationship between the State and victims of human rights violations. In the founding affidavit placed before the Court, the word "betrayal" is used 10 times to describe the lack of retributive justice in South Africa, more broadly, and in Nokuthula's case specifically. As

[375] *Nkadimeng v. National Director of Public Prosecutions* (2015) Case Number 3554, Founding Affidavit par. 45.
[376] Ibid, par. 45.

Nokuthula's mother described in her supporting affidavit, this betrayal functioned on several levels, implicating a number of actors in the process.

> "We feel betrayed. Nokuthula was betrayed by one of her own cadres. The TRC's Amnesty Committee granted the white security officers amnesty for kidnapping even though they had found that these same individuals had been untruthful about what they did to her during captivity, and that they made the false claim that Nokuthula was cooperating with them. The Amnesty Committee nonetheless granted amnesty to the white officers for kidnapping and in doing so violated the full disclosure principle. We regarded this is an inexplicable betrayal. We then expected the various post-apartheid governments to pursue justice in Nokuthula's case. They turned their backs on us. Prosecutors even refused to investigate those police officers who did not apply for amnesty for the kidnapping of Nokuthula. This included the Commander of Security Branch C1 Section, former Brigadier Willem Schoon, who authorized the crimes committed against Nokuthula."[377]

First, Nokuthula was betrayed by one of her own comrades, a fellow MK cadre turned state operative who worked with the Soweto Intelligence Unit of the South African Security Police to abduct Nokuthula. The disappearance of Nokuthula left her family "with a deep sense of loss and anguish," with her mother suffering "pain that is impossible to quantify."[378] This suffering was further compounded by the subsequent betrayal of Nokuthula and her family by the TRC's Amnesty Committee. Despite finding that the Security Branch officers involved in Nokuthula's disappearance and torture had lied to the Commission [to minimize their role quote], the Amnesty Committee "betrayed its own law, which states that amnesty can only be granted in exchange for the truth and full disclosure."[379] A final betrayal occurred at the hands of the police and State prosecutors assigned to Nokuthula's case, state actors whose willful neglect of the case and others like it "betrayed [the] trust" of the Simelane family.

---

[377] *Nkadimeng v. National Director of Public Prosecutions* (2015) Case Number 3554, Supporting Affidavit of Sizakele Ernestina Simelane, par. 11.

[378] Ibid, par. 12.

[379] *Nkadimeng v. National Director of Public Prosecutions (2015)* Case Number 3554, Founding Affidavit, par. 13.

Framing the failure to pursue retributive justice as a betrayal by the post-apartheid state is emblematic of nationalistic legal frame, particularly when one considers the word "betray" as "to be disloyal." In framing the harm experienced by the dearth of criminal prosecutions as a betrayal of trust, the founding affidavit implies that a degree of trust, and indeed, loyalty was supposed to characterize the relationship between Nokuthula and the post-apartheid state. Importantly, from the perspective of Nokuthula's family, this loyalty was not intended to be one sided. Just as Nokuthula was loyal to the liberation forces fighting the apartheid regime, the Simelane family expected the liberation forces, now at the helm of the South African state, to reciprocate that loyalty by pursuing justice for Nokuthula.

According to the court affidavits, the family's expectation of loyalty in return was further bolstered by the notion of a democratic transition itself. According to Thembi, the family "firmly believed that the *new democratic* South Africa would take the necessary steps. We were wrong…This betrayal cut the deepest."[380] In her supporting affidavit, Nokuthula's mother echoed these sentiments, stating that "we expected that with liberation a *new post-apartheid* government would stand with us to search for the truth and to hold the perpetrators accountable. We were wrong."[381] In these quotes, as well as elsewhere in the affidavits, the South African state is repeatedly referred to as "the new South Africa", "the post-apartheid government," and "the new democratic state." Such framing works to not only distinguish the ANC-lead government from the prior apartheid regime, but also to suggest that accompanying the promise of the democratic transition was the expectation of a different relationship with the State, a relationship characterized by loyalty to its citizens, and indeed, the pursuit of justice.

[380] Ibid, par. 12, italics added.
[381] Ibid, par. 8, italics added.

The prosecution of perpetrators denied amnesty by the TRC reflects both a constitutional commitment made by the ANC during the negotiated transition as well as a legislative requirement established by the Promotion of National Unity and Reconciliation Act. This Act provided for the creation of the TRC and the truth-for-amnesty scheme that came to characterize the Commission, while maintaining a commitment to retributive justice for those not granted amnesty. For many victims and their families, the TRC Act was a compromise agreed to, in part, because of the threat of retributive justice. As the founding affidavit states,

> The historic compromises that gave birth to [South African] democracy with its enshrined freedoms required certain sacrifices, particularly on the part of victims…My family and I accepted the necessary and harsh compromises that had to be made in order to cross the historic bridge from apartheid to democracy. We did so on the basis that there would be a genuine follow-up of those offenders who spurned the process and those who did not qualify for amnesty. This part of South Africa's historic pledge with victims has not been kept in Nokuthula's case and indeed in most arising from the conflicts from the past.[382]

The state's failure to fulfill its previous commitments to retributive justice suggests such the sacrifices by victims and their families have been "rendered largely meaningless."[383] As with all nationalistic legal frames, the frame in composed, in part, by causal attributions about the cause of harm. In the Simelane case, the nationalistic legal frame positions the post-apartheid State as the main perpetrator of harm in the democratic era. This harm is said to result from a failure to live up to its constitutional requirements and principles as well as legislative prescriptions that require the independent, apolitical pursuit of retributive justice.

Equal Rights Frame

In addition to nationalistic legal framing, the Simelane family engaged collective rights framing. As Pedriana observes, rights discourse is central to the framing behavior of social

movement organizations. Indeed, rights talk serves as the foundation for legal frames that are often deployed by social movement organizations to transform problems into social grievances, mobilize constituents, and provoke change.[384] Leachman identifies two types of rights frames are identified in the social movement literature: collective and individual rights frames. These frames vary, first and foremost, in the manner in which they define the nature of harm experienced. Are grievances framed as violations of individual rights or collective rights? Whereas collective rights framing defines social grievances as collective harms that violate the status-based rights of a group, individual rights framing emphasizes the individual as the entity in need of legal protection, with grievances framed as violations of individual rights – rather than group rights. These diagnostic beliefs of an individual or collective rights frame can have considerable impact on the discursive process of frame amplification, a generative process of accenting and highlighting issues, experiences, events, or beliefs within a frame, punctuating certain aspects while excluding others. [385]

With diagnostic beliefs positioning the harm experienced as collective in nature, collective rights frames emphasize the social differences and distinct experiences of a movement's constituency in order to legitimize demands for status-based legal protections. As such, collective rights frames turn the focus of a movement inward, with collective rights discourses combined with messages of solidarity working to reinforce a sense of collective identity among movement participants and, in turn, motivate collective action. In contrast, individual rights frames often strategically downplay the differences between the movement's constituency and other groups, preferring instead to amplify the ways in which victimized individuals are similar to the rest of society, and thus, deserving of equal protection – not special

[384] Pedriana, "From Protective to Equal Treatment."
[385] Leachman, "Legal Framing," 33-41.

protection – under the law.[386] In the Simelane case, the failure of the state to pursue prosecutions for apartheid-era crimes was framed as a violation of the family's right to equality and dignity. While the right to dignity featured centrally in the Simelane family's arguments before the court, this chapter focuses primarily on the family's claim to equality and the performative dimensions of such a claim.

Equality: An Individual or Collective Right?

In the legal affidavits, the Simelane family frames the failure to pursue justice for apartheid-era crimes as a violation of the right to equal protection before the law. The right to equality enshrined in Section 9 of the Constitution states that "everyone is equal before the law and has the right to equal protection and benefit of the law,"[387] with equality defined as "the full and equal enjoyment of all rights and freedoms."[388] Section 9(2) provides for the adoption of "legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination." Finally, Section 9(3) prevents state discrimination on the basis of categories such as "race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth."[389]

It is important to note that collective rights frames often highlight the social differences and distinct experiences of a victimized group in order to legitimize demands for status-based legal protections. The Simelane family's claims to the right to equal protection are framed as inherently identity-based, collective rights claims, with the collectivity in question that of

[386] Ibid, 33-37.
[387] The Constitution of the Republic of South Africa, 1996, Section 9(1)
[388] Ibid, Section 9(2)
[389] Ibid, Section 9(3).

victims' families. According to Thembi's founding affidavit, "the prolonged delay, and failure to take forward the so-called political cases of the past, including Nokuthula's case, violates the right to equal protection and benefit of the law enshrined in Section 9 by unjustifiably discriminating against the victims of this class of crimes." Indeed, the founding affidavit argues that although the legal affidavits concerned the disappearance of Nokuthula in particular, "this case is representative of most cases arising from South Africa's conflicts of the past that were submitted by the Truth and Reconciliation Commission ("TRC") to the… [National Prosecuting Authority]…for further investigation and possible prosecution ("the TRC cases")….The bulk of these cases have not been seriously investigated."[390]

The founding affidavit goes on to assert that the delays resulting from political interference and pressure "reinforce the view…that serious crimes of the past do not receive any diligent attention from the authorities and indeed have been singled out for neglect."[391] Given the widespread allegations of political interference in the duties of the NPA, such neglect is said to "only have been the product of a policy or decision to abandon these cases."[392] The legal framing within the founding affidavit thus works to amplify the distinct experiences of one group in particular – the victims of apartheid-era human rights violations and their families – suggesting that the right to equality in this context is a collective rights, rather than an individual right, as equality is sometimes framed.[393]

The diagnostic beliefs of the equal rights frame invoked in the founding affidavit work to broaden the victimized group from those who directly experienced egregious acts of violence to

[390] *Nkadimeng v. National Director of Public Prosecutions (2015)* Case Number 3554, Founding Affidavit, par. 3.
[391] Ibid, par. 73.
[392] Ibid, par. 4.
[393] For example, the reproductive rights movement in the US has at times characterized reproductive rights as a collective right held by a unique group in need of protection (i.e. women) as well as an individual right to equality held by every member of society, regardless of group membership, subsequently downplaying the unique experiences of women as a group.

the family members of those victims as well. By willfully neglecting to investigate or prosecute these crimes, according to the Simelane family, the State is said to discriminate against a particular category of South African citizens (i.e. the victims of apartheid's human rights abuses), further compounding the legal discrimination and judicial neglect experienced during prior periods of colonization and apartheid. Within the equal rights frame, then, is the notion that victims and their families constitute a unique class of individuals whose interests should be actively promoted and protected, rather than undermined, by the law.

Such rights claims are also accompanied by the implicit claim that the post-apartheid State should prioritize these cases when administering justice. As Thembi notes, "It can't be only the NPA looking at the Simelane case because the Simelane's took them head on, and forget about the rest [of the victims' families] who do not have the affordability or the assistance."[394] Rather, the NPA, regardless of external financial and legal assistance, must consider actively investigating the 480 or so cases of the disappeared who were recorded by the TRC.[395] Within family's claims to equality is implicit support for affirmative action policies promoting the active prosecution of apartheid-era crimes over other the prosecution of ordinary crimes work to challenge the liberalism that came to define much of the post-apartheid transition.

