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Commodified Justice as Commodified History after February 24th, 2022 — Eric Loefflad

APRIL 2, 2022~ LEGAL FORM

[This is the first in a series of posts comprising a symposium on Christine Schwöbel-Patel's recently published book, Marketing Global Justice: The Political Economy of International Criminal Law (2021).]

In an important 1990 article on the international legal academy in Nazi Germany, Detlev Vagts noted how a survival mechanism amongst scholars fearful of the regime's scrutiny was '...writing only about safe subjects such as the history of international law.' [1] This presently puzzling depiction of international legal history as politically uncontroversial is a testament to just how quickly and profoundly consciousness within the international legal field can metamorphose. Unlike the context of Vagt's subject matter — and context in which he produced this observation — the history of international law is today a key area of controversy both substantively and methodologically. [2] Fuelled by failures to transform the world order following the Cold War, critical re-imagination of international law's past has gone hand-in-hand with exhausted disappointment in international law's present. [3] In few places is this presumably endless hangover truer than in international criminal law where the clarion calls to 'end impunity' now feel as distant as ever. What could link a revealed past and the prospects of a transformed future on this front? New histories have unearthed curious conceptualisations, (re)introduced a colourful cast of characters, and turned our eyes to the profundity of neglected events. [4] However, they have been generally less concerned with building a systematically materialist account of the social conditions underlying these pasts and their continuity into the present. [5] Fortunately, Christine Schwöbel-Patel's remarkable recent book *Marketing Global Justice* provides, amongst many other things, tools for bringing this gap between historical consciousness and political praxis in the domain of international criminal law.

In portraying contemporary international criminal justice as a force that cannot fundamentally contest (and in many ways upholds) a vastly unequal global social order – a systemic logic concealed by the masterful applications of capitalist marketing and

branding strategies – Schwöbel-Patel is clear that this arrangement did not simply fall from the sky. To this end, she provides a robustly historicised explanation of how the 1990s enabled the emergence of the duplicitously neoliberal regime of international criminal law *Marketing Global Justice* so carefully dissects. In the domain of international legal development, reigning notions of sovereign inviolability gave way to new regimes and principles that sought to expand justifications for intervention, impose greater liability on individuals for breaching international crimes, and order the global economy in a manner that profoundly circumscribed state autonomy and discretion. [6] In the domain of geopolitics, the US emerged victorious from the Cold War and commanded a degree of military power hitherto unwitnessed in history. [7] In the domain of business/economic practice, through the rise of corporate branding, the process of consumer demand cultivation moved away from emphasizing the tangible utility/superiority of products and services and towards the sale of lifestyles that consumers could build their identities around. [8] In sum, a presumptively universal order of individual liability for international crimes was guaranteed by the dominance of a sole capitalist superpower and sold through the most cutting-edge technologies of capitalist reproduction.

As such, *Marketing Global Justice* can be understood as depicting the 90s rise of ICL as a grand illustration of hegemony that unites the dimensions of physical supremacy and ideological uniformity often split in studies of this concept. [9] At the centre of this hegemonic construction, often explained in the language of ‘globalisation’, is America at the ‘end of history.’ As a matter of supremacy, the US (ideally via multilateral channels) could presumptively end atrocities through incontestable military force and, in demonstrating its strategy-transcending altruism, deliver those responsible to face the procedure-bound judgment of all ‘humanity.’ As a matter of ideology, the idyllic lifestyle of an aspirational, socially mobile, and cosmopolitan American middle-class was sold as a template for universal emulation. In summation, supporting the interventionist and punitive efforts of an ‘international community’ made realisable by American power was a means of buying into a consumption-based lifestyle that, unburdened by old divisions, promised universal morality, belonging, and humanity.

Understanding how this momentary hegemony shaped a distinct imagination of the 90s provides an invaluable lens for contextualising the many examples of marketed global

justice Schwöbel-Patel deploys throughout the book. This, in turn, provides a new grounding for historicising eras that speak directly to the critiques lodged by *Marketing Global Justice*. Of particular relevance are the immediate timeframes preceding and subsequent to the hegemonic moment of the 90s as it relates to condemning mass atrocity through law under conditions of late capitalism. What these respective timeframes, the 1980s and 2000s, have in common is a high degree of disjuncture between power and ideal that serves to affirm 90s hegemony as a unique moment of seamless harmony worth desiring in the present — and thus enabling it to act as a distinct marketing tool. Consciousness of these dynamics is central to how a particular historicised narrative of the modern international criminal justice follows a commodified logic very much within the purview of late capitalist branding practice. As a product, the selling point of adhering to the ideals of 90s-spawned global justice projects is the nostalgic promise of returning to an imagined past of meaningful coherence, optimism, and virtue that stands in stark contrast to that which came before and since.

