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a German-Argentine constellation

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Criminal Trials, Economic Dimensions of State Crime, and the Politics of Time in International Criminal Law

A German-Argentine constellation

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Thesis Submitted for the Degree of Doctor of Philosophy
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I hereby declare that the work presented in this thesis is my own, except where explicit reference is made to the work of others.



Hannah C. Franzki

Abstract

In the past thirty years, International Criminal Law (ICL) has established itself as an influential framework through which claims for justice in relation to the past can be mediated. This thesis offers a critique of the particular way in which ICL links history, law and justice. To this end, it contrasts a transitional justice perspective on trials in response to state crime, with one that looks at such trials as sites of competing politics of time. While the former focuses on the stabilisation of political authority, the later privileges its destabilisation. This perspective is then brought to bear on two sets of trials. These are, on the one hand, the trials of German industrialists conducted by the Allies in the wake of World War II (1939-1945) and, on the other hand, the ongoing trials in Argentina which seek to address the economic dimensions of the last Argentinian dictatorship (1976-1983).

Through the reading of these trials, ICL is shown to be a *liberal* concept of historical justice, not (merely) because it focuses on individual responsibility or because it seeks to foster the liberal rule of law, but, more importantly, because it understands the economic dimensions of state crime according to the ontological separation of the state and the economic which is inherited from political liberalism. As a consequence, ICL tends to authorise a liberal democratic order, while sidelining other political imaginaries and related claims to justice, especially those that would involve a reshaping of the political economy on which liberalism rests.

This argument is developed in two parts. The first part, consisting of three chapters, contrasts what has become the predominant perspective from which to study trials in response to state crime, namely transitional justice, with a theoretical framework inspired by the work of Walter Benjamin – in particular, his philosophy of history and his critique of violence. The central difference between these approaches, this thesis will argue, lies with the way in which each conceives of the promise of justice that comes with the memory of past violence. Transitional justice literature links the duty to remember past violence to the promise of fostering a particular juridico-political order, namely the liberal rule of law. Walter Benjamin, by contrast, is interested in the past's ability to expose the foundational violence of the present juridico-political order. Against this backdrop, the promise of trials in response to state crime can be located only at the place, where they unearth 'rags of history' that, if

read, expose not only the the violence of the past, but also that of the present, thereby opening it anew for contestation.

Chapters Four, Five and Six put this theoretical framework to work in close readings of several criminal trials which deal with the economic dimensions of state crime conducted in post-World War II Germany and contemporary Argentina. These readings bring into relief the way in which the ontological underpinnings of political liberalism – such as the separation of the economic from the political, and the categorisation of violence according to sanctioned and non-sanctioned manifestations – structures the way that ICL makes sense of the economic dimensions of state crime.

Acknowledgments

An important part of this thesis aims at bringing into relief the contingency of the way in which theories of legal responsibility distinguish those acts that are considered relevant to a particular outcome – the crime – from those that are not. Against this backdrop, there is a certain irony in the attempt to identify the people who have been important in the process of planning, writing and finishing this thesis. The acknowledgments that follow cannot but betray their purpose, namely to reflect the voluntary and involuntary, direct and indirect contributions friends and colleagues have made to this thesis.

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Contents

Prelude	10
the question — the thesis — the theory	
1 ‘Martínez de Hoz and Boots’	17
1.1 Reading the Image	18
montage — economic dimensions	
1.2 Reading Trials	29
founding images — dialectical images	
1.3 Constellations	33
Argentina — Germany	
1.4 Chapter Outline	37
2 International Criminal Law, Transitional Justice and the Place of the Economic	44
2.1 International Criminal Law	46
humanity’s law — international criminal law and transitional justice	
2.2 Transitional Justice as a Liberal Project	52
political liberalism — transitology — rule of law promotion — including the economic	
2.3 Shifting perspective	66
3 From the Representation to the Temporalisation of History	70
3.1 A History of the Oppressed	72
3.2 Historical Truth as Justice	79
court-room quality truth — smashing the kaleidoscope — the dialectical image	
3.3 Historical Justice and the Law	89
law as mythical violence — exception and rule — the real state of emergency	
3.4 Politics of Time	100
trials as law preserving violence — the dialectical image as law’s <i>entsetzung</i>	
4 Instituting the Capitalist State	107
4.1 The Industrialist Trials as a Historical Object	109
precedent — citations — developing the image — thesis, antithesis, awakening	
4.2 Mapping the Force Field	118
the economic case at the International Military Tribunal (IMT) — subsequent trials — small-scale history	

4.3 The 'bowels': dissecting the legal arguments	126
corrupted capitalism — aggressive war — slave labour: necessity and moral choice — business as usual — totalizing and dialectical images	
4.4 Founding the German State	141
neue soziale marktwirtschaft and ordoliberalism — collectivism vs. competition — economic democracy	
4.5 Awakening	151
foundational violence — law-repeating violence	
5 Plata Dulce / Sweet Cash	154
5.1 Debt – Guilt	157
state affair — 'crimes against humanity committed for economic reasons'	
5.2 N° 8405/2010: The History of a Case	163
case n° 40.528 — case n° 41.712	
5.3 Economic Subversion	166
'the subordination of public to the private' — 'domination of the act'	
5.4 Liberal Contradictions	172
redefining economic subversion — prosecuting economic subversion	
5.5 Remembering Primitive Accumulation	178
fabricated legality — forms of violence — temporalisations	
6 The Ledesma Trial	185
6.1 The State of Ledesma	190
the state within the state — ledesma's police station — from state to accomplice — structure and agency — the laws of causation — organised power structure	
6.2 States of Exception	201
desaparecidos — el familiar — progress as catastrophe	
6.3 Conclusion	206
lack of imagination — suspensions	
Postlude	213
Bibliography	214

List of Figures

1.1 Martínez de Hoz and Boots	19
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Prelude

In the past thirty years, International Criminal Law (ICL) has established itself as an influential language and conceptual framework through which claims for justice in relation to the past are mediated.¹ This turn to criminal law to address past violence is connected to the broader phenomenon of ‘transitional justice’, a mode of political practice and a site of academic inquiry which emerged towards the end of the 1980s.² The term refers to a set of juridico-political procedures and practices that seek to both account for a previous regime’s crimes and secure the existence of a democratic order developed in its stead.³ Those who stress the importance of criminal prosecutions in response to systematic state violence refer to the capacity of criminal trials to establish an account of the past violence, offer retribution and, in acknowledging and judging the violence exercised in the name of the state, contribute towards liberalising political and social change.

This thesis conceives of criminal trials in response to state crime as sites in which the meaning of the past, and its relevance for the present, are negotiated. It is interested in ICL as a concept of historical justice and looks at the way in which criminal trials reproduce and enact a conglomerate of assumptions about the causal and normative nexus between past, present and future. It

¹A note on terminology: the ‘international’ in ICL refers to the international dimension of the respective crimes. A crime, according to ICL theory, is an international crime when it amounts to a violation of presumed core values of the international community. Importantly, ICL has extensively been applied and developed by national courts in order to establish individual accountability. Therefore, it might be more accurate to speak of ‘transnational’ criminal law. However, I use the term ICL in order to avoid confusion with other areas of transnational criminal law such as corruption or organised crime. On the ‘international’ in ICL and the concept of core crimes in international law, see M. Cherif Bassiouni. ‘International Crimes: Ius Cogens and Obligatio Erga Omnes’. In: *Law and Contemporary Problems* 59.4 (1997), pp. 63–74, p. 69; M. Cherif Bassiouni. *International Criminal Law. Sources, Subjects, and Contents*. Leiden: Martinus Nijhoff Publishers, 2009, p. 130; Gerhard Werle. *Principles of International Criminal Law*. Cambridge: Cambridge University Press, 2005, p. 28; On the role of national courts in developing ICL see, Andreas Fischer-Lescano. *Globalverfassung. Die Geltungsbegründung der Menschenrechte*. Weilerswist: Velbrück Wissenschaft, 2005; Kathryn Sikkink. *The Justice Cascade. How Human Rights Prosecutions are Changing World Politics*. New York and London: W.W. Norton, 2011; Jessica Almqvist and Carlos D. Espósito, eds. *The Role of Courts in Transitional Justice. Voices from Latin America and Spain*. London: Routledge, 2012.

²See Paige Arthur. ‘How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice’. In: *Human Rights Quarterly* 31.2 (2009), pp. 321–367, for a detailed discussion of the term, see Chapter Two.

³For a detailed description, see Ruti G. Teitel. ‘Transitional Justice Genealogy’. In: *Harvard Human Rights Journal* 16 (2003), pp. 69–94, pp. 78–84.

understands criminal law as *one particular way* of framing justice claims in relation to past violence. To be more specific: it is concerned with the *politics* of ICL as a concept of historical justice – that is, the participation of ICL and related trials in the process of grounding and ungrounding a political order.⁴

the question

This research interest originated from the observation of a temporal coincidence of the proliferation of criminal trials as a means to deal with systematic state-backed violence and the end of the Cold War following the collapse of the Soviet Union. This particular historical moment famously was celebrated by some as the chance for a ‘liberal revolution’⁵ or indeed the ‘end of history’.⁶ Such readings of the events of the late 1980s claim that after the collapse of socialist societies, liberal democracy and market economy have proven to be the only legitimate option for societal organisation. As Jacques Derrida put it:

The incantation repeats and ritualizes itself, it holds forth and holds to formulas, like any animistic magic. To the rhythm of a cadenced march, it proclaims: Marx is dead, communism is dead, very dead, and along with it its hope, its discourse, its theories, and its practices. It says: long live capitalism, long live the market, here’s to the survival of economic and political liberalism.⁷

While this claim remained by no means politically or intellectually uncontested, it came to inform the foreign policy of Western countries, international governmental institutions and think tanks.

It also found its way into academia. The supposition of the end of history appeared in the form of the thesis of a democratic norm in international law, liberal peace theories and comparative democratisation studies.⁸ In the scholarship on ICL and transitional justice, the fostering of a liberal democratic order following authoritarian rule or state socialism became the justifying rationale for trials. What this literature has in common and I will return to this point in Chapter Two is that it mostly lacks any effort to justify the very aim of the process of transition, the liberal democratic state.

The championing of political democracy following the end of the Cold War, as Derrida’s quote reminds us, was accompanied by the championing of economic

⁴I will expound my notion of politics in more detail in Chapter Three. Suffice it to say for now that in line with post-foundational political thought, I conceive of politics as the ongoing, failure-prone attempt to ground a political order and, by implication, a particular way of relating the juridico-political to the social or the economic.

⁵Bruce Ackerman. *The Future of Liberal Revolution*. New Haven: Yale University Press, 2008.

⁶Francis Fukuyama. *The End of History and the Last Man*. New York: Free Press, 1992.

⁷Jacques Derrida. *Specters of Marx. The State of the Debt, the Work of Mourning, and the New International*. New York and London: Routledge, 1994, p. 64.

⁸See Susan Marks. *The Riddle of all Constitutions. International Law, Democracy and the Critique of Ideology*. Oxford: Oxford University Press, 2000, especially pp. 33-37; Nicolas Guilhot. *The Democracy Makers. Human Rights & International Order*. New York: Columbia University Press, 2005; David Chandler. ‘The Uncritical Critique of “Liberal Peace”’. In: *Review of International Studies* 36.1 (2010), pp. 137–155.

liberalism especially in its neo-liberal variant. If ICL as a concept of historical justice is historically indebted to a liberal project in so far as it seeks to endow *liberalising* social change with a claim to justice, what promise does it hold for those whose suffering is not redeemed by the liberal rule of law and market economy? More specifically, what does it hold for those who were subjected to state violence because they fought against the structural violence inflicted by capitalist society?

This is the overarching question that stood at the beginning of this thesis, and it is two-dimensional. The first question is of an analytical nature: What does it mean to speak of (international) criminal law as a liberal concept of historical justice? The second dimension of the question picks up law's claim on the idea of justice. What is the underlying promise of justice in (international) criminal law? Is it possible to think of a promise of justice from trials in response to state crime that is not attached to fostering the liberal rule of law?

In order to answer these questions, I looked at several criminal trials that deal with economic dimensions of state crime which were and are conducted in post-World War II Germany and contemporary Argentina. I also engaged with philosophical writings on history, historical time and law, most notably the work of Walter Benjamin.⁹

the thesis

If we understand liberalism as a logic of government characterised by the 'management and organization of the conditions in which one can be free',¹⁰ a logic that takes its clues from political economy and which evolves around the question of how to limit government in relation to society (and its economy), then the trials dealing with the responsibility of economic actors for state-backed violence constitute a privileged site of inquiry for my research question.¹¹ Trials in response to state crime in general are concerned with the

⁹The trials in Argentina are the first systematic attempt to legally assess the responsibility of economic actors in state crime since the so-called Industrialists Trials conducted in post-World War II Germany. There have been a few odd cases against businessmen at the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia, as well as trials on the domestic level; for an overview, see: Grietje Baars, 'Law(yers) Congealing Capitalism: On the (Im)possibility of Restraining Business in Conflict through International Criminal Law', PhD thesis, London: University College London, 2012, pp. 255-281; contributions in Sabine Michalowski, ed. *Corporate Accountability in the Context of Transitional Justice*, Milton Park: Routledge, 2013; On the 'Industrialists trials' in Germany, see: Allison M. Danner, 'The Nuremberg Industrialist Prosecutions and Aggressive War', In: *Virginia Journal of International Law* 46 (2006), pp. 651-676; and contributions in Kim Christian Priemel and Alexa Stiller, eds. *NMT. Die Nürnberger Militärtribunale zwischen Geschichte, Gerechtigkeit und Rechtschöpfung*, Hamburg: Hamburger Edition, 2013.

¹⁰Michel Foucault, *The Birth of Biopolitics. Lectures at the Collège de France, 1978-79*, Basingstoke: Palgrave Macmillan, 2008, p. 63.

¹¹Foucault develops his analysis of liberalism and neo-liberalism in his lectures on the Birth of Biopolitics, held in 1979. I will engage with this work more extensively in Chapter Four of this thesis. Foucault, *The Birth of Biopolitics*.

excesses of the state, the omnipresence of the state apparatus and the suspension of individual liberties. They are intended to perform a break between a violent past and a democratic present.

In this thesis I will argue that in trials dealing with the responsibility of economic actors, the lines that demarcate the difference between the 'evil' predecessor state and the new 'good' state are twofold. They not only mark the opposition between arbitrary state violence and a democratic rule of law, but also distinguish those interactions between the economy and the state which are considered acceptable from those thought to be conducive towards violence. As we will see in the course of this thesis, what is at stake in the attempt to determine the responsibility of economic actors in the crimes committed by the Nazi state and under the authoritarian regime in Argentina is the definition of inadequate and adequate interactions between the state and the economy – those resulting in uncontrolled state violence and those enhancing political and economic liberty.

ICL – and this is my response to the first, analytical part of the question outlined above – is a liberal concept of historical justice, not merely because it focuses on individual responsibility or because it seeks to foster the liberal rule of law, but because of the way in which it distinguishes inadequate (criminalised) from adequate (acceptable) interactions of the state and economic actors. The place attributed to the economic in state crime, I will argue, is circumscribed by liberal theories of the state which are deeply inscribed in the way (international) criminal law imagines the criminal state and which continue to pervade most of the recent literature on socio-economic dimensions of state crime.

As a result, ICL and the corresponding jurisprudence tend to reproduce two central blind spots they inherit from political liberalism: first, in positing the democratic rule of law as the just answer to arbitrary state violence, the violence that characterises the rule of law itself is rendered invisible. Second, when deciding about the responsibility of economic actors, the trials eventually reintroduce the distinction between the state as the realm of politics on the one hand and society as the realm of the economy on the other. This distinction, as we will see, carries with it several implications, one being that state violence is disconnected from any economic rationale.

Moving on to the second dimension of the question, does this analysis imply that there is no hope for those who became victims of (physical) state violence while struggling for a society in which democracy would be linked not only to political but also to economic equality and self-determination? For those concerned with the permissive violence that is inscribed in the liberal imaginary?¹² Indeed, this seems to be the conclusion drawn by the few existing

¹²On the role of the liberal state in creating spaces of permissive violence, see Ives Winter. 'Beyond Blood and Coercion: A Study of Violence in Machiavelli and Marx'. PhD thesis. Berkeley: University of California, 2009.

studies that link the longstanding neglect of economic violence and justice to the very structure of (international) criminal law itself. Identifying law with the law of the capitalist state, these contributions argue that the respective trials can only cloud the structural violence that comes with capitalism.¹³

This thesis puts forward a different conclusion. It will argue that the trials investigating the responsibility of economic actors for state crimes produce material that exposes the very operations through which the lines between the state and the economy and between past and present are drawn. It is in the moment of exposure of that which is excluded by the history written in the trial, of those links that cannot be accommodated by the constructions of legal responsibility, where the promise of justice of these trials lies. Here, history – invoked but not controlled by the trials – becomes a source of rupture which has the potential to open the present anew for contestation.

the theory

I will be making sense of this double movement of the authorisation and destabilisation of liberal democracy at work in the trials by conceiving this answer within a theoretical framework of a politics of time. As indicated above, Walter Benjamin has been my main ally in this endeavour. I will draw on a selection of his writings, in particular the fragment *Capitalism as Religion* (*Capitalism*), dated 1921, his essay *Critique of Violence* (*Critique*), published in 1921, and his later writings on history, such as the *Theses on the Philosophy of History* (*Theses*) and the *Arcades Project*.¹⁴ Read in constellation, these texts will allow me to develop a theoretical framework that offers an analytical perspective on trials without abandoning the central problem posed by law, namely its ties with both violence and justice.

Such a perspective differs from the study of criminal trials as a means of transitional justice in that it does not define their contribution to historical justice in terms of their ability to contribute towards historical truth finding or to foster the liberal rule of law. While with Benjamin, the role of historiographical representation in trials remains a potential source of justice, this promise of justice is not linked to either the adequate representation of history or the authorisation of a particular juridico-political order.

Instead, it would be tied to the disruptive force with which the images of the past that are unearthed by the legal proceedings destabilise the present-

¹³See Baars, 'Law(yers) Congealing Capitalism: On the (Im)possibility of Restraining Business in Conflict through International Criminal Law'; Tor Krever. 'Unveiling (and Veiling) Politics in International Criminal Trials'. In: *Critical Approaches to International Criminal Law*. Ed. by Christine Schwöbel. New York: Routledge, 2014, pp. 117–137.

¹⁴Walter Benjamin. 'Capitalism as Religion'. In: *Selected Writings*. Ed. by Marcus Bullock and Michael W. Jennings. Cambridge, Massachusetts: Belknap Press, 1996, pp. 288–291; Walter Benjamin. 'Critique of Violence'. In: *Reflections*. New York: Schocken Books, 1978, pp. 277–300; Walter Benjamin. 'Theses on the Philosophy of History'. In: *Illuminations*. Ed. by Hannah Arendt. New York: Harcourt, Brace & World, 1968, pp. 255–266; Walter Benjamin. *The Arcades Project*. Cambridge, Massachusetts: Belknap Press, 1999.

day juridico-political. In other words, it would lie where history makes itself present in what Benjamin calls the ‘time of the now’, or *Jetztzeit*, suspending the law for an instance by exposing the violence on which it hinges. From such a perspective history, potentially, enters trials in different temporalities. Because depending on these temporalities, the past participates either in the grounding or ungrounding of a societal order, I speak of a competing politics of time at work in criminal trials.

To summarise: the argument I will present in this thesis operates on two different levels. On a general level, I propose a framework for the study of trials in response to state crimes. This framework conceives of trials as a place of competing politics of time and should be understood as a counter-perspective to what I identify as dominant approach in contemporary literature which analyses trials in their capacity to contribute to liberalising change. With regard to the existing literature on ICL, criminal trials and historical justice, this means that we have to expand the focus from the problem of adequate *representation* of history in trials and orient our gaze towards the *temporalisation* of history. Viewed from this perspective, and now moving on to a more concrete level of analysis, I argue that the trials studied here allow us to formulate a critique of criminal law as a liberal concept of historical justice. This is because they expose the ways in which they participate in the definition of the place of the economic in relation to the state.

It is the aim of the following first chapter to make the link between these two levels more palpable. To this end, I will engage in a reading of a collage made by the Argentinian artist León Ferrari. The image allows me to show why I think it is necessary to engage with both the representation and temporalisation of history in trials in order to critique ICL as a liberal concept of historical justice. The chapter will also offer some reflections on the methodology underlying this thesis; to close, it will present the reader with an outline of the rest of the chapters.

1 | ‘Martínez de Hoz and Boots’

*‘The first stage in this undertaking
will be to carry over the principle of
montage into history.’*

— Walter Benjamin
The Arcades Project

As indicated in the prelude, in this chapter I wish to establish the link between the two distinct yet interrelated threads of the argument that I will develop throughout the thesis. These threads were announced to operate on two levels. On a general level, I propose a framework for the study of trials in response to state crimes. This framework draws heavily on Walter Benjamin’s philosophy of history and his writing on the relationship between law and violence, and will be introduced as a counter-perspective to the literature that analyses trials as a means of transitional justice, that is, in their capacity to contribute towards liberalising change. I will introduce both approaches in detail over the next two chapters.

For the purpose of this chapter, I will limit myself to introducing what I consider to be the central implications of this change in perspective. With Benjamin, trials can be understood as a site of a competing politics of time in which past and present relate to each other in two fundamentally different, politically relevant, ways. Images of the past, I will be arguing, are either invoked as negative reference in order to *authorise* the present order, or appear in trials in a way that sheds light on the continuities between past and present, thereby *destabilising* the claim of the present order to be the non-violent answer to the violent past.

In line with the first temporal relationship, transitional justice literature on International Criminal Law (ICL) invokes the ability of trials to contribute towards establishing a truthful account of past violence and thereby help foster liberal institutions. With Benjamin, on the contrary, the promise of justice would lie in the instances in which the past exposes the foundational violence of the present order.

Through this change in perspective – and this will be the second thread of the argument to be developed in the thesis – I will be able to advance a critique of criminal law as a liberal concept of historical justice. In focusing on the

ruptures, on that which cannot be translated into the established language of ICL, we will be able to identify that which is simply posited, the decision that cannot be accounted for. I will be arguing that ICL is not (merely) liberal because it focuses on individual responsibility or seeks to authorise liberal institutions. Rather, it is liberal in the way it conceives of the relationship between law and violence on the one hand, and the state and the economy on the other.

I wish to establish the link between these two threads through the reading of a collage made by Argentine artist León Ferrari. It will allow me to introduce the reader to the principle of the montage – central to Benjamin’s philosophy of history – as well as to the problem of defining the relationship between state violence and the economy that will be at stake in the trials I will be examining (1.1). My discussion of the collage will lead to a section in which I relate the reading of the image to the reading of the trials put forward in this thesis. In particular, I will sketch out what I conceive of the different ways of representing the past in the trials (1.2). The two first parts concerning the overall argument to be made in this thesis will be followed by a brief section that explains why I look at the ‘economic cases’ in Germany and Argentina for a more general critique of ICL (1.3). I will then conclude the chapter with an outline of the chapters to come (1.4).

1.1 Reading the Image

‘Martínez de Hoz and Boots’¹ is a collage made by León Ferrari as part of a series of over thirty collages which the Argentinian artist produced in 1995 for a new edition of the *Nunca Más (Never Again)* – the final report published by the National Commission on the Disappearance of Persons (CONADEP).² The CONADEP was created in 1983 by then President Raúl Alfonsín with the aim of documenting the human rights abuses committed during the ‘Process of National Reorganisation’ (*Proceso*), the name given by the military junta for the authoritarian rule which was instituted with the *coup d’état* on 24th March 1976.³ Twelve years after its first publication, the daily newspaper ‘Página/12’ reprinted the *Nunca Más* report in fascicles which were distributed with the paper. The item ‘Martínez de Hoz and Boots’ illustrates the front cover of fascicle XVII. It is the fascicle which reproduces the report’s section H, titled

¹See image 1.1 on p. 19.

²CONADEP. *Nunca Más. Informe de la Comisión Nacional sobre la Desaparición de Personas*. Buenos Aires: EUDEBA, 2006.

³It is impossible to escape a politics of naming and a politics of periodisation when talking about the state violence experienced in Argentina in the 1970s and 1980s. In terms of naming, I mostly use the designation introduced by the military junta itself because it reminds us that the use of state violence was linked to a wider political and societal project. In terms of periodisation, I should note at this point that the dates 1976 and 1983 only mark the official temporal limits of the military government, but indicate neither the beginning of state violence nor its end.