From a liberal perspective, redistributive programs such as affirmative action policies are often seen as a violation of state neutrality and negative liberty, preventing individuals as moral autonomous persons from realizing their own respective conceptions of the good. Challenging liberalism's belief that such redistributive programs are inegalitarian in nature, the family's calls for the prioritization of political apartheid-era crimes by the South African Police Services and National Prosecuting Authority work to shift the normative priority of the criminal justice system

[394] Interview with Thembisile Simelane, June 21, 2018, Johannesburg, South Africa.
[395] Ibid.

from the individual to the group. While the South African state has embraced affirmative action programs within the socio-economic realm as mechanisms to rectify economic inequalities created by white minority rule, the Simelane family's rights claims draw attention to lack of *legal* equality enjoyed by the group of victims of apartheid-era human rights abuses and their families.

V: Performativity and Legal Framing

Within socio-legal research on legal framing, nationalistic legal frames and equal rights frames exist as distinct frames that work to define grievances and attribute blame in divergent, and potentially conflicting ways. The equal rights frame appears to be in tension with the nationalistic legal frame, as the latter calls for the post-apartheid state to serve as apolitical executors of the law and fulfill its constitutional and legislative obligations. In contrast, the equal rights frame implies that for equality before the law to exist, legal actors must eschew such neutrality in favor of prioritizing cases of apartheid-era human rights abuses. In making a claim to equality, the family demands that the Court disavow legalist notions of lawyering and judging implicit in the nationalistic legal frame, instead advocating for the State's moral engagement with the predicament of the "Other," the marginalized and silenced families of victims of apartheid-era human rights violations.

While at face value, the nationalistic legal and collective rights frames deployed by the Simelane family appear to contradict one another, a performative approach to legal framing shines light on the ways in which these distinct frames share similar performative effects. Indeed, both frames reflect a form of political engagement that enabled the Simelane family to create and contest the boundaries of community and the meaning of identity in South Africa. By

making rights claims against the state in their pursuit of justice, the Simelane family has engaged in the generative process of creating new forms of political subjectivity, a process "whereby people who have no place or voice in a political community act as if they have both and, in doing so, shift the basic understandings and boundaries of that community."[396]

Historically, victims of human rights abuses and their families have been marginalized not only socially, but legally as well, with victims' families facing considerable obstacles to the pursuit of justice during the apartheid era. For many families, the deaths of their loved ones at the hands of the apartheid state were shrouded in secrecy, clouded by state-produced falsities about the nature of their deaths and the location of bodies. For those who died while in detention, such as Ahmed Timol and Steve Biko, the apartheid state concocted stories of suicide and accidental deaths to hide state involvement in their murders. Formal judicial inquests – a family's main legal avenue for the establishment of the truth - were often held to exonerate white police officers while institutionalizing these false narratives within the broader criminal justice system. And for many disappeared members of the ANC's armed wing, such as the case of Nokuthula, deaths had to be assumed, leaving victims' families without knowledge of their fate or a body to bury. Under the apartheid regime, victims' families lacked legal avenues to put pressure on the state for justice for their loved ones, or even truth about their demise.

This marginalization of victims of human rights abuses and their families continued after the democratic transition in 1994, as the ANC-led government faced minimal incentives to pursue retributive justice schemes that may ultimately work to prosecute their own members. The Simelane family's trials and tribulations with the NPA are emblematic of this continued marginalization. While a docket into Nokuthula's death was opened in 1996, it took twenty years of lobbying by the Simelane family, the Legal Resources Centre, and the Foundation for

[396] Zivi, *Making Rights Claims*, 91.

Human Rights, and other legal actors before the NPA would consider reopening the case for investigation. It is important to note that political violence committed against the Simelane family continued long after the abduction, torture, and disappearance of Nokuthula. As Bhargava suggests,

> When political victims suffer violence, they are not merely harmed physically, however. The act of violence transmits an unambiguous, unequivocal message, that their views on the common good – on matters of public significance – do not count, that their side of the argument has no worth and will not be heard, that they will not be recognized as participants in any debate, and finally, that to negotiate, or even reach a compromise with them, is worthless. In effect, it signals their disappearance from the public domain. [397]

In the post-apartheid era, the Simelane family and other families of the disappeared, maimed, and dead are indeed characterized by the condition of "political death.[398] Such a claim may appear strange given the fact that Thembi Simelane is an active member of the ANC, serving as the Mayor of Polokowne at the time her family's appeal before the court was lodged. While the representation of black women in government has improved since the democratic transition, the ANC-lead government has reinforced the political death of victims' families by constructing a political order in which individuals who demand retributive justice rather than reconciliation are deemed as "an enemy outsider," rather than a legitimate, rights-bearing citizen of the post-apartheid era.[399] According to Philpott, "as long as the political order fails even to recognize this injustice, emitting silence or official denials, the victim continues to be politically dead."[400] In the absence of political will and resources to prosecute within the National Prosecuting

---

[397] Rajeev Bhargava, "Restoring Decency to Barbaric Societies,"," in *Truth v. Justice: The Morality of Truth Commissions*, eds. Robert I. Rotberg and Dennis Thompson, (Princeton: Princeton University Press: 2000): 47.
[398] Political death is a term derived from Orlando Paterson's notion of "social death" and used by political philosopher Rajeev Bhargava to describe the exclusion of victims of political violence from the political domain. Ibid, 47.
[399] Daniel Philpott, "Beyond Politics as Usual: Is Reconciliation Compatible with Liberalism?," in *The Politics of Past Evil: Religion, Reconciliation, and the Dilemmas of Transitional Justice*, ed. Daniel Philpott, (Notre Dame, Indiana: University of Notre Dame Press, 2006): 17.
[400] Ibid, 17.

Authority, the high financial burden of conducting private investigations and litigating before the Constitutional Court to force the hand of the NPA, as in the case of the Simelane family, has resulted in the continued marginalization of victims and their families from the criminal justice system.[401]

While the Simelane family's positionality in post-apartheid South Africa can be said to be – in the criminal justice domain – characterized by political death, given the ANC's continued refusal to entertain notions of retributive justice, the family – led by Thembi and supported by legal experts and civil society – spoke as if their voices could be heard, as if they were already recognized as an instrumental part in the shaping of their post-apartheid political community. A performative approach to legal claims made by the Simelane family demands a consideration of the transformative effect such claims can have on the subjectivity of those who are politically dead. To understand the performative dimensions of the Simelane family's legal framing and the generative processes of political subjectivity resulting from such claims, the Simelane family's claim to equality must also be placed within their broader discursive context, one characterized by discourses of victimhood, reconciliation, and citizenship that the Simelane family draws from, and at times, contests as they make their claims against the state.

Reconstituting South African Citizenship through Dissident Citizenship

In order to understand how the Simelane family's legal framing worked to challenge and reconstitute notions of victimhood and citizenship in South Africa, it is important to situate such framing within a broader discursive context, noting the ways in which victims of the apartheid state have historically been constructed and marginalized. Beginning in the mid-1970s, the deaths of ANC guerilla fighters were subject to intense politicization by ANC leadership who

[401] Interview with Thembisile Simelane, June 21, 2018, Johannesburg, South Africa.

sought to use their deaths as an instrument of political resistance and a method of mobilization. Funeral processes were transformed during this time to include overtly political elements such as speeches by ANC leaders, songs of liberation, political pamphlets, and flags. As Rousseau notes, for the ANC, "the potency of [the] dead body's political life lay in its requiring, in the face of death, not mourning or sorrow, but defiance and resistance, conscripting its peers and families into freedom's struggle."[402] The deaths of guerilla fighters, framed by the ANC as 'heroes' of the liberation movement, were no longer confined to the private sphere, to be mourned by family members and friends. Rather, such deaths became public affairs, sources of inspiration and mobilization for the ANC's wider constituency. The glorification of guerilla fighter deaths created a hierarchy of victimhood that simultaneously privileged the victimhood of guerilla fighters while also limiting family ownership over the bodies of their loved ones.

With the creation of the TRC in 1996, a hierarchy of victimhood in South Africa began to emerge that placed such 'hero-victims' at the top, as the TRC's narrow definition of victim worked to exclude "all those cases that were not 'politically motivated' and thereby not heroic."[403] As Kovras aptly notes, the TRC's focus on politically motivated human rights violations worked transform those considered 'terrorists' by the apartheid regime into not simply 'victims of state terror' but 'heroes of liberation.' Ultimately, "in this binary framing of politicized deaths (heroes vs. repressors), there is no space for nuances or unaffiliated victims."[404] The TRC's prioritization of hero-victims is evident in the workings of the Missing Persons Task Team, a unit established to work alongside the TRC to locate and exhume those identified as disappeared by the TRC. Of the 477 cases of disappeared persons considered by the

[402] Nicky Rousseau, "Identification, Politics, Disciplines: Missing Persons and Colonial Skeletons in South Africa," in *Human Remains and Identification* (Manchester: Manchester University Press, 2015): 187.
[403] Iosif Kovras, *Grassroots Activism and the Evolution of Transitional Justice: The Families of the Disappeared*, (Cambridge: Cambridge University Press, 2017): 192.
[404] Ibid, 198.