Regarding the 80s, a ‘Second Cold War’ born out of failed 70s efforts to diplomatically alleviate superpower tensions ushered in a new round of hostility between the US and Soviet Union. Materially, this development enabled the US to discipline other industrial capitalist states, especially those empowered by efforts to ‘thaw’ the Cold War, and assert itself as the unquestioned leader of a Western bloc in newfound need of American military power and the particular capitalist configuration that reproduced it. [10] However, Reaganite actions furthering this Cold War transformation can be understood as generating a grand marketing competition centred on human rights and humanitarianism. On one hand, Reagan’s supporters justified their actions by invoking an ideal of American conservative ‘freedom’ (a tormented chimera of traditional values and unrestricted markets [11]) as the true essence of human rights, and in need of defence against the malevolent forces of ‘totalitarianism’ believed to have hijacked the UN and international institutions more broadly. On the other hand, critics within the US and beyond (especially in the capitalist states slighted by the new American agenda) condemned actions in the name of such as a shamefully unilateral undermining of the international legal order through which human rights needed to be achieved — a position of liberal pluralists that acquired doctrinal validation through the ICJ’s *Nicaragua* decision. [12] This human rights-based marketing competition cannot

be separated from the fact that by this point the most prominent forces of revolution were in deep decline throughout the world; either devolving into reactionary sectarianism or surrendering to liberalism as a least worst option. [13] When the Cold War ended, the stage was set for the dominance of 'gentrified human rights' as the morality of a world that could now be unquestionably defined by the dawning of a 'globalisation' that combined Reaganite commitments to neoliberalism with anti-Reaganite commitments to cosmopolitanism. [14] The stage was set for a grand marketisation of global justice Schwöbel-Patel describes so well.

The hopes of the 90s came crashing down in the most dramatic fashion with the attacks of 9/11 and subsequent US-led 'Global War on Terror.' Shortly thereafter, the ratification of the Rome Statute brought forth the International Criminal Court as the first permanent fora for the adjudication of international criminal breaches — a product of much concerted campaigning in the 90s. Thus, almost simultaneously, the realisation of an optimistic decade's crowning institutional achievement went hand-in-hand with the nation at the core of this optimism waging a reckless crusade of retribution that seemingly defied any and all notions of temporal, spatial, or juridical constraint. With these intertwined developments came a brave new landscape for the buying and selling of international criminal justice projects. For the entrepreneurs, the marketing of global justice could now exploit the fact that, beyond recalcitrant sovereigns in the Global South, the highest ranking American officials were now imaginable as those awaiting humanity's judgment for violations of international law. [15] Here, true to the highest aspirations of the 90s as a tragically betrayed time of 'good hegemony', the image of such potential prosecution could conveniently stand as an image of Western virtue redeeming Western excesses.

However, the actual operation of this process said something very different about the imagined West's ability to redeem the West. Largely as a matter of marketing optics, this newfound condemnation was coupled with a liberal pragmatic ethos of 'starting small.' In other words, if there was ever to be a legal-institutional regime capable of prosecuting George W Bush, Dick Cheney, Tony Blair, or Benjamin Netanyahu, it had to establish a foundation — a foundation that could be established through the prosecution of African rebels and warlords. Such a backdrop of progressive hope explains how some many individuals of a counter-hegemonic persuasion could be

captivated by the ultimately counter-revolutionary entrepreneurial campaigns documented in *Marketing Global Justice*.