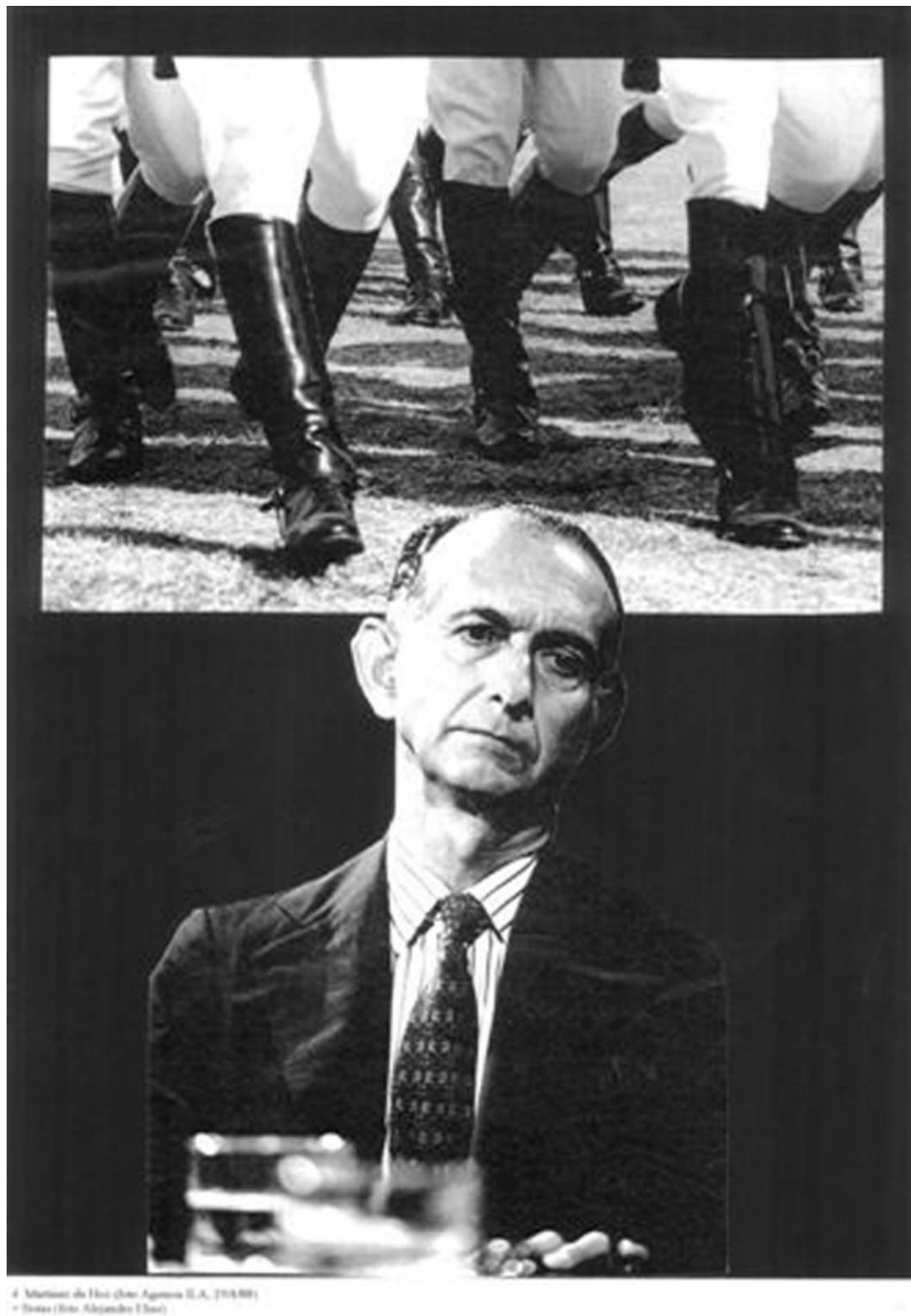


Figure 1.1: Martínez de Hoz and Boots

'Trade Unionist' (*Gremialistas*).⁴ I will turn to the content of this particular section – and the way the image connects – further below. Let us start, for now, with a close look at the image itself.

The collage 'Martínez de Hoz and Boots', as the name indicates, consists of two items. Against a black backdrop, Ferrari arranged a picture of boots, marching lock-step, and a clipping of the upper body of a man in a suit – Juan Alfredo Martínez de Hoz, Minister of Economic Affairs during the first eight years of the *Proceso*. The head of the man, whose picture is positioned at the bottom, slightly overlaps with the image of the boots which itself fills the top half of the collage.

In the context of the *Nunca Más* series, the boots formation constitutes a clear reference to the military regime. The boots move towards the observer. The photograph fills the whole width of the image: there is no space that is not reached by the authoritarian state, there is no escape from it. The boots march in bright daylight, with no need to hide: the *coup d'État* coincided with an exemplary *coup de force* through which the junta sought to provide its government with legal grounds.⁵ Claiming its 'constituent power', the junta declared itself the 'highest body of the nation'.⁶

The sunlit boots, however, throw long shadows. The official military rule produces spaces shielded from day light. The bodies and their shadows can be taken as the visualisation of the double structure of the *Proceso*, which sought to authorise itself on legal grounds while exempting certain spaces from the application of its law.⁷ These spaces are most famously the clandestine detention centres, synonyms for torture and forced disappearance.⁸

⁴Although titled 'Trade Unionist', this section entails subsections on individual cases which did not fit any of the categories, namely on Alice Domon and Leonie Duquet (two French nuns who belonged to the *Institute des Missions Etrangères*, Toulouse), Adolfo Esquivel (Nobel Peace Prize winner in 1980) and Dagmar Hagelin (a Danish student). See CONADEP, *Nunca Más*, Section H.

⁵Derrida uses the notion to highlight how in the moment of foundation of a legal order, the performative and the constative coincide in the face of the absence of any legal grounds. See Jacques Derrida. 'The Force of Law'. In: *Acts of Religion*. Ed. by Gil Anidjar. London: Routledge, 2002, pp. 230–297, p. 241; and Jacques Derrida. 'Declarations of Independence'. In: *Negotiations*. Ed. by Elizabeth Rottenberg. Stanford, California: Stanford University Press, 2002, pp. 46–54, p. 51.

⁶In the 'Statute for the Process of National Reorganisation', published on the day of the coup, we read 'The Military junta, in exercise of the constituent power, establishes: Art. 1° — The Military junta . . . , highest body of the nation, ensures the normal functioning of the other state powers' (my translation). See 'Estatuto para el Proceso de Reorganización Nacional'. In: *Documentos básicos y bases políticas de las Fuerzas Armadas para el Proceso de Reorganización Nacional*. Buenos Aires: Imprenta del Congreso de la Nación, 1980, p. 23.

⁷On the double structure of the state that characterised the dictatorship, see Victoria Crespo. 'Legalidad y dictadura'. In: *Argentina, 1976*. Ed. by Clara E. Lida, Horacio Gutiérrez Crespo, and Pablo Yankelevich. México D.F.: El Colegio de México, Centro de Estudios Históricos, 2007, pp. 165–186; Enrique I. Groisman. 'El derecho durante el "Proceso": una relación ambigua'. In: *¿Usted también doctor?* Ed. by Juan Pablo Bohoslavsky. Buenos Aires: siglo veintiuno editores, 2015, pp. 45–60.

⁸There is vast literature on the function and structure of the clandestine detention camps. The CONADEP report impressively documents the operation of the camps and the systematic use of torture and physical violence. For a philosophical engagement with the phe-

The upper body of José Alfredo Martínez de Hoz, the second item in the collage, sits at a table. His fingers rest on the edge of the table top, a glass of water is within his reach. He wears a suit and a tie. The white skin of his face and high forehead contrast with the black backdrop, the dark tie is clearly visible against his white shirt. Martínez de Hoz is portrayed in his role as minister of economic affairs. The top of his head reaches into the marching, bodiless, boots. Martínez de Hoz, in turn, is shown without legs.

With this collage, Ferrari establishes a connection between the violent repression implemented by the militarised state apparatus during the *Proceso* and what I provisionally call its economic dimensions, embodied by the figure of Martínez de Hoz. The place of the 'economic' in state crimes is precisely what is at stake in the trials I will look at in this thesis, and I will talk about the link between Ferrari's collage and the trials in a moment. Before doing so, however, I wish to proceed with a few reflections on the particularities of the collage as a form of aesthetic representation. This will provide us with some pointers for reading the image further and will also prepare the ground for a brief introduction to Benjamin's philosophy of history as well as its relevance for a critique of ICL as a concept of historical justice.

montage

Ferrari himself understood his collages as 'graphic commentary' and 'contemporary visual testimony' which 'actualises' the *Nunca Más* report that had initially been published ten years earlier.⁹ With the image of Martínez de Hoz in the collage, Ferrari cites one of the very few sentences to be found in the entire report that refer explicitly to the economic project of the dictatorship. The sentence follows a short description of the repression of the workers at the Acindar metal plant in Villa Constitución which took place before and after the coup of 1976.¹⁰ The section reads:

The Santa Fe Delegation of the Commission on Disappeared People twice went to the town of Villa Constitución and, in addition, carried out an official examination of an illegal detention centre which operated on the Premises of the Acindar company. ... In one of the testimonies it is reported that in 1975 (towards the end of the year) the Acindar company,

nomenon of disappearance in Argentina, see Claudio Martyniuk. *ESMA. Fenomenología de la desaparición*. Buenos Aires: Prometeo Libros, 2004.

⁹See interview with Ferrari published by *Página/12* on the occasion of the announcement of the new edition. 'La Explicación de León Ferrari. «La Actualización Gráfica»'. In: *Página/12* (1995-07-09), p. 13, p. 13; Cf. also Benjamin, *Arcades Project*, 'The founding concept (of historical materialism) is not progress but actualization', p. 460 (N2,2).

¹⁰See Victoria Basualdo. 'La organización sindical de base en Acindar Villa Constitución en la segunda ISI: aportes para la comprensión de sus particularidades y su significación histórica'. In: *La clase trabajadora argentina en el siglo XX*. ed. by Victoria Basualdo. Argentina: Cara o Seca, 2011; Dirección Nacional del Sistema Argentino de Información Jurídica, ed. *Responsabilidad empresarial en delitos de lesa humanidad. Represión a trabajadores durante el terrorismo de Estado*. Vol. 1. Buenos Aires: Editorial Ministerio de Justicia y Derechos Humanos de la Nación, 2015, pp. 221-244; José Ernesto Schulman. *Tito Martín, el villazo y la verdadera historia de Acindar*. Rosario: n/a, 1996.

which has about 5,000 workers, ordered them to get their Federal Police identity documents and also a new factory pass, for which they were photographed again. These photos were later used by security and/or military agents to carry out raids and abductions.

Martínez de Hoz, later to become Minister of Economic Affairs, *was not unrelated* to these events; at that time he was a director of Acindar This case provides an eloquent example of the link between the policy of state security and economic power.¹¹

The report resorts to a negation to establish a link between the events and Martínez de Hoz. He, Martínez de Hoz, 'was not unrelated'. It thereby asserts a connection without specifying it. I suggest that the collage of 'Martínez de Hoz' and 'Boots' offers an illustration of the 'link between the policy of state security and economic power' established by the report in both content and form. That is, the particular quality of the 'graphic commentary' provided by Ferrari ten years later consists of taking up the movement of the negative relation: it suggests a link between the interests of economic actors and state violence without defining the exact relationship, thereby maintaining a gap between the two.

This movement is characteristic of the form of montage as a technique of representation. León Ferrari had been using the form of montage since the 1960s, when he applied more abstract forms of representation. His strategy of composition was to a great extent influenced by the European avant-garde.¹² The aesthetics of montage as introduced by the European avant-garde towards the end of the 19th century was to break with previous regimes of representation. Where previous artistic representations of 'reality' would attempt to disguise the fact that they are produced, the art of the avant-garde presents itself as artefact. It breaks, as Peter Bürger observes, with the 'appearance of totality' which is attempted in earlier 'organic' artworks.¹³ In collage, meaning is created by juxtaposition of fragments, not through completeness. 'For the first time in the development of art', Theodor Adorno writes in his *Aesthetic Theory*, 'affixed debris cleaves visible scars in the work's meaning. . . . The negation of synthesis becomes a principle of form'.¹⁴ The elements – fragments of reality – 'disavow unity' when juxtaposed but cannot

¹¹My translation and my emphasis. The official English version translates the double negation of 'no fue ajeno a' with 'he was not aware of'. The limitation to the level of knowledge/awareness in the English translation does not capture the reference to an actual relation in the expression 'no fue ajeno a', literally translated with 'was not alien to'. CONADEP, *Nunca Más*.

¹²There are, of course, differences between the European avant-garde at the end of the 19th century and the Argentinian avant-garde in the 1960s and 1970s. On the Argentinian movement of which Ferrari formed a part, see Andrea Giunta. *Avant-garde, Internationalism, and Politics. Argentine Art in the Sixties*. Durham: Duke University Press, 2007, p. 258; For a discussion of Ferrari's work in English, see Vikki Bell. 'Writing to the General, and Other Aesthetic Strategies of Critique: The Art of León Ferrari as a Practice of Freedom'. In: *Journal of Latin American Cultural Studies* 21.2 (2012), pp. 253–285.

¹³Peter Bürger. *Theorie der Avantgarde*. Frankfurt am Main: Suhrkamp, 1981, p. 97.

¹⁴Theodor W. Adorno. *Aesthetic Theory*. London, New York: Continuum, 2002, p. 155.

escape unity completely, for they only provoke the rupture in relation to each other.¹⁵ He, Martínez de Hoz, 'was not unrelated' to the events that took place at the Acindar metal plant.

Susan Buck-Morss highlighted the epistemological implications of the technique of montage. She stresses the difference between the montage of images with the aim to hide the act of montage (as, for example, in the medium of film, or – to give a more recent example – the 'photoshopping' of images) and the principle of montage that guided the work of the avant-garde. She writes:

Not the medium of representation, not merely the concreteness of the image or the montage form is crucial, but whether the construction makes visible the gap between the sign and referent, or fuses them in a deceptive totality so that the caption merely duplicates the semiotic content of the image instead of setting it into questions.¹⁶

The disruptive potential of the collage, then, results from the autonomy the individual fragments maintain as signs. Their meaning is not fixed by the totality of the image, but remains open to external references. The formal principle of montage is thus characterised by an epistemological instability.¹⁷

I emphasise the particular manner of representation at work in the collage – a discussion which at first seems to be far removed from the business of criminal trials – because it is central to Benjamin's concept of the dialectical image on which I will be drawing throughout the thesis. The notion of the dialectical image condenses Benjamin's way of conceiving the recognisability and representation of history, and is both a critique of and answer to historicist approaches to history.

The influence of the concept of montage, as deployed by the surrealists, on Benjamin's thought is easily perceivable: 'Where thinking comes to a standstill in a constellation saturated with tensions', Benjamin writes in his notes for the *Arcades Project*, 'there the dialectical image appears'.¹⁸ He continues:

[The dialectical image] is the caesura in the movement of thought. Its position is naturally not an arbitrary one. It is to be found, in a word, where the tension between dialectical opposites is greatest.¹⁹

Just as the aesthetics of the montage break with a particular truth claim in visual depictions of 'reality', Benjamin's dialectical image challenges historicism's attempt to provide 'the "eternal" image of the past'.²⁰ In what Benjamin figuratively calls 'historicism's bordello', historical knowledge is conceived of

¹⁵Cf. Adorno, *Aesthetic Theory*, p. 145.

¹⁶Susan Buck-Morss, *The Dialectics of Seeing. Walter Benjamin and the Arcades Project*. Cambridge, Massachusetts: The MIT Press, 1991, pp. 67-68.

¹⁷Buck-Morss, *Dialectics of Seeing*, p. 227. Buck-Morss develops her argument through a discussion of the work of John Heartfield, whose work was highly influential on Benjamin.

¹⁸Benjamin, *Arcades Project*, p. 475 (N10a,3).

¹⁹Benjamin, *Arcades Project*, p. 475 (N10a,3).

²⁰Benjamin, 'Theses', p. 264 (XVI).

as always being readily available.²¹ With the dialectical image, Benjamin in turn conceives that historiographical recognition is the result of a specific and precarious temporal constellation. From this perspective, the task of writing history would no longer be to (re-)present the past 'as it really was'.²² Instead, Benjamin suggests, true historical knowledge – knowledge that 'leads the past to bring the present into a critical state' – needs to grasp a particular constellation that flashes up where past and present are drawn together in a temporal register of what Benjamin calls the *Jetztzeit*, the 'time of the now'.²³ The formal principle of the dialectical image, just as the collage's, is characterised by an epistemological instability.

I will properly introduce the notion of the dialectical image as part of Benjamin's philosophy of history in Chapter Three. For now, I wish to illustrate the aforementioned epistemological instability by continuing with the reading of Ferrari's collage. I will then bring to bear the discussion on the methodological claim I advanced in the prelude, namely, that for a critique of ICL as a *liberal* concept of historical justice (and the way it does or does not address economic dimensions of state crime), it is necessary to engage with questions of historiography and historical time.

economic dimensions

I had paused the reading of the image, suggesting that with the combination of the marching boots and the upper body of Martínez de Hoz, León Ferrari establishes a connection between the *Proceso* and what I had provisionally called its economic dimensions. The discussion of the aesthetics of the montage directs our attention to the instability produced by the juxtaposition of the two images. Once we attempt to define the economic rationale underlying the *Proceso* that is insinuated by the collage, we will realise that it is impossible to offer *one* explanation of this link. Rather, the image 'Martínez de Hoz' can be interpreted in various ways. It gives way to manifold, and at times contradictory, specifications of what is often reduced to one economic rationale of the *Proceso*.

With this focus on the aesthetics of the collage, my reading of Ferrari's collage departs from the interpretation the Argentinian sociologist Emilio Crenzel puts forward in his analysis of the political reception and resignification of the *Nunca Más* report.²⁴ According to Crenzel, what the collages add to the report is an *explanation* of the horrors of the *Proceso* (rather than a mere description). He argues that the human rights perspective sheds light on the systematic

²¹ Benjamin, 'Theses', p. 264 (XVI).

²² Benjamin, 'Theses', p. 255.

²³ Benjamin, *Arcades Project*, p. 471 (N7a,5).

²⁴ Cf. Emilio Crenzel. 'El Nunca Más en fascículos: el infierno resignificado'. In: *Estudios Interdisciplinarios de América Latina y el Caribe* 17.2 (2006), pp. 87–106, in particular p. 93; Emilio Crenzel. *La historia política del Nunca Más. La memoria de las desapariciones en la Argentina*. Buenos Aires: siglo veintiuno editores, 2008, pp. 156–162.

repression that was implemented during the *Proceso*, without offering any rationales for its implementation. Ferrari's collages, on the contrary, hint at various possible explanations. In addition to 'Martínez de Hoz and Boots', the only collage to make reference to the economic dimensions of the *Proceso*, the collages cite images from the Spanish inquisition, the violence against indigenous people, Nazi Germany and the catholic Church.²⁵ What is new about the collages, Crenzel argues, is that Ferrari presents the *Proceso* not as a break with, but precisely as a repeated experience of violence that is very much a part of western civilisation.

This observation of Crenzel's is important, as it allows us to understand Ferrari's intervention as a counter-move to a dominant narrative according to which systematic violence is at odds with western values. However, contrary to Crenzel, I suggest that Ferrari does not make this intervention by offering a counter-narrative about the past. By combining carefully chosen images, Ferrari certainly introduces possible rationales of the *Proceso*. With the arrangement of the *legs* of the military with the *head* of Martínez de Hoz, Ferrari suggests an economic rationale behind the military state. However, the epistemological instability inherent to the collage, indicated above, becomes apparent once we try to explicate the possible references associated with the figure of Martínez de Hoz. Rather than offering a counter-narrative, I suggest it poses the *link* as a question. It invites us to inquire into the economic dimensions of the *Proceso*. As we will see, there is not one answer, but many.

We have already encountered one possible answer, mentioned in the *Nunca Más* report which Ferrari actualises in his collage: from 1968 to 1976, Martínez de Hoz was director of the Acindar S.A. metal plant in Villa Constitución.²⁶ In the early 1970s, Villa Constitución had been the scene of intense labour struggles which were violently repressed in March 1975 – one year before the coup – in a joint operation of police, military forces and the paramilitary organisation 'Alianza Anticomunista Argentina' (Argentinian Anticommunist Alliance, AAA). All trade union representatives were arrested and held in a clandestine detention centre installed on the factory premises. Against this backdrop, the figure of de Hoz points towards the responsibility of individual businessmen for particular crimes carried out by the state apparatus. It furthermore questions the neat temporal demarcation between constitutional government and dictatorship, calling into question the *coup d'état* as the starting point of extra-legal state violence.

As the first minister of economic affairs of the *Proceso*, Martínez de Hoz is furthermore renowned for the profound economic reform of the Argentine economy initiated under his office. On 2 April 1976, eleven days after the coup,

²⁵The collages are documented on Ferrari's web page, see León Ferrari. *Nunca Más*. URL: <http://leonferrari.com.ar/index.php?/projects/series--series/> (visited on 09/25/2014).

²⁶Cf. the official website in memory of Martínez de Hoz José Alfredo Martínez de Hoz. *Official Website*. URL: <http://www.martinezdehoz.com/> (visited on 10/06/2013).

he announced the foundations of his economic plan on national broadcast and television.²⁷ Echoing a mix of classic liberal and neo-liberal economic ideas, this plan was based on two main pillars: first, a reduction of the state except for cases in which the required action could not be carried out by private actors (a so-called subsidiary function of the state), and second, the opening of the national market to the global economy.²⁸ Effectively, the adopted measures transformed the Argentinian economy from a production-based economy to one that was geared towards the global financial markets; this corresponded with a redistribution of wealth and power within the Argentinian economic elite.²⁹ It is furthermore estimated that as a result of the 'liberalisation' of the economy, including the deregulation of the labour market, real wages dropped by 40% within the first year of the *Proceso*.³⁰

On the first anniversary of the *coup* on 24 March 1977, the Argentinian writer and journalist Rodolfo Walsh published an open letter to the Military junta linking the economic policy to the systematic physical violence. Walsh wrote:

These events [abductions, torture and disappearances, H.F.], which have shaken the conscience of the civilized world, are, however, not the greatest suffering undergone by the Argentine people, nor are they the worst violations of human rights for which you are responsible. It is in the economic policies of this government that one finds not only the explanation of your crimes, but also a greater atrocity which punishes millions of human beings with planned misery.³¹

The last sentence points towards two possible 'economic dimensions' associated with Martínez de Hoz in his role as Minister of Economic Affairs during the first five years of the *Proceso*. First, Walsh presents the economic policies of the *Proceso* as rationale behind the systematic violence carried out in the name of the state, 'the explanation of your crimes'. Here, the physical repression figures as a necessary means by which the state implements an economic project which is resisted against by a large sector of the society. Against this backdrop, Walsh's emphasis that the military rule can only be understood if

²⁷ José Alfredo Martínez de Hoz. *El ministro de economía del Proceso de Reorganización Nacional anuncia su plan económico por cadena nacional. Radio Speech*. La Plata, 2/04/1976. URL: <http://hdl.handle.net/10915/32745> (visited on 07/01/2014).

²⁸ Martínez de Hoz exposes the basic principles of his economy in his book José Alfredo Martínez de Hoz. *Bases para una Argentina moderna, 1976-80*. Buenos Aires: n/a, 1981.

²⁹ Eduardo Basualdo. 'El legado dictatorial. El nuevo patrón de acumulación de capital, la desindustrialización y el ocaso de los trabajadores'. In: *Cuentas pendientes*. Ed. by Horacio Verbitsky and Juan Pablo Bohoslavsky. Buenos Aires: siglo veintiuno editores, 2013, pp. 81–100, p. 89.

³⁰ Basualdo, 'El Legado Dictatorial', p. 91.

³¹ Rodolfo Walsh. *A Year of Dictatorship in Argentina. March 1976 - March 1977. An Open Letter to the Military junta from Rodolfo Walsh*. Ed. by Committee to Save Rodolfo Walsh. London, 1977, pp. 8-9. Translation adapted. The Spanish original has been reprinted in Rodolfo Walsh. *Carta abierta de un escritor a la Junta Militar. 24 de Marzo de 1977. Propuestas para trabajar en el aula. Seleccionado y comentado por Edgardo*. 2010. URL: http://contid.derhuman.jus.gov.ar/_pdf/serie_1_walsh.pdf (visited on 07/12/2014).

it is connected to the economic project of the *Proceso* – the marching boots connected to the head of Martínez de Hoz – asks for a reconsideration of the responsibilities for the crimes committed in the clandestine detention centres beyond the military institution.

Second, Walsh challenges the focus on the physical violence inflicted by the state. The economic policies themselves constitute atrocities, he claims, for they inflict *planned misery* on millions of human beings. ‘Planned misery’, Susan Marks writes in her effort to recover the concept for the analysis of human rights violations, ‘does not denote intended or deliberately inflicted misery’. but ‘misery that belongs with the logic of particular socio-economic arrangements’.³² From this perspective, what is at stake is the question of what is understood to constitute (state) violence.

There is a third association provoked by Martínez de Hoz in his position as minister of economic affairs. By 1995, when Ferrari was working on the collages, Argentina had undergone not only the economic reforms initiated by Martínez de Hoz, but also the privatisations and neo-liberal policies carried out under the presidency of Carlos Meném (in office from 1989-1999). During his time in office, fellow economists had criticised Martínez de Hoz for carrying out the liberalisation of the economy only halfheartedly. In the 1990s, however, he was praised for having prepared the mental change in Argentinian society for the more radical steps that were taken by Meném and his minister of economic affairs, Domingo Cavallo: Martínez de Hoz, the harbinger of neo-liberalism in Argentina.³³

This is only true if we understand neoliberalism as a theory which, when put in practice, is never pure. De Hoz, for example, can be associated as much with the liberalisation of the economy and the financial markets as with the nationalisation of both enterprises and debts. A case in point is the Ítalo company, which was nationalised under Martínez de Hoz at an artificially high price.³⁴

Martínez de Hoz, the harbinger of neo-liberalism, also holds true in so far as the policies adopted during the *Proceso* resulted in a structural change of the Argentine economy. This change led to a re-articulation of the relationship of social forces that consequently enabled the implementation of the ‘proper’

³²Marks takes the concept from Naomi Klein’s ‘The Shock doctrine’. Klein in turn refers to Walsh’s letter. See Susan Marks. ‘Human Rights and Root Causes’. In: *The Modern Law Review* 74.1 (2011), pp. 57–78, p. 75.

³³See analysis in Daniel Fridman. ‘La creación de los consumidores en la última dictadura argentina’. In: *Apuntes* 14 (2008), pp. 71–92, pp. 88–89; and Daniel Fridman. ‘A New Mentality for a New Economy: Performing the Homo Economicus in Argentina (1976–83)’. In: *Economy and Society* 39.2 (2010), pp. 271–302.

³⁴On the Ítalo case, see Federico Delgado. ‘El pillaje organizado’. In: *Cuentas pendientes*. Ed. by Horacio Verbitsky and Juan Pablo Bohoslavsky. Buenos Aires: siglo veintiuno editores, 2013, pp. 317–326, p. 318. The nationalisation of the company is discussed in more detail in a document produced by the prosecutor for case 12 071/074 (Juzgado Federal N°4) after it was reopened in 2007 (document on file with the author).

monetarist policies adopted by Menem.³⁵ As Gills, Rocamora and Wilson would have it: the paradox of the representative democratic regimes instaurated in the 1990s after the end of the Cold War is

that a civilised conservative regime can pursue painful and even repressive social and economic policies with more impunity and with less popular resistance than can an openly authoritarian regime.³⁶

To explore one final reference: Martínez de Hoz was a member in the *Azcuénaga* group, a circle of industrialists and liberal intellectuals which met on a regular basis to discuss political ideas and translate them into policy suggestions. Some of its members would later hold positions in Martínez de Hoz's ministry. While much referred to in the recent debate on the economic dimension of the *Proceso*, the exact structure of this group, the identity of its members and their respective interests still remain very much in the dark.³⁷ According to those accounts, Martínez de Hoz constitutes the linking element between the organised interests of the economic elite and economic policies implemented during and with the help of the *Proceso*. Framing this nexus in structural terms, the figure of Martínez de Hoz comes to stand for an 'economic interest' behind the *Proceso* in its combination of physical repression of the labour movement, the reform of the labour law, and the economic policies implemented by the regime.