TRC, 476 cases concerned the fate of ANC guerilla fighters, despite the fact that guerilla fighters constituted only a fraction of those reported missing to the TRC.[405]

From the late 1990s onward, the ANC-led government continued this framing of the dead and missing guerilla fighters as "heroes of the liberation," further solidifying the hero-victims' position at the top of the hierarchy of victimhood. Just as ANC leadership in 1970s politicized the funerals of guerilla fighters to encourage further involvement in the liberation movement, the ANC leadership of the late 1990s politicized the exhumations and reburials of guerilla fighters identified through the work of Missing Persons Task Team. At the first reburial of exhumed fighters, for example, President Mandela, standing in "Freedom Park" in front of coffins draped with ANC flags, "took this opportunity, as president of South Africa, to call on all political parties and organizations, on all soldiers and others across the old political divide – on all among these and other forces who have reason to apply for amnesty – to do so before the 10th of May." He further declared the fallen guerillas as 'heroes' who 'did not die in vain." [406] Subsequent exhumations and reburials assumed this political script of a military funeral, with local or provincial ANC party structures overseeing the reburial of guerillas "that, while restoring personhood, thus placed, not a family member, but the armed guerilla at the center of the script."[407]

The ANC's hegemonic framing of dead and missing guerilla fighters as hero-victims has implications for the rights claims made by the Simelane family, in particular, and the pursuit of justice more broadly. First and foremost, by framing the missing and dead as heroes of the liberation movement, first, and individual citizens, second, ANC guerilla fighters were "treated

[405] Ibid, 199.
[406] SABC, *TRC Special Report*, episode 45, parts 1-4, screened April 27, 1997 by the South African Broadcasting Corporation (SABC), available at https://www.youtube.com/watch?v=clPxqSfW1rk&list=PLA73EAC764847614D
[407] Rousseau, "Identification, Politics, Disciplines," 185.

as soldiers fallen in the line of duty, not as victims,"[408] a reconceptualization that implies such fighters enjoyed "the moral privilege of sacrificing their lives for liberation."[409] This instrumental reframing worked to generate political capital for the ANC-led government while transforming the mourning of such heroes into a public, rather than private event, with the bodies of the dead and missing treated not as family members but as the foundation for the democratic era. The political instrumentalization of the dead and missing worked to simultaneously improve the image of the ANC whilst preventing the families from engaging in more personal modes of mourning. Furthermore, as Kovras aptly observes, the ANC's "instrumental and heroic approach [also] excludes any discussion about the legal rights of the families or the duties of the state," with such matters silenced by the public celebrations of the hero-victim's life and death.[410]

It is important to note that the framing of the dead and missing guerilla fighters as heroes was not limited to the ANC-led government. Indeed, as Aronson observes, the relatives of guerilla fighters frequently demanded, with anger, "collective (social and public) recognition not just of their victimhood, but also of their sacrifice for the freedom of all South Africans, primarily through acknowledgment of the missing as military heroes by the state."[411] The Simelane family, in the founding affidavit submitted before the Court, invoked this victim-hero discourse as well, noting that while Nokuthula "devoted her life to resisting the pernicious system of Apartheid…[and that her] sacrifices helped to lay the basis for South Africa's democracy with its enshrined freedoms, the new South Africa has turned its back on her."[412] By framing Nokuthula's involvement as a courier in the armed wing of the ANC as a personal

[408] Kovras, *Grassroots Activism*, 202.
[409] Ibid, 203.
[410] Ibid, 203.
[411] Jay D. Aronson, "The Strengths and Limitations of South Africa's Search for Apartheid-Era Missing Persons," *International Journal of Transitional Justice* 5, no. 2 (2011): 273.
[412] *Nkadimeng v. National Director of Public Prosecutions (2015)* Case Number 3554, Founding Affidavit, par. 10.

sacrifice for the democracy enjoyed by South Africans today, the Simelane family reinforced the ANC's hegemonic framing of hero victims as the "bodies of the new nation." [413]

At the same time, however, the Simelane family, through their claims to equality, made visible the various ways in which the dead and missing guerilla fighters *as well as* their families were conceptualized as unequal, noncitizens in the post-apartheid era. More than making a simple constative utterance about the right to equality as it exists within the Constitution, the Simelane family depicted the broader community of victims' families as victims, not only of human rights abuses, but of an unresponsive criminal justice system and political maneuvering by the ANC. In doing so, the Simelane family made clear the contradiction between the ANC's framing of their loved ones as heroes of the liberation struggle and the failure to pursue justice for those who gave their life for liberation. In this way, the Simelane family's legal framing works to contest the hegemonic framing of Nokuthula and other disappeared guerilla fighters by highlighting discrepancies between the ways in which such (hero)victims are instrumentalized by the ANC but not substantively prioritized with regards to truth and justice. The Simelane family's claims to equality, for example, imply that if dead and disappeared guerilla fighters were truly heroes, as the ANC purports, their sacrifice would be recognized by the State in the form of retributive justice. Thus, the equal rights frame works to not only establish victims' families as victims of the unresponsive post-apartheid State, but to emancipate the family's own victimhood from the ANC's hero-victim discourse that restrict victims' families from the pursuit of legal justice for their loved ones.

Furthermore, by making claims to a democratic state that upholds rule of law, pursues accountability for crimes, and protects victims' rights to equality, the Simelane family has engaged in a kind of legal framing that has worked to contest categories of protected groups as

[413] Rousseau, "Identification, Politics, Disciplines," 177.

outlined in Section 9(3) of the Constitution, creating new forms of political victim subjectivity in the process. While the South African Constitution is incredibly progressive when it comes to identifying the categories to be protected from discrimination, categories such as race, gender, or marital status do not capture the special category the Simelane family purports to represent: the families of victims of apartheid-era political crimes. In asserting that the failure to investigate and prosecute apartheid-era abuses constitutes a transgression of legitimate political authority and a violation of the right to equality held by victims and their families, the Simelane family not only contests the existing categories to be protected from discrimination under the law, but envisions and enacts a *new* category of persons in need of protection as well, creating a new political community of victims-citizens in the process.

The founding affidavit's implicit demand to include victims' families in the list of protected requires a re-imagination of the ways in which protected categories are constituted, specifically, and what it means to be a victim *and* rights-bearing subject in South Africa, more broadly. The end of apartheid saw the emergence of a new understanding of South African citizenship, one no longer predicated on racial hierarchies and the politics of racial exclusion, but rather, rooted in the reconciliation discourse that came to dominate the transition. The postamble of the 1993 interim Constitution, providing for the granting of amnesty for political offences, is emblematic of this reconciliation discourse, declaring that "the pursuit of national unity and the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society…[t]here is a need for understanding but not for vengeance, a need for reparation but not retaliation, and need for ubuntu but not for victimization."[414] Although this chapter of the constitution also provides for the creation of

[414] Constitution of the Republic of South Africa, Chapter 15, Act 82 of 1993 (Interim Constitution). The Interim Constitution has been repealed.

mechanisms, including tribunals, it advocates primarily for reconciliation, rather than retribution, as the pathway for breaking with the past and opening "a new chapter" in South African history.

Resulting, in part, from the liberal nature of the negotiated transition in South Africa, the role of religious leadership in the liberation movement, and the post-apartheid political interests of the ANC, the 'new' South African citizen reflects a normative post-apartheid identity that is reconciliation oriented and non-racial in nature. Because South Africa's reconciliation-based approach to the transition mandates inter-group reconciliation and the reintegration of apartheid's survivors into society, any recognition of the ongoing effects of apartheid-era violence is subsequently pushed to the background. Attempts by survivors to bring the ongoing consequences of apartheid's violence to the public sphere are "resented as a sign of the speaker's ungrateful egotism and seen as proof of the speaker's inability to integrate."[415] Such efforts, according to reconciliation discourse, are held as direct threats to South Africa's break with the past and its hopes for a sustainable peace in the future. Under the reconciliation frame, any "acknowledge of a person's victimhood should instead be smooth, sociable, and generous – not threaten to evoke bad memories or to challenge the success of the so-called new South Africa."[416] In essence, the reconciliation discourse that came to dominate much of South Africa's transition from apartheid mandates that victims and survivors to let sleeping dogs lie, to accept the publication of the TRC's Final Report in 2003 as the point in which the question of apartheid-era victimhood was resolved.

[415] Rita Kesselring, *Bodies of Truth: Law, Memory, and Emancipation in Post-Apartheid South Africa,* (Stanford, CA: Stanford University Press, 2017): 120.
[416] Ibid, 120.

A number of scholars have noted the intense pressure felt by South Africans to comply with the ANC's reconciliation-oriented approach to the democratic transition.[417] Indeed, Thembi Simelane has viewed her family's pursuit of justice as "socially costly," given the dominance of the reconciliation discourse described above. Thembi notes that "there are people who come up to me and say, "But we think you must leave this whole thing [behind]. We don't think it is necessary anymore." According to Thembi, that reconciliation dominated the transition from apartheid resulted in "fighting so hard against a system [of reconciliation] that is socially adjusted to quite a number of people," even those who have indicated concern and desire to find the truth about their missing family members as well. This resistance to continued retributive justice is expressed particularly in light of the monetary costs of prosecution as well, with the cost of justice juxtaposed to the economic strife facing many South Africans today.[418]

If, as the reconciliation discourse accompanying the transition from apartheid asserts, a good democratic citizen of South Africa is understood as one that sacrifices their desire for retribution in favor of reconciliation and reintegration, the claim to equality before the law exposes that particular understanding of 'good' citizenship as excluding those South Africans who desire retributive justice from the state. In making claims to the right to equality, the Simelane family does not intend to derail the national reconciliation process, but *further* it by pursuing justice for Nokuthula. While victims of human rights abuses and their families are South African citizens in the formal, legal sense, they are treated as strangers existing outside of the political order when they make retributive justice demands. When victims' families make claims to rights such as equality and the non-politicization of justice, such claims thrust the speaker into the process of "claiming to be conceived as a rights-bearing individual, as a person,

[417] See, for example, Michael Humphrey, "Reconciliation and the Therapeutic State," *Journal of Intercultural Studies* 26, no. 3 (2005): 203-220.

in the first place," as rights-bearing subjects that exist *in spite of* their rejection of the reconciliation discourse that dominated the transition.[419]

In this way, the Simelane family's legal framing not only challenges the version of reconciliation-based citizenship that has emerged in the democratic era, but enables the family to enact a kind of *dissident citizenship* that is fundamentally democratic in nature. First conceptualized by Holloway Sparks, dissident citizenship can be understood as "the practices of marginalized citizens who publicly context prevailing arrangements of power by means of oppositional democratic practices that augment or replace institutionalized channels of democratic opposition when those channels are inadequate or unavailable."[420] Eschewing institutionalized practices of resistance such as voting and petitioning, dissident citizens engage in creative oppositional practices in the public sphere such as marches, sit-ins, and street theater, practices that have the potential to "reconstitute the very boundaries of the political itself."[421] Importantly, dissident citizens do not contest current arrangements of power as participatory equals. Rather dissident citizens act "from the margins of their non-democratic polities because they have no institutionalized channels of opposition available or because they lack meaningful access to those channels."[422] While Holloway focuses primarily on dissident acts of citizenship that occur outside of institutionalized forms of contestation, namely, in the public sphere, he maintains rooms for dissident citizens to engage in institutionalized dissent as well.

Merry's exploration of legal consciousness among working class plaintiffs reflects this kind of enactment of dissident citizenship within institutionalized channels of democratic contestation. Merry notes that although working-class plaintiffs in America "have submitted

---

[419] Zivi, *Making Rights Claims*, 83.
[420] Holloway Sparks, "Dissident Citizenship: Democratic Theory, Political Courage, and Activist Women," *Hypatia* 12, no. 4 (1997): 75.
[421] Ibid, 75.
[422] Ibid, 75.

their problems voluntarily for the court's consideration, suggesting a willingness to accept its authority…the choice of court is not unconstrained: virtually the only alternatives are violence and enduring the situation. Local authorities are absent or ignored. These people are resisting in the sense that they are trying to control the course of their problem in court. ….Here, resistance consists of challenges to the court's efforts to determine which discourse frames the problem at hand. Plaintiffs resist this cultural domination by asserting their own understanding of the problem, usually by insisting on talking about it legal discourse."[423] Thus, the enactment of dissident citizenship can take place even within institutionalized channels associated with the state, provided that such challenges come from, not participatory equals, but those existing on the margins of a community.