When surveying this landscape of prior and subsequent discontent, we can see the unique selling points of the 90s through its marketing of nostalgic comforts. However, like any other commodity, its value is due to the external forces responsible for the conditions of its demand. With the present war between Russia and Ukraine, it is hard to imagine a single greater inflation of this value — a deeply disturbing prospect given how such commodification impulses eclipse richer and more meaningful ways of understanding this catastrophic conflict. In direct abstraction from actual human suffering and the pathological politics that produced it, this event, when imaged from the perspective of the average Western consumer, is so thickly saturated in the tropes of the 80s ‘New Cold War’ and the 00s ‘Global War on Terror’ that structure a marketable 90s optimism, one would almost be forgiven for thinking it was all by design. Regarding the 80s, this conflict is the grand realisation of the supreme fear that defined the final escalating years of the Cold War — the image of Russian tanks advancing westward into the European peninsula. The ‘Good Guys’ actually get to prove themselves as the ‘Good Guys.’ From another angle, in contrast to the malaise of the early twenty-first century, this conflict injects a shot of redemption into an image of Western militarism sullied by the blunders, intractabilities, callousness, and existential pointlessness that came to define the ‘Global War of Terror.’ The ‘Good Guys’ can now once again be the ‘Good Guys.’

Written well before these events occurred, Schwöbel-Patel’s text could scarcely be a better guide to the ways in which the international legal dimensions of this conflict will be marketed. Of particular relevance here is *Marketing Global Justice*’s deployment of the theory of a spectacle-driven ‘attention economy’ that ‘...not only draws the attention, [but]...also has an ordering function, which in turn has distinct distributive effects.’ [16] Through such means, presenting something as an ‘aberration’ separates its occurrences from its conditions of production as a means of affirming and reproducing the dominant logics of the status quo. Applied to Vladimir Putin’s war against Ukraine, it is easy to portray such actions as a flagrant disregard that is without precedent in the postwar world, and thus uniquely evil. Western breaches, by virtue of their greater efforts at justification through reference to reigning notions of international legality,

supposedly cannot compare. [17] Relatedly, there is to the extent to which this conflict is racialized — a reality exposed by numerous expressions of shock at the witnessing of violence in a ‘relatively civilised’ European location as opposed to somewhere in the Global South where it apparently ‘belongs.’ As Schwöbel-Patel has shown, this racial depiction of ‘ideal victims’ is all pervasive in efforts to market global justice against the backdrop of attention economy that inversely renders differentiated manifestations of violence invisible in some situations and hyper-visible in others. [18]

When it comes to prescriptive measures, global justice entrepreneurs have vast opportunities to sell institutional designs for accountability or, more minimally, the incontestable virtue of their understanding of international criminal law. It is difficult to deny that Russian actions are likely very much in violation of the international criminal law standards codified in the Rome Statute and thus an ‘objective basis’ is readily available. However, to invoke these standards is to invoke their conditions of production and dissemination. This, as discussed above, is the imagination of 90s hegemony as worthy of desire in the present. The use of this historic moment has much selling power in light of the particular cast of characters who shape the present. It was at this moment of the 90s that Russia, the largest entity to have emerged from the dissolved Soviet Union, was at its most pacified and thus was unimaginable as the threat to world order it poses today. The desired return to such a state of affairs is overwhelming for many and, given the varied means through which global justice can be marketed, the prospects of commodifying this sentiment are presumptively limitless.

However, as Schwöbel-Patel makes abundantly clear, uncovering the marketized dynamics of global justice need not entail an attitude of jaded detachment towards those who suffer – not even remotely. Rather by understanding such dynamics, the Left might better understand the limited character of cynically calling-out the hypocrisy of liberal proclaimers of solidarity with Ukraine who fail to, or have failed in the past to, display similar solidarity in relation to Iraq, Palestine, Afghanistan, or other comparable cases where victims were less than ‘ideal.’ While hypocrisy is certainly rife on this front, and linking Ukraine to other instances of violence provides much needed context, such a tactic carries distinct risks if decoupled from any greater material analysis. Reminiscent of Third Reich jurist Carl Schmitt’s famed dictum that ‘whoever invokes humanity wants to cheat’, such allegations can easily slip into the view that, given the all-pervasive taint

of political motives, true moral condemnation is impossible. [19] In other words, who is anyone to judge anyone? Such is a favored tactic of Putin. It is also at the core of the Realist theories of International Relations that, while they provide talking points to the Left regarding Russian reaction to NATO expansion (an important consideration for sure), they are ontologically incompatible with Left theories of 'the international.' [20]