'Martínez de Hoz and Boots' is not about the particular relationship between Martínez de Hoz himself and the military junta. 'This case provides an *eloquent example* of the link between the policy of state security and economic power'.³⁸ To summarise: the image of Martínez de Hoz evokes an economic rationale behind the authoritarian state, structural violence inflicted by the economic policies of the regime, and the complicity of individual companies in specific cases of abductions and torture; he stands for privatisation of state enterprises but also for state investment; his figure points to the continuities between the authoritarian and democratic regime – continuity, to specify, in the use of state violence as well as in the distribution of wealth. The constellations produced by the images of Martínez de Hoz and the boots, in sum, allow for various readings of what could be considered the 'economic dimension of the *Proceso*'; of the ways in which the state and the economy came to relate to and interact with each other. In this sense, the collage disrupts a reading

³⁵Basualdo, 'El Legado Dictatorial', p. 89.

³⁶Barry K. Gills, Joel Rocamora, and Richard A. Wilson. 'Low Intensity Democracy'. In: *Low Intensity Democracy*. Ed. by Barry K. Gills, Joel Rocamora, and Richard Wilson. London: Pluto Press, 1993, pp. 3–34, pp. 8–9.

³⁷So far, the work of the journalist Vicente Muleiro provides the most information, the sources of which are not always disclosed. Many of the other sources refer to his book and reproduce his account Vicente Muleiro. 1976. *El Golpe Civil*. Buenos Aires: Planeta, 2011; For the intellectual outlook of the group, see Martín Alejandro Vicente. 'Los intelectuales liberal-conservadores argentinos y la última dictadura. El caso del grupo Azcuénaga'. In: *KAIROS. Revista de Temas Sociales*. 16.26 (2012), pp. 1–17.

³⁸CONADEP, *Nunca Más*, (my emphasis).

which reduces the *Proceso* to its juridico-political manifestations by pointing to its economic dimension without, however, determining how this economic dimension should be understood.

1.2 Reading Trials

Now, contrary to the aesthetic form of the collage, the trials under scrutiny in this thesis, like all trials, have to produce a decision.³⁹ Where the form of montage generates meaning by opening up a gap, the logic of legal judgment longs for closure. The initial suspicion that the accused 'is not unrelated' to the crime under investigation opens a variety of associations, only to be pinned down to a single narrative about the past which is shaped by doctrinal forms of criminal responsibility and intended to ground a judgment. Legal proceedings produce an array of testimonies, documents and other evidence which are subsequently assembled into a seemingly coherent account of the events. In this vein, Shoshana Felman reminds us that

[a] trial is presumed to be a search for truth, but technically, it is a search for a decision, and thus, in essence, it seeks not simply truth but a finality: a force of resolution'.⁴⁰

In the context of trials dealing with state-backed violence, this resolution concerns not only the individual responsibility of the accused, but it is also – to use the words of Otto Kirchheimer – a decision about where 'to draw the line between atrocity beyond the pale and legitimate policy'.⁴¹ ICL, as Gerry Simpson has pointed out, 'is revealed at its origins as a composite of collective and individual notions of responsibility'.⁴² It individualises responsibility for acts that require an organisational structure. So while ICL claims to be concerned with the individual responsibility of the accused, trials in response

³⁹On the 'programmatic separation of art and law' in modern jurisprudence cf. Costas Douzinas and Lynda Nead. 'Introduction'. In: *Law and the Image*. Ed. by Costas Douzinas and Lynda Nead. Chicago: University of Chicago Press, 1999, pp. 1–15, pp. 1–6. The authors quote from Plato's 'The Laws': 'when a poet or a painter represents men with contrasting characters he is often obliged to contradict himself, and he does not know which of the opposing speeches contains the truth. But for the legislator, this is impossible: he must not let his laws say two different things on the same subject.' (p. 6); See also Daniel Loick. 'Creation, Not Judgment. Response to Christoph Menke'. In: *The Power of Judgment*. Ed. by Daniel Birnbaum and Isabelle Graw. Berlin and New York: Sternberg Press, 2010, pp. 31–35, who writes: 'Art is the domain that best represents the undecidability of cases, and therefore the problematic character of judgment, because, unlike a murder case, an art case admits this undecidability right from the beginning'; In a similar vein, Felman contrasts the logic of trials with the logic of literary texts which are, according to her, 'a search for meaning, for expression, for heightened significance, and for symbolic understanding, see Shoshana Felman. *The Juridical Unconscious. Trials and Traumas in the Twentieth Century*. Cambridge Massachusetts: Harvard University Press, 2002, p. 55.

⁴⁰Felman, *Juridical Unconscious*, p. 55.

⁴¹Otto Kirchheimer. *Political Justice. The Use of Legal Procedure for Political Ends*. Princeton, New Jersey: Princeton University Press, 1961, p. 326.

⁴²Gerry J. Simpson. *Law, War and Crime. War Crimes Trials and the Reinvention of International Law*. Cambridge: Polity, 2007, p. 71.

to state-backed violence inevitably engage with and pronounce themselves on the context in which the crime took place.

founding images

In his seminal study on political trials, Kirchheimer observed that

[s]etting the new regime off from the old and sitting in judgment over the latter's policies and practices may belong to the constitutive acts of the new regime.⁴³

He suggested that for a trial to be effective as a political trial, that is to work as a constitutive moment in the founding of political authority, it must create *one* image.⁴⁴ The 'image-creating capacity'⁴⁵ Kirchheimer attributes to trials consists of their ability to translate and transform 'fragmentary acts into a simplified picture of political reality'.⁴⁶ The image Kirchheimer thinks of is a totalising one, it allows but one reading of the past:

In an exceptional case, such as the Nuremberg trial, the record of the defunct regime may be so clear-cut that the image produced in court could not but appear a reasonably truthful replica of reality.⁴⁷

The academic interest in this constitutive, 'image-creating' dimension of trials in response to state crime – that is to say, their role in the foundation and legitimisation of a new political order – has changed over time. This shift processes from an *analytical* interest in the ways political regimes resort to trials in order to claim authority towards a *normative* framework that evaluates trials according to their capacity to authorise a political regime, in particular a liberal rule of law. It is already present in Kirchheimer's work and finds its climax in those studies that look at trials in response to state crime from a perspective of transitional justice. Writing on political trials in general, Kirchheimer's interest was first and foremost of an *analytical* nature – why, he asks, do political regimes even resort to law to fight political foes while putting up with the uncertainty that this move involves?⁴⁸ As Başak Ertür highlights in her careful reading of Kirchheimer's work, a slip occurs in the argument when he begins to discuss what he summarises under the heading of 'trials by fiat of the successor regime'.⁴⁹ Writing about the International Military Tribunal (IMT) at Nuremberg, the analysis of the constitutive moment

⁴³Kirchheimer, *Political Justice*, p. 308.

⁴⁴Kirchheimer, *Political Justice*, p. 308.

⁴⁵Kirchheimer, *Political Justice*, p. 430. I thank Başak Ertür for making me aware of Kirchheimer's mentioning of the image-creating capacity of political trials.

⁴⁶Kirchheimer, *Political Justice*, p. 113.

⁴⁷Kirchheimer, *Political Justice*, p. 423.

⁴⁸For a recent overview on the genre, see Başak Ertür. 'Spectacles and Spectres. Political Trials, Performativity and Scenes of Sovereignty'. PhD thesis. London: Birkbeck College, University of London, 2014.

⁴⁹Ertür, 'Spectacles and Spectres. Political Trials, Performativity and Scenes of Sovereignty', pp. 41-44; Kirchheimer, *Political Justice*, p. 308.

at work in the trial acquires a normative quality, namely the hope that the judgment might constitute a step towards an international order which shuns state crime. Kirchheimer fails to account for this slip in the argument, in the wake of which the authorisation of a juridico-political order (be it national or international) is no longer critically examined, but somehow hoped for.

By now the ability of trials to authorise or ground a political order became the main justification for criminal prosecutions in the academic literature that accompanied the proliferation of ICL as a means of transitional justice over the past 25 years. Any suspicion and uneasiness regarding the state and state authority – even in its constitutional guise – which is still manifest in Kirchheimer's work on political trials and law in general, has been replaced by a normative embracement of the liberal state to be created.⁵⁰ In this context, the 'image-creating capacity' – that is, the ability of trials to provide 'a reasonably truthful replica of reality' – has become a cornerstone of the arguments in favour of criminal prosecution. As we will see in more detail in the next chapter, not only are criminal trials' contributions towards establishing historical truth advocated as a requirement of justice in itself, but it is furthermore suggested that in exposing and judging past violence, trials contribute towards historical justice in that they foster a liberal democratic society.

dialectical images

Now, as Kirchheimer himself knew well enough, political trials do not necessarily succeed in creating clear-cut images of the past which could pass as 'a truthful replica of reality' and thus might serve to ground sovereign claims.⁵¹ Instead, the images criminal trials produce of the violence exercised by predecessor regimes at times evidence their arbitrary temporal, spacial and conceptual demarcations. These legal images – recorded in the judgment – appear to us as (failed) attempts at forgery.

This thesis is interested precisely in these moments of failure. They occur, I will argue, where the judgment's totalising representation of the past is undermined by what I conceptualise – with Walter Benjamin – as 'dialectical images'. Above, I introduced the dialectical image as Benjamin's way to think of history and historiographical recognition, namely as the result of a particular temporal constellation.

What I will be conceiving of as 'dialectical images' in the trials appear where, digging into the past, the legal proceedings unearth 'rags' from history's 'refuse' that cannot be accounted for in and by the legal order that sits in judgment over the past.⁵² As a consequence, these constellations between

⁵⁰See essays in Otto Kirchheimer. *Politics, Law, and Social Change. Selected Essays of Otto Kirchheimer*. New York and London: Columbia University Press, 1969.

⁵¹See Kirchheimer, *Political Justice*, p. 118.

⁵²'Refuse of history' is one of the tags Benjamin used in his notes for the Arcades Project Benjamin, *Arcades Project*, p. 461 (N2,6; N2,7).

past instances of violence and the present juridico-political order expose the political implications of the way in which legal concepts and imaginaries define the 'line between atrocity beyond the pale and legitimate policy'.

In my analysis of the trials, I will be focusing on these constellations. In the prelude, I suggested that trials addressing the economic dimensions of state crime constitute a privileged side of investigation for a critique of ICL as a *liberal* concept of historical justice. This is because they gravitate around one of liberalism's central problems: how to best organise the relationship between the state and the economy so that individual freedom is guaranteed.

The argument that I will gradually build up throughout the case studies is that ICL is not merely liberal because it seeks to authorise liberal democracy or because it focuses on individual responsibility. Rather, ICL is liberal insofar as it reproduces two conceptual assumptions that are at the core of liberalism and which bind the way in which the courts relate the economic to the state, and the violence exercised in its name. The first of these assumptions is the strict juxtaposition of the public and the private, the state and the economy, force and liberty. The second presumption concerns the classification of violence according to its sanctioned and its non-sanctioned manifestations.

It was the aim of the first two parts of the chapter to make the link between both levels of the argument to be developed in this thesis more palpable by engaging in a reading of León Ferrari's collage 'Martínez de Hoz and Boots'. Through my reading of the collage, I on the one hand introduced an element that is central to Walter Benjamin's philosophy of history, in particular to the concept of the 'dialectical image'. The latter, I argued, is indebted to the technique of montage as a form of representation, namely the ability to disrupt established content, without positing new authoritative interpretations. As we will see in Chapter Three, which engages more thoroughly with Benjamin's philosophy of history and his critique of law, this idea of disposing without positing is a recurrent theme in his writings. It will be central to the framework I propose for the study of trials in response to state-backed violence.

On the other hand, the reading of the collage allowed me to show the implications of adopting such a perspective. Focusing on the gap that, in the collage, opens up between the two elements – the military 'boots' and the former Minister of Economic Affairs, 'Martínez de Hoz' – I exposed the myriad of ways in which that which is often summarised as the 'economic dimensions of state crime' could be spelled out. In my analysis of the trials that address the criminal responsibility of German industrialists following World War II and of the trials that investigate the responsibility of economic actors in Argentina (Chapters Four, Five and Six), I will focus on the fissures that appear in the moment in which the images, documents, impressions and testimonies

generated by the legal proceedings are translated into juridical imaginaries of the criminal state and of individual responsibility. These fissures allow us to formulate a critique of ICL as a liberal concept of historical justice.

The argument that I sketched out thus far results from a dialogue between the study of trials that address economic dimensions of state crime on the one hand, and Benjamin's writings on history and law on the other. To develop a critique of ICL based on a reading of two very specific sets of trials raises the methodological question of the link between these trials and ICL. Why do I think that these trials, which are partly conducted by national courts, can offer insights on ICL as a concept of historical justice more generally instead of just being relevant as case studies? I want to address this question in the following section and will then conclude this chapter with an outline of the chapters to come – an exercise which requires that this oscillating movement between theory and empirical material be translated into a linear form of presentation.

1.3 Constellations

In the prelude to this thesis, I summarised the question that stood at the beginning of this research project as follows: If ICL as a concept of historical justice is historically indebted to a liberal project, what promise does it hold for those whose suffering is not redeemed by the liberal rule of law and a market economy? For those who were subjected to state violence because they fought, among other things, against the structural violence inflicted by capitalist society? I asked these questions against the backdrop of the observation that the rise of ICL as a means to deal with claims to justice after state-backed violence took place in a context in which the fostering of the liberal rule of law and a free market economy were handled as answers to the experiences of violence under the authoritarian regimes in Eastern Europe and South America.

The trials in Argentina and the trials of German industrialists are central to finding an answer to this question because thus far, they are the only attempts to systematically address the economic rationale of state-backed violence through criminal law. As we will see in more detail in Chapter Five, courts in Argentina started to investigate the link between the economic project of the *Proceso* and the systematic human rights violations that were committed in its name, only in 2010. The trials against German industrialists, held in 1947 and 1948, were the eventual crystallisation of the 'economic case' that was originally brought forward at the International Military Tribunal (IMT) in Nuremberg. By prosecuting representatives of the German industrial elite, the Allies wanted to express their conviction that the rise of the Nazi party and the consequent waging of World War II would not have been possible without the support of German big business. The trials against German industrialists remind us of the fact that the investigation of the economic

dimensions of state crime was central to the prosecutorial strategy in response to the crimes committed by the Nazis. The 'economic case' was only written out of 'Nuremberg' when the IMT was constructed as a foundational moment of ICL in the 1990s. Against this backdrop, the relevance of both sets of cases for an analysis of ICL is that, if looked at in constellation, they point us to absence of an explicit concern with the economic dimensions of state crime in ICL – and transitional justice more generally – at the time of the (re-)emergence of this framework.

At the same time, these two sets of cases are central to a critique of ICL as a concept of historical justice because in so far as they exist, they provide us with the material that allows us to analyse the way in which criminal law frames the economic dimension of state crime once they are addressed. As I already stated above, it is through an analysis of these materials, and the way the courts make sense of them, that we will be able to identify the underlying concepts at work in ICL and their political implications.

Having said that, the project of prosecuting German industrialists for their participation in the Nazi crimes was nearly abandoned before the Industrialist trials started, and the trials in Argentina are running the danger of remaining stuck at pre-trial stage. It is the precarious existence of both sets of trials from which I will be drawing important clues about the place of the economic in ICL.

Argentina

The 'economic cases' in Argentina so far only exist as legal documents – criminal complaints and carefully drafted decisions to open the trial following months of investigations during pre-trial stage, respective appeals and revisions – waiting to be dealt with by the judges in charge. Some of these documents have waited for nearly thirty years. Following criminal complaints filed by the relatives of those who were abducted, tortured and 'disappeared' during the dictatorship, some prosecutors initiated legal proceedings towards the end of the *Proceso* in 1983. The number of proceedings increased with the trial against the members of the first three juntas.⁵³ However, with the amnesty laws decreed in 1986 and 1987, all cases investigating the crimes committed during the last military dictatorship were put on hold.⁵⁴

Only with the abrogation of the amnesty laws in 2001 have the investigations been taken up again. Importantly, the court that annulled the amnesty laws grounded its decision on the duty to prosecute crimes against humanity as

⁵³The president Raúl Alfonsín issued a decree in December 1983 that the high military officials should be tried by a military court *Juicio a las Juntas*. 13/84. Judgment. Consejo Supremo de las Fuerzas Armadas.

⁵⁴*Ley Nr. 23.492. Ley de Punto Final*. El Senado y la Cámara de Diputados de la Nación Argentina. 1986-12-23. URL: <http://www.infoleg.gov.ar/infolegInternet/anexos/20000-24999/21864/norma.htm> (visited on 06/08/2015); *Ley Nr. 23.521. Ley de Obediencia Debida*. El Senado y Cámara de Diputados de la Nación Argentina Reunidos en Congreso. 1987-06-04. URL: <http://www.infoleg.gov.ar/infolegInternet/anexos/20000-24999/21746/norma.htm> (visited on 06/08/2015).

established by ICL.⁵⁵ Since then, national courts have adopted a principle called ‘double subsumption’ to prosecute the crimes committed during the *Proceso*: the individual crimes are first contextualised within a systematic plan and subsumed under the count of ‘crimes against humanity’ as defined by ICL to argue that they have not prescribed and that the state has a duty to prosecute the human rights violations. However, the actual counts and legal responsibility of the defendant are then defined and decided according to Argentinian criminal law.⁵⁶

Out of the 411 pending cases – investigating the responsibility of 2431 accused – only a small number explicitly inquire into the legal responsibility of economic actors, the economic policies implemented during the *Proceso*, or the long-term effects of the political persecution of the labour movement.⁵⁷ Among the 2431 individuals investigated, there are 288 civilians in total. According to my own investigation, the number of businessmen accused of having collaborated with the military junta amounts to fifteen. In addition, several individuals who held positions in the Ministry of Economic Affairs or the National Securities and Exchange Commission have been charged.

Many of the cases that deal with the responsibility of businessmen may never come into existence as trials. This is either because the judge at pre-trial stage finds that there is not enough evidence to open the oral trial or because of (at times intentional) delays in the judicial proceedings which are often closed with the death of the accused. So far, none of the ‘economic cases’ have come to a conclusion. Those trials that are advancing remain stuck at the pre-trial stage. One could say the crux of a trial, namely the oral hearing and judgment deciding the criminal responsibility of the defendant, has yet to take place. Still, extensive pre-trial decisions allow one to identify the legal reasoning at work in order to make sense of the participation of economic actors in the *Proceso*.

In this thesis, I will be looking in detail at two of these cases. Rather than seeing their uncompleted state as an obstacle to conduct social research – often understood as the study of that which is present – I take their precarious existence as an invitation to think about what this incompleteness might tell us about ICL and the trials themselves.⁵⁸

⁵⁵This judgment was later confirmed by the Supreme Court *Simón, Julio Héctor y otros*. Corte Suprema de Justicia de la Nación. 2005-06-14.

⁵⁶See Pablo F. Parenti. ‘La jurisprudencia argentina frente a los crímenes de derecho internacional’. In: *Lateinamerika Analysen* 3.18 (2007), pp. 61–93.

⁵⁷Numbers as of December 2013, according to the statistics of the Centro de Estudios Legales y Sociales (CELS). The statistical information provided by the CELS can be found here: Centro de Estudios Legales y Sociales. *Blog de Estadísticas*. 2013-12. URL: <http://www.cels.org.ar/blogs/estadisticas/> (visited on 03/17/2014).

⁵⁸The importance of the ‘absent’ for social research has been argued for by several authors, see e.g. Boaventura de Sousa Santos. *Toward a New Legal Common Sense. Law, Globalization and Emancipation*. London: Butterworths LexisNexis, 2002, p. 465; Boaventura de Sousa Santos. ‘Para uma sociologia das ausências e uma sociologia das emergências’. In: *Revista Crítica de Ciências Sociais* 63 (2002), pp. 237–280; Avery F. Gordon. *Ghostly*

Germany

Contrary to the Argentine trials, the trials against German industrialists are completed. Indeed, their judgments are cited as legal precedents in the trials investigating the criminal responsibility of businessmen in Argentina.⁵⁹ For many years, these trials were mostly studied by historians. Excluded from the foundational narrative of ICL that reduced 'Nuremberg' to the IMT, these trials were only re-discovered by ICL scholarship in the context of recent attempts to hold corporate actors to account for human rights violations.

The prosecutorial strategies and the judgments rendered in the trials of German industrialists reflect the controversy regarding the relationship between capitalism and the violence inflicted by the Nazi State which accompanied the founding of the new German State,⁶⁰ a controversy which still fuels debates in contemporary historical research. While some attributed the economic causes of World War II to the problem of *monopoly* capitalism, thus calling for a truly competitive market to guarantee a peaceful, democratic state, other voices linked the violence of the Nazi state to capitalism as such, hence demanding a democratisation of the economic order – a request which found its way into many of the *Länder* constitutions adopted between 1945 and 1950.

I will carve out these lines of contestation and their implications for the foundation of the German State when looking at the trials against German industrialists. The 'citation' of the Industrialist Trials by the contemporary trials in Argentina opens the door to a societal debate and struggle which is rendered silent by accounts that insert the trials into a linear account of corporate accountability. These are debates, societal struggles and legal arguments about the relationship between monopoly capitalism, war and state crime – and at the same time, about the compatibility of capitalism and democracy.

In sum, to look at the constellation formed by these two sets of trials on the one hand prompts us ask why an explicit engagement with economic dimensions of state crime was nearly absent at the time when criminal justice as a concept of historical justice became prominent in the 1990s. On the other hand however, in so far as the trials took place, they provide us with the material to scrutinise the way in which ICL makes sense of the participation of economic actors in systematic state-backed violence.

Matters. Haunting and the Sociological Imagination. Minneapolis: University of Minnesota Press, 2008, p. 24; Derrida, *Specters of Marx*, p. xviii.

⁵⁹ See e.g. *Fiscal Federal No. 2 solicita acumulación (Aredez, Luis Ramón y otros)*. 296/09. Auto de Procesamiento. Juzgado Federal de Jujuy Nr. 2. 2012-11-15, pp.107-110.

⁶⁰ Kim Christian Priemel. 'Tales of Totalitarianism. Conflicting Narratives in the Industrialist Cases at Nuremberg'. In: *Reassessing the Nuremberg Military Tribunals*. Studies on war and genocide. New York: Berghahn Books, 2012, pp. 161–193; Kim Christian Priemel. "A Story of Betrayal": Conceptualizing Variants of Capitalism in the Nuremberg War Crimes Trials'. In: *The Journal of Modern History* 85.1 (2013), pp. 69–108.

1.4 Chapter Outline

The following chapter addresses the first question by linking the re-emergence of ICL towards the end of the 1980s to the global transitional justice project that established itself around the same time. The chapter starts by tracing how, following the end of the Cold War, criminal law established itself as a globalised framework for dealing with systematic state-sponsored violence. It was only then, I will argue, that the position held sway within international criminal jurisprudence that the international community had not only the *possibility* to try those responsible for systematic human rights violations, but the *duty* to do so.

This legal imperative generally was (and is) accounted for by referring to an alleged historiographical or pedagogical function of trials. The theories of ICL that justify ICL with regard to these functions in turn draw on ideas about historical change and justice established by the broader transitional justice discourse that started to emerge towards the end of the 1980s. I will identify two central assumptions that constitute the core of what I call a latent theory of historical justice that is at work in ICL. The first assumption holds that the adequate representation of truth is a demand of justice in itself and that trials in response to systematic human rights violations are central towards establishing historical truth. The second assumption links the truth finding to the prospect of social change and asserts that the knowledge of past crimes in combination with the authoritative judgment of the courts fosters the liberal rule of law and helps preventing the repetition of violence.

I will then proceed to look in more detail at transitional justice literature. I will argue that the initial absence of an explicit concern with the economic dimensions of state crime from the field of ICL and transitional justice can be explained with reference to both the conceptual boundaries of its theoretical and philosophical informants – transition to democracy literature and political liberalism – as well as the political practice of which it forms a part, namely the promotion of the rule of law.

The place of the ‘economic’ in this concept of historical justice, as we will see, is circumscribed by the very aim of a liberal rule of law. Because it begs the separation of the political and the economic realm on which political liberalism rests, even the literature that indicates the need to address the socio-economic dimensions of state crime does so in a way that exempts questions concerning redistribution and the relationship between economy and democracy from political contestation. What is missing from most of the contemporary literature on the economic dimensions of state violence or corporate accountability is an engagement with the dialectical relationship between democracy and capitalism as well as with the organization of the economy as a problem of democracy.

A central point I will be making throughout the chapter is that what is characteristic of the field of ICL is that practice and academia are closely intertwined. In this context, trials are predominantly studied as a means of transitional justice. In positing the liberal rule of law as the aim of transition, a transitional justice perspective on trials in response to state crime also adopts central ontological assumptions from political liberalism, on which it consequently fails to reflect: this is, first, the relationship between law and violence, and, second, the separation of the political and the economic.

Chapter Three introduces an alternative framework for the study of trials in response to state crime that draws on Walter Benjamin's writing on history and law. I will start by introducing Walter Benjamin's philosophy of history as one that is concerned with the oppressed in history and set out why, for Benjamin, a philosophy of history that wishes to side with the oppressed must rest on the value of rupture or destabilisation.⁶¹ In doing so, I will be offering Benjamin's notion of remembrance (*Eingedenken*) as a way to think the promise of history that radically differs from the memorial imperative imposed by ICL and transitional justice more generally.

Against this backdrop, I will then focus on the motif of interruption or suspension as it can be found in Benjamin's philosophy of history and his critique of law.⁶² In so doing, these sections will also contest the two pillars of the latent theory historical justice underlying ICL that I started to delineate in the previous chapter.

As opposed to the notion of historical truth underlying ICL, historical truth for Benjamin does not consist of the quest for adequate representation. Instead, truth is located in a temporal nucleus that links the past to the present, an idea which informs Benjamin's concept of the 'dialectical image' already introduced in this chapter. It is in the notion of the 'dialectical image' that we will encounter for the first time the idea of rupture as a gesture towards justice.