By framing the failure to pursue retributive justice in legal terms, as a violation of Constitutional principles ensuring the non-politicization of justice as well as the right to equality, the Simelane family engages in a kind of dissident citizenship that complicates hegemonic conceptions of the rights-bearing public in South Africa. In making their claims to justice from the margins of society, the Simelane family engages in a performative contradiction, as the family is simultaneously "excluded from the universal, and yet belongs to it nevertheless, speak[ing] from a split situation of being at once authorized and de-authorized."[424] By resisting the reconciliation discourse of the post-apartheid transition by citing and, at times, exceeding conventions such as equality, the Simelane family comes to constitute themselves as victim-citizens with the right to retributive justice.

The performative utterances embedded within the nationalistic and equal rights frames serve as transformative speech acts in that they not only work to constitute victims' families as

[423] Sally E. Merry, *Getting Justice and Getting Even: Legal Consciousness Among Working-Class Americans,* (Chicago: University of Chicago Press, 1990), 197.
[424] Judith Butler, *Excitable Speech*, 91.

political subjects, but create space for victims' families to become subjects in a manner that is different than they currently are. The Simelane family does accept the notions of victimhood and citizenship as they have been constructed in the democratic era. Rather, the family performs a kind of dissident citizenship that reconfigures the relationship between victimhood and citizenship, acting as citizens who have an obligation to hold the state accountable, rather than simply victims to be glorified and then discarded by the democratic state. While the Simelane family demands recognition of the harm experienced by both the apartheid regime and the ANC-lead government, the family, through legal framing, also demands being recognized as more than victims, as citizens who have the right to participate in the creation of the emerging democratic polity.

VI: Conclusion

In their pursuit of justice for Nokuthula, the Simelane family relied on legal framing to reconstruct their grievances against the post-apartheid state. On the one hand, the Simelane family interpreted state failure to secure justice for victims of apartheid-era crimes as a betrayal by the ANC-led government to live up to the historic compromise made with victims and their families, as well as the constitutional and legislative obligations to prosecute those denied amnesty by the TRC. In this way, the family positions the post-apartheid state as both the ultimate provider of justice and the primary agent of harm in the democratic era. By making claims to the right to a democratic state that refrains from politicizing the pursuit of justice, the Simelane family questions the legitimacy of the ANC-led government, while highlighting the gap between promises of retributive justice made during the negotiated transition and the lived reality of the transition. In this way, nationalistic legal framing enabled the Simelane family to

articulate an alternative relationship between the democratic state and its citizens, one characterized by social trust, rule of law, and the fulfillment of retributive justice obligations.

At the same time, the Simelane family, through equal rights framing, asserts that the. failure to prosecute an entire class of cases (i.e. human rights abuses committed during the apartheid era) constitutes a violation of their right to equality before the law. Whereas the nationalistic legal frame calls for the apolitical execution of justice by a neutral state, the equal rights frame calls on the state to prioritize the prosecution of apartheid-era human rights violations, ensuring equal protection before the law for a community of victims who have traditionally lacked access to criminal justice processes. If this chapter had adopted a purely descriptive approach to the legal frames deployed in the Simelane family affidavits filed before the High Court, the nationalistic and equal rights frames would appear in tension with one another, calling for state action along contradictory lines. Yet, when frame analysis is supplemented with a performative perspective, it becomes clear that both the nationalistic and equal rights frame utilized in this case are united in their constitutive effects. Both frames appear to be part of a generative process that not only challenges, but works to reconstitute what it means to be a victim *and* citizenship in post-apartheid South Africa.

By making a claim to equality and a depoliticized justice system within the context of broader discourses of victimhood and reconciliation, the Simelane family has enacted a form of dissident citizenship that undermines dominant conceptions of rights-bearing citizenship in South Africa as well as understandings of victimhood, protected groups and the state's obligation towards them. Kesselring notes that once an individual articulates their victimhood publically, "the role of victimhood in the person's subjective experience changes. Such articulation brings with it a distinctly political victim subjectivity, a state in which one's personhood is constituted

in relation to other, often prevailing discourses about victimhood…"[425] While the Simelane family has at times drawn on the hero-victim discourse propagated by the ANC, a framing strategy that allows their claims to be intelligible, the family's claims have also exceeded such dominant discourses, enabling the family the participate in a form of political engagement that is both counter-hegemonic and creative. Through the legal framing process, the Simelane family reconstructs victims as citizens who actively hold their state accountable, rather than outsiders who are subject to the retributive justice whims of an indifferent state. The Simelane family's claims to equality mark a refusal to accept the condition of political death imposed on them, with the family speaking as if their voices already mattered within the justice sector. Importantly, such claims appear to work to transform the family's status as marginalized victims of an unresponsive criminal justice system to empowered participants in important criminal justice decisions such as the decision to prosecute.

In this way, legal framing in the Simelane case not only transforms the Simelane family and other victims' families from non-citizens to dissident citizens, but *active* citizens as well. Active citizenship, according to Shklar, is predicated on an "*internalized* part of a democratic order that relies on the self-direction and responsibility of its citizens rather than their mere obedience."[426] Active citizens are those that, through their willingness to act in response to injustices, reinforce democratic culture and the constitutional order and protect the formal provisions of citizenship. As Nagy notes, it is this "renewal of the sense of injustice [that] is…foundational to moral and democratic (re)construction in South Africa."[427] By recognizing the injustice of no justice for Nokuthula, the Simelane family's legal framing appears to be a

[425] Kesselring, *Bodies of Truth*, 13.
[426] Judith N. Shklar, *American Citizenship: The Quest for Inclusion*, (Cambridge, Mass: Harvard University Press, 1991): 6.
[427] Rosemary Nagy, "After the TRC: Citizenship, Memory, and Reconciliation," *Canadian Journal of African Studies* 38, no. 3 (2004): 642.

necessary condition for the establishment of a truly democratic state, particularly when such claims come from the politically dead following egregious acts of violence. Such claims are democratic in nature, creative contestations that destabilize hegemonic understandings of the good citizen and make possible the emergence of new political subjectivities and forms of citizenship in the aftermath of extreme violence.

CHAPTER FIVE:

CONCLUSION

What is the role and utility of law in post-conflict transitions? Understanding the role of law in post-conflict transitions is an ambitious endeavor, one that requires an analytical framework that captures the many functions that law serves in the construction and navigation of transitions away from violent conflict. This dissertation sought to illuminate the role of law as an interpretive frame and rhetorical capability that is deployed by transitional justice actors to not only make sense of past atrocities and the requirements of a post-conflict transition, but achieve various retributive justice goals as well. In adopting a frame analytic approach to the role of law in transition, the studies presented in this dissertation focus on the many ways in which law is understood, used, and acted on to shape the trajectory of retributive transitional justice in South Africa. Each chapter examined how law and legal framing is used by a range of actors, across levels of analysis, at various stages of the retributive justice process.

Chapter 2 provided an analysis of the liberal legalist frame in both transitional justice theorizing and praxis, demonstrating the utility of frame analysis at the disciplinary level. How transitional justice scholars and practitioners frame mass atrocities and their consequences can influence the framing of post-conflict transitions as well. The dominance of the liberal legalist frame is case in point: by viewing mass atrocities through the prism of the liberal legalist frame, transitional justice scholars and practitioners come to understand the requirements of post-conflict transitions as distinctly legal in nature. In the case of South Africa, the dominance of liberal legalism prior to the transition, as both a mechanism of repression by the apartheid state

as well a form of resistance to the indignities of apartheid, resulted in a largely liberal legalist approach to the negotiated transition.

Whereas the analysis presented in Chapter 2 occurs at the disciplinary level of analysis, Chapter 3's investigation of the *Basson* prosecution highlights the utility of frame analysis at the individual and organizational levels of analysis, as retributive justice processes began to unfold in South Africa. One important contribution of Chapter 3 lies in the temporal dimension of its analysis. The institutionalization of the domestic law frame during the apartheid-era and the framing processes that took place during the early investigative stages of the Basson case subsequently shaped nature of legal framing as the case progressed into the trial phase. Furthermore, Chapter 3 highlighted the ways in which the legal framing behavior of one set of actors, such as the defense team, can prompt changes in the ways in which law is used by other actors, such as state prosecutors.

In addition to examining legal framing at the disciplinary and organizational levels of analysis, this dissertation also considered the dynamics of legal framing at the individual level of analysis, long after the transition to democracy began in South Africa. Chapter 4's case study of the Simelane family's pursuit of justice for Nokuthula Simelane highlights the role of legal framing in micro-mobilization of victims' families against an intransigent post-apartheid State. Here, law proved to be an important discursive resource to challenge the state and force it to hold perpetrators of apartheid-era human rights abuses accountable for their crimes.

While the chapters in this dissertation are diverse in substance and focus, all work to highlight two important functions of law in transition. The following discussion reflects on law's function as an interpretive resource and rhetorical capability, before concluding with a brief discussion about the consequences of law's dominance in transitional justice.

I. Law as an Interpretive Frame

As a method of meaning-making, legal framing is often used by retributive justice stakeholders to promote a particular interpretation of the conflict period over others. This interpretive function of law in transition is not always deliberate, as the various ways in which actors use law to construct narratives of past violence is often dependent on the cultural milieu in which such framing occurs. Viewed from a frame analytic perspective, how retributive justice actors make sense of past atrocities is clearly an important force that can shape the trajectory of justice in the post-conflict era in profound ways. As the typology of diagnostic and prognostic beliefs developed by social movement scholars makes clear, there is an intrinsic relationship between how people define the violence of the past and the pathways for remedy that are deemed necessary and legitimate to pursue in the post-conflict era.

At the disciplinary level, the liberal legalist frame is used to transform egregious acts of violence inflicted against victims on the basis of group membership into harm experienced, first and foremost, by individuals. Though the liberal legalist frame broadens the victimized group to include the international community as a whole, the harm produced by the perpetration of international crimes is understood as a violation of *individual* rights. These diagnostic beliefs, combined with liberal legalism's emphasis on individualism, proportionate punishment for crimes, and punishment as "just deserts," positions individual criminal accountability as the only legitimate way to condemn the radical evil of extraordinary international criminality. As an interpretive frame, liberal legalism enables the Western-trained lawyers who populate the field of transitional justice to pursue post-conflict justice in a way that legitimizes and reinforces their

continued dominance in the field. The embrace of liberal legalism by transitional justice scholars and practitioners is not necessarily a deliberate act meant to signal the superiority of the frame. Rather, because the liberal legalist frame is constituted by beliefs and values rooted in the Western legal tradition, transitional justice scholars and practitioners (who originate largely from the West) find that the frame resonates highly with their pre-existing worldview.