Beyond these risks of strange intellectual alliances, those who engage in this line of discourse often fail to consider the way in which the consumer of marketized global justice has been rendered immune to their charges. As Robert Meister has shown in his genealogy of the liberal human rights consciousness that seized its hegemonic moment in the 90s, past harm is irrelevant to present suffering and physical cruelty is a greater political evil than hypocrisy. [21] If the logics of marketing are taken seriously, being called-out as a hypocrite can easily affirm resolve through its bolstering of a lifestyle brand whereby belief in liberal projects of global justice casts one as 'part of the solution' in a world that has sadly succumbed to cynicism and relativism. The mainstream community of international lawyers seems to be leading the way in this regard. Once again, the commodified legacies of a distinct historical moment help to ensure the durability of marketized global justice's success.

What then are the options for those who condemn the logics of both commodification and cynicism when conceptualizing violence on a global scale? *Marketing Global Justice* provides a number of tactics towards this end that range from the dissociation from dominant information channels to focus on the deeper contexts through which violence is produced to deliberate subversion of reigning tropes to recovering the legacies of more radically transformative and anti-imperial struggles to achieve global justice. [22] When applied to the Russia-Ukraine War, the many paths of inquiry enabled by these tactics brings forth numerous points that marketized projects of global justice are unwilling or unable to consider – all of which present a different view of the 90s than the ones holding together mainstream Western characterizations. For instance, rather than seeing Putin's invasion as a gross deviation (or just one intervention amongst many for that matter), it can be understood as the grand culmination of the gradual loosening of use of force restrictions following the Cold War. [23] Another strategy would be to reject the implicit 'civilizational' hierarchy that leads some to see violence in Ukraine as more worthy of attention than elsewhere in the

world. This would entail uncovering the ways in which Eastern Europe and the Global South share striking similarities when it comes to experiences of war and imperial domination – not to mention the many tangible connections between these locations that are largely unknown in the West. [24] Under this view, the post-Cold War era of neoliberal restructuring process in Europe, and its East/West division, is simply the latest demonstration of this ‘civilizational’ logic. [25] In few places were the dislocations of shock therapy more severe than in Russia itself; a factor markedly absent amongst mainstream explanations of the social basis of Putin’s authority.

While these points might be promising, there is a larger body of theory that can integrate them all – and the phenomenon of international criminal justice has a great deal to do with it. In the critical discourse of international criminal law, ‘empire’ is an ever-present term. For many a counter-hegemonic scholar, a standard progression goes from viewing this regime as a potential tool of resisting empire, that upon further scrutiny, turns out to be a tool of empire. However, what is often left unengaged on this point are the various, diverging theories of empire that are of cornerstone importance within the Marxian tradition. [26] Where it is engaged in the context of international criminal law, scholars have tended to focus on theories that define imperialism through a transnational ruling class transcending state authority. [27] Less focus has been on the Leninist theory of inter-imperial rivalry whereby great power struggle is the destiny of a system premised on endless capital accumulation. [28] While Putin’s actions may have breathed new life into this framework, a closer examination reveals it is not just something to be theoretically applied to international criminal justice discourse, but it lies at the very origins of the international criminal justice project. One need not stray far from the site of the present war to tell this story. Such considerations give a whole new meaning to Putin’s present denial of Ukraine’s legitimacy on the grounds that it is a ‘Bolshevik creation.’

For Lenin, a key component of the revolutionary transcendence of inter-imperial rivalry was the right of nations to self-determination. So long as this right lay unrealized, there could be no solidarity between the working classes of oppressed and oppressor nations for the ruling classes of oppressor nations could buy the support of their domestic working classes through the super-profits that only imperial domination could generate. [29] With this formulation, the Bolsheviks denied reigning distinctions

between 'civilised' versus 'uncivilised' nations and would persistently take the imperial powers to task on this point. While the World Revolution did not progress as hoped, and original grand designs for self-determination were left unrealized across many Soviet locations (including Ukraine), it nevertheless formed a point of outwardly focused aspiration that survived, and was very much sharpened by, the many contradictions of the Soviet Union. [30]