I will then expose Benjamin's analysis of the link between law, justice and violence, as developed in *On the Critique of Violence*, in order to challenge the second pillar, namely the idea that the liberal rule of law constitutes a non-violent answer to the past's violence, as well as the hope that a legal judgement could redeem past suffering. According to Benjamin any manifestation of law is bound to be caught in the cycle of law-positing and law-maintaining violence and only the suspension of this cycle, the *Entsetzung* of law, could break with this mythical violence.⁶³

With the discussion of Benjamin's notion of historical truth and his critique of law, I will have prepared the grounds for a framework for the study of trials in response to state crime that requires us to think the promise of historical justice in trials differently from the way it is implied in ICL's the latent theory

⁶¹ Benjamin, 'Theses'; Benjamin, *Arcades Project*.

⁶² Benjamin, 'Critique of Violence'.

⁶³ Benjamin, 'Critique of Violence'.

of historical justice. Such a perspective requires us to shift the focus from the representation of history to its temporalisation in trials and thereby allows us to perceive trials as a site of a competing politics of time. While in ICL the promise attached to the historiographical function of trials is the authorisation of a juridico-political order, namely the liberal rule of law, with Benjamin the only promise of justice could lie where images of the past bring the present into a critical state.

If one accepts Benjamin's philosophy of history and his critique of law as a philosophical backdrop for the study of trials, they can be conceived of as sites where different temporalities, and not merely different narratives of the past, compete. The task would be no longer to examine the ability of trials to foster the liberal rule of law, but instead to train the gaze on the ruptures which are produced by the images of the past that are unearthed throughout the legal proceedings.

Chapter Four is the first chapter in which I bring to bear such a perspective on a set of criminal trials, namely the trials of German industrialists, conducted by the US American, French and British occupying forces between 1947 and 1949. Focusing on the politics of time in the industrialists trials, I will argue that, in addressing the responsibility of economic actors for the crimes committed under the Third Reich, these trials also defined 'right' and 'wrong' forms of interaction between the state and the economy. Against the collectivism, trusts, and monopolies that were identified with the German war economy, the underlying reasoning of the judgments suggests, only a juridico-political order based on the principle of competition could prevent history from repeating itself. The image of the Nazi state and its economic order thus created, came to serve as a negative reference for the West German post-war order, namely the New Social Market Economy (*Neue Soziale Marktwirtschaft*).

I will be exposing this authorising function of the way in which the past is invoked by the trials by exploring the fissures that open between the evidence put forward by the prosecution on the one hand, and the way in which the judges attempted to make sense of the participation of economic actors in war crimes without discrediting the capitalist economy as such. These fissures, as we will see, appear where judges presume, ex-ante, the state's monopoly on violence, and the existence of a free economic sphere in order to define the individual responsibility of the accused for aggressive war, slavery and plunder and spoliation.

From this first case study, we will be retrieving several elements for a critique of ICL as a liberal concept of historical justice. First, while ICL it is often presented as breaking with the principle of state sovereignty, the trials investigating state-sponsored violence also participate in the grounding of sovereignty. Second, that ICL is a liberal concept not only because it focuses on individual responsibility or because it protects individual rights,

but because it re-introduces the liberal construction of the public and the private when defining the economic dimensions of state crime. Third, that the Industrialists Trials rather than judging the violent excesses of capitalism, as it is often suggested by those who see them as an instance of corporate accountability, participated in the positing of the aim of liberal democracy and the free market as the just answer to excessive state violence. To be more specific, the narratives offered by the judgments in the industrialists trials tie in with the ordoliberal logic according to which the state derives its legitimacy from its ability to guarantee the functioning of the free market.

If in post-World War II Germany the interventions of ordo-liberal economists sought to establish the principle of competition as necessary correlate for a democratic society, this argument is empirically refuted by the Argentine 'Process of National Reorganisation'. It provides an example for the establishing of the supposedly 'democratic sphere of the market' with the help of systematic, state-sponsored violence. Chapters Five and Six will take a closer look at two of the trials that deal with the economic dimension of the *Proceso*.

Chapter Five centres on a trial that poses the very question of the relationship between the *Proceso*'s use of systematic state violence and its rhetoric of economic freedom. This trial investigates the responsibility of three military officials and one civil servant for the abduction and torture of several men and women that were linked to the investment and financial business sector and who were forced to sell their property. All of them had been accused of economic crimes amounting to 'economic subversion by the then director of the National Securities Commission (Comisión Nacional de Valores, CNV), Alfredo Etchebarne.⁶⁴ The chapter starts by situating the trials of economic actors in Argentina within the re-foundational project that was introduced by Nestor Kirchner following the financial, economic, political and social crisis which began in 2001. Kirchner conceived of the debt crisis of 2001 as the long-term result of the neoliberal policies first introduced with the help of the dictatorial state. In addressing the link between the human rights violations committed during the *Proceso* and its neoliberal economic project in the trials, the new government sought to establish itself as the political project that finally broke with the dictatorial past as well as with its economic legacy.

I will argue that while these trials challenge the dichotomous, temporal divide between dictatorship and democracy by shedding light on the economic policies adopted during the *Proceso*, and their long term economic consequences, they also produce a new periodization that tries to locate the violence that was

⁶⁴As defined by the National Security Act adopted in 1974 *Ley Nr. 20.840. Seguridad Nacional. Penalidades para las actividades subversivas en todas sus manifestaciones*. El Senado y la Cámara de Diputados de la Nación Argentina. 1974-09-30. URL: <http://www.infoleg.gov.ar/infolegInternet/anexos/70000-74999/73268/norma.htm> (visited on 09/03/2014); D'Alessandri, Francisco *Obdulio y otros s/ privación ilegal de la libertad*. 8405/ 2010. Auto de procesamiento. Juzgado Criminal y Correccional Federal 3. 2013-07-12.

inflicted by the economic project of the *Proceso* in the past. In my discussion of the trial of Etchebarne and the three military officials I will focus on two instances in which this attempt at periodisation fails and is therefore rendered visible. These failures are produced by images that were unearthed by the pre-trial proceedings but which could not be accommodate in the committal for trial order that was issued by the judge.

The first rupture emerges with regard to the possible motif for abductions of the businessmen. I will argue that because the judge associates the *Proceso* with the violent implementation of a societal and economic project that oppressed the working class, he has troubles linking the prosecution of businessmen for economic crimes to the economic rationale of the *Proceso*. Instead, and against his intention, he ends up separating the prosecution and persecution of businessmen from the logic of the repressive state by presenting the abduction and torture of the businessmen as the capture of the state apparatus by private interests.

I will contrast the reading of the judge with another reading that is inspired by the quotes that the judge cites from the economic subversion cases. Through these materials, the prosecution and persecution of businessmen can indeed be connected to the economic rationale of the *Proceso*: they show that in the eyes of the *Proceso*, those threatening the stability of the financial system by not acting responsibly constituted a threat to national security and the newly implemented economic order. Understood in this manner, the prosecution of businessmen by the military is not so much linked the authoritarian logic of the *Proceso*, but instead directs us towards the tensions and contradictions that are characteristic of neoliberal justifications of the free market.

I will turn to the second instance that exposes the periodization at work in the trial. I will pick up on a line from the pre-trial decision in which the judge describes the forced transfer of property in the clandestine detention as instances of primitive accumulation. I will draw on Marx's account of primitive accumulation as well as on Benjamin's fragment *Capitalism as Religion* to distinguish primitive and capitalist accumulation analytically according to the kind of violence that dominates the respective mode of accumulation.⁶⁵

I will argue that in making the use of force in the property transactions a central category that distinguishes the violent past from what is suggested to be a non-violent present, the judge introduces the distinction between primitive and capitalist accumulation as a periodisation. That is, the violence of the primitive accumulation, associated with the *Proceso*, is opposed to the allegedly non-violent rule of law. This periodisation has two effects on the present: first, the part of Marx's analysis that aims at revealing the violence operative in economic forms of accumulation is thereby elided; second, instances of non-capitalist forms of accumulation are relegated to a pre-democratic past.

⁶⁵Benjamin, 'Capitalism as Religion'.

Through my reading of the trial, the liberal imaginary at work in the judge's reasoning makes itself present in two ways. First, and similar to what could be observed in the German industrialist trials, the judge projects the ontological assumption of the separation of state and the economic as a norm onto the past: what is considered an undue 'subjection of the public to private' emerges as central explanation for the prosecution of businessmen during the *Proceso*. Second, while the judge in his description of the historical context condemns the economic violence inflicted by the *Proceso*, the violence that is recognized as such by the law are the illegal detentions. He thereby reproduces the distinction between sanctioned and non-sanctioned forms of violence that is characteristic of the liberal rule of law.

Both distinctions are also central to the way in which the trial studied in the final chapter makes sense of the responsibility of two businessmen for the illegal detentions and the subsequent disappearance of several of their workers. What I will call the 'Ledesma Trial' is the proceedings concerning the legal responsibility of Juan Carlos Blaquier, owner and director of the biggest Argentinian sugar company, Ledesma, and Alberto Lemos, a former member of the company's executive board. They were accused as participants in crimes against humanity committed during the *Proceso*.⁶⁶ The case of Ledesma is one among many in which the disappearances of workers followed labour conflicts at factories, and is one of the few cases in which the responsibility of managers is examined by the courts.

Paralleling the argument made in Chapter Five, I will argue that the trial of Blaquier and Lemos exposes the way in which the image of the economic dimension of the *Proceso* that is constructed in the trials is shaped by a liberal imaginary of the state. Again, I will be focusing on two instances of such an unintended self-subversion.

The first instance can be observed at the moment in which the judge tries to accommodate the evidence produced throughout the pre-trial stage within the available legal theories of participation and causation which demarcate the limits between who is conceived of as responsible for a certain outcome (the crime) and which interactions are considered to be legally irrelevant. The image of the company as a state within the state that is summoned by the testimonies and other evidence unearthed by the pre-trial proceedings, brings into relief the fictional element of the Weberian bureaucratic state, with its presumption of the state's monopoly of power.

The second part of the chapter continues the discussion of the periodisation from Chapter Five. It does so by contrasting two different narratives which explain the absence of the body of Jorge Weisz, a union activist at Ledesma who was arrested in 1974 and disappeared in 1976. In the indictment, the continuing absence of his body, as with that of the other bodies, is explained

⁶⁶ Aredez, *Luis Ramón y otros*, pp. 1-15.

with reference to the systematic practice of disappearance carried out with the help of the clandestine state machinery. As such, he becomes a '*desaparecido*', a figure closely associated with the suspension of the rule of law during the *Proceso*.

At the same time, testimonies reveal that Weisz's co-workers assumed that he had been fed to the *Familiar*. According to a local legend, the *Familiar* is a vicegerent of the devil who guarantees the wealth of the owner of the sugar company. In turn, he is regularly fed a worker. As someone who was devoured by the *Familiar*, the violence Weisz experienced is not merely that of the state of exception with which the *junta* justified the suspension of the rule of law. Rather, the violence he suffered is also that of a state of exception that is the rule under the laws of capitalist accumulation. This second state of exception, I will argue, is the one rendered permissive by the liberal rule of law.

In a brief postlude, I will return to the questions posed in the prelude. Against the backdrop of Benjamin's philosophy of history and his critique of violence, the trials' potential to expose and denounce not only the violence of the past, but, also that of the present juridico-political order, might be the only promise of justice these trials have to offer. It is the weak promise to produce images that do not serve as previsions of a just future, but that are provisions for opening the present anew for contestation.

2 | International Criminal Law, Transitional Justice and the Place of the Economic

In the previous chapter, I linked my object of study – the trials of German industrialists following World War II and the trials investigating the responsibility of economic actors for crimes committed during the Argentine dictatorship – to the object of my critique, International Criminal Law (ICL), by invoking Walter Benjamin's notion of the constellation. I suggested that the two sets of trials form a constellation which prompts us to inquire into the absence of an explicit concern with the economic dimensions of state crime when criminal trials as response to state crime re-emerged on a broad scale in the 1990s. This chapter offers one explanation for this absence, by contextualising ICL within the broader discourse of transitional justice that accompanied its resurgence.

The first section of this chapter substantiates the implicit claim made above, namely: that ICL became an important framework with which to address claims for historical justice in the 1990s. To this end, I will start by tracing how the development of an international obligation to prosecute international crimes in ICL endowed the memorial imperative with a universal claim. At the same time, as I will show, ICL was put forward as a means with which to comply with the now universalised duty to remember past violence. In order to justify the validity of ICL, the corresponding jurisprudence would emphasise the so-called historiographical or pedagogical function of trials, by arguing that establishing the truth about past crimes and judging the responsible individual was important for fostering the liberal rule of law and necessary for preventing the repetition of history. These theories of ICL that justify ICL with regard to its historiographical or pedagogical function draw on ideas about historical change and justice established by the broader transitional justice discourse that started to emerge towards the end of the 1980s (2.1).

Once the link between ICL and transitional justice has been established, the second section will look in more detail at transitional justice literature. I will argue that the initial absence of concern with the economic dimensions of state crime in transitional justice literature and practice can be explained with

reference to both the conceptual boundaries of its theoretical and philosophical informants – transition to democracy literature and political liberalism – as well as the political practice of which it forms a part, namely the promotion of the rule of law. More specifically I will argue that both the initial absence of the economic from transitional justice literature, as well as the way it later came to be addressed, can be attributed to the separation of the political and the economic realms that is central to political liberalism (2.2).

Section two raises two issues that are central to the overall argument of this thesis, both of which will be addressed in the concluding section. The first, as already indicated, concerns the place of the economic in transitional justice practice and literature, which, as I will argue, is circumscribed by the aim of liberal democracy. While the latter is often considered to be politically neutral, it in fact already exempts the economic from democratic contestation. In equating the notion of democracy with liberal democracy, demands for social justice or for the democratic control of the economy, that were central to societal debates following World War II are sidelined. This raises the question of how to conceive of ICL's promise of justice of ICL for those who were struggling to create a society in which social and political justice were thought together.

The second point that emerges from the discussion in this chapter concerns transitional justice as a framework with which to study trials in response to state crime. Because transitional justice presupposes the desirability of liberal democracy, it cannot reflect on two of the central assumptions on which liberalism rests. The first assumption is that the rule of law is the opposite, and thus the adequate answer to, the arbitrary state-backed violence experienced under an authoritarian regime. The second assumption concerns the ex-ante separation of the public and the private, the state and the economy. Both assumptions set boundaries for the way the economic dimensions of state crime, as well as what might constitute acts of redemption, are thought (2.3).

In the next chapter I will present an alternative approach to the study of trials in response to state crime, which allows us to analyse the way in which trials participate in the definition of what is considered state violence, as well as how the economic dimensions of state crime are defined. This approach will draw on Benjamin's philosophy of history along with his critique of law. The decision to present the critical engagement with the existing literature in this chapter, separated from my own theoretical approach in the following chapter, is primarily based on the issue of readability. It allows me to engage with the existing literature, and to familiarise the reader with my material, before entering in greater depth the philosophical and theoretical discussions introduced in Chapter One. It does not, however, reflect a linear order of thinking. The critique of ICL and transitional justice as concepts of historical justice presented in this chapter is already informed by my reading of Benjamin, and I will be engaging with Benjamin in the light of my interest

in ICL. Rather than constituting two consecutive steps in the development of an argument, I would like to think of the first two chapters as two sides of the same coin.

2.1 International Criminal Law

As stated in the prelude to this thesis, I am interested in ICL as *a concept of historical justice*. That is, I look at it as a framework and a language through which justice claims which relate to the past are mediated and expressed. Criminal law was a central means through which the allies addressed the crimes committed by the Nazi regime, and several states resorted to national criminal trials in order to prosecute Nazi crimes.¹ However, as I will be arguing in this section, it was only following the end of the Cold War that criminal law established itself as a globalised framework for dealing with systematic state-backed violence. As we will see, it was only then that international criminal jurisprudence established that the international community had not only the ability to try those responsible for systematic human rights violations, but the duty to do so. This legal duty to prosecute human rights violations forms part of a wider transitional justice discourse, a discourse which ICL helped to globalise and from which, conversely, ICL draws in order to justify its legitimacy. Before making this argument, though, I will briefly expand on my definition of the term 'ICL'.

humanity's law

With 'ICL' I denote the ensemble made up of the body of customary and codified law which criminalises systematic violence carried out by an institutional structure, typically states but also organised non-state armed groups. ICL is the law that criminalises the violence designated as violating central values of the 'international community', 'humanity' and/or as constituting a breach of ratified international law (such as the Geneva Conventions).² ICL jurisprudence disagrees on whether ICL only comprises the so-called 'core crimes' (genocide, crimes against humanity, war crimes, crime of aggression) or whether it also includes torture.³ By now, the central norms of ICL are positive law and codified by the Rome Statute for the International Criminal Court (ICC).

¹Most famously the Eichmann trial in Israel and the Barbie trial in France. See Hannah Arendt. *Eichmann in Jerusalem. A Report on the Banality of Evil*. New York: Penguin, 2006; Alain Finkelkraut. *Remembering in Vain. The Klaus Barbie Trial and Crimes Against Humanity*. New York: Columbia University Press, 1992.

²Bassiouni, 'International Crimes', p. 69; Bassiouni, *International Criminal Law*, p. 130; Werle, *Principles*, p. 28.

³Grietje Baars offers a helpful analytical summary of the different foundational narratives in ICL jurisprudence. See Grietje Baars. 'Making ICL History: On the Need to Move Beyond Prefab Critiques of ICL'. in: *Critical Approaches to International Criminal Law*. Ed. by Christine Schwöbel. New York: Routledge, 2014, pp. 196–218.

This definition is largely in line with that given in the ‘leading’ text books on ICL. The crucial difference is that, contrary to the text books, which seek to provide arguments for the validity of law, I am not making a normative argument about which crimes should be part of ICL. Instead, I am interested in the foundational narrative which theses texts provide for ICL.

In this vein, I understand the ‘international’ in ICL as an element that refers to the claim of validity, rather than to the international character of the courts or the treaties. That is, the ‘international’ in ICL introduces the rationale for why states should be allowed to break with one of the core principles of international law, the principle of state sovereignty. The international is not a reference to ICL’s legal foundations in international treaties signed by states, but rather is a substitute for the absence of any international treaty at the time when ICL was first enforced. It refers to a presumed international community (‘humanity’) which is said to share certain values, the violation of which allows the community to prosecute individuals (and thereby to break with the principle of state sovereignty).⁴

With the individual responsibility established by ICL, the individual enters the realm of international law, either as victim or as perpetrator. Not only are human rights violations no longer considered solely the issue for the respective state, but furthermore it is no longer possible for head of states to hide behind the cloak of state sovereignty.⁵ In most of the literature on ICL, this is taken as indicating that the international community advances from anarchy to a rule of ‘humanity’s law’.⁶ Such a narrative of the history of ICL relies on a single subject of history – humanity – and the idea of historical progress: the fact that the international community does not tolerate massive violence any more is taken as indicative of a process of civilisation.⁷

In sum, I use the phrase ICL to designate a body of criminal law built mostly through ad-hoc jurisprudence by international tribunals and national courts with reference to existing international law. Importantly, this body of law is created, contested and applied by a vast array of different legal institutions which refer to diverging legal grounds: for example, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) are based on the Charter of the United Nations; the ICC was created by the Rome Statute; and many national courts invoke

⁴Immi Tallgren offers an excellent analysis of the role this fiction holds in ICL. See Immi Tallgren. ‘Who Are ‘We’ in International Criminal Law? On Critics and Membership’. In: *Critical Approaches to International Criminal Law*. Ed. by Christine Schwöbel. New York: Routledge, 2014, pp. 71–95.

⁵For an early version of this argument see Hans Kelsen. ‘Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals’. In: *California Law Review* 31.5 (1943), pp. 530–571.

⁶For a recent example of this narrative, see Ruti G. Teitel. *Humanity’s Law*. Oxford: Oxford University Press, 2011.

⁷For an analysis of the idea of progress in international law, see Thomas Skouteris. *The Notion of Progress in International Law Discourse*. The Hague: Cambridge University Press, 2010.

ICL either directly emphasising the principle of universal jurisdiction or on the basis of national legislation that regulates the application of international law by national courts.⁸ Thus, while international tribunals such as the ICTY and the ICTR may be the most visible institutions associated with ICL, the latter is actually created and applied by a ‘global community of courts’.⁹

Given the transnational character of the law-making process in relation to state crime, some authors discuss the processes I have just described as ‘transnational criminal law’. Peer Zumbansen, for example, has called the globalisation of criminal law in order to address state-backed violence the ‘transnational law of post-conflict justice’.¹⁰ However, because the label ‘transnational criminal law’ is also used to refer to any criminal law dealing with ‘transnational crime’, I will be using the name ‘ICL’ to denote the body of law that enables the criminal prosecution of systematic state-backed violence.¹¹

international criminal law and transitional justice

The institutionalisation of ICL in the 1990s coincided with the emergence and proliferation of the notion of transitional justice. The latter has come to denote a ‘set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses’¹² and also refers to particular ‘legal, moral and political dilemmas that arise in holding human rights abusers accountable at the end of conflict’.¹³ These brief accounts of ‘transitional justice’ show us that the term has come to denote phenomena to be studied (such as trials and truth commissions), but also their dominant form of theorisation, namely as means to fostering liberalising change. We will return to this point below.

In contrast to comparative studies, which subsume a wide array of historical instances of political change under the notion of transitional justice,¹⁴ I conceive of transitional justice as a distinctive field of knowledge and practice

⁸Sikkink, *Justice Cascade*; Almqvist and Espósito, *Courts*.

⁹Fischer-Lescano, *Globalverfassung*.

¹⁰Peer Zumbansen. ‘Transitional Justice in a Transnational World: the Ambiguous Role of Law’. In: *CLPE Research Paper Series* 04.08 (2008), pp. 1–25, p. 7.

¹¹See for example Neil Boister and Robert J. Currie, eds. *Routledge Handbook of Transnational Criminal Law*. Routledge Handbooks. Milton Park: Routledge, 2015.

¹²International Center for Transitional Justice (ICTJ). *What is Transitional Justice?* 2012. URL: <http://ictj.org/about/transitional-justice> (visited on 04/09/2013); see also Pablo de Greiff. ‘A Normative Conception of Transitional Justice’. In: *Politorbis* 50 (2010), pp. 17–29, p. 18.

¹³Christine Bell, Colm Campbell, and Fionnuala Ni Aoláin. ‘Justice Discourses in Transition’. In: *Social & Legal Studies* 13.3 (2004), pp. 305–328, p. 305.

¹⁴For example the work of John Elster, who compares around thirty cases of ‘regime change’, beginning with ancient Greece and defying all academic conventions for comparative analysis. Jon Elster. *Closing the Books. Transitional Justice in Historical Perspective*. Cambridge: Cambridge University Press, 2004; Ruti Teitel dates the ‘origin’ of transitional justice back to post-World War II Germany and Japan. See Teitel, ‘Genealogy’; Ruti Teitel. ‘Transitional Justice: Postwar Legacies’. In: *Cardozo Law Review* 27.4 (2006), pp. 1615–1631.

that emerged in response to the downfall of the communist regimes in the late 1980s.¹⁵ It serves, as Christine Bell highlights, as a ‘cloak’ which

has been woven into a superficially coherent whole through processes of international diffusion, similarity in institutional provision and the common language of transitional justice fieldhood [sic!] itself.¹⁶

Even though the field unites many different approaches and research interests, its core consists of a relatively coherent set of assumptions. Principally there are two: firstly, transitions to liberal democracy are desirable; secondly, truth commissions, trials, institutional reforms and reparations can contribute to the fostering of the democratic rule of law and social reconciliation. Given that these assumptions inform most transitional justice practice and scholarship, it is possible to speak of a ‘mainstream’ in the field.¹⁷

The link between the re-emergence of ICL and a global transitional justice discourse is not just a temporal coincidence. Rather, the former played a crucial role in the proliferation of the latter. The international lawyer Diane Orentlicher published a series of articles which were the first to argue that states which were party to certain treaties have a legal obligation to prosecute the human rights violations of a prior regime.¹⁸ In an article published in 1991, Orentlicher concludes that

both the treaty and customary obligations to punish atrocious crimes are consistent with a limited program of prosecutions, but would be breached by wholesale impunity.¹⁹

This affirmation of a *duty* to prosecute certain violations of human rights marks a qualitative shift from the *possibility* established at the the beginning

¹⁵For a detailed analysis of the emergence of the notion see Arthur, ‘Conceptual History’.

¹⁶Christine Bell. ‘Transitional Justice, Interdisciplinarity and the State of the ‘Field’ or ‘Non-Field’’. In: *The International Journal of Transitional Justice* 3 (2009), pp. 5–27, p. 15; see also Rosemary Nagy. ‘Transitional Justice as Global Project: Critical Reflections’. In: *Third World Quarterly* 29.2 (2008), pp. 275–289.

¹⁷See e.g. UN Human Rights Council. *Analytical Study on Human Rights and Transitional Justice. Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General (A/HRC/12/18)*. 2009. URL: http://www.unrol.org/files/96696_A-HRC-12-18_E.pdf (visited on 11/15/2012); UN Human Rights Council. *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Pablo de Greiff*. 9/08/2012. URL: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-46_en.pdf (visited on 11/25/2012); William Muck and Eric Wiebelhaus-Brahm. *Patterns of Transitional Justice Assistance Among the International Community. Paper presented at the Sixth ECPR General Conference*. Reykjavik, 2011; Hugo van der Merwe, Victoria Baxter, and Audrey R. Chapman, eds. *Assessing the Impact of Transitional Justice: Challenges for Empirical Research*. Washington and D.C: United States Institute of Peace Press, 2009; International Center for Transitional Justice (ICTJ), *What is Transitional Justice?*; de Greiff, ‘Normative Conception’; Ruti G. Teitel. *Transitional Justice*. Oxford: Oxford University Press, 2000.

¹⁸Diane F. Orentlicher. ‘Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime’. In: *Yale Law Journal* 100.8 (1991), pp. 2537–2615; Orentlicher later published a personal evaluation of her initial position, see Diane F. Orentlicher. ‘Settling Accounts’ Revisited: Reconciling Global Norms with Local Agency’. In: *International Journal of Transitional Justice* 1.1 (2007), pp. 10–22, in particular pp. 13–15.