For South African state prosecutors pursuing criminal accountability for past human rights abuses, legal framing assists prosecutors in translate instances of thought-defying violence into objective criminal conduct, proscribed by law and thus eligible for prosecution. In the case of the prosecution of Wouter Basson, two variants of liberal legalist frames were available to state prosecutors as they (re)constructed Basson's conduct into justiciable offences: the domestic law frame and the international law frame. Reframing the mass murder of anti-apartheid detainees from instances of ordinary crime proscribed under domestic to examples of extraordinary international criminality allowed state prosecutors to hold Basson accountable for human rights violations that took place outside of South African jurisdiction.

Importantly, the meaning-making function of law in transition is not limited to making sense of human rights violations of the past. As the legal framing behavior of the Simelane family suggests, legal frames may also help victims and their families make sense of the state's failure to pursue post-conflict justice as well. In the Simelane family's pursuit of justice for Nokuthula, law served as an interpretive resource from which the lack of justice could not only be understood, but remedied as well. By framing the intransigence of the state to actively investigate and prosecute Nokuthula's murderers as a violation of constitutional commitments and their right to equality, the Simelane family effectively opened up a legal pathway through which the democratic state could too be held accountable. Only by framing the state's failure to

pursue justice as a violation of constitutional and legal rights could the Simelane family's grievances be heard before the courts. Had the Simelane family framed the lack of retributive justice using the language of emotions, such as anger, grief, and betrayal, their journey for justice would have stopped at the courthouse steps, lacking a legal basis from which the court could compel the National Prosecuting Authority to act. By reframing the emotional harm experienced by a lack of justice into violations of legal rights and constitutional commitments, the Simelane family was able to use the courts as a method of putting pressure on the state.

II. Law as a Rhetorical Capability

Law in transition is not only an interpretive resource but rhetorical capability as well. This dissertation helps establish legal framing an important discursive tool for transitional justice stakeholders, a tool that actors across the political spectrum may use to advance or block their respective retributive justice goals. In the *Basson* prosecution, the defense team used a domestic law frame to persuade the trial judge to quash six conspiracy charges leveled against Basson. In response, state prosecutors used an international law frame to overcome the jurisdictional limitations highlighted by the defense. While the *Basson* case involved a framing contest between two different types of legal frames, the same legal frame may be used by stakeholders to pursue radically different retributive justice goals. Public debate surrounding retributive justice in South Africa is case in point. Whereas the human rights faction has used liberal legalism's principle of equality before the law to demand the prosecution of apartheid-era crimes, the conservative faction has used the same principle to hinder the state's pursuit of retributive justice.

Importantly, the rhetorical capability of law and legal framing is not limited to the pursuit of legal ends. Indeed, law in transition also offers transitional justice stakeholders with an interpretive, discursive tool that assists in the achievement of non-legal ends as well. The Simelane family's pursuit of justice for Nokuthula is case in point. In framing their grievances against the state as a violation of legal rights, the Simelane family was able to not only force the state to indict Nokuthula's murderers, but challenge hegemonic conceptions of victimhood, citizenship, and state-citizen relations as well. Ultimately, legal framing in this case helped provide a foundation from which alternative conceptions of state responsibility, equality before the law, and the "good" South African citizen could emerge.

Any discussion of law as a rhetorical capability must also address the role of power in post-conflict justice. A number of scholars have noted the role of power in shaping the transitional justice agenda, with the distribution of power, often determined by electoral politics, crucial in determining the type of justice pursued in the aftermath of violent conflict. For example, Huntington contends that the key determinant of human rights prosecutions during democratic transitions is the balance of power configuration that exists in the period immediately following a transition. Huntington further asserts that these power arrangements are determined to a large extent by the type of transition that occurs, with prosecutions less likely to occur in negotiated transitions.[428] Such balance of power arguments are premised on the assumption that the prevalence of transitional trials is dependent on domestic politics and elite preferences, with popular demands for justice reaching their height in the periods that immediately follow a post-conflict transition.

[428] Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, (Norman, Oklahoma: University of Oklahoma Press, 1991).

A frame analytic approach like the one advanced in this dissertation allows transitional justice scholars to go beyond analyzing the power politics of transitional justice agenda setting, alerting scholars to the role of power in retributive justice processes that both before and after the post-conflict agenda has been set. Insights from political science, sociology, and media studies research on framing suggests that at any given moment, a multiplicity of actors are engaged in framing contests, each competing with one another to assert their preferred frame as the authoritative interpretation of an issue. These framing contests do not occur within a political vacuum, but within a sociopolitical context defined by a unique distribution of power, a distribution that enables some frames to be more successful than others in providing the hegemonic interpretation of the issue at hand. Thus, a sensitivity to the relationship between framing and sociopolitical power requires, first and foremost, attention to the important role of frame sponsorship in determining the outcome of framing contests. Within the context of transitional retributive justice, frame analysis forces a consideration of not only the content of a given frame related to retributive justice, but who sponsors a particular frame as well.

At the disciplinary level, the dominance of the liberal legalist frame in the field of transitional justice can be attributed, in part, to the power of the frame's sponsors: Western transitional justice scholars and practitioners. While there has been an increasing recognition of and resistance to the limits of the liberal legalist approach to mass atrocities, the field of transitional justice remains largely committed to drawing from the liberal legalist toolbox as post-conflict transitions unfold. This is due, in part, to the tremendous power that external actors, particularly donors, maintain in the funding, design, and implementation of transitional justice processes. As transitional justice initiatives require enormous human, financial, and technical resources that exceed the capacity of most post-conflict states, those funding

transitional justice have the power to sideline initiatives that do not align with their own agendas. With transitional justice increasingly integrated into the liberal peacebuilding framework of the UN, the World Bank, and think-tanks such as the International Center for Transitional Justice and the United States Institute for Peace, the emerging reality "is that post-conflict societies are expected to or even forced by other states and international organizations to undertake TJ processes in accordance with international common standards and practices."[429] Despite calls for the localization of transitional justice initiatives, most of the organizations funding, designing, and implementing transitional justice processes come from the Global North, with such organizations promoting the liberal legalist frame outlined in Chapter 2. For transitional justice scholars and practitioners concerned with the dominance of the liberal legalist frame, one must understand how the sponsorship of the frame by Western actors and organizations prevents the true localization of transitional justice initiatives.

Frame analysis of the charging decisions in the *Basson* case exemplifies the ability of a frame analysis approach to capture the interplay between power, retributive justice, and legal framing. While South African state prosecutors enjoy a fair degree of prosecutorial independence and discretion in the construction of criminal charges against an alleged human rights violator, frame analysis of both South African prosecutor's social surround and decision field highlights the ways in which the distribution of power during the apartheid era shaped the range of charges deemed reasonable and available to prosecutors following the democratic transition. The persistent framing of Basson's egregious conduct as ordinary crimes proscribed by domestic law can be attributed to the power of the apartheid state to exclude the international law frame from law schools and legal institutions, creating a gap in legal knowledge with regards

[429] Ismael Muvingi, "Donor-Driven Transitional Justice and Peacebuilding," *Journal of Peacebuilding and Development* 11, no. 1 (2016): 11.

to international law as well as encouraging the firm institutionalization of the domestic law frame in the state's prosecuting authority. The apartheid regime's power to prevent the international law frame from emerging as a legitimate decision-frame in the construction of charges against human rights offenders remained even after the dismantling of the apartheid state.

While not explicitly analyzed in Chapter 4, power undoubtedly has played a role in the pursuit of justice for Nokuthula Simelane. The Simelane family's power to transform a personal grievance (i.e. the lack of justice for their family member) into a violation of legal rights requires both power and resources. To do so is often quite difficult for the families of victims targeted by the apartheid regime, as such individuals often exist as politically dead, relegated to the margins of society, and, while formally classified as citizens of South Africa, often characterized as outsiders who threaten the stability of the nation-building process. Yet, as the Simelane case suggests, by speaking as if their voices could be heard, as if they were already recognized as an essential part of the South African nation-building endeavor, the Simelane family has been able to transform themselves from disempowered victims at the mercy of the state to empowered citizens who are invaluable contributors to the future of the state. In this way, law appears to serve as a means by which victims and their families can emancipate themselves from their own victimhood and establish themselves as integral participants in the post-conflict transition.

III: Liberal Legalism: Help or Hindrance?

One major limitation plaguing existing discussions of the role and utility of law in transitional justice is the tendency to view law as a monolithic, stable construct that is synonymous with the Western legalist tradition. Often, scholars arguing against the "dominance of law in transitional justice" use "*law*" and "*Western legalism*" interchangeably, with such

conceptual conflations in turn working to bolster a misguided view of Western law as the only law in town. Ultimately, such critiques prove to be self-defeating. By conflating *law* with *liberal legalism,* the very critics who denounce transitional justice as Western imperialism in legal form end up contributing to the West's hegemonic grasp on the field and sidelining alternative conceptions of justice in the process. While critics of law's dominance in transitional justice theorizing and praxis are right to challenge the ubiquity of Western liberal legalism in discussions of post-conflict justice, they would benefit from a more explicit interrogation of the precise nature of the legal tradition that scholars urge the field to move beyond.

As this dissertation sought to demonstrate, an interpretivist, frame analytic approach to the study of law in transition is useful, in part, because forces a reconceptualization of law as a an interpretive frame of reference that is ambiguous, contestable, and dynamic in nature. As an emergent structure of social life, law is intertwined with the social practices and identities of a given society, with the meaning, and by extension, force of law dependent on how legal categories, symbols, and rules are understood, objectified, and used by agentic actors. Frame analysis, as an analytical framework, elevates current debates about law in transition by highlighting the multiplicity of conceptions of law that exist.

While this dissertation focused primarily on the role and utility of liberal legalism in South Africa's democratic transition, it is clear that liberal legalism is far from a homogenous, static system of legal rules, categories, and symbols. As an elaborated master frame, liberal legalism serves as the interpretive foundation from which a number of sub-frames can emerge. As reflected in Figure 1, the context-specific frames derived from liberal legalism include both an international law frame (i.e. global liberal legalism) and a domestic law frame (i.e. domestic liberal legalism). The domestic law frame, in turn, can spawn the development of legal frames

that emphasize constitutional commitments (i.e. nationalistic legal framing) as well as the human rights of citizens (i.e. individual rights frame). Scholars decrying the dominance of Western liberal legalism in transitional justice theorizing and praxis would benefit from a more careful examination of what type of liberal legalism is at play in a given context.

While future research on the role of law in post-conflict justice would benefit from expanding the analysis of legal frames to include alternative conceptions of law that exist outside of the Western legal tradition, such as indigenous law, the seemingly narrow focus of this dissertation on liberal legalism allows for a more nuanced assessment about the consequences of the liberal legalism's hegemonic grasp on transitional justice. The previous chapters suggest that the ubiquity of liberal legalist understandings of post-conflict justice is neither entirely positive nor destructive.