A particular medium for the survival of this aspiration was the very formation of international criminal law during the Second World War, a project that upon close inspection becomes hard to imagine succeeding without a distinctly Soviet influence. [31] As is well known, the Allies' prosecution strategy hinged on criminalizing aggressive war as something for which the Nazis bore unique guilt. The chief juridical architect of this guilt was the Soviet jurist Aron Trainin and it was his formulation that proved amongst the most influential to Westerners whose commitments to legal liberalism cause them to struggle immensely with such a novel medium of criminalization. [32] When read closely, the imprint of materialist theories of imperialism, self-determination, and just war on Trainin's work is difficult to mistake, and it was this alternative counter-idealistic grounding of lawful authority that provided him with what his contemporaries lacked. [33]

To invoke these Soviet origins of international criminal law is not to romanticize them. After all, when considering Finland, the Baltic states, and Eastern Poland, the Soviets, despite being architects of this standard, were arguably liable for crimes of aggression themselves. However, what this history does speak to is the reality that deploying a materialist lens to analyze the patterns of violence that form the subject of international criminal law is not only possible, but at the heart of this project. Why then is this account of Soviet origins obscure to point that a major recent study of the origins of the outlawry of aggression can casually dismiss it? [34] As Francine Hirsch has shown, the Soviets had grand aspirations to use Nuremberg as an all-encompassing vindication of their system and their sacrifices. [35] However, as the Nuremberg proceedings captured the attention of the international press, it was the Soviets who uniquely faced grave challenges in navigating a competitive media landscape that was not under the airtight control of a centralized state apparatus of the likes that defined Stalinism. [36] For the Americans, fresh from selling their project of global supremacy both internationally and

domestically (perhaps the greatest multi-level marketing scheme in all of history), navigating a media environment defined by commercial competition was hardly a problem by comparison. [37] As a result, it was their version of Nuremberg that predominated to the point that the return of international criminal law against the backdrop of 90s hegemony could be imagined as the exalted resurrection of this virtuous past that the world was now ready for. [38] With the end of the Soviet Union came the moment to sell a global justice project stripped of all Soviet lineage. This return to contingent origins could not make for a more fitting vindication of Schwöbel-Patel's analysis – if we are able to see through the logics of marketing and commodification that define international criminal justice as we know it, who knows where our historiographic consciousness might end up?

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[1] Detlev Vagts, 'International Law in the Third Reich' (1990) 84 *American Journal of International Law*, 661, 679.

[2] See Anne Orford, *International Law and the Politics of History* (Cambridge University Press 2021).

[3] Orford, *International Law and the Politics of History*, 19.

[4] See e.g., Gerry Simpson and Kevin Jon Heller (eds), *The Hidden Histories of War Crimes Trials* (Oxford University Press 2013); Immi Tallgren and Thomas Skouteris, *The New Histories of International Criminal Law: Retrials* (Oxford University Press 2019); Frédéric Mégret and Immi Tallgren, *The Dawn of a Discipline: International Criminal Justice and Its Early Exponents* (Cambridge University Press 2020).

[5] For an important exception, see Grietje Baars, 'Capitalism's Victor's Justice? Prosecution of Industrialists post WWII' in Simpson and Heller (n 4).

[6] Christine Schwöbel-Patel, *Marketing Global Justice: The Political Economy of International Criminal Law* (Cambridge University Press 2021), 76-92.

[7] Schwöbel-Patel, *Marketing Global Justice*, 60-61.

[8] Schwöbel-Patel, *Marketing Global Justice*, 65-74.

[9] Robert Knox, 'Hegemony' in Jean d'Aspremont and Sahib Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar 2019).

[10] Richard Saull, *The Cold War and After: Capitalism, Revolution, and Superpower Rivalry* (Pluto Press 2007), 157-159.

[11] See Eric Foner, *The Story of American Freedom* (WW Norton 1994), 307-332.

[12] See e.g., Daniel Patrick Moynihan, *On the Law of Nations* (Harvard University Press 1990).

[13] See Paige Arthur, 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice' (2009) 31 *Human Rights Quarterly*, 321, 338-341; Paul Chamberlin, *The Cold War's Killing Fields: Rethinking the Long Peace* (Harper Collins 2018), 363; Steven Striffler, *Solidarity: Latin America and the US Left in the Age of Human Rights* (Pluto Press 2019).

[14] Andrew Fagan, 'The Gentrification of Human Rights' (2019) 41 *Human Rights Quarterly*, 283.