¹⁹Orentlicher, ‘Settling Accounts’, p. 2541.

of the century that had enabled the prosecution of Nazi crimes in the wake of World War II.

This shift was later affirmed in academic publications and the jurisprudence of the ICTY and the ICTR.²⁰ Furthermore, as mentioned above, transnational litigation efforts, in particular concerning crimes committed under authoritarian rule in Argentina and Chile, resulted in the affirmation of an universal duty to prosecute violations of *ius cogens*.²¹

The description of state-sponsored violence in generalised legal concepts such as ‘crimes against humanity’, ‘war crimes’ or ‘genocide’ made it possible to abstract from the historical particularities of each case. And although not every country’s political elite will decide to prosecute human rights violations (South Africa is a case in point), they will still need to ‘articulate a relationship to the accountability standards of international law’.²² It is thus international human rights law, and in particular ICL, which served to spread and unify the memorial imperative established under the heading of transitional justice.

Above, I mentioned that the term transitional justice denotes not only the institutional measures that are adopted in order to reckon with the human rights account of a predecessor regime. Furthermore, the term implies a specific perspective on these measures. As we will see in more detail in the next section, transitional justice literature evaluates trials, truth commissions and the like according to their ability of fostering liberalising change. The alleged ability of criminal trials to contribute towards such a liberalising change has also become central an element in ICL jurisprudence that seeks to substantiate the validity of ICL.²³

Already, at the International Military Tribunal (IMT), prosecutors and judges emphasised the necessity of legally identifying those responsible for systematic state-backed violence, calling upon a diffuse mix of moral and legal arguments that concern not only the suffering of the victims but also the ability of criminal trials to contribute to a less violent future of the international community. Robert H. Jackson, chief United States prosecutor at the IMT in Nuremberg, for example, established this causal nexus at the beginning of his opening speech when he stated that

²⁰Werle, *Principles*; Bassiouni, *International Criminal Law*.

²¹Naomi Roht-Arriaza. *The Pinochet Effect. Transnational Justice in the Age of Human Rights*. Pennsylvania: University of Pennsylvania Press, 2006; Fischer-Lescano, *Globalverfassung*.

²²Bell, ‘The State of the Field’, p. 15.

²³I understand jurisprudence as both a practice of the courts and the legal theory that aims to provide a ‘foundational and legitimising discourse for (law’s) activity’, in the words of Costas Douzinas. Costas Douzinas, Ronnie Warrington, and Shaun McVeigh. *Postmodern Jurisprudence. The Law of Text in the Texts of Law*. London: Routledge, 1991, p. 14; we can also invoke Niklas Luhmann’s definition of jurisprudence as ‘attempts at theory that – despite their often critical approaches – respect the character of law, and are committed to its corresponding normative reference.’ Niklas Luhmann. *Law as a Social System*. Oxford: Oxford University Press, 2004, p. 60.

[t]he wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated.²⁴

One could be tempted to reduce the hope expressed by Jackson to the emotions that often characterise court hearings, or to a cheap moral cover for power politics. However, the claim that only if trials in response to large scale violence take place, can their repetition be avoided, is at the heart of current scholarly attempts to offer a theory of ICL.

Confronted with the obvious shortcomings of traditional penal theories in justifying criminal prosecutions, emerging theories of ICL often draw on what their proponents call the 'pedagogical', 'expressive' or 'historiographical' function of trials in response to state crime. These theories link the promise of justice in trials to the writing of history that takes place in the court room. For analytical purposes, we can distinguish two ways in which this link is established.²⁵ The first line of argument claims that establishing the truth about the violence experienced by a society is a requirement of justice in its own right. This claim has found its legal expression in the (individual and collective) 'right to truth'.²⁶ In this context, trials are put forward as a means to comply with the state's duty to investigate human rights violations that are imposed on it by the right to truth.

A second line of argument makes of the writing of history in trials a source of justice by linking it to the promise of a better future. It holds that, by establishing an account of past abuses ('history as it really was') and subsequently

²⁴Robert H. Jackson. 'Opening Statement'. In: *Trial of the Major War Criminals Before the International Military Tribunal: 1947*, pp. 98–155, pp. 99.

²⁵In the literature both elements are often combined, although authors vary in their emphasis. See e.g. Mark Osiel. *Mass Atrocity, Collective Memory, and the Law*. New Brunswick, New Jersey: Transaction Publishers, 1997, pp. 20–22; Louise Arbour. *War Crimes and the Culture of Peace. The Senator Keith Davey Lecture*. Toronto: University of Toronto Press, 2002, p. 47; Lawrence Douglas. *The Memory of Judgment. Making Law and History in the Trials of the Holocaust*. Yale University Press, 2005; Mark A. Drumbl. 'A Hard Look at the Soft Theory of International Criminal Law'. In: *The Theory and Practice of International Criminal Law*. Ed. by Leila Nadya Sadat and Michael P. Scharf. Leiden: Martinus Nijhoff Publishers, 2008, pp. 1–18, pp. 7–13; Herbert Jäger. 'Makroverbrechen als Gegenstand des Völkerstrafrechts. Kriminalpolitisch-kriminologische Aspekte'. In: *Themenschwerpunkt: Strafrecht und Rechtsphilosophie*. Ed. by B. Sharon Byrd. Berlin: Duncker & Humblot, 2003, pp. 325–354, p. 339; Robert Sloane. 'The Expressive Capacity of International Punishment. The Limits of the National Law Analogy and the Potential of International Criminal Law'. In: *Stanford Journal of International Law* 43 (2007), pp. 39–94; Christoph Safferling. *Internationales Strafrecht. Strafanwendungsrecht, Völkerstrafrecht, Europäisches Strafrecht*. Springer Lehrbuch. Berlin and Heidelberg: Springer, 2011, pp. 124–129; David S. Koller. 'The Faith of the International Criminal Lawyer'. In: *New York University Journal of International Law & Politics* 40 (2008), pp. 1019–1069, pp. 124–129.

²⁶As developed by the Inter-American Court of Human Rights in *Castillo Páez Vs. Perú*. Reparaciones y Costas. Inter-American Court of Human Rights. 1998-11-27; and *Barrios Altos Vs. Perú*. Inter-American Court of Human Rights. 2001-03-14; for the ongoing legal discussion concerning the status of the right to truth in international law, see Yasmin Naqvi. 'The Right to the Truth in International Law: Fact or Fiction?' In: *International Review of the Red Cross* 88.862 (2006), pp. 245–273; for a critical engagement with the right to truth, see Leora Bilsky. 'Transitional Justice as a Modern Oedipus: The Emergence of a Right to Truth'. In: *Critical Analysis of Law* 2.2 (2015), pp. 446–466.

identifying their criminal nature (judgment), criminal trials affirm the values of the liberal rule of law. The fostering of liberal democracy is offered as a promise of justice in response to the violent past. I will discuss the implications of both arguments in detail in the next chapter. For now, suffice it to note that ICL jurisprudence merges the ‘truthful’ representation of history, the legal judgment and the prospect of social change together into a latent theory of historical justice. That is, the discipline has answered the turn to criminal law in search of historical justice, with a turn to history in the search for grounds that could justify the criminal prosecution of state crimes.

In 2006 David Luban published a review of several publications on transitional justice, in which he offers this summary:

Twenty years ago the phrase ‘transitional justice’ did not exist; and although none of the problems we today classify as transitional justice issues is new, treating them as a single philosophical ‘kind,’ a topos, is a product of the 1990s. The category of transitional justice did not arise from an internal development in philosophical discourse about justice.²⁷

This quote entails two important observations. First, while transitional justice did not arise from an internal development in the philosophical discourse on justice, it nonetheless draws on philosophical concepts for its own authorisation as it establishes itself as a model with which to deal with systematic human rights abuses. Advocates of transitional justice make assumptions about what constitutes a *just* response to state violence which are based on ideas about the course of history and historical time – but these ideas are not made explicit or developed as a coherent philosophical framework. Second, the quote reminds us that this specific perspective on states’ responses to the violence committed by a predecessor regime, emerged only in the 1990s.

The following section looks in more detail at the underlying concepts of the transitional justice project, as well as at the political situation in response to which it emerged. Because, as I have argued in this section, ICL draws on basic assumptions that are put forward and fostered by transitional justice practice and literature for its own validation, and because transitional justice has become a widespread approach for the study of trials in response to state crime, to look in detail at the transitional justice discourse will offer important insights for our analysis of ICL as a concept of historical justice and of the way in which it takes into account economic dimensions of state crime.

2.2 Transitional Justice as a Liberal Project

To claim that transitional justice is a liberal concept seems to be stating the obvious. Most of the policy literature on transitional justice explicitly invokes

²⁷David Luban. ‘Review of Elster, Jon. Closing the Books: Transitional Justice in Historical Perspective. Cambridge: Cambridge University Press, 2004’. In: *Ethics & International Affairs* 116.2 (2006), pp. 409–412, p. 409.

liberal principles so as to justify transitional justice measures. Within the realm of academia, recent efforts to provide a normative theory of transitional justice draw on genuine liberal constructs such as John Rawls' 'political liberalism,' or other such contractual theories.²⁸ However, what I mean by saying that transitional justice is a liberal project is not just that transitional justice scholarship is – explicitly or implicitly – normatively committed to liberalism or liberal democracy. More than this, transitional justice literature mirrors an idea cultivated by political liberalism, namely that the normative commitment to liberalism is politically neutral.

In this section, I will contest this presumption by arguing that the initial exclusion of concerns for social justice from the 'arithmetic of justice' put forward by transitional justice literature is owed to its conceptual ties with political liberalism.²⁹ Because the latter reduces the notion of democracy to the organisation of collective decision-making under the rule of law, it can treat questions concerning social justice or the organisation of the economy as issues that are, in principle, not connected to the democratic organisation of a society. I will then proceed to argue that such a de-linking of questions concerning social and economic justice (organisation of the economy) from those concerning political justice (democratic legitimisation of state institutions) not only made it possible to disregard the economic dimensions of the transition processes, but also defined the ways in which concerns for economic justice have come to be addressed in transitional justice literature over the past ten years.

political liberalism

Ruti Teitel's work epitomises the tendency mentioned above to conceive of the liberal rule of law as an institutional framework which precedes, is outside of or is at least indifferent to decisions concerning politics. On this basis, she is able to beg the question of liberalisation. That is, rather than providing positive arguments for them, she merely posits liberal institutional arrangements as aim of political transitions.³⁰ Teitel's writings have become a central point of reference in the academic debate and have served as an academic foundation for transitional justice policies.³¹ In the introduction to her volume *Transitional Justice*, she writes:

²⁸See e.g. Kora Andrieu. 'Political Liberalism after Mass Violence: John Rawls and a 'Theory' of Transitional Justice'. In: *Transitional Justice Theories*. Ed. by Susanne Buckley-Zistel, Teresa Braun Christian Beck, and Friederike Mieth. London: Routledge, 2013, pp. 165–202; de Greiff, 'Normative Conception'.

²⁹Vasuki Nesiah. 'The Trials of History: Losing Justice in the Monstrous and the Banal'. In: *Law in Transition*. Ed. by Ruth Buchanan and Peer Zumbansen. Oxford: Hart Publishing, 2014, pp. 289–308, p. 297.

³⁰See Teitel, *Transitional Justice*; Ruti Teitel. 'Transitional Justice in a New Era'. In: *Fordham International Law Journal* 26.4 (2002), pp. 893–906; Teitel, 'Genealogy'.

³¹See e.g. UN Human Rights Council, A/HRC/21/4.

The constructivist approach proposed by this book suggests a move away from defining transitions purely in terms of democratic procedures, such as electoral processes, toward a broader inquiry into other practices signifying acceptance of liberal democracy and the rule-of-law. The inquiry undertaken examines the normative understandings, beyond majority rule, associated with liberalizing rule-of-law systems in political flux.³²

Teitel's 'constructivist approach' should not be confused with the ontological perspective that is often associated with term 'constructivism' and that refers to the 'social construction of reality'.³³ Instead, her constructivism proposes an evaluation of political practices according to their ability to bring about liberal institutions. The qualities of transitional law, according to Teitel, are that it enables transition through combining a 'process of established, measured legitimation and gradual political change'.³⁴ Transitional justice is imperfect and partial but, Teitel holds, this is precisely why it is valuable in constructing liberalising change and hence should not easily be dismissed.³⁵ She characterises transitional justice measures as 're-definitional', in that they seek to contribute to the legitimisation of the new regime by condemning past injustices.³⁶

While transitional justice literature presumes a consensus on liberal democracy as the aim of transition, it does not provide a justification for this normative stance. Being a 'democrat', it seems, does not require any further justification. What goes undetected in the respective literature is that 'liberal' or 'constitutional' democracy is by no means the only possible meaning of the term. In this vein, Wendy Brown reminds us that

no compelling argument can be made that democracy inherently entails representation, constitutions, deliberation, participation, free markets, rights, universality, or even equality.³⁷

Transitional justice's uncritical embracing of liberal democracy as its aim speaks of the success of political liberalism at presenting itself as post-political, that is, as a political order that is acceptable to everyone. Certainly, recent theories of liberal democracy – such as Jürgen Habermas' account of deliberation or Rawls' political liberalism – present their normative framework as neutral with regards to cultural, social and economic values and hence as potentially universal. In this spirit, Rawls holds that the

³²Teitel, *Transitional Justice*, p. 5.

³³Peter L. Berger and Thomas Luckmann. *The Social Construction of Reality. A Treatise in the Sociology of Knowledge*. New York: Anchor, 1967.

³⁴Teitel, *Transitional Justice*, p. 223.

³⁵Teitel, *Transitional Justice*, pp. 225, 227.

³⁶Teitel also uses the term 'performative', see Teitel, *Transitional Justice*, pp. 9, 221.

³⁷Wendy Brown. "We are all Democrats Now..." In: *Democracy, in What State?* Ed. by Giorgio Agamben. New York and Chichester: Columbia University Press, 2011, pp. 44–57, p. 45; see also the other contributions in Giorgio Agamben, ed. *Democracy, in What State?* New York and Chichester: Columbia University Press, 2011.

problem of political liberalism is to work out a political conception of political justice for a (liberal) constitutional democratic regime that a plurality of reasonable doctrines, both religious and nonreligious, liberal and non-liberal, may endorse for the right reasons.³⁸

Defenders of political liberalism often hold that the latter is *only* political in so far as it would not prescribe any decisions concerning the organisation of the cultural, economic or social life of a political community. In what follows, I draw from existent critiques of political liberalism to argue that political liberalism is not *only* political, but *already* political. It already implies political decisions because it reduces the problem of democratic legitimation to the realm of politics, thereby barring questions concerning democratic control of the economy from political debate and marginalising claims for social equality. Transitional justice has to be considered part of this politics in so far as it seeks to authorise liberal democratic institutions.³⁹

Before I proceed, however, one clarification should be made: to say that transitional justice is a genuinely liberal concept is not to say that some of the assumptions on which it is based cannot also be at odds with its ideal of liberal democracy. Cora Andrieu, for example, points to a number of disconnections and contradictions between liberal thought and transitional justice, such as the construction of a foundational narrative in transitional justice, which goes against the principle of plurality upheld by liberalism.⁴⁰ In a similar vein Teitel asks, referring to the idea of 'posthistory': 'Might it not be a normative imperative of the liberal state that it allow for ongoing historical change?'⁴¹ I suggest that these 'contradictions' should not be conceived of as an incoherency of transitional justice which needs to be 'solved' by scholarship, but rather that they are proper of liberalism. In this regard, Brown notes that

[e]ven in the texts of its most abstract analytic theorists, [liberalism] is impure, hybridised, and fused to values, assumptions, and practices unaccounted by it and unaccountable within it.⁴²

Political liberalism, then, has managed to equate a philosophy and a cultural form (liberalism) with a political practice (democracy).⁴³ The post-political

³⁸John Rawls. *Political Liberalism*. New York: Columbia University Press, 1996, p. xxxix; for a critical discussion of this claim see Wendy Brown. *Regulating Aversion. Tolerance in the Age of Identity and Empire*. Cambridge Massachusetts: Princeton University Press, 2008, p. 23.

³⁹Carolina Olarte Olarte provides an excellent analysis of the way the liberal rule of law precludes decisions concerning the economic and how this has influenced the way transitional justice literature has come to address the relationship between transitional and economic justice. See Carolina Olarte Olarte. 'Constitutionalism, Economy and the Evacuation of the Political: Transitional Justice and Biopolitics in the Colombian Case'. PhD thesis. London: University of London, 2013.

⁴⁰Andrieu, 'Political Liberalism'.

⁴¹Teitel, *Transitional Justice*, p. 108.

⁴²Brown, *Regulating Aversion*, p. 23.

⁴³Brown, *Regulating Aversion*, p. 23; Jacques Rancière. *Disagreement. Politics and Philosophy*. Minneapolis: University of Minnesota Press, 1999, p. 97.

conception of democracy as a consensus on basic equal rights and institutions clouds the fact that this consensus reduces democracy to a certain state of social relations, namely constitutional government and market economy.

Liberalism as a political ideology evaluates institutions according to their ability to protect individual liberty. While in classical liberalism this included the absolute protection of the inalienable right to private property, the so-called 'new' or social liberalism recognises that unrestricted property rights can constitute impediments for the realisation of political liberty.⁴⁴ This tendency is probably best exemplified by Rawls' egalitarian liberalism, which seeks to ensure, by its second justice principle, that social and economic inequalities do not infringe on the exercise of equal basic rights.⁴⁵ Despite this, new liberalism also reduces democracy to a problem of political justice which only concerns itself with the distribution of economic wealth insofar it affects political equality.⁴⁶

From a liberal position, then, neither social equality nor the democratic control of the means of production constitute a genuine problem of democracy. Even though some commentators have argued that, taking his own principles of justice seriously, Rawls should be considered a socialist, his theory of justice has mostly been read as a philosophical justification for welfare capitalism.⁴⁷ Justified as a tool to foster democratic norms, transitional justice thus engages with a specific kind of justice that is centred around liberal democratic values. The emphasis in transitional justice on violations of civil and political rights, institutional change, and legal reform in transitional justice is precisely the result of assumptions made in liberal democracy theory about what constitutes a properly political matter, and what belongs to an allegedly non-political economic realm.⁴⁸

transitology

It is against this backdrop that we can understand the exclusion of economic dimensions of state crime from the 'arithmetic of justice' that underlies transitional justice. This connection becomes particularly evident when we revisit the scholarly debates on 'transitions to democracy' from the 1980s and 1990s

⁴⁴On the distinction between 'old' and 'new' liberalism (not to be confused with neo-liberalism) see Gerald Gaus and Shane D. Courtland. *Liberalism*. Ed. by Edward N. Zalta. 2011. URL: <http://plato.stanford.edu/archives/spr2011/entries/liberalism/> (visited on 11/16/2012); On the relationship between the right to property and political liberty in modern law see Christoph Menke. *Kritik der Rechte*. Berlin: Suhrkamp, 2015, pp. 175-226.

⁴⁵John Rawls. *Justice as Fairness: A Restatement*. Cambridge, Massachusetts: Belknap Press, 2001, p. 44.

⁴⁶Cf. Marks, *Constitutions*, pp. 71-72.

⁴⁷David Schweickart. 'Should Rawls be a Socialist? A Comparison of his Ideal Capitalism with Worker-controlled Socialism'. In: *Social Theory and Practice* 5.1 (1979), pp. 1-27, p. 23; Martin O'Neill. 'Liberty, Equality and Property-Owning Democracy'. In: *Journal of Social Philosophy* 40.3 (2009), pp. 379-396, p. 379.

⁴⁸See also Zinaida Miller. 'Effects of Invisibility: In Search of the "Economic" in Transitional Justice'. In: *The International Journal of Transitional Justice* 2.3 (2008), pp. 266-291, pp. 267-268.

which operated as an important conceptual ‘informant’ during the formation of the field of transitional justice. This discussion will show that the exclusion of economic justice from democratisation processes was at one point a conscious decision, but one which has subsequently been rendered invisible by transitional justice scholarship.

In mainstream political science, scholars started studying the political changes of the 1980s and 1990s – particularly the end of military dictatorships in various regions of the world, especially Latin America, and the subsequent decomposition of the Soviet bloc and its satellites – under the heading of ‘transition to democracy’. A three volume publication on *Transitions from Authoritarian Rule* edited by Guillermo O’Donnell and Philippe Schmitter, set the foundation for this new line of scholarship.⁴⁹ Around the same time, in 1988, the Aspen Institute organised a conference on ‘State Crime: Punishment or Pardon’, that was funded by the Ford Foundation. The institute invited activists, politicians and scholars from ten countries which had experienced state-sponsored violence.⁵⁰ Several of the scholars studying transitions to democracy were invited to this conference and also participated in a series of follow-up conferences concerned with the dynamics of transitions to democracy. The term ‘transitional justice’ was coined in the context of these conferences.⁵¹ Furthermore, these ‘transitologists’ contributed to Neil Kritz’s three volume study on transitional justice.⁵²

The ‘transition to democracy’ literature, despite some internal differences, shares various commonalities which distinguish it from earlier comparative studies of democracy and democratisation. Indeed, the emergence of the transition paradigm marks a turning point: it fundamentally altered the idea of social change which underpinned democratisation studies. Early comparative research concerned with the conditions for transitions from authoritarian to democratic regimes – and vice versa – were interested in factors *explaining* such transitions. Against the backdrop of regime collapses in the Southern Cone and Eastern Europe, however, academic interest shifted towards a ‘*programming* of transition’.⁵³ In a similar vein, David Chandler observed that

⁴⁹ Guillermo O’Donnell and Philippe C. Schmitter. *Transitions from Authoritarian Rule. Tentative Conclusions about Uncertain Democracies*. Baltimore, Md. and London: Johns Hopkins University Press, 1986.

⁵⁰ Arthur, ‘Conceptual History’, p. 322. The represented countries were the United States of America, Argentina, Chile, Haiti, Uganda, Guatemala, Korea (South), Uruguay, Brazil and South Africa. Arthur also provides a list of the twenty-four participants and their institutional affiliations.

⁵¹ Arthur, ‘Conceptual History’, p. 324.

⁵² See Neil J. Kritz, ed. *Transitional Justice. How Emerging Democracies Reckon with Former Regimes. General Considerations*. Vol. 1. Washington, DC: United States Institute of Peace Press, 1995, Vol. 1, especially sections two and three.

⁵³ Nicolas Guilhot. ‘The Transition to the Human World of Democracy’: Notes for a History of the Concept of Transition, from Early Marxism to 1989’. In: *European Journal of Social Theory* 5.2 (2002), pp. 219–242, p. 234, my italics.

[i]n the wake of the unexpected and unpredicted collapse of the Soviet Union, norm based, ideational approaches were advanced as a counter to earlier rationalist and structural materialist perspectives, which were now held to be unable to theorise transformational change.⁵⁴

In his book *The Democracy Makers*, Nicolas Guilhot provides a detailed analysis of this change and its implications for the study of democracy.⁵⁵ For the present purpose, two interrelated observations of his are important. First, that the shift from explaining to programming political transitions parallels a shift in the theoretical framework of regime change. The early works of comparative political researchers such as O'Donnell, Schmitter, Laurence Whitehead and Adam Przeworski were led by structural analyses (often inspired by Marxist theory) that focused on the relationship between economic development and democratisation. With the prospect of the fall of communist regimes, the transitologists increasingly prioritised theories that emphasised the role of individual agency in political change.⁵⁶ Guilhot concludes that

[f]rom a science having as its object the evolution of societal structures, the study of democratisation had successfully become a science of political conflicts within the state apparatus.⁵⁷

The move away from structural analysis towards a focus on agency and institutions as the main factors for social change is central to the field of transitional justice. This ontological shift is the precondition on which stands the constructivist potential that transitional justice literature attributes to criminal trials, truth commissions and institutional reforms. Only if one assumes that social change can be engineered or steered through institutions, does it become plausible to think of trials as a catalyst for social change. And it is only on the basis of this presumption, paired with the normative commitment to political democracy, that research aimed at identifying best practice (i.e. the most effective way to carry out such engineering or steering) becomes possible at all.

The second relevant observation to be drawn from Guilhot's study is on the way in which this shift in focus was accompanied by an explicit commitment to electoral democracy that sidelined claims for social justice. O'Donnell and Schmitter, for example, define democracy in strictly procedural terms: a secret and universal vote, regular elections, free competition between political parties, and the right to create associations and join them.⁵⁸ In order to secure a transition, the authors argue, it would be necessary to channel mobilisation toward moderate goals of political equality, so that the benefits that the

⁵⁴David Chandler. 'Promoting Democratic Norms? Social Constructivism and the 'Subjective' Limits to Liberalism'. In: *Democratization* (2012), pp. 1–25, p. 3.

⁵⁵Guilhot, *Democracy Makers*.

⁵⁶Guilhot, *Democracy Makers*, p. 146.

⁵⁷Guilhot, *Democracy Makers*, p. 161.

⁵⁸O'Donnell and Schmitter, *Transitions*, p. 22; see also Juan J. Linz. *La quiebra de las democracias*. Madrid: Alianza Editorial, 1996, p. 17.

dominant classes had obtained from the authoritarian arrangement would not be threatened.⁵⁹ They argue that seeking to establish a political democracy first is the preferable option,

even after recognizing the significant tradeoffs that its installation and eventual consolidation can entail in terms of more effective, and more rapid, opportunities for reducing social and economic inequities.⁶⁰

O'Donnell and Schmitter's argument in favour of a 'low-intensity democracy' was soon contested by Barry K Gills, Joel Rocamora and Richard Wilson. In an alternative reading of the transitologists' preferred case studies, they argue that, although the newly established democracies

may have formally instituted some of the trappings of Western liberal democracies (for example, periodic elections), in a real sense these new democracies have preserved ossified political and economic structures from an authoritarian past.⁶¹

Low-intensity democracy, they argue, rests on the premise that, in order to preserve stability, institutional opening has to occur gradually. Its effectiveness, the authors hold, 'is its ability to implement limited and carefully selected agendas of change'.⁶² In practice, these 'agendas of change' consisted mostly of neoliberal-inspired legal reforms for the promotion of market economies (see the next section). The conscious postponement of social justice in transition to democracy literature, then, 'generated a formula for democratisation' which enabled precisely the implementation of neoliberal economic policies which, as a general tendency, led to increasing social inequality in the transitioning countries.⁶³

We can read Robert Meister's analysis of what he calls the 'politics of victimhood' as a reflection on the way in which the described postponement of social justice in transition to democracy literature came to be reflected in transitional justice.⁶⁴ He points out that the focus on civil and political human rights violations has led to a rigid distinction between 'victims' and 'perpetrators', a justice equation which does not include 'beneficiaries' of human rights abuses. Transitional justice is characterised by the assumption that not only a 'moral consensus on evil is [. . .] necessary' but that it is also 'sufficient to put it in the past'.⁶⁵ Victims are thereby conceded a moral victory at the expense of further

⁵⁹ O'Donnell and Schmitter, *Transitions*, pp. 12-14.