On the one hand, the liberal legalist frame has restricted popular understandings of the violence of apartheid to violations of bodily integrity rights, with the frame treating the devastating violations of the social, economic, and cultural rights that occurred under apartheid as subordinate to civil and political rights at the heart of the liberal legalist frame. Furthermore, the power held by the principle sponsors of the liberal legalist frame – Western lawyers, practitioners and donors – can often incentivize transitional justice stakeholders to use the language of liberal legalism to legitimize their retributive justice interests and claims, often to the detriment of the pursuit of a sustainable peace. The conservative faction's demands for equality before the law and the ANC-led government's lip service to retributive justice is emblematic of this point. With the exception of Nelson Mandela, South African presidents during the democratic era have used liberal legalist discourse to emphasize their commitment to criminal accountability, while refusing to provide the resources and political will to implement such

justice in practice. Here, the language of liberal legalism has worked to legitimize South African leaders as protectors of human rights whilst obscuring their true commitment to impunity for all. Law, it seems, "channels and imposes the force of the state," in often detrimental ways.

Yet, as Merry notes, "law, as an ideological weapon, has two edges: it is a source of domination and, at the same time, contains the possibilities of challenge to that domination."[430] As James Scott depicts in his book *Domination and the Arts of Resistance,* hegemonic ideologies do not only control, constrain, and imprison its subjects, but establish the parameters for resistance as well.[431] The performative approach to legal framing advanced in Chapter 4 makes this point very clear. Speech act theory holds that for any speech act to have an effect on the world, such utterances must be intelligible, that is, make reference to existing norms, beliefs, and discourses that already dominate the structuring of social life. In the Simelane case, the force of the family's legal framing is derived, in part, by their reference to liberal legalist beliefs and values such as the apolitical dispensation of criminal justice and the right to equality before the law. Yet, in their case before the courts, the Simelane family do more than merely reference liberal legalist values and beliefs. Rather, the family's rights claims reflect *perverse iterations,* processes of citationality that, while derived from the liberal legalist frame, are deployed in creative and unconventional ways. For example, in their claims to the right of equality, the Simelane family work to transform this right from a legal right held by individuals to a legal right held by a group (i.e. victims of apartheid-era abuses and their families). By emphasizing the lack of legal equality held by members of this community, the Simelane family reconstruct equality before the law as a group right, requiring a necessary reinterpretation of who is eligible for status-based legal protections. In this way, liberal legalist discourse not only helps legitimize

[430] Sally Engle Merry, *Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans,* (Chicago: University of Chicago Press, 1990): 8.
[431] James C. Scott, *Domination and the Arts of Resistance,* (New Haven: Yale University Press, 1990).

the claims of the Simelane family, enabling them to be recognized before the courts, but provides a window of opportunity for the liberal legalist frame to be challenged and transformed in the process.

Ultimately, this dissertation reinforces the notion that what is needed most in the field of transitional justice is a modicum of disciplinary reflexivity. While the dominance of liberal legalism must be criticized and questioned, particularly as it relates to the exclusion of alternative conceptions of post-conflict justice, its utility is highly context-specific. Liberal legalism, as a form of law, can be both conservatizing and transformative. Any analysis of the effect law has on the pursuit of post-conflict justice must consider not only what type of law is under scrutiny, but also how transitional justice actors understand, use, and act on law. Disregarding the polysemy of law and role of legal consciousness in post-conflict transitions hinder the discipline's understanding of the requirements of post-conflict transitions and the role transitional justice may play in promoting a sustainable peace.

References

Books and Articles

Abelson Robert P. "Psychological Status of the Script Concept." *American Psychologist* 36, no.7 (1981): 715-729.

Albertyn, Cathi and Beth Goldblatt. "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality." *South African Journal on Human Rights* 14, no. 2 (1998): 248-276.

Andersen, Elizabeth. "Transitional Justice and the Rule of Law: Lessons from the Field." *Case Western Reserve Journal of International Law* 47, no. 1 (2015): 305-317.

Aronson, Jay D. "The Strengths and Limitations of South Africa's Search for Apartheid-Era Missing Persons," *International Journal of Transitional Justice* 5, no. 2 (2011): 262-281.

Arthur, Paige. "How 'Transitions' Reshaped Human Rights: a Conceptual History of \ Transitional Justice." *Human Rights Quarterly* 31, no. 2 (2009): 321–367.

Aukerman, Miriam J. "Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice." *Harvard Human Rights Journal* 15 (2002): 39-97.

Austin, J.L. *How to Do Things With Words,* Cambridge, Mass.: Harvard University Press, 1975.

Austin, J.L. "Performative Utterances." In *Philosophical Papers,* edited by J.O. Urmson, and G.J. Warnock. 234-252. Oxford: Clarendon Press, 1979.

Bell, Christine, Colm Campbell, and Fionnuala Ni Aolain. "Justice Discourses in Transition." *Social and Legal Studies* 13, no. 3 (2004): 305-328.

Benford, Robert D. *Framing Activity, Meaning, and Social Movement Participation: The Nuclear Disarmament Movement,* PhD Thesis Department of Sociology, University of Texas, Austin, 1987.

Benford, Robert D. "An Insider's Critique of the Social Movement Framing Perspective," *Sociological Inquiry* 67, no. 4 (1997): 409-430.

Benford, Robert D. "Frame Disputes." In "The Wiley Blackwell Encyclopedia of Social and Political Movements," edited by David A. Snow, Donaatella della Porta, Bert Klandermans, and Doug McAdam, 1-2. Wiley-Blackwell Publishing, 2013.

Benford, Robert D. and David A. Snow. "Framing Processes and Social Movements: An Overview and Assessment." *Annual Review of Sociology* 26, no. 1 (2000): 611–639.

Berbrier, Mitch. "'Half the Battle': Cultural Resonance, Framing Processes, and Ethnic Affectations in Contemporary White Separatist Rhetoric." *Social Problems* 45, no. 4 (1998): 431–450.

Berlin, Isaiah. *Four Essays on Liberty.* Oxford: Oxford University Press, 1969.

Bernstein, Mary. "Gender, Queer Family Politics, and the Limits of Law." In *Queer Families, Queer Politics: Challenging Culture and the State, edited by* Mary Bernstein and Renate Reimann, 420-446. New York: Columbia University Press, 2001.

Bhargava, Rajeev. "Restoring Decency to Barbaric Societies,"." In *Truth v. Justice: The Morality of Truth Commissions,* edited by Robert I. Rotberg and Dennis Thompson, 45-67. Princeton: Princeton University Press: 2000.

Bisset, Alison. *Truth Commissions and Criminal Courts*. Cambridge: Cambridge University Press, 2012.

Bohler-Muller, Narnia. "Western Liberal Legalism and Its Discontents: A Perspective from Post-Apartheid South Africa." *Socio-Legal Review* 3, no. 1 (2007): 1-27.

Brown, Wendy. *States of Injury: Power and Freedom in Late Modernity*, Princeton: Princeton University Press, 1995.
Bubenzer, Ole. *Post-TRC Prosecutions in South Africa: Accountability for Political Crimes After the Truth and Reconciliation Commission's Amnesty Process.* Leiden: Koninklijke Brill NV, 2009.
Burger, Marlene and Chandre Gould. *Secrets and Lies: Wouter Basson and South Africa's Chemical and Biological Warfare Programme*, Cape Town: Zebra Press, 2002.
Butler, Judith. *Excitable Speech: A Politics of the Performative*, New York: Routledge, 1997.
Cameron, Edwin. "Judges, Justice, and Public Power: The Constitution and the Rule of Law in South Africa." *Oxford University Commonwealth Law Journal* 18, no. 1 (2018): 73-97.
Cameron, Edwin. "Dugard's Moral Critique of Apartheid Judges: Lessons for Today." *South African Journal on Human Rights* 26, no. 2 (2017): 310-319.
Carroll, William and R.S. Ratner. "Master Framing and Cross-Movement Networking in Contemporary Social Movements." *The Sociological Quarterly* 37, no. 4 (1996): 601-625.
Chong, Dennis and James Druckman, "Counterframing Effects." *The Journal of Politics* 75, no. 1 (2013): 1-16.
Comaroff, Jean and John Comaroff. "Reflections on Liberalism," *Social Identities* 9, no. 4 (2003): 446-473.
Constitution of the Republic of South Africa, 1993 (Interim Constitution).
Constitution of the Republic of South Africa, 1996.
Creed, Douglas W.E., Jeffrey A Langstraat, and Maureen A Scully. "A Picture of the Frame: Frame Analysis as Technique and as Politics." *The Journal of Politics* 5, no. 1 (2002): 34–55.
Creed, W.E. Douglas, Maureen A. Scully, and John R. Austin. "Clothes Make the Person? The Tailoring of Legitimating Accounts and the Social Construction of Identity," *Organization Science* 13, no. 5 (2002): 475-496.
Crossley, Nick. *Making Sense of Social Movements.* Philadelphia: Open University Press, 2002.
Czarnetzky, John M. and Ronald J. Rychlak, "An Empire of Law: Legalism and the International Criminal Court." *Notre Dame Law Review* 79, no.1 (2003): 55-126.
Dancy, Geoff and Christopher Fariss, "Rescuing Human Rights Law from International Legalism and its Critics." *Human Rights Quarterly* 39, no. 1 (2017): 1–36.
De Wet, Erika. "The 'Friendly but Cautious' Reception of International Law in the Jurisprudence of the South African Constitutional Court: Some Critical Remarks." *Fordham International Law Journal* 28, no.6 (2004): 1529-1565.
Dubow, Saul. *South Africa's Struggle for Human Rights.* Athens, OH: Ohio University Press, 2012.
Dossa, Shiraz. "Liberal Legalism: Law, Culture, and Identity." *The European Legacy* 4, no. 3 (1999): 73-81.
Drumbl, Mark. *Atrocity, Punishment, and International Law.* Cambridge: Cambridge University Press, 2007.
Dugard, John. *International Law: A South African Perspective*. Cape Town: Juta Press, 2011.
Emerson, Robert M. "Holistic Effects in Social Control Decision-Making." *Law and Society Review, 17,* no. 3, (1983): 425-55.
Entman, Robert M. "Framing: Towards Clarification of a Fractured Paradigm." *Journal of Communication* 43, no.4 (1993): 51-58.