[15] See Kate Grady, 'War and Order: Rethinking Criminal Accountability for the Iraq War' (2021) 9 *London Review of International Law*, 245.

[16] Schwöbel-Patel, *Marketing Global Justice*, 50.

[17] This line of argument was very much lodged in relation to the 2014 Crimea annexation, see e.g., Thomas Grant, *Aggression Against Ukraine: Territory, Responsibility, and International Law* (Palgrave Macmillan 2015).

[18] See Schwöbel-Patel, *Marketing Global Justice*, 132-139.

[19] Carl Schmitt, *The Concept of the Political*, George Schwab, trans (University of Chicago Press 2007), 54.

[20] This incompatibility seems from the fact that realist theories are premised on state-centric and ahistorical depictions of 'anarchy' that cannot readily account for material social relations and their historical variation. For a classic Marxian critique, see Justin Rosenberg, *The Empire of Civil Society: A Critique of the Realist Theory of International Relations* (Verso 1994). This tendency to fetishise the geopolitical at the expense of the social is a similar flaw within Schmitt's theory, see Benno Teschke, 'Fatal Attraction: a Critique of Carl Schmitt's International Political and Legal Theory' (2011) *3 International Theory*, 179, 184.

[21] Robert Meister, *After Evil: A Politics of Human Rights* (Columbia University Press 2011), 37-47.

[22] Schwöbel-Patel, *Marketing Global Justice*, 251-268.

[23] See Patrick Terry, 'The Return of Gunboat Diplomacy: How the West Has Undermined the Ban on the Use of Force' (2019) *10 Harvard National Security Journal*, 75.

[24] See James Mark, Bogdan Iacob, Tobias Rupperecht, and Ljubica Spaskovska, *1989: A Global History of Eastern Europe* (Cambridge University Press 2019).

[25] See David Kennedy, 'Turning to Market Democracy: A Tale of Two Architectures' (1991) *32 Harvard International Law Journal*, 373; see also Maria Mälksoo, *The Politics of Becoming European: A Study of Polish and Baltic Post-Cold War Security Imaginaries* (Routledge 2009).

[26] Murray Noonan, *Marxist Theories of Imperialism: A History* (IB Tauris 2019).

[27] See e.g., B.S. Chimni, 'International Institutions Today: An Imperial Global State in the Making', (2004) *15 European Journal of International Law*, 1, 11.

[28] Vladimir Lenin, *Imperialism: The Highest Stage of Capitalism* (Pluto Press 1996 [1915]).

[29] Vladimir Lenin, 'Imperialism and the Split in Socialism' in VI Lenin, *Collected Works, Vol XXIII* 115 (Progress Publishers 1964).

[30] Bill Bowring, 'Positivism versus Self-Determination: The Contradictions of Soviet International Law' in Susan Marks (ed), *International Law on the Left: Re-examining Marxist Legacies* (Cambridge University Press 2008).

[31] For a broader account, see Eric Loefflad, 'The World Revolutionary Origins of the Crime of Aggression: Sovereignty, (Anti-)Imperialism, and the Soviet Union's Contradictory Geopolitics of Global Justice' (2019) 12 *Unbound: Harvard Journal of the Legal Left*, 1.

[32] John Quigley, *Soviet Legal Innovation and the Law of the Western World* (Cambridge University Press 2007), 152-153.

[33] Loefflad, 'The World Revolutionary Origins of the Crime of Aggression: Sovereignty, (Anti-)Imperialism, and the Soviet Union's Contradictory Geopolitics of Global Justice', 32-36.

[34] Oona Hathaway and Scott Shapiro, *The Internationalists: And Their Plan to Outlaw War* (Allen Lane 2017), 257.

[35] Francine Hirsch, 'The Soviets at Nuremberg: International Law, Propaganda, and the Making of the Postwar Order' (2008) 113 *American Historical Review*, 701.

[36] Hirsch, 'The Soviets at Nuremberg: International Law, Propaganda, and the Making of the Postwar Order', 722-723.

[37] Stephen Wertheim, *Tomorrow, the World: The Birth of US Global Supremacy* (Harvard University Press 2020).

[38] Ruti Teitel, 'Transitional Justice Genealogy' (2003) 16 *Harvard Human Right Journal*, 69, 90-92.