⁶⁰ O'Donnell and Schmitter, *Transitions*, p. 10.

⁶¹ Gills, Rocamora, and Wilson, 'Low Intensity Democracy', p. 3.

⁶² Gills, Rocamora, and Wilson, 'Low Intensity Democracy', p. 28.

⁶³ Guilhot, *Democracy Makers*, p. 142; on the relationship between the implementation of neoliberal economic policies and social equality see Ray Kiely. 'The World Bank and 'Global Poverty Reduction': Good Policies or Bad Data?' In: *Journal of Contemporary Asia* 34.1 (2004), pp. 3-20; Robert Hunter Wade. 'Is Globalization Reducing Poverty and Inequality?' In: *World Development* 32.4 (2004), pp. 567-589.

⁶⁴ Robert Meister. 'Human Rights and the Politics of Victimhood'. In: *Ethics & International Affairs* 16.2 (2002), pp. 91-108.

⁶⁵ Robert Meister. *After Evil. A Politics of Human Rights*. New York: Columbia University Press, 2011, p. 14 (my emphasis).

claims for historical (social) justice.⁶⁶ Meister summarises the consequences of this arrangement as follows:

Those who benefited passively from social injustice can now comfortably bear witness to the innocence of idealised victims whose ability to transcend their suffering reveals that they were never really a threat.⁶⁷

Meister contrasts transitional justice literature with revolutionary ideologies, mainly present in Marxist thought. These pictured beneficiaries of injustice as ‘would-be perpetrators’. Their demands for historical justice consequently include all those who profited from the past regime. In this context, initial victory over the perpetrators of oppression ‘would be merely a first stage in a longer struggle against the passive beneficiaries of the old regime’.⁶⁸ Insofar as it replaces this concept of revolutionary justice, Meister characterises transitional justice as a counterrevolutionary project.⁶⁹ It substitutes historical justice (the break with the past) for intra-societal justice.

This break between violent past and non-violent future which transitional justice seeks to perform is restricted to the political/institutional level given that the notion of democracy is identified with the democratic organisation of the political realm. As a consequence, the continuity of economic policies are not perceived as a threat to the intended break itself, nor to the alleged democratic quality of the emerging regime. Teitel, for example, remarks that in the Americas ‘the attempt to adhere to a Western-style economy went hand in hand with oppression’ only to reduce the problem to be merely one of transitions from authoritarianism to ‘a struggle over subjecting the military to civilian rule’, thereby excluding the economic realm from the problem of transition.⁷⁰ It is only because of this exclusion that the new democratic regimes in South America could claim legitimacy on the basis of a break with the authoritarian past. Regarding the emblematic case of Chile, Brett Levinson points out that

⁶⁶See also Tshepo Madlingozi. ‘Good victim, bad victim: Apartheid’s beneficiaries, victims and the struggle for social justice’. In: *Law, Memory, and the Legacy of Apartheid: Ten Years After Azapo V. President of South Africa*. Ed. by Wessel Le Roux and Karin van Marle. Pretoria: Pretoria University Law Press, 2007, pp. 107–126, p. 112.

⁶⁷Meister, *After Evil*, p. 24.

⁶⁸Meister, *After Evil*, p. 21.

⁶⁹Meister, *After Evil*, p. 21.

⁷⁰Teitel, *Transitional Justice*, p. 173; see also Alexandra Barahona de Brito. ‘Truth, Justice, Memory, and Democratization in the Southern Cone’. In: *The Politics of Memory*. Ed. by Carmen González Enríquez, Alexandra Barahona de Brito, and Paloma Aguilar Fernández. Oxford: Oxford University Press, 2001, pp. 119–160; Elster, *Closing the Books*; In the political and academic discourse concerning the socialist regimes in Central and Eastern Europe, ‘transition’ established a link between a liberalised, de-regulated and privatised market economy, and a form of regulation and governance in which the state withdraws from strong forms of economic and social regulation’. See Norman Fairclough. ‘Critical Discourse Analysis in trans-disciplinary Research on Social Change: ‘Transition’ in Central and Eastern Europe’. In: *British and American Studies* 11 (2005), pp. 9–34, p. 3.

the imposition of the free market was the reason for Pinochet's installation; the forgetting of this fact renders easier the adoption of free market values as those of democracy.⁷¹

rule of law promotion

So far, I argued that the normative commitment of transitional justice practice and literature to the fostering of political liberalism lead to an exclusion of concerns for social-justice as well as of the economic dimensions of authoritarianism from the arithmetic of transitional justice. This does, however, not imply that the proliferation of transitional justice (as practice and concept of historical justice) does not have an economic dimension. In what follows, I will be arguing that the latter needs to be linked to the wider liberal peace-building and development project, in the context of which transitional justice measures are implemented in post-conflict societies. Both liberal peace-building and development cooperation promote the implementation of free market and trade policies based on their respective beliefs – either that an economy which is integrated globally according to liberal principles fosters international peace, or that it boosts economic development. Political liberalisation and economic liberalisation are linked through the notion of the rule of law.

The promotion of the 'democratic rule of law' in post-conflict societies draws its legitimation from the 'democratic norm' thesis developed in different strands of scholarship, especially those in international law and international relations.⁷² As Susan Marks observes, in her discussion of the work of Francis Fukuyama and international law scholars, this thesis is based on two assumptions: firstly, that a liberal revolution is under way; and secondly, that this opens the way for a 'democratic peace', which needs to be actively promoted by the international community.⁷³ Scholarly work on the 'democratic norm' has served as a legitimating background for the 'democratic peace-building' practice, which seeks to promote low-intensity democracy through the strengthening of state institutions, the rule of law, privatisation and the integration of local economies in the world market.⁷⁴

Under the 'liberal peace' label, critics have started to question this international peace-building practice and its theoretical underpinnings. In addition to the fact that the assumption that democracies wage less war does not stand

⁷¹Brett Levinson. 'Dictatorship and Overexposure: Does Latin America Testify to More than One Market?' In: *Discourse* 25.1&2 (2003), pp. 98–118, p. 98.

⁷²Anne-Marie Slaughter. 'Revolution of the Spirit'. In: *Harvard Human Rights Journal* 3.1 (1990), pp. 1–11; Anne-Marie Slaughter. 'International Law in a World of Liberal States'. In: *European Journal of International Law* 6 (1995), pp. 503–538.

⁷³Marks, *Constitutions*, p. 33.

⁷⁴For a detailed analysis of the different strands within the democratic peace-building paradigm see John Heathershaw. 'Unpacking the Liberal Peace: The Deviding and Merging of Peacebuilding Discourses'. In: *Millennium - Journal of International Studies* 36.3 (2008), pp. 597–622; Oliver P. Richmond. 'A Genealogy of Peace and Conflict Theory'. In: *Palgrave Advances in Peacebuilding: Critical Developments and Approaches*. Ed. by Oliver P. Richmond. New York: Palgrave Macmillan, 2010, pp. 14–38.

up to scrutiny, these critics also highlight the internal contradictions of the framework, including cultural imperialism and the top-down approach taken in contemporary peace-building practice.⁷⁵ These criticisms can be (and indeed have been) applied to transitional justice practice as well.⁷⁶

I am here particularly engaged with a further strand of critique, which connects the cornerstones of liberal peace-building, namely political liberalisation and economic liberalisation. I hold that these do not constitute separate agendas but are rather linked to each other via a particular take on the concept of the rule of law, which has also become central to transitional justice in the context of its growing attention to post-conflict scenarios. In his latest report, the UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Pablo de Greiff, points out that the shift from post-authoritarian to post-conflict settings requires a change in transitional justice practice because 'weak institutions' and 'economic scarcity' complicate the successful implementation of transitional justice measures as we know them from post-authoritarian settings.⁷⁷ Against this background, transitional justice processes and mechanisms are to be considered a 'critical component of the United Nations framework for strengthening the rule of law' in societies emerging from conflict.⁷⁸ In a similar vein, the *World Development Report 2011* holds that transitional justice initiatives in post-conflict societies 'send powerful signals about the commitment of the new government to the rule of law'.⁷⁹

In international rule of law promotion, as opposed to the theoretical elaborations on the rule of law, the 'rule of law' has come to serve as an empty signifier which serves to legitimise all sorts of development cooperation, especially the exportation of laws to secure property rights and of institutional models.⁸⁰ While policy-oriented literature often writes about the 'rule of law' as though it was an economically and politically neutral concept, several recent academic publications have suggested that its promotion is actually connected to the wider neoliberal economic project of the last two decades.⁸¹ Brian Tamanaha notes that the rule of law has been 'put forth as the "front man" in the liberal package international development organizations provide

⁷⁵Richmond, 'Genealogy of Peace and Conflict Theory', pp. 26-33; see also Chandra Lekha Sriram, 'Justice as Peace? Liberal Peacebuilding and Strategies of Transitional Justice'. In: *Global Society* 21.4 (2007), pp. 579-591, 588f.

⁷⁶See e.g. contributions in Kieran McEvoy and Lorna McGregor, eds. *Transitional Justice from Below. Grassroots Activism and the Struggle for Change*. Oxford: Hart Publishing, 2008.

⁷⁷UN Human Rights Council, A/HRC/21/4, §§ 16-18.

⁷⁸*Guidance Note of the Secretary-General. United Nations Approach to Transitional Justice*. 2010. URL: http://www.unrol.org/files/TJ_Guidance_Note_March_2010FINAL.pdf (visited on 10/26/2012); see also UN Human Rights Council, A/HRC/21/4, § 40.

⁷⁹The World Bank. *The World Development Report 2011. Conflict, security, and development*. Washington, DC: The World Bank, 2011, p. 125.

⁸⁰Stephen Humphreys. *Theatre of the Rule of Law. Transnational Legal Intervention in Theory and Practice*. Cambridge: Cambridge University Press, 2010, pp. 5-6.

⁸¹See Michael Pugh. 'The Political Economy of Peace Studies: a Critical Theory Perspective'. In: *International Journal of Peace Studies* 10.2 (2005), pp. 23-42, p. 25.

for developing countries'.⁸² This package generally includes 'training judges and police, and drafting and implementing legal codes that protect property and foreign investment'.⁸³ As such, the rule of law

constrains, overrides, and dictates to domestic law-making in connection with liberal economic matters (affecting property rights, tariffs, subsidies, efforts to protect jobs).⁸⁴

The notion of the rule of law advocated in policy reports and manifested, for example, in the World Bank's 'Worldwide Governance Indicators' and 'Doing Business Indicators', is depoliticizing, as Humphreys argues, in that it '[naturalizes] a certain view of economy and the role of law within it', while its homogenizing character presents 'the political in the guise of the technical'.⁸⁵ Instead of merely serving as a framework within which debates concerning the organisation of the economy take place and decisions are made, as it is often claimed, the rule of law turns into a pre-condition for a particular way of organising the economy. That is, the market is designated as the 'dominant organising position within capitalist societies'.⁸⁶ The prominent role of the rule of law in liberal peace-building and development assistance is a prime example of how liberal ideas are invoked to legitimise neoliberal policies.⁸⁷

Conceiving of itself as a tool for political liberalisation, most of the transitional justice literature fails to take account of the fact that, in most post-conflict societies, the very reconstruction of the liberal rule of law it seeks to support, consists of a transformation of states in accordance with neoliberal ideas.⁸⁸ The specific relevance of the liberal peace critique for transitional justice lies in the connection it draws between the two pillars of liberal peace building, namely the promotion of free markets and of the liberal rule of law. It emphasises that, since the end of the Cold War, political and economic liberalisation have been two sides of the same coin. To understand transitional justice merely as a problem of *political* liberalisation renders invisible the fact that it is part of a wider socio-economic project.

⁸²Brian Tamanaha. 'The Dark Side of the Relationship between the Rule of Law and Liberalism'. In: *New York University Journal of Law & Liberty* 33 (2008), pp. 516–549, p. 547; see also Scott Newton. 'The Dialectics of Law and Development'. In: *The New Law and Economic Development. A Critical Appraisal*. Ed. by David M. Trubek and Alvaro Santos. Cambridge: Cambridge University Press, 2006, pp. 174–202.

⁸³Tamanaha, 'Dark Side', p. 547; see further Newton, 'Dialectics', p. 191.

⁸⁴Tamanaha, 'Dark Side', p. 546.

⁸⁵Humphreys, *Rule of Law*, p. 148.

⁸⁶Tamanaha, 'Dark Side', p. 546.

⁸⁷Cf. Wendy Brown. 'Neo-Liberalism and the End of Liberal Democracy'. In: *Theory & Event* 7.1 (2003), \P 1–43, p. 27; Humphreys, *Rule of Law*, I will discuss the basic assumptions of neoliberal thought in more detail in Chapter Four, when looking at the trials against German industrialists and their role in the foundation of the new German state. See p. 141.

⁸⁸For a theoretically rich discussion see Humphreys, *Rule of Law*; and Stephen Humphreys. *Are Social Rights Compatible with the Rule of Law? A Realist Inquiry*. 2010. URL: http://www.law.nyu.edu/global/workingpapers/2006/ECM_DLV_015760 (visited on 08/01/2010).

including the economic

In one of the first critiques of the exclusion of the economic from transitional justice concerns, Zinaida Miller draws attention to the coincidence (in terms of ‘correspondence in time of occurrence’) of transitional justice and neoliberal economic reforms. She argues that current transitional justice practices neglect the economic root causes of conflict, including structural socio-economic violence, to the effect that emerging democracies come to be marked by high social inequality, which in turn is often further aggravated by neoliberal reforms adopted in the contexts of transitions.⁸⁹ Various publications in the field of transitional justice have since responded to the absence of the ‘economic’ from transitional justice that was diagnosed by Miller.⁹⁰ In what seems to be an instance of reassessment of the prospects and promises of justice borne by transitional justice measures, transitional justice literature expresses an increased concern with the responsibility of economic actors for human rights violations as well as with the economic dimensions of conflicts. This tendency can be understood as an answer to the failures of actually existing constitutional states to deliver on the promise of equality made by political liberalism.⁹¹

What is common to most of these contributions, however, is that they present their demands, that the socio-economic dimensions of past conflict be addressed, not as political claims concerning the redistribution of wealth, but as a technical advice which should be adopted by a peace-willing community. Louise Arbour, for instance, holds that

[t]ransitional justice having as an objective to contribute to the building, in societies in transition, of a solid foundation for the future based on the

⁸⁹Miller, ‘Effects’, p. 267.

⁹⁰See e.g. the contributions in International Journal of transitional justice Vol. 2.3 and in Pablo de Greiff and Roger Duthie, eds. *Transitional Justice and Development. Making Connections*. New York: Social Science Research Council, 2009; Louise Arbour. ‘Economic and Social Justice for Societies in Transition’. In: *Center for Human Rights and Global Justice Working Paper* 10 (2006); Lisa J. Laplante. ‘On the Indivisibility of Rights: Truth Commissions, Reparations, and the Right to Development’. In: *Yale Human Rights & Development Law Journal* 10 (2007), pp. 141–177; Lisa J. Laplante. ‘Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework’. In: *The International Journal of Transitional Justice* 2.3 (2008), pp. 331–355; for a recent overview on socio-economic dimensions of transitional justice see Lisa Hecht and Sabine Michalowski. *The Economic and Social Dimensions of Transitional Justice*. 2012. URL: <http://www.essex.ac.uk/tjn/documents/TheeconomicandsocialdimensionsofTJ.pdf> (visited on 11/18/2012); For a helpful differentiation between the various strands of the debate and in particular the difference between claims for socio-economic justice and for the prosecution of social and economic rights Evelyne Schmid and Aoife Nolan. ‘Do No Harm’? Exploring the Scope of Economic and Social Rights in Transitional Justice’. In: *International Journal of Transitional Justice* 8.3 (2014), pp. 362–382.

⁹¹Vikki Bell identifies the capacity to promise as a ‘necessary but potentially destabilizing point’ in liberalism, see Vikki Bell. ‘The Promise of Liberalism and the Performance of Freedom’. In: *Foucault and Political Reason*. Ed. by Andrew Barry, Thomas Osborne, and Nikolas Rose. London: UCL Press, 1996, pp. 81–97, p. 82.

rule of law, it is imperative to see how best to equip a country to redress often deep-seated social and economic inequalities.⁹²

In a similar vein, Muvingi argues that the unequal distribution of resources and poverty is at the root of many conflicts, making socio-economic justice in processes of transition a *conditio sine qua no* for reconciliation and societal peace.⁹³

The strand of transitional justice literature that focuses on the economic dimensions of state crime has made an important contribution in rendering visible the selective character of the transitional justice project. However, from the fact that its proponents suggest the need to 'include' socio-economic matters into transitional justice, makes it seem as though they assume that the economic, up to that point, had merely been forgotten and simply needed to be added. Above I argued that transitional justice literature adopted the normative preference for political democracy from transition to democracy studies, but with one important difference: in contrast with the authors of the *Transitions from Authoritarian Rule* volumes, it declares that which initially was considered a trade-off for the sake of stability (i.e. liberal democracy) to be its goal. This change is relevant to the ways in which transitional justice scholarship has come to engage with the socio-economic dimensions of transition. In embracing the notion of liberal democracy as the only possible meaning of democracy, the literature fails to reflect on the fact that transitologists, concerned above all with political stability, favoured this constitutional arrangement precisely because it would not put in danger the economic interests of pre-transition elites.

In contemporary transitional justice literature, the ontological assumption that a rational consensus on the inclusion of social justice is possible and desirable has trumped those analyses which focus on conflicting interests in the moment of transition. The economic is re-inserted at the technical level. Social justice, and the means to achieve it, enter the transitional discourse in an already-colonised form, where questions of, for instance, economic self-determination or the democratic organisation of the economy are not part of what is debatable. In this vein, Carlina Olarte Olarte has observed an 'evacuation of the political' in transitional justice literature, in so far as it

tends to make of transition a corollary of an understanding of the political that sees economic issues, such as structural inequality or socio-economic injustices, as alien or, at least, as an independent arena.⁹⁴

⁹²Arbour, 'Economic and Social Justice', p. 22, my italics.

⁹³See e.g. Ismael Muvingi. 'Sitting on Powder Kegs: Socioeconomic Rights in Transitional Societies'. In: *The International Journal of Transitional Justice* 3 (2009), pp. 163–182; Tony Addison. 'The Political Economy of the Transition from Authoritarianism'. In: *Transitional Justice and Development*. Ed. by Pablo de Greiff and Roger Duthie. New York: Social Science Research Council, 2009, pp. 110–140, p. 111.

⁹⁴Olarte Olarte, 'Constitutionalism, Economy and the Evacuation of the Political: Transitional Justice and Biopolitics in the Colombian Case', p. 150.

With reference to the work of Emilios Christodoulidis, Olarte Olarte suggests that what is at stake in the way transitional justice literature has not only excluded, but *also* included, the economic into concepts of transitional justice is ‘the denial of economic democracy’.⁹⁵ This observation is important because, as we will see in Chapter Four’s discussion of the trials against German industrialists, it is in this aspect that the contemporary debate on how to address economic dimensions of state crime or conflict differs fundamentally from the debate that followed the defeat of Nazi Germany. As I will argue there, the democratisation of the economy was, at least initially, a central demand by political actors across all parties, that followed from the awareness that German big business was central to the rise of the Nazi-party as well as to Germany’s ability to wage war. While the German post-war political and economic order was eventually modeled according to ordoliberal ideas which posited the free market as guarantor of democracy, the contributions made by all actors were permeated by an awareness that constitutional arrangements concerning the relationship between the economy and the political were, in themselves, highly political.

2.3 Shifting perspective

I started this chapter by invoking the constellation formed between the ‘economic trials’ in Argentina and the post-World War II trials of German industrialists. This constellation, I argued, prompted me to inquire into the absence of an explicit concern with the economic dimensions of state crime at the time when ICL established itself as a central framework for expressing claims for justice in response to state crime. Parts two and three of the chapter consequently provided an explanation for this ‘absence’ by linking the re-emergence of ICL towards the end of the 1980s to the global transitional justice project.

I first clarified the link between ICL and transitional justice, arguing that on the one hand, ICL’s claim to universality was crucial in the proliferation of the memorial imperative posited by transitional justice. On the other hand, I argued, transitional justice offered a language through which the application of ICL could claim its legitimacy. In this context, trials were conceived of as a means of transitional justice that could foster liberalising change by establishing an account of past human rights violations.

I consequently focused on the conceptual underpinnings of transitional justice literature as well as on the wider political context in which it emerged, in order to gain insights into the reasons why an explicit concern with the economic dimensions of state crime and conflict had been absent from both

⁹⁵Olarte Olarte, ‘Constitutionalism, Economy and the Evacuation of the Political: Transitional Justice and Biopolitics in the Colombian Case’, p. 148; Emilios Christodoulidis. ‘Against Substitution: The Constitutional Thinking of Dissensus’. In: *The Paradox of Constitutionalism*. Ed. by Martin Loughlin and Neil Walker. Oxford: Oxford University Press, 2007, pp. 189–210, p. 199.

ICL and transitional justice practice and scholarship in the 1990s. My central claim was that both the initial absence, as well as the way in which the economic dimensions of state crime and conflicts later came to be addressed, can be attributed to the field's normative commitment to liberal democracy.

I argued that, because it begs the separation of the political and the economic realm on which political liberalism is based, even the literature that indicates the need to address the socio-economic dimensions of state crime does so in a way that exempts questions concerning redistribution and the relationship between economy and democracy from political contestation. What is missing from most of the contemporary literature on the economic dimensions of state violence or corporate accountability is an engagement with the dialectical relationship between democracy and capitalism as well as with the organisation of the economy as a problem of democracy.⁹⁶

To situate ICL within the context of transitional justice thus draws our attention towards the fact that while it breaks with the principle of national sovereignty in international law, it also participates in the foundation of sovereignty: trials in response to state crime are perceived as an important element to bring about liberalising change. From a transitional justice perspective, the promise of justice associated with trials in response to state crime is their ability to expose and condemn the violence of the past, thereby reaffirming liberal values. As I will be arguing in more detail in the next chapter, in ICL the violence of the past is invoked as a negative reference against which the juridico-political order claims its own superiority.

Such an understanding of historical justice as historical change which occurs through learning from past experiences of violence, condenses what Reinhart Kosellek has identified as the characteristic element of the historical time of the *Neuzeit*. Historical time, for Kosellek, becomes graspable where 'past and future, or (in anthropological terms) experience and expectation' are differentiated.⁹⁷ As for the particular historical time of the *Neuzeit*, he argues that '*Neuzeit* is first understood as a *neue Zeit* from the time that expectations have distanced themselves evermore from all previous experience'.⁹⁸ This temporal difference between experience and expectation, Kosellek adds, was rendered plausible through the notion of progress:⁹⁹

⁹⁶For one of the most recent discussions on capitalism and social inequality see Thomas Piketty. *Capital in the Twenty-First Century*. Cambridge Massachusetts: Belknap Press, 2014; For an overview on the debate on the dialectical relationship between democracy and capitalism see Sonja Buckel. 'Demokratie und Kapitalismus heute'. In: *Perspektiven sozialer Demokratie in der Postdemokratie*. Ed. by Oliver Eberl and David Salomon. Staat - Souveränität - Nation. Wiesbaden: Springer, 2016.

⁹⁷Reinhart Koselleck. *Futures Past. On the Semantics of Historical Time*. New York: Columbia University Press, 2004, p. 3.

⁹⁸Reinhart Koselleck. "'Space of Experience' and 'Horizon of Expectation': Two Historical Categories". In: *Futures Past. On the Semantics of Historical Time*. New York: Columbia University Press, 2004, pp. 255–275, p. 263.

⁹⁹Koselleck, "'Space of Experience' and 'Horizon of Expectation': Two Historical Categories', p. 268.

It became a rule that all previous experience might not count against the possible otherness of the future. The future would be different from the past, and better, to boot.¹⁰⁰

Both transitional justice practice and scholarship, as I showed in this chapter, define this promise of a better future in terms of the arrival of liberal democracy. The liberal rule of law is posited ex-ante as the just answer to the violence experienced in the past. As a consequence, the foundation of political authority in and through criminal trials has become a central concern underpinning the study of trials in transitional justice scholarship. As a consequence, this strand of scholarship is not able to reflect on the political implications of the ontological assumptions underlying liberalism.

This is problematic for at least two reasons. In this chapter, I emphasised the fact that political liberalism presupposes the separation of the political and the economic realm and that, consequently, demands for social justice were excluded from transitional justice literature. Furthermore, I indicated, that the political liberalisation envisioned by transitional justice went hand in hand with economic liberalisation that, in many countries, lead to increasing social inequality. Against this backdrop, we will have to ask to what extent the suffering of those who were subjected to human rights violations because they denounced the violence of capitalism or because they demanded redistributive policies, is redeemed by the pair of liberal democracy and market economy.

The second problem that comes with the begging of liberalisation in transitional justice scholarship, and I will address this aspect in more detail in the next chapter, is that, because it posits the rule of law as the non-violent answer to the violence of the past, transitional justice scholarship cannot account for the role of law in defining what we perceive as violence and what not.

In the text chapter, I will be turning to the work of Benjamin in order to recover a perspective on trials that is able to critically reflect on both these issues. Such a perspective understands trials as moments that participate in the grounding and un-grounding of a political order.¹⁰¹ With Benjamin, I will argue in the next chapter, we need to think historical justice radically differently from the way it is conceived of in transitional justice approaches to criminal trials. The duty to attend to the victims of past violence and to tell their stories in the context of criminal trials, can no longer be derived from the wish to bring about or to authorise a particular political order – such as liberal democracy. Linking Benjamin's philosophy of history and critique of law, I will suggest that the critical potential of trials instead is to be found where they

¹⁰⁰Koselleck, "Space of Experience" and "Horizon of Expectation": Two Historical Categories', p. 267.