Epstein, Lee and Jack Knight. *The Choices Justices Make.* Washington, DC: Congressional Quarterly Press, 1997.
Evans, John H. "Multi-Organizational Fields and Social Movement Organization Frame Content: The Religious Pro-Choice Movement." *Sociological Inquiry* 67, no. 4 (1997): 451-469.
Ewick, Patricia, and Susan S. Silbey. *The Common Place of Law: Stories from Everyday Life.* Chicago: University of Chicago Press, 1998.
Ferree, Myra Marx. "Resonance and Radicalism: Feminist Framing in the Abortion Debates of the United States and Germany." *American Journal of Sociology* 109, no. 2 (2003): 304-344.
Finnemore, Martha and Kathryn Sikkink. "International Norm Dynamics and Political Change." *International Organization* 52, no. 1 (1998): 887-917.
Fletcher, George P. "Some Unwise Reflections about Discretion." *Law and Contemporary Problems* 47, no. 4 (1984): 269-286.
Fletcher, Laurel E. "From Indifference to Engagement: Bystanders and International Criminal Justice." *Michigan Journal of International Law* 26, no. 4 (2005): 1014-1095.
Fletcher, Laurel E. and Harvey M. Weinstein. "Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation." *Human Rights Quarterly* 24, no. 3 (2002): 573-639.
Foundation for Equality before the Law, "Press Release – Let Justice Be Done Regardless of the Consequences." April 27, 2016, accessible at https://www.samirror.com/press-release-27-april-2016.html.
Gamson, William A. *Talking Politics.* Cambridge: Cambridge University Press, 1992.
Gready, Paul. "Reconceptualizing Transitional Justice: Embedded and Distanced Justice." *Conflict, Security, and Development* 5, no. 1 (2005): 3-21.
Gready, Paul and Simon Robins. "Rethinking Civil Society and Transitional Justice: Lessons from Social Movements and 'New' Civil Society." *The International Journal of Human Rights* 21, no. 7 (2017): 956-975.
Greenbaum, Lesley. "A History of Racial Disparities in Legal Education in South Africa." *John Marshall Law Journal* 3, no. 1, (2009): 1-18.
Goffman, Erving. *Frame Analysis: An Essay on the Organization of Experience*, Boston: Northeastern University Press, 1974.
Gordan, Robert W. "Critical Legal Histories." *Stanford Law Review* 36, no. 1 (1984): 60.
Gould, Chandre and Marlene Burge. "Wouter Basson Trial Notes." *Centre for Conflict Resolution, University of Cape Town*, October 4, 1999, available at http://www.geocities.ws/project_coast/01.html
Gutmann, Amy and Dennis Thompson. "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: Princeton University Press, 2000.
Halliday, Simon and Bronwen Morgan. "I Fought the Law and the Law Won? Legal Consciousness and the Critical Imagination." *Current Legal Problems* 66, no. 1 (2013): 1–32.
Hawkins, Keith. *Environment and Enforcement: Regulation and the Social Definition of Pollution*. Oxford: Clarendon Press, 1984.
Hawkins, Keith. "On Legal Decision-Making." *Washington and Lee Review 43*, no. 4 (1986): 1161-1242.
Hawkins, Keith. *Law as a Last Resort: Prosecution Decision-Making in a Regulatory Agency.*

New York: Oxford University Press, 2002.
Hawkins, Keith and Peter K. Manning. “Legal Decisions: A Frame Analytic Perspective.” In *Beyond Goffman: Studies on Communication, Institution, and Social Interaction,* edited by Stephen H. Riggins, 203-234. Berlin: Mouton de Gruyter, 1990.
Hawkins, Keith and Peter K. Manning, “The Contexts of Regulation: The Impact upon Health and Safety Inspectorates in Britain.” *Law and Policy 12,* no. 2 (1990): 103-136.
Hawkins, Keith and Peter K. Manning, “Legal Decisions: A Frame Analytic Perspective.” In *Beyond Goffman: Studies on Communication, Institution, and Social Interaction,* edited by Stephen H. Riggins, 203-234. Berlin: Mouton de Gruyter, 1990.
Heitlinger, Alena. “Framing Feminism in Post-Communist Czech Republic.” *Communist and Post-Communist Studies* 29, no. 1 (1996): 77-93.
Henkin. Alice H. “Conference Report.” In *State Crimes: Punishment or Pardon*, edited by Justice and Society Program of the Aspen Institute, Queenstown, Maryland: Aspen Institute of Human Studies, 1989.
Henkin, Alice H. “Preface.” In *The Legacy of Abuse: Confronting the Past, Facing the Future,* edited by Alice H. Henkin Washington, DC: The Aspen Institute, 2002.
Hertog, James K. and Douglas M. McLeod. “A Multiperspectival Approach to Framing Analysis: A Field Guide.” In *Framing Public Life: Perspectives on Media and Our Understanding of the Social World,* edited by Stephen Reese, Oscar H. Gandy, and August E. Grant, 135-169. Mahawah, New Jersey: Lawrence Erlbaum Associates, 2001.
Hudson, Peter. “Liberalism, Democracy, and Transformation in South Africa.” *Politikon* 27, no. 1 (2000): 93-102.
Hull, Kathleen E. “The Political Limits of the Rights Frame: The Case of Same-Sex Marriage in Hawaii.” *Sociological Perspectives* 44 (1997): 207-232.
Humphrey, Michael. “Reconciliation and the Therapeutic State,” *Journal of Intercultural Studies* 26, no. 3 (2005): 203-220.
Hunt, Scott A., Robert D. Benford, and David A. Snow. “Identity Fields: Framing Processes and the Social Construction of Movement Identities.” In *New Social Movements: From Ideology to Identity,* edited by Enrique Larana, Hank Johnston, and Joseph R. Gusfield, 185-208. Philadelphia: Temple University Press, 1994.
Huntington, Samuel. *The Third Wave: Democratization in the Late Twentieth Century.* Norman, Oklahoma: University of Oklahoma Press, 1991.
Isin, Engin. “Performative Citizenship.” In *The Oxford Handbook of Citizenship,* edited by Ayelet Shachar, Rainer Baubock, Irene Bloemraad, and Maarten Vink, 502-503. Oxford: Oxford University Press, 2017.
Jamnejad, Maziar and Michael Wood, “The Principle of Non-Intervention.” *Leiden Journal of International Law* 22, no. 2 (2009): 345–381.
Jasper, James M. and Jane D. Poulsen. “Recruiting Strangers and Friends: Moral Shocks and Social Networks in Animal Rights and Anti-Nuclear Protests.” *Social Problems* 42, no. 4 (1995): 493–512.
Johnston, Hank. “A Methodology for Frame Analysis: From Discourse to Cognitive Schemata.” In *Social Movements and Culture*, edited by Hank Johnston and Bert Klandermans, 217-246. Minneapolis: University of Minnesota Press, 1995.
Kahneman, Daniel and Amos Tversky, “Prospect Theory: An Analysis of Decision Under Risk.” *Econometrica* 47, no. 2 (1979), 263-291.
Keck, Margaret E. and Kathryn Sikkink. *Activists Beyond Borders: Advocacy Networks in*

International Politics. Ithaca. New York: Cornell University Press, 1998.
Kennedy, David. "The International Human Rights Movement: Part of the Problem?" *Harvard Human Rights Journal,* no. 15 (2002): 102-125.
Kesselring, Rita. *Bodies of Truth: Law, Memory, and Emancipation in Post-Apartheid South Africa.* Stanford, CA: Stanford University Press, 2017.
Khulumani Support Group. "Legal Challenge: Prosecution Policy is Unconstitutional." July 18, 2007, accessible at https://www.khulumani.net/khulumani/statements/item/15-legal-challenge-prosecution-policy-is-unconstitutional.html.
Kotze, Dirk. "Navigating South Africa's Loaded Political Lexicon." *The Conversation*, June 9, 2015, available at https://theconversation.com/navigating-south-africas-loaded-political-lexicon-42791.
Kovras, Iosif. *Grassroots Activism and the Evolution of Transitional Justice: The Families of the Disappeared,* Cambridge: Cambridge University Press, 2017.
Lakoff, George and Mark Johnson. *Philosophy in the Flesh: The Embodied Mind and its Challenge to Western Thought*. New York: Basic Books, 1999.
Leachman, Gwendolyn. "Legal Framing." *Studies in Law, Politics, and Society* 61 (2013): 25-59.
Leebaw, Bronwyn A. "The Irreconcilable Goals of Transitional Justice." *Human Rights Quarterly* 30 (2008): 95–118.
Legal Resources Centre, *Oral History Interview,* November 27, 2007, 8, available at http://www.historicalpapers.wits.ac.za/inventories/inv_pdft/AG3298/AG3298-1-184-text.pdf
Levine, Kay L. and Ronald F. Wright, "Prosecution in 3-D." *Journal of Criminal Law and Criminology 102*, no.4 (2013): 1119-1180.
Linkdekilde, Lasse. "Discourse and Frame Analysis: In-Depth Analysis of Qualitative Data in Social Movement Research." In *Methodological Practices in Social Movement Research,* edited by Donatella della Porta, 195-227. Oxford: Oxford University Press, 2014.
Lubowski, Anton. "Democracy and the Judiciary." *Democracy and the Judiciary, Proceedings of the National Conference on Democracy and the Judiciary, Organized and Presented by the Institute for a Democratic Alternative for South Africa* 16 (1988).
Mamdani, Mahmood. "Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa." *Diacritics* 34, no. 3-4 (2002): 33-59.
Manning, Peter K. "The Social Reality and Social Organization of Natural Decision-making." *Washington and Lee Law Review 43*, no. 4 (1986): 1291-1311.
Manning, Peter K. '"Big Bang" Decisions: Notes on a Naturalistic Approach." In *The Uses of Discretion,* edited by Keith Hawkins, 249-286. Oxford: Clarendon Press, 1992.
Markowitz, Lawrence P. "How Master Frames Mislead: The Division and Eclipse of Nationalist Movements in Uzbekistan and Tajikistan." *Ethnic and Racial Studies* 32, no. 4 (2009): 716-738
Marshall, Anna-Maria. "Injustice Frames, Legality, and the Everyday Construction of Sexual Harassment." *Law and Social Inquiry 28*, no. 3: 2003, 659-689.
McAdam, Doug. "The Framing Function of Movement Tactics: Strategic Dramaturgy in the American Civil Rights Movement." In *Comparative Perspectives on Social Movement Opportunities, Mobilizing Structures, and Framing*, edited by Doug McAdam, John D. McCarthy, and Mayer N. Zald, 338-356. Cambridge: Cambridge University Press, 1996.
McAuliffe, Padraig. *Transitional Justice and Rule of Law Reconstruction: A Contentious Relationship.* London: Routledge, 2013.