¹⁰¹For the study of trials as political trials, see Kirchheimer, *Political Justice*; See also Otto Kirchheimer. 'Politics and Justice'. In: *Politics, Law, and Social Change*. Ed. by Frederic S. Burin and Shell Kurt L. New York and London: Columbia University Press, 1969, pp. 408–427; Judith N. Shklar. *Legalism. Law, Morals, and Political Trials*. Cambridge, Massachusetts: Harvard University Press, 1986; Arendt, *Eichmann*.

expose both the violence of the past, as well as the violence that is rendered invisible and permissive by the judging juridico-political order.

In drawing attention to the authorising and destabilising effects of the past in relation to the present, Benjamin is one of the first thinkers to conceptualise what can be called a politics of time. This term has, in the past twenty years, been deployed by scholars such as Peter Osborne¹⁰² and Kathleen Davis¹⁰³ to designate the political implications of diverging forms of temporalisation and periodisation.¹⁰⁴ A study of ICL that seeks to take into account the politics of time at work in criminal trials has to combine an interest in the historical narrative which criminal trials create about the experienced violence (the representation of the past), with an eye for how trials bring the past to bear on the present (temporalisation). Such a shift in perspective, as we will see, has important implications for how we think about the promise of justice that criminal trials might have to offer for those victims of violence whose suffering is not redeemed by the pairing of liberal democracy and the market economy.

¹⁰²Peter Osborne. 'The Politics of Time'. In: *Radical Philosophy* 68 (1994), pp. 3–9; Peter Osborne. *The Politics of Time. Modernity and Avant-garde*. London: Verso, 1995.

¹⁰³Kathleen Davis. *Periodization and Sovereignty. How Ideas of Feudalism and Secularization Govern the Politics of Time*. Philadelphia: University of Pennsylvania Press, 2008.

¹⁰⁴Berber Bevernage also takes up this term from Osborne, see Berber Bevernage. 'Writing the Past Out of the Present: History and the Politics of Time in Transitional Justice'. In: *History Workshop Journal* 69.1 (2010), pp. 111–131.

3 | From the Representation to the Temporalisation of History

In the previous chapter I argued that International Criminal Law (ICL) has become a central framework to address justice claims that emerge in response to systematic state-backed violence. As such it relies on a latent theory of history on which it grounds its validity. I called it a *latent* theory because it is not explicitly stated nor does it dialogue with theories of history or theories of justice. Instead, it implicitly draws on a set of assumptions concerning the nature of history and historical change. This latent theory of historical justice, I showed, rests on two pillars: the alleged contribution of criminal trials in establishing the truth about past violence, and the trials' presumed capacity to foster the democratic rule of law.

At the beginning of the previous chapter, I suggested to the reader that this chapter and the previous one should be read as two sides of the same coin. This chapter constitutes a reversal of what has been presented up to this point, insofar as many of the insights concerning the latent theory of history underlying ICL and transitional justice literature are gained through my engagement with Walter Benjamin's philosophy of history and his critique of law, which will be presented in this chapter.

We can think of Benjamin's philosophy of history, as well as his critique of law, as a theory of historical justice, albeit one that links historical truth, memory, justice and political change (and the role law can play in this equation) in a radically different way than the literature reviewed in the previous chapter. In this chapter I will be arguing that the fundamental difference between the latent theory of historical justice underlying ICL on the one hand, and the philosophy of history developed by Benjamin on the other, is the political relationship which they establish between the past and present. While the former draws its normative claim from the *authorisation* of the present or of a pre-conceived future, Benjamin links the possibility of historical justice to the past's ability to *destabilise* present societal arrangements.

If we follow Benjamin in privileging the moment of rupture over that of authorisation, then this also has implications for the way in which we study trials. The central concern is no longer the ability of the trials to foster liberalising change, but rather to critically examine the way in which these trials participate in the grounding and ungrounding of political authority. Analytically, such a framework does not presuppose the separation of the public and the private, but instead looks for the ways in which the trials participate in the construction of this binary. Similarly, the framework does not define violence ex-ante according to its sanctioned and unsanctioned manifestations, but instead invites us to look at the ways in which the trials participate in drawing the line between those forms of interaction that are rendered permissive by a juridico-political order and those that are not.

The function of this chapter within my overall thesis is thus twofold: First, it seeks to substantiate my critique of ICL, by sketching out a counter-theory of historical justice that draws its normative claim not from the value of authorisation, but from the idea of rupture or destabilisation. Second, it points out the implications of such a perspective for the study of trials in response to state crime, which will then be put to practice in the chapters to come.

I will start by introducing Walter Benjamin's philosophy of history as one that is concerned with the oppressed in history and set out why, for Benjamin, a philosophy of history that wishes to side with the oppressed must rest on the value of rupture or destabilisation. In doing so, I will be offering Benjamin's notion of remembrance (*Eingedenken*) as a way to think the promise of history that radically differs from the memorial imperative imposed by ICL and transitional justice more generally (3.1).

Against this backdrop, the two sections that follow focus on the motif of interruption or suspension as it appears in the *Theses on the Philosophy of History* (hereafter *Theses*) and *On the Critique of Violence* (hereafter *Critique*) as an answer to the problem posed by the historical temporality of capitalism.¹ In so doing, these sections also contest the two pillars of the latent theory of historical justice underlying ICL presented in the previous chapter.

I will first be taking up the link between knowledge of the past ('historical truth') and the promise of justice attached to it as established in ICL and transitional justice literature on the one hand, and Walter Benjamin on the other. As opposed to the notion of historical truth underlying ICL, I will be arguing, historical truth for Benjamin does not consist of the adequate representation of the past. Instead, truth is a temporal relationship and finds its expression in what Benjamin calls the 'dialectical image'. It is in the notion of the 'dialectical image' that we will encounter for the first time the idea of rupture as a gesture towards justice (3.2).

¹Benjamin, 'Theses'.

I will then examine Benjamin's analysis of the link between law, justice and violence, as developed in the *Critique*, in order to challenge the idea that the liberal rule of law constitutes a non-violent answer to the past's violence as well as the hope that a legal judgement could offer historical justice. This is because according to Benjamin any manifestation of law is bound to be caught in the cycle of law-positing and law-maintaining violence. Here, only the suspension of this cycle, the *Entsetzung* of law, could break with this mythical violence (3.3).

The last section of this chapter proposes a perspective on trials in response to state crime which takes into account Benjamin's critique of historicism and legal violence. Such a perspective requires us to shift the focus from the representation of history to its temporalisation in trials and thereby allows us to perceive trials as a site of a competing politics of time. While in ICL the promise attached to historiographical function of trials is the authorisation of a juridico-political order, namely the liberal rule of law, with Benjamin the only promise of justice could lie where images of the past bring the present into a critical state (3.4).

3.1 A History of the Oppressed

In the spring of 1940 Benjamin wrote in a letter to Gretel Adorno:

The war and the constellation, by which it was brought about, made me put down some thoughts of which I can say that I kept them safe for about twenty years, indeed, kept them safe from myself. . . . They make me think that the problem of remembrance (and forgetting) will continue to occupy my mind for a long time.²

In September of the same year, Benjamin committed suicide in Portbou, Spain, as his attempt to enter the country failed. The 'notes' Benjamin mentions in the letter formed what is now known as the *Theses on the Philosophy of History*³ or *On the Concept of History*.⁴

In the same letter to Gretel Adorno he cautions:

Needless to say that nothing could be further from my intentions than a publication of these notes (not to mention the version at your hand). It would open the floodgates for enthusiastic misunderstandings.⁵

Since then, five manuscripts and one typescript of the *Theses* have been discovered and published, with scholars having spent a good amount of time

²Gérard Raulet. 'Entstehungs- und Publikationsgeschichte'. In: *Über den Begriff der Geschichte*. Ed. by Gérard Raulet. Kritische Gesamtausgabe. Berlin: Suhrkamp, 2010, pp. 161–208, p. 161 (my translation).

³Benjamin, 'Theses'.

⁴Walter Benjamin. 'On the Concept of History'. In: *Selected Writings*. Ed. by Howard Eiland and Michael W. Jennings. Cambridge, Massachusetts: Belknap Press, 2003, pp. 389–400.

⁵Raulet, 'Entstehungs- und Publikationsgeschichte', p. 161 (my translation).

trying to reconstruct their chronology.⁶ The letter gives us important clues for a reading of the *Theses*. As Benjamin states, his notes form an attempt to condense his thinking about remembrance and forgetting, two concepts that for him are central to the problems of history and historiography. The *Theses* can be read as a first attempt to formulate the theoretical scaffolding for the *Arcades Project*, a historical work on the cultural history of the Paris arcades.⁷ In Convolute N of the *Arcades Project*, titled 'Epistemology, Theory of Progress', Benjamin started to collect quotes, comments and thoughts which are also found in the *Theses*, as well as other later writings such as *Eduard Fuchs: Collector and Historian*, written in 1937, or *The Image of Proust*.⁸ The centrality of the question of 'remembrance and forgetting' for Benjamin becomes clear when he writes that the thoughts expressed in the *Theses* have been on his mind for twenty years. In this vein, Stéphane Moses highlights the similarity of key concerns in texts like *The Life of Students*, written as early as 1914, and the *Theses*.⁹

Yet it is most likely that Benjamin would not have published any of the drafts circulating under the name of the *Theses*. And one could say that Benjamin has been proven right when he anticipated 'enthusiastic misunderstandings' of his text. Once published, the notes sparked a wide debate among his friends and colleagues.¹⁰

Any engagement with the *Theses* has to keep in mind the fact that, despite their centrality to Benjamin's thinking, they were not intended for publication. While beautifully written, the text is dense and at times enigmatic. Any attempt to offer a summary must fail. The work needs unpacking rather than condensation. And much of this unpacking has been done. Indeed, there are countless articles, edited volumes and entire monographs on the *Theses* alone, a text which in itself does not exceed ten pages.¹¹ In this chapter I will concentrate on what I consider to be the central impulses that we can gain from Benjamin's philosophy of history for a critique of ICL as a concept of historical justice.

The cornerstone of Benjamin's philosophy of history is the critique of an ideology of progress. Benjamin frames his critique of progress – the idea that

⁶In 2010, all of them were published, together with related manuscripts, notes and correspondence, see Walter Benjamin. *Über den Begriff der Geschichte. Werke und Nachlaß*. Kritische Gesamtausgabe. Berlin: Suhrkamp, 2010.

⁷Benjamin, *Arcades Project*.

⁸Walter Benjamin. 'Eduard Fuchs: Collector and Historian'. In: *The Essential Frankfurt School Reader*. Ed. by Andrew Arato and Eike Gebhardt. New York: Continuum, 2002, pp. 225–253; Walter Benjamin. 'The Image of Proust'. In: *Illuminations*. Ed. by Hannah Arendt. New York: Harcourt, Brace & World, 1968, pp. 203–217.

⁹Stéphane Mosès. *The Angel of History. Rosenzweig, Benjamin, Scholem*. Stanford, California: Stanford University Press, 2009, p. 66.

¹⁰Raulet, 'Entstehungs- und Publikationsgeschichte'.

¹¹For some recent engagements, see Michael Löwy. *Fire Alarm. Reading Walter Benjamin's On the Concept of History*. London: Verso, 2005; Reyes Mate. *Medianoche en la historia. Comentarios a las tesis de Walter Benjamin «Sobre el concepto de historia»*. Madrid: Editorial Trotta, 2006.

history constitutes an automatic advancement of mankind towards a situation of fulfillment – by linking it to the notion of catastrophe:

The concept of progress must be grounded in the idea of catastrophe. That things are 'status quo' is the catastrophe. It is not an ever-present possibility but what in each case is given. Thus Strindberg (in *To Damascus?*): hell is not something that awaits us, but this life here and now.¹²

By thinking progress in terms of catastrophe, Benjamin marks a shift in perspective: what some label progress, by others is lived a series of catastrophes. To understand history as a 'pile of debris', as recurrent violence, leads to a necessary abandonment of the idea of an universal history of progress (and humanity as universal subject of that history).¹³ This is, in part, because the idea of a universal history of progress impedes our ability to attend to those on whose back the supposed progress takes place:

The products of art and science owe their existence not merely to the effort of the great geniuses that created them, but also to the unnamed drudgery of their contemporaries. There is no document of culture which is not at the same time a document of barbarism.¹⁴

Benjamin thus urges us to turn our gaze to those histories, inscribed within the tales of progress, that bear witness to the violence of this process.

This alteration of the perspective sheds a different light on the 'whig histories' of ICL. Textbook accounts of ICL tend to identify its development with a continuous civilisation of the global order that manifests itself in an international legal order no longer protecting the interests of states but human security.¹⁵ In this vein, the institutionalisation of ICL in itself is taken as evidence that a process of civilisation is taking place at a global level.

Furthermore, as we have seen in the previous chapter, ICL is not only thought to be symptomatic of the progress of humankind, but is also considered to actively participate in it, in so far as the prosecution of crimes under ICL is claimed to contribute towards liberalising change. What in ICL literature is presented as a history of progress, namely the legal protection of the values presumably shared by the international community, could also be told as a history of recurring conflict and violence that does not seem to become any less despite the proliferation of ICL.

The insight that history presents itself very differently for victors and vanquished of past struggles constitutes the *movens* of Benjamin's thinking about history. In a letter to Max Horkheimer, written in March 1937, he writes:

¹²Benjamin, *Arcades Project*, p. 472 (N9a,1).

¹³Benjamin, 'Theses'.

¹⁴Benjamin, 'Eduard Fuchs', p. 233.

¹⁵See for example Teitel, *Humanity's Law*; Bassiouni, *International Criminal Law*; Antonio Cassese, *International Criminal Law*. Oxford: Oxford University Press, 2008; Werle, *Principles*.

To me, an important question has always been how to understand the odd figure of speech, ‘to lose a war or a court case.’ . . . Finally, I explained it to myself thus: the events involved for a person who has lost a war or a court case are truly concluded and thus for that person *any avenue of praxis has been lost*. This is not the case for the counterpart, who is the winner. Victory bears its fruit in a way much different from the manner in which consequences follow defeat.¹⁶

The present is a present that has been shaped by those who won the struggles of the past because those who lost a war or a court case also lost ‘any avenue of praxis’. Benjamin’s philosophy of history is committed to opening anew an *avenue of praxis* for those unfinished projects, curtailed by defeat.¹⁷

At the beginning of Benjamin’s philosophy of history, then, there is a political positioning, a siding with the ‘oppressed’ of history. To say it even more strongly: the only truly *historical* knowledge for Benjamin is one that adopts the perspective of those who have been oppressed in and by history. They are the historical subject: ‘The subject of historical knowledge is the struggling, oppressed class itself.’¹⁸ The remembrance of past struggles, of violence experienced by those defeated, is important in so far as it opens an avenue of practice in the present that could redeem the suffering endured by previous generations.

At first glance ICL, with its legal obligation to investigate systematic state-backed violence, appears to be a practice that (co)responds to Benjamin’s appeal for remembrance. But, I will be arguing in this chapter, the memorial imperative postulated by ICL and reinforced by transitional justice literature differs in significant ways from what Benjamin formulates as the task of remembrance or, as he calls it, *Eingedenken*.¹⁹

The problem with historicism for Benjamin, is the political effect of the ontological claim to represent the ‘past as it really was’, a desire which according to Benjamin necessarily results in ‘empathy with the victor’ of past struggles.²⁰ What historicism presents as historical ‘truth’ is shaped by the concepts through which it is looked at. These concepts, in turn, are the concepts coined by present relationships of power. They consequently produce

¹⁶Walter Benjamin. *Briefe 2*. Frankfurt am Main: Suhrkamp, 1978, p. 1338; Translation taken from Rolf Tiedemann. ‘Historical Materialism or Political Messianism? An Interpretation of the Theses ‘On the Concept of History’’. In: *Benjamin: Philosophy, Aesthetics, History*. Ed. by Gary Smith. Chicago: University of Chicago Press, 1989, pp. 175–209, p. 182, italics in the original.

¹⁷This does not imply that literally all those who lost a war are to be considered to belong to the oppressed in history. Instead, it encourages us to pay attention to potentialities not realised in the present.

¹⁸Benjamin, ‘On the Concept of History’, p. 394 (Thesis XII).

¹⁹Benjamin coined the term ‘Eingedenken’, otherwise rarely used in German, to describe a particular practice of engaging with the past. Throughout the thesis, I translate ‘Eingedenken’ with ‘remembrance’, and use the word ‘memory’ to describe the memorial practices demanded by transitional justice.

²⁰Walter Benjamin. ‘Paralipomena to “On the Concept of History”’. In: *Selected Writings*. Ed. by Howard Eiland and Michael W. Jennings. Cambridge, Massachusetts: Belknap Press, 2003, pp. 401–411, p. 406.

an image of the past that ‘invariably benefits those currently ruling’.²¹ The present is a present shaped by the winners of history. This is why for Benjamin the practice of *Eingedenken* needs to be linked to a ‘presentation of history [which] leads the past to bring the present into a critical state’.²²

In this chapter, I will relate Benjamin’s critique of historicism to the writing of history in criminal trials. If we accept Benjamin’s claim that historicist representations of the past stabilise the societal arrangements that are in place, and if it is true that ICL’s promise of justice relies on a historicist understanding of history, then ICL sides with the victors of history. This claim might sound counter-intuitive given that trials in response to state crime judge the perpetrators of massive human rights violations and, especially in the last few years, have tried to adapt the rules of procedure and evidence to take into account the needs of victims.²³ Or, it might not sound that surprising at all, given that trials by fiat of the successor regime have often been denounced as victors justice by those who found themselves in the dock.

However, a Benjaminian perspective on ICL points towards something else. While ICL addresses the violence experienced by the victims of state-backed crime, it does so from the perspective of the present juridico-political order. As set out in the previous chapter, transitional justice and ICL bear the theoretical and conceptual mark of the self-declared ‘winners’ of history of the 1990s, liberal democracy and market economy. Those considered victims of violence are only those recognisable as such by the juridico-political order of the present. This conceptual mark, I have argued there, is most evident, first, in the assumption that the liberal rule of law presents a non-violent answer to the experience of arbitrary state violence, and second, in the ontological separation of the realm of the political and the realm of the economic. Together, as we will be seeing in the case studies, these presumptions produce boundaries between those acts that are considered to constitute unbearable and unacceptable violence and those declared to merely constitute wrong policies.

Thus, the philosophical, political and historiographical problem that Benjamin is concerned with is the following: how to respond to the victims of violence in history, to redeem their suffering, without siding at the same time with those currently ruling? For Benjamin, as we have seen above, the fundamental difference between the victors and oppressed in history is that with the defeat the oppressed have lost ‘any avenue of praxis’, leaving their political project discontinued. By definition, a history is only a history of the oppressed if it discontinuous.

This poses a problem for historiography for how to get hold of, how to remember, the tradition of the oppressed if it has been discontinued? Benjamin

²¹ Benjamin, ‘Paralipomena’, p. 406.

²² Benjamin, *Arcades Project*, p. 471 (N7a,5).

²³ See Thorsten Bohnacker. ‘Global Victimhood: On the Charisma of the Victim in Transitional Justice Processes’. In: *World Political Science Review* 9.1 (2013), pp. 97–129.

was very much aware of this problem. In the notes to the *Theses* he pins down the central challenge as follow:

Fundamental aporia: 'The history the oppressed is a discontinuum' – 'The task of history is to get hold of the tradition of the oppressed'.²⁴

Benjamin's answer to this aporia, as already indicated in the first chapter, is a philosophy of history, and a corresponding historiographical method, that breaks with a linear notion of historical time, introducing in its stead a time which he calls the time of the now or *Jetztzeit*. The time of the now is, for Benjamin, the moment in which historiographical recognition takes place. It marks a constellation between a moment in the past and the present in which this particular moment is recognised. The relation between these two moments, importantly, is not one of continuity but is instead characterised by a tension. To get hold of the tradition of the oppressed means to get hold of a moment of the past that exposes the violence of the present. I will turn to Benjamin's philosophy of history and how it relates to the promise of justice attached to the representation of history in trials in more detail in a moment.

First, however, I wish to make another point. Benjamin's philosophy of history is often discussed merely as a critique of historicism and of the idea of progress, ignoring Benjamin's – at times rather bold – statements in which he refers to himself as a historical materialist and describes his philosophical perspective as 'historical materialism'. And indeed, the task he sets the historical materialist and his vision of historical materialism have little to do with orthodox Marxist historical materialism. It is true that, with its emphasis on discontinuity, Benjamin's philosophy of history gives up on an universal historical subject (such as 'humanity' or 'the working class'). Still, I would like to take seriously the link between his critique of progress, progressive historical time and historicism and his concern with a particular group of oppressed in history, namely those victims who suffer the violence inflicted by capitalist societies. This concern is evident not only in the *Arcades Project*, to which the *Theses* are strongly connected, but also evidences itself much earlier, for example in the fragment *Capitalism as Religion*.²⁵

In this fragment, Benjamin carries over his analysis of capitalism as religion into a structural argument about historical time and justice. Benjamin's critique of capitalism is both a condemnation of the specific violence inflicted by capitalism on human beings as well as a critique of the temporal logic of capitalism.²⁶ He describes the history of capitalism as a history that engenders guilt as it repeats itself through progressive historical time. Benjamin's analysis

²⁴Walter Benjamin. 'Manuskripte – Entwürfe und Fassungen'. In: *Über den Begriff der Geschichte*. Ed. by Gérard Raulet. Kritische Gesamtausgabe. Berlin: Suhrkamp, 2010, pp. 217–239, p. 123 (my translation).

²⁵Benjamin, 'Capitalism as Religion'.

²⁶Werner Hamacher. 'Guilt History: Benjamin's Sketch Capitalism as Religion'. In: *Diacritics* 32.3/4 (2002), pp. 81–106.

of capitalism as religion seems to lead him to an impasse. In the fragment we do not find indicators as to how a philosophy of history that does not reproduce this temporal logic could be conceived of.

It is at this point that I would like to take up an argument from Sami Khatib and suggest that it is possible to read Benjamin's philosophy of history, with its emphasis on discontinuity and interruption of the course of history, as a heresy to capitalism as religion.²⁷ That is, while Benjamin develops his philosophy of history out of concern for the struggling, oppressed class of capitalism's guilt history, the philosophical position that emerges from this critique cannot assume an universal subjecthood of the oppressed, or guarantee the identity of the oppressed of the past and the oppressed of the present.²⁸ It is this argument concerning the temporality of capitalism's history, which brings Benjamin to develop a historiographical method that does not merely urge us to remember different lives, stories or experiences of violence, but to remember them differently.

I mention this connection between Benjamin's critique of the violence of capitalism and his philosophy of history because it parallels the reasoning of my own argument which I summarised in the first chapter: a critique of criminal law that is concerned with the (in)ability of ICL to address the economic dimensions of state crime, I argued, cannot limit itself to a study of the representation of the past in trials, but needs to take into account the temporalisation of history.²⁹

Benjamin's philosophy of history, as we will see in the rest of this chapter, is a heresy which does not offer an alternative religion or a specific promise of redemption.³⁰ The promise of historical justice, for Benjamin, is linked to the ability of the past to destabilise the present relationship of forces, thereby opening the present anew for contestation. This emphasis on rupture as a moment of justice is fundamentally different from ICL and transitional justice, which, as we saw in Chapter Two, link the promise of memory to the authorisation of liberal democracy. In the next two sections I will specify the implications of this change in perspective for the two pillars of the latent theory

²⁷Sami R. Khatib. *"Teleologie ohne Endzweck"*. *Walter Benjamins Ent-stellung des Messianischen*. Marburg: Tectum, 2013, pp. 9-19.

²⁸In this vein also Philippe Simay. 'Tradition as Injunction: Benjamin and the Critique of Historicism'. In: *Walter Benjamin and History*. Ed. by Andrew E. Benjamin. London and New York: Continuum, 2005, pp. 137-155.

²⁹With this emphasis on Benjamin's concern with the violence of capitalism, I do not wish to revive the heated debates about whether Benjamin should properly be considered a theologian or a historical materialist, see Tiedemann, 'Historical Materialism'; Rather, I seek the company of some recent engagements with Benjamin which overcome the divide between an early, theological, and a later, materialist Benjamin, such as Mosès, *Angel of History*; Khatib, *"Teleologie ohne Endzweck"*; Matthias Fritsch. *The Promise of Memory. History and Politics in Marx, Benjamin, and Derrida*. Albany: State University Of New York Press, 2005; Detlev Schöttker. 'Kapitalismus als Religion und seine Folgen. Benjamins Deutung der kapitalistischen Moderne zwischen Weber, Nietzsche und Blanqui'. In: *Theologie und Politik*. Ed. by Bernd Witte and Mauro Ponzio. Berlin: Erich Schmidt, 2005, pp. 70-81.

³⁰Khatib, *"Teleologie ohne Endzweck"*, p. 14.

of historical justice identified in that chapter, namely the claim that justice could be found in the adequate representation of the past and that the rule of law enacted through the trials constitutes a non-violent answer to the violence of the past.

3.2 Historical Truth as Justice

In my discussion of the literature on ICL in the previous chapter, I showed that ICL jurisprudence answered the turn to criminal law in search of historical justice with a turn to history. That is, the literature invokes the so-called historiographical or pedagogical function of trials in order to justify the criminal prosecution of state crimes.³¹ In the absence of any legal justification that could ground the validity of ICL, practitioners and scholars alike argue that tribunals in response to state crime are an important means of truth-finding. In these accounts, to establish the truth about past events is either presented as a requirement of justice in itself, or it is thought of as a precondition necessary to guarantee the non-repetition of the events. Here, the knowledge (and memory) of the violent events is introduced as a necessary, and sometimes even sufficient, condition to bring about a better future.

As I have indicated in the first section of this chapter, Benjamin's philosophy of history, too, establishes a duty to attend to the oppressed in history. However, the way in which he ties the task of historiography to claims for justice and societal change is totally different from the latent philosophy of history underlying ICL. In this section, I will be contrasting the link between historical truth and justice as it is established in ICL, with Benjamin's philosophy of history.