McBride, Julie. *The War Crime of Child Soldier Recruitment.* The Hague: T.M.C. Asser Press, 2013.
McCann, Michael. *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization*. Chicago: University of Chicago Press: 1994.
McEvoy, Kieran. "Beyond Legalism: Towards a Thicker Understanding of Transitional Justice." *Journal of Law and Society* 34, no. 4 (2007): 411-440.
McIntyre, Lisa. *Law in the Sociological Enterprise: A Reconstruction,* Boulder, Colorado: Westview, 1994.
Merry, Sally Engle. *Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans*. Chicago: University of Chicago Press, 1990.
Merry, Sally Engle. "Transnational Human Rights and Local Activism: Mapping the Middle." *American Anthropologist* 108, no. 1 (2006): 38-51.
Michel, Verónica. "The Role of Prosecutorial Independence and Prosecutorial Accountability in Domestic Human Rights Trials." *Journal of Human Rights* 19, no. 1, (2017): 1–27.
Minsky, Marvin. "A Framework for Representing Knowledge." In *Mind Design II: Philosophy, Psychology, Artificial Intelligence*, edited by John Haugeland, 111-143. Cambridge, MA: MIT Press, 1997.
Moseneke, Dikgang. "The Role of Comparative and Public International Law in Domestic Legal Systems: A South African Perspective." *Middle Temple and SA Conference: Comparative Law*, (2010): 63-66.
Muvingi, Ismael. "Donor-Driven Transitional Justice and Peacebuilding." *Journal of Peacebuilding and Development* 11, no. 1 (2016): 10-25.
Nagy, Rosemary. "After the TRC: Citizenship, Memory, and Reconciliation," *Canadian Journal of African Studies* 38, no. 3 (2004): 642.
Nkadimeng v. National Director of Public Prosecutions (2015) Case Number 3554, Supporting Affidavit of Sizakele Ernestina Simelane.
Nkadimeng v. National Director of Public Prosecutions (2015) Case Number 3554, Founding Affidavit.
Nouwen, Sarah M.H. and Wouter G. Werner, "Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity." *Journal of International Criminal Justice* 13 (2015): 157-176.
Payne, Rodger A. "Persuasion, Frames, and Norm Construction." *European Journal of International Relations* 7, no.1 (2001): 37-61.
Pedain, Antje. "Was Amnesty a Lottery? an Empirical Study of the Decisions of the Truth and Reconciliation Commission's Committee on Amnesty." *South African Journal of Criminal Justice* 121, no. 4 (2004): 785–828.
Pedriana, Nicholas. "From Protective to Equal Treatment: Legal Framing Processes and Transformation of the Women's Movement in the 1960s." *American Journal of Sociology* 111, no. 6 (2006): 1718–1761
Philpott, Daniel. *The Politics of Past Evil*: *Religion, Reconciliation, and the Dilemmas of Transitional Justice.* Notre Dame, IN: University of Notre Dame Press, 2006.
Polletta, Francesca. "The Structural Context of Novel Rights Claims: Rights Innovation in the Southern Civil Rights Movement, 1961-1966). *Law and Society Review 34* (2000): 367-406.
Polletta, Francesca and M. Kai Ho. "Frames and Their Consequences." In *The Oxford Handbook*

of Contextual Political Analysis, edited by Robert E. Goodin and Charles Tilly, 187-209. Oxford: Oxford University Press, 2006.
Price, Richard. "Reversing the Gun Sights: Transnational Civil Society Targets Land Mines." *International Organization* 52, no. 3 (1998): 613-644.
Promotion of National Unity and Reconciliation Act, No. 34 of 1995.
Prosecutor v. Deronjić, Case No. IT-02-61-A, para 136 ICTY Appeals Chamber, July 20, 2005.
Prosecutor v. Tadić, Case No. IT-94-1. ICTY Appeals Chamber, Oct. 2, 1995.
Rawls, John. *A Theory of Justice.* Cambridge: Harvard University Press, 1972.
Reese, Stephen D. "Prologue – Framing Public Life: A Bridging Model for Media Research." In *Framing Public Life: Perspectives on Media and Our Understanding of the Social World,* edited by Stephen D. Reese, Oscar H. Gandy, Jr., and August E. Grant, 7-31. Mahwah, New Jersey: Lawrence Erlbaum Associates, Inc., 2001.
Rosenberg, Gerald N. *The Hollow Hope: Can Courts Bring About Social Change?* Chicago: The University of Chicago Press, 1991.
Rousseau, Nicky. "Identification, Politics, Disciplines: Missing Persons and Colonial Skeletons in South Africa," In *Human Remains and Identification,* edited by Elizabeth Anstett and Jean-Marc Dreyfus, 175-202. Manchester: Manchester University Press, 2015.
Ryan, Charlotte. *Prime Time Activism: Media Strategies for Grassroots Organizing.* Boston: South End Press, 1991.
S v Basson 2004 no. 1, SA 246 SCA.
S v Basson 2005 no. 1, SA 171 CC.
SABC, *TRC Special Report,* episode 45, parts 1-4, screened April 27, 1997 by the South African Broadcasting Corporation (SABC), available at https://www.youtube.com/watch?v=clPxqSfW1rk&list=PLA73EAC764847614D
Salet, Renze. "Framing in Criminal Investigation: How Police Officers (re)Construct a Crime." *The Police Journal* 90, no. 2 (2017): 128-142.
Sanghera, Gurchathen, Katherine Botterill, Peter Hopkins, and Rowena Arshad. "'Living Rights,' Rights Claims, Performative Citizenship and Young People – The Right to Vote in the Scottish Independence Referendum," *Citizenship Studies* 22, no. 5 (2018): 540-555.
Sarat, Austin and Thomas R. Kearns. "Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life." In *Law and Everyday Life,* edited by Austin Sarat and Thomas R. Kearns, 21-63. Ann Arbor: University of Michigan Press: 1995.
Scott, James C. *Domination and the Arts of Resistance.* New Haven: Yale University Press, 1990.
Shanto Iyengar, *Is Anyone Responsible? How Television Frames Political Issues.* Chicago: University of Chicago Press, 1991.
Shklar, Judith. *Legalism: Law, Morals, and Political Trials*. Cambridge: Harvard University Press, 1964
Shklar, Judith N. *American Citizenship: The Quest for Inclusion.* Cambridge, Mass: Harvard University Press, 1991.
Simon, Dan. "A Third View of the Black Box: Cognitive Coherence in Legal Decision Making." *The University of Chicago Law Review* 71, no. 2 (2004): 511–586.
Skaar, Elin and Wiebelhaus-Brahm, Eric, "The Drivers of Transitional Justice: An Analytical

Framework for Assessing the Role of Actors." *Nordic Journal of Human Rights* 31, no. 2 (2013) 127-148.
Snow, David A. and Robert D. Benford. "Master Frames and Cycles of Protest." In *Frontiers in Social Movement Theory*, edited by Aldon D. Morris and Carol McClurg Mueller, 133-155. New Haven: Yale University Press, 1992.
Sparks, Holloway. "Dissident Citizenship: Democratic Theory, Political Courage, and Activist Women," *Hypatia* 12, no. 4 (1997): 74-110.
Steinberg, Marc W. "Tilting the Frame: Considerations on Collective Action Framing from a Discursive Turn," *Theory and Society* 27, no. 6 (1998): 845-872.
South Africa, *Truth and Reconciliation Commission of South Africa Report Volume 5* Cape Town: 1999.
South Africa, *Truth and Reconciliation Commission of South Africa Report Volume 1* Cape Town: 1999.
Teitel, Ruti. "Transitional Justice Genealogy." *Harvard Human Rights Journal* 16, no. 1 (2003): 69-94.
Turner, Catherine. "Deconstructing Transitional Justice." *Law and Critique* 24, no. 2 (2013): 193-209.
Turner, Catherine. *Violence, Law, and the Impossibility of Transitional Justice.* New York: Routledge, 2017.
Sharp, Dustin N. "Interrogating the Peripheries: The Preoccupations of Fourth Generation Transitional Justice." *Harvard Human Rights Journal* 26, (2013): 150-151.
Sharp, Dustin N. "Emancipating Transitional Justice From the Bonds of the Paradigmatic Transition." *International Journal of Transitional Justice* 9, no. 1 (2015): 150–169.
Snow, David A., Burke Rochford, Jr., Steven K Worden, and Robert D. Benford. "Frame Alignment Processes, Micromobilization, and Movement Participation." *American Sociological Review* 51 (4): 464 – 481.
Subotić, Jelena. "The Transformation of International Transitional Justice Advocacy." *International Journal of Transitional Justice* 6, (2012):106-125.
Swart, Mia. "The Closest South Africa Came to Nuremberg? The Wouter Basson Prosecution." *Heidelberg Journal of International Law 68,* no. 1 (2008): 209-226.
Swart, William J. "The League of Nations and the Irish Question: Master Frames, Cycles of Protest, and 'Master Frame Alignment." *Sociological Quarterly* 36 (1995): 465-481.
Turhan, Ebru and Cigdem Bozdag. "From 'Economic Consequences' to the 'Personal Impact' Frame: Representation of Turkey in the German Media." In *Framing Violence: Conflicting Images, Identities, and Discourses,* edited by Banu Baybars-Hawks, 94-110. Newcastle: Cambridge Scholars Publishing, 2016.
Trubek, David M. "Where the Action Is: Critical Legal Studies and Empiricism." *Stanford Law Review* 36, no. 1/2 (1984): 575-622.
Varney, Howard and Jeremy Sarkin. "Failing to Pierce the Hit Squad Veil: an Analysis of the Malan Trial." *South African Journal of Criminal Justice* 10, no.2 (1997): 141-161.
Wählisch, Martin. "Cognitive Frames of Interpretation in International Law." In *Interpretation in International Law,* edited by Andrea Bianchi, Daniel Peat, and Matthew Windsor, 331-351. Oxford: Oxford University Press, 2015.
Webster, Edward and Karin Pampallis. "Introduction: Revisiting the National Question." In *The*

Unresolved National Question in South Africa: Left Thought Under Apartheid and Beyond, edited by Edward Webster and K. Pampallis, 1-18. Wits University Press: Johannesburg, 2017.
Wedeking, Justin. "Supreme Court Litigants and Strategic Framing." *American Journal of Political Science* 54, no. 3 (2010): 617-631.
Werle, Gerhard and Florian Jessberger, *Principles of International Criminal Law*. Oxford: Oxford University Press, 2014.
West, Robin. "Reconsidering Legalism." *Minnesota Law Review* 88, (2003): 119-158.
Whitear-Nel, Nicola and Warren Freedman. "A Historical Review of the Development of the Post-Apartheid South African LLB Degree – With Particular Reference to Legal Ethics." *Fundamina Pretoria* 21, no. 2 (2015): 234-250.
Wilson, Richard A. "The Sizwe Will Not Go Away: The Truth and Reconciliation Commission, Human Rights, and Nation-Building in South Africa." *African Studies 55*, no. 2 (1996): 1-20.
Wilson, Richard A. *The Politics of Truth and Reconciliation in South Africa.* Cambridge: Cambridge University Press, 2001.
Women's Initiative for Gender Justice, Letter from Brigid Inder, Executive Director, Women's Initiative for Gender Justice to Luis Moreno Ocampo, Prosecutor, International Criminal Court, August 2006, available at http://www.iccwomen.org/news/docs/Prosecutor_Letter_August_2006_Redacted.pdf
Zivi, Karen. *Making Rights Claims: A Practice of Democratic Citizenship. Oxford*: Oxford University Press, 2012.

Interviews

Interview with Anton Ackermann, Hermanus, South Africa, December 19, 2017.
Interview with Jan D'Oliveira and Torie Pretorius, Pretoria, South Africa, November 30, 2017.
Interview with Mia Swart, Pretoria, South Africa, November 28, 2017.
Interview with Naseema Fakir, Johannesburg, South Africa, June 5, 2018.
Interview with Thembisile Simelane, Johannesburg, South Africa, June 21, 2018.
Interview with Wim Trengove, Johannesburg, South Africa, November 17, 2017.