In ICL, historical truth is usually defined in terms of adequacy. Consequently, the discussion around the historiographical function of trials in the literature often focuses on their ability to represent historical events adequately. For Benjamin, on the contrary, the notion of historical truth is tied to a temporal relationship. This form of historiographical recognition and representation is opposed by Benjamin to the quest of historicism for an adequate reconstruction of past events. The latter's presentation of historical events, according to Benjamin, leads to an authorisation of the present (which, as we have seen above, is the present shaped by the victors of history). Benjamin's, instead, sets the historiographer the task to invoke the past in a way that destabilises the present. Because these two forms to think historiographical representation hinge on different notions of historical time, I will propose to shift the discussion of the role of history in trials from one focusing on the representation of the past in trials to one that takes into account history's temporalisation.

³¹See above, p. 51

court-room quality truth

In Chapter Two I already indicated that ICL practice and jurisprudence resort to truth finding as an important aspect of criminal trials in response to state crimes. The repeated assertion that trials in response to state crime can and should serve as a laboratory for the writing of history has not remained uncontested. Both lawyers and historians have insisted on the selectivity that comes with the writing of history in courtrooms. I do not wish to revisit the entire debate here. Rather, the point I want to make is that those who defend the historiographical function of trials, as well as those who contest it, coincide in a notion of historical truth as adequacy. That is, law is found either to be able to represent the past adequately, or to be unable to do so. In accordance with this finding, trials are thereupon considered valuable, or not, for the process of establishing historical truth.

The position that criminal trials should participate in the writing of history can be exemplified by quoting Louise Arbour, former Chief Prosecutor of the UN Ad Hoc Tribunals for Rwanda and the former Yugoslavia. In a talk given in 2002, she suggested that it would be necessary to commit the criminal process

to the exposition of the larger picture, to painting the broad and complex historical fresco, in an effort not only to expose and record individual guilt but to exploit the dramatic stage of the trial to construct the collective memories that may help cleanse both victims and perpetrators, indeed whole nations, of the brutal past.³²

She later asserted that to conduct criminal trials was important because

[c]riminal prosecution is considerably more threatening than history for populations that have already constructed collective memories in which court-room-quality truth does not constitute a major ingredient. History leaves room for doubt . . . Justice, in contrast, imposes irreversible conclusions.³³

The opposing position, namely that trials in response to state crime do not constitute an adequate environment for the elaboration of historical explanations of the events in the context of which systematic human rights violations take place is put forward by both lawyers and historians. In his memorandum on the 'Approach to the Preparation of the Prosecution Against Axis Criminality', the US chief prosecutor at the International Military Tribunal, Telford Taylor, wrote in 1945:

It is important that the trial *not* become an inquiry into the *causes* of the war. It cannot be established that Hitlerism was the sole cause of the war, and there should be no effort to do this. . . . The question of causation is important and will be discussed for many years, but it has no place in this

³²Arbour, *War Crimes*, p. 34.

³³Arbour, *War Crimes*, p. 35.

trial, which must rather stick rigorously to the doctrine that planning and launching an aggressive war is illegal, whatever may be the factors that caused the defendants to plan and to launch. Contributing causes may be pleaded by the defendants before the bar of history, but not before the tribunal.³⁴

Taylor's concern that the court should limit itself to a decision on the criminal responsibility of the accused is also echoed by Hannah Arendt, in her report on the Eichman trial. She warns:

The purpose of a trial is to render justice, and nothing else; even the noblest of ulterior purposes – 'the making of a record of the Hitler regime which would withstand the test of history,' as Robert G. Storey, executive trial counsel at Nuremberg, formulated the supposedly higher aims of the Nuremberg Trials – can only detract from the law's main business: to weigh the charges brought against the accused, to render judgment, and to mete out due punishment.³⁵

While both Taylor and Arendt express the fear that the attempt to write history would corrupt the trial, most of the sceptics on the writing of history in the court room fear for the quality of the history written in courts.³⁶ In this vein, Paul Ricoeur argues that

the fit that the judgment establishes between the presumed truth of the narrative sequence and the imputability by reason of which the accused is held accountable – this good fit in which explanation and interpretation come together at the moment the verdict is pronounced – operates only within the limits traced out by the prior selection of the protagonists and of the acts alleged.³⁷

Ricoeur here reminds us that the 'question of fact' is established in the light of the question of law, and that therefore only those moments are reconstructed that are needed to establish the personal responsibility of an individual. Similarly, the Italian historian Carlo Ginzburg observes that the judicial model leads to a particular kind of historiography, namely, one that focuses on events

³⁴Telford Taylor. *The Anatomy of the Nuremberg Trials. A Personal Memoir*. New York: Knopf, 1992, pp. 51-52 (italics original).

³⁵Arendt, *Eichmann*, p. 372.

³⁶See e.g. Richard J. Evans. 'History, Memory and the Law: The Historian as Expert Witness'. In: *History and Theory* 41.3 (2002), pp. 326-345, at 345; Carlo Ginzburg. 'Checking the Evidence: the Judge and the Historian'. In: *Critical Enquiry* 18.1 (1991), pp. 79-91; contributions in Norbert Frei, Dirk van Laak, and Michael Stolleis, eds. *Geschichte vor Gericht. Historiker, Richter und die Suche nach Gerechtigkeit*. München: Beck, 2000; Michael Stolleis. 'Der Historiker als Richter - der Richter als Historiker'. In: *Geschichte vor Gericht. Historiker, Richter und die Suche nach Gerechtigkeit*. Ed. by Norbert Frei, Dirk van Laak, and Michael Stolleis. München: Beck, 2000, pp. 173-187; Donald Bloxham. *Genocide on Trial. The War Crimes Trials and the Formation of Holocaust History and Memory*. Oxford: Oxford University Press, 2001, at 185-222; Douglas, *Memory of Judgment*; Paul Ricoeur. *History, Memory, Forgetting*. London, New York: The University of Chicago Press, 2004, at 322-333; Henry Rousso. *The Haunting Past. History, Memory, and Justice in Contemporary France*. Philadelphia: University of Pennsylvania Press, 2002.

³⁷Ricoeur, *History*, p. 320.

that could be easily ascribed to specific actions, performed by one or more individuals, and which disregards those phenomena that resist this explanatory framework.³⁸ For Ginzburg, the merit of the *Annales d'histoire économique et sociale* was precisely that it moved away from a 'moralistic historiography inspired by a judicial model' towards one which tries to understand historical processes.³⁹

What distinguishes the legal structuring of memory from rules that guide academic investigations or the conceptual design of an exhibition in a museum is the fact that it translates a conflict into a decidable legal problem. In doing so, it necessarily restricts 'ambiguities regarding what the past may require of us, in the name of the rule of law'.⁴⁰ Emiliós Christodoulidis calls this selective access to the past 'law's immemorial'. He writes:

Law's immemorial reminds us that law cannot inhabit all these points of observation, but inflicts upon the past a specific mode of remembering that has to do with its function and expectational structures.⁴¹

Histories written in courts are not only selective, they are selective conforming to a particular pattern. With regards to criminal trials in response to state crime, various authors have highlighted the bias that results from the focus of modern (criminal) law on individual responsibility. In this context, it has been argued that histories written in state crime trials conceal the economic dimensions of systematic violence because they are blind to structural violence not attributable to individuals.⁴² Tor Krever, for example, concludes his analysis of the jurisprudence produced by the ICTY by stating that

[s]ystemic forces – neoliberalism, imperialism, geopolitical rivalry, or even simply capitalism – are thus lost from sight in the international criminal trial.⁴³

I do not want to challenge the claim that law and historiographical research ask different questions about the past, and hence produce different accounts

³⁸Ginzburg, 'Checking the Evidence', p. 82.

³⁹Ginzburg, 'Checking the Evidence', p. 82.

⁴⁰Emiliós Christodoulidis, 'Law's Immemorial'. In: *Lethe's Law*. Ed. by Emiliós Christodoulidis and Scott Veitch. Oxford: Hart Publishing, 2001, pp. 207–227, p. 219.

⁴¹Christodoulidis, 'Law's Immemorial', p. 223; similarly: Niklas Luhmann. *Das Recht der Gesellschaft*. Frankfurt am Main: Suhrkamp, 1993, p. 118.

⁴²Martti Koskeniemi. 'Between Impunity and Show Trials'. In: *Max Planck Yearbook of United Nations Law* 6 (2002), pp. 1–35, in particular pp. 14–22; Simpson, *War Crimes*, in particular chapter 3; See also contributions in Kevin Jon Heller and Gerry J. Simpson, eds. *The Hidden Histories of War Crimes Trials*. Oxford: Oxford University Press, 2013; Tor Krever. 'International Criminal Law: An Ideology Critique'. In: *Leiden Journal of International Law* 26.03 (2013), pp. 701–723, p. 706; Baars, 'Law(yers) Congealing Capitalism: On the (Im)possibility of Restraining Business in Conflict through International Criminal Law', pp. 230–281; Raymond J. Michalowski. 'In Search of 'State' and 'Crime' in State Crime Studies'. In: *State Crime in the Global Age*. Ed. by William J. Chambliss, Raymond J. Michalowski, and Ronald C. Kramer. Cullompton: Willan Publishing, 2010, pp. 13–30; David Hoogenboom. 'Theorizing "Transitional Justice"'. PhD thesis. Ontario: The University of Western Ontario, 2014.

⁴³Krever, 'Unveiling (and Veiling) Politics', p. 131.

of, for example, the economic dimensions of state-backed violence. In fact, a substantial part of my chapters on trials addressing the economic dimensions of state crime in post-World War II Germany and contemporary Argentina is dedicated to pointing out the subtle ways in which legal understandings of the state, its relation to the economy, as well as concepts of legal responsibility, frame that which the trials can identify as the economic dimensions of state crime. We thus will return to the question of selectivity at work in ICL.

What I do want to challenge is the way in which the attested (in)ability to represent the past is linked to the promise of justice attributed to these trials. Both positions define historical truth in terms of adequacy. Any critique of ICL that merely focuses on its selective approach to the past, operates within the same understanding of historical truth as the one that permeates ICL jurisprudence.

Those affirming the court's capacity to offer historical knowledge emphasise the high standard of proof, thorough scrutiny of evidence as well as the production of testimonies and documents, which add up to produce what Arbour, in the quote above, labeled 'court room quality'. Those challenging this claim, in turn, argue that this 'legal truth' is not able to reflect the 'actual' complexity of history, thereby presupposing a privileged access to the past by historians or social researchers which cannot be gained by the legal system. In both cases, the writing of history is understood as the adequate representation of the past.

With Benjamin, I would like to propose a different way of conceiving the task of historiography, and the way it can be linked to the moral duty to attend to the those who became victims of state-backed violence. Rather than understanding historical truth in terms of an objective, 'truthful' representation of history, the 'true' image of the past, that is, for Benjamin, the image that seeks to rescue the discontinuous history of the oppressed, captures a particular temporal constellation between the past and the present.

smashing the kaleidoscope

In the *Theses*, Benjamin takes issue with historicism for pretending to offer an image of the 'past as it really was', when in fact its gaze at the past is mediated through those concepts and ideas which are proper to the present.⁴⁴ This present, any present, is a present that – as we saw in the first section of this chapter – Benjamin understands as having been shaped by those who won the struggles in the past. In a text titled *Central Park* Benjamin invokes the image of the kaleidoscope – a trace from his engagement with the French writer Charles Baudelaire – to describe the ordering function of these concepts.⁴⁵ He writes:

⁴⁴ Benjamin, 'Theses', p. 255.

⁴⁵ Walter Benjamin. 'Central Park'. In: *New German Critique* 34 (1985), pp. 32–58, p. 34.

The course of history as represented in the concept of catastrophe has no more claim on the attention of the thinking than the kaleidoscope in the hand of a child which, with each turn, collapses everything ordered into new order. The justness of this image is well-founded. The concept of the rulers have always been the mirror by means of which the image of an 'order' was established. – This kaleidoscope must be smashed.⁴⁶

Bringing the image of the kaleidoscope to bear on the critique of the writing of history in trials, one could say that legal concepts operate as mirrors within the kaleidoscope, ordering the image of the past according to the ontological and normative categories of the present. Importantly, though, all writing of history, not only that which takes place in courts, is bound by the concepts of the present. Each change in the present constellation of power coincides with a shifting of the kaleidoscope, and thus produces a new perspective on past events. We only get to see that which is reflected by the mirrors.

Benjamin's image of the kaleidoscope draws attention to the situatedness of our engagement with the past. It dialogues with Benjamin's image of 'historicism's bordello', to be found in *Theses*, in which the whore called "Once upon a time" offers her services. Both images criticise the belief that every moment in history is always recognisable and accessible.⁴⁷ Similarly, Benjamin demands in the *Arcades Project* a '[r]esolute refusal of the concept of "timeless truth"'.⁴⁸

Benjamin's critique of historicism is certainly a critique of positivism. But, as Philippe Simay rightly points out, it is more than that.⁴⁹ It is a critique of the ethical and political relationship historicism establishes between the past and the present. Historicism, with its belief in the possibility of an adequate presentation of the past, is problematic because it produces empathy with the current rulers – and consequently leads to the authorisation of the present relationship of forces. Historicist approaches combine a claim to objectivity with the 'causal nexus among various moments in history'⁵⁰ and thereby create a 'narrative of continuity' the effect of which, as Simay points out, is twofold. Not only does it assimilate each instant into a continuum, so that every moment of the past is considered bygone, but it also establishes the present as the inevitable consequence of the past.⁵¹ '[T]he idea of progress based on a linear and continuous vision of historical time' Stéphane Mosès

⁴⁶ Benjamin, 'Central Park', p. 34 (translation amended).

⁴⁷ Benjamin, 'Theses', p. 264 (XVI).

⁴⁸ Benjamin, *Arcades Project*, p. 453 (N3,2); On Benjamin's casting of truth as the ultimate fetish in the 'Arcades Project' see Buck-Morss, *Dialectics of Seeing*, p. 211; and James R. Martel, *Divine Violence. Walter Benjamin and the Eschatology of Sovereignty*. Abingdon: Routledge, 2012, p. 11.

⁴⁹ Simay, 'Tradition as Injunction', p. 137.

⁵⁰ Benjamin, 'On the Concept of History', p. 396 (Thesis XVII).

⁵¹ Simay, 'Tradition as Injunction', p. 141.

summarises Benjamin's point, correlates 'with a political attitude of resignation to the present'.⁵²

To counter these effects of a historicist philosophy of history Benjamin seeks to develop a form of historical thinking and writing in which historical knowledge expresses, as Mosès puts it, '*a bond that is not a causal relationship*'.⁵³ Such a philosophy of history needs to rescue the history of the oppressed, but this cannot be done using the same historiographical method, with other words, by merely turning the kaleidoscope. Again, the task, according to Benjamin, is not merely to write a different history, but to think history differently. Hence: 'The kaleidoscope must be smashed'. To the image of the past created by the kaleidoscope, Benjamin responds with the 'dialectical image', a notion which condenses his theory of historical recognition and historiography at once.

the dialectical image

We have already encountered the notion of the dialectical image in Chapter One. There, I offered a reading of the collage 'Martínez de Hoz and Boots', emphasising the way that this form of visual representation generates meaning. I introduced the technique of montage or collage as a form of visual representation that, through juxtaposition, seeks to interrupt the totality of any representation of 'reality'. Similarly, Benjamin's notion of the dialectical image envisions a historiographical method that challenges totalising representations of past as they are typically rehearsed by historicist approaches.⁵⁴

I now wish to return to the concept of the dialectical image and expand on this point by contextualising it within Benjamin's philosophy of history. In Benjamin's notion of the dialectical image, *true* historical knowledge is defined not in terms of adequate representation of the past, but in terms of a temporal relation between past and present: 'To articulate the past historically', Benjamin writes, 'does not mean to recognize it "the way it really was" (Ranke). It means to seize hold of a memory as it flashes up at a moment of danger'.⁵⁵

The figure of the 'dialectical image' can be said to compress Benjamin's philosophy of history.⁵⁶ It is produced by a constellation of different moments

⁵²Mosès, *Angel of History*, p. 66.

⁵³Mosès, *Angel of History*, p. 84 (italics in the original).

⁵⁴Cf. discussion of the principle of montage above, p. 21

⁵⁵Benjamin, 'On the Concept of History', p. 255 (Thesis VI). I will expand on some other aspects of the dialectical image – such as its specific 'dialectics' – at the beginning of the next chapter.

⁵⁶The notion of the 'dialectical image', despite its centrality to Benjamin's thinking, is not fully developed in his writings, and poses several methodological challenges for those who wish to work with it, see Rolf Tiedemann. 'Dialectics at a Standstill'. In: *The Arcades Project*. Ed. by Rolf Tiedemann. Cambridge, Massachusetts: Belknap Press, 1999, pp. 929–945, p. 942; On the 'dialectical image' in Benjamin see further Buck-Morss, *Dialectics of Seeing*, pp. 219–220; Max Pensky. *Melancholy Dialectics. Walter Benjamin and the Play of Mourning*. Amherst: University of Massachusetts Press, 1993, p. 212.

in time, by a tension between ‘what-has-been’ and the ‘now’.⁵⁷ According to Benjamin, it is the task of the historical materialist to grasp ‘the constellation which his own era has formed with a definite earlier one’.⁵⁸ He writes:

Where thinking comes to a standstill in a constellation saturated with tensions — there the dialectical image appears. It is the caesura in the movement of thought. Its position is naturally not an arbitrary one. It is to be found, in a word, where the tension between dialectical opposites is greatest.⁵⁹

History does not exist outside its recognisability, but ‘can be seized only as an image that flashes up’.⁶⁰ It is a moment of recognisability which can also be missed. In the second thesis on the philosophy of history Benjamin writes:

The past carries with it a temporal index by which it is referred to redemption. There is a secret agreement between past generations and the present one. Our coming was expected on earth. Like every generation that preceded us, we have been endowed with a *weak* Messianic power, a power to which the past has a claim.⁶¹

Benjamin conceives of the ‘*weak* messianic power’ in terms of *Eingedenken*, a particular form of remembrance which combines historical cognition and political action. As Werner Hamacher observes,

this messianic power is the intentional correlate of the claim that calls upon us from the missed possibilities of the past, not to miss them a second time but to perceive them in every sense: cognizingly [sic!] to seize and to actualize them’.⁶²

As already alluded to at the beginning of this chapter, the practice of *Eingedenken* or remembrance is distinct from memory and traditional historiography. It does not demand a representation of past suffering, but rather the actualisation of past struggles.⁶³ That not every act of remembering the suffering of the past can be considered an act of *Eingedenken* is evident in

⁵⁷ Benjamin, *Arcades Project*, p. 462 (N2a,3).

⁵⁸ Benjamin, ‘Theses’, 265 (Thesis XVIII A); Cf. translation in Benjamin, ‘On the Concept of History’, 397: ‘He grasps the constellation into which his own era has entered, along with a very specific earlier one.’

⁵⁹ Benjamin, *Arcades Project*, p. 475 (N10a,3).

⁶⁰ Benjamin, ‘On the Concept of History’, p. 390 (Thesis II).

⁶¹ This translation is based on Hannah Arendt’s typescript of the theses, see translation in Benjamin, ‘Theses’, p. 254, italics in the original. Benjamin later amended thesis two slightly, see Benjamin, ‘On the Concept of History’, p. 390. In total, six versions of the theses have been recovered, five of which are written German and one in French. These typescripts and manuscripts together with changes and amendments are documented in Benjamin, *Über den Begriff der Geschichte*.

⁶² Werner Hamacher. ‘Now’: Walter Benjamin on Historical Time’. In: *Walter Benjamin and History*. Ed. by Andrew E. Benjamin. London and New York: Continuum, 2005, pp. 38–68, p. 41; In a similar vein, Buck-Morss describes political action as link between the two registers of time (empirical history and messianic time) in Benjamin’s work, Buck-Morss, *Dialectics of Seeing*, p. 242.

⁶³ Cf. Benjamin, *Arcades Project*, p. 460 (N 2, 2).

Benjamin's attack on Erich Kästner, who he accuses of 'left melancholy', that is, of the objectification of the misery produced by capitalist society which

transforms political struggle so that it ceases to be a compelling motive for decision and becomes an object of comfortable contemplation; it ceases to be a means of production and becomes an article of consumption.⁶⁴

As Mosès remarks, Benjamin's notion of remembrance warns against the

apologetic temptation in the name of which the victims of history risk freezing their own past into a 'heritage' destined not to be reactualised in the struggles of the present but to become a simple object of commemoration.⁶⁵

When, for Benjamin, the 'lost' struggles of the past are lost in that they are 'completed'⁶⁶, remembrance is the structural possibility which can 'make something incomplete (happiness) into something complete, and the complete (suffering) into something incomplete'.⁶⁷ The 'right of entry which the historical moment enjoys vis-à-vis a quite distinct chamber of the past', Benjamin notes, 'coincides in a strict sense with political action'.⁶⁸

Importantly, as I have argued in Chapter One, dialectical images are characterised by an epistemological instability. They enable political action not by offering stable grounds, but by questioning the present and exposing its lack of foundation. It is in this vein that Susan Buck-Morss observes that these images are 'less pre-visions of postrevolutionary society than the necessary pro-visions for radical social practice'.⁶⁹ As a form of remembrance, they do not project any lessons learned into the future. Instead, they shed light on the continuing violence and thereby destabilise the present such that an avenue of praxis is opened anew.

Let me bring this brief account of the notion of the dialectical image back to the problem of historiography in trials before moving on to the second dimension of ICL's latent philosophy of history, namely that trials in response to state crime contribute towards historical justice by fostering liberalising change. What historicism and the literature on trials in response to state crimes have in common, I suggested, is that they tie the promise of justice of war crime trials to the adequate representation of history. From a Benjaminian perspective, such a 'court-room-quality truth' and 'irreversible conclusions'

⁶⁴Walter Benjamin. 'The Author as Producer'. In: *Understanding Brecht*. London: Verso, 1998, pp. 85–103, pp. 96–97; See also Walter Benjamin. 'Left-Wing Melancholy. (On Erich Kästner's New Book of Poems)'. In: *Screen* 15.2 (1974), pp. 28–32, p. 29; and the discussion of the politics of melancholy in Pensky, *Melancholy Dialectics*, pp. 6–12.

⁶⁵Mosès, *Angel of History*, p. 110.

⁶⁶See letter to Horkheimer above, p. 75

⁶⁷Benjamin, *Arcades Project*, p. 471 (N8,1).

⁶⁸Benjamin, 'Paralipomena', p. 402; in a similar vein, Derrida conceives of a time that is 'out-of-joint' as the condition needed in order to recognise a lack of justice. Derrida, *Specters of Marx*.

⁶⁹Buck-Morss, *Dialectics of Seeing*, p. 117.

imposed by legal decisions would have to be qualified precisely as the 'narcotics' which put societies into a state of overpowering 'conformism'.⁷⁰ If this present is a present shaped by the winners of history and indebted to the violence of the past, a representation of past violence that wishes to side with the oppressed and redeem their suffering would have to interrupt or destabilise the present.

In a situation where the 'historiographical function' of trials is emerging as a central justifying argument for criminal trials in response to state crime, I wish to make two interventions by turning to Benjamin's philosophy of history. First, I want to draw attention to the fact that any past reconstructed in the trials, even when investigating crimes of the powerful, is reconstructed through the kaleidoscope representing the present relationships of power. The legal concepts through which the court constructs both the historical events under investigation, as well as the concepts of legal responsibility of the defendants, constitute the mirrors of the legal kaleidoscope and set bounds to that which is identified as violence as well as who is recognised as legally responsible for state-backed violence.

The second intervention I want to make concerns the conclusions that we draw from the observation that histories written through the 'kaleidoscope' of ICL are selective. If we accept Benjamin's critique, this observation cannot lead to a demand to offer a more 'complete' representation of the 'true nature' of the violence. Such a representation would only lead again to the authorisation of a particular juridico-political order.

While we cannot solve the problem of a selective representation of the past in trials with a call for a more adequate representation, this does not imply that trials have to be given up as a site in which claims for historical justice can be addressed. This is because, with Benjamin, we have to consider the possibility that the images of past events unearthed by the trial enter into a constellation with the present, and, if grasped, expose the selectivity at work in the trials as well as the violence that characterises both past and present.

To locate the promise of justice, or the emancipatory potential of trials, in a moment of rupture that exposes the limits of or the violence inherent to the law is, perhaps, already a tradition within those contributions to legal scholarship that want to respond to law's intimate relationship with violence without giving up on its emancipatory potential altogether. It is probably one of the central differences between liberal theories of law and critical legal studies that the former present the law as the opposite to violence, while the latter foreground the way in which law is indebted to violence itself. So far, I have merely alluded to the link between law and violence and it is the purpose of the following

⁷⁰See the statement from former Chief Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda Arbour, *War Crimes*.

section to substantiate this claim by turning to Benjamin's critique of law as developed in his essay *On the Critique of Violence*.⁷¹

Benjamin's essay has been central to the thinking about the relationship between law and violence in contemporary critical legal studies, especially since Jacques Derrida's famous reading of the essay in *Force of Law. The 'Mystical Foundation of Authority'*, the first part of which was presented on the occasion of a colloquium held at the Cardozo Law School in October 1989.⁷² Here, I wish to bring to bear Benjamin's text on the latent theory of historical justice on which ICL bases its legitimacy, and specifically on the second aspect that I identified in the previous chapter. In the context of transitional justice, I argued there, the liberal rule of law has been posited as the aim of transition. Law figures prominently as both the aim of transition, as well as a means of this transition, and in both instances is cast as non-violent answer to the state-backed violence of the predecessor regime.

Against the backdrop of Benjamin's *Critique of Violence*, I will be arguing in the next section, the rule of law and trials would need to be thought of not as the end to an history of violence, but as part of a history characterised by a mythical cycle of law-positing and law-maintaining violence. Similarly to Benjamin's critique of the historical temporality of capitalism exposed above, such a position implies that justice can only be found in an intervention that does not reproduce this cycle, but that interrupts it.

3.3 Historical Justice and the Law

To link trials in response to state violence to the debate about the relationship between law and violence introduces a counter-argument to the predominant position in the literature on ICL and transitional justice, which rehearses modern law's own claim to break with the violent cycle of vengeance. One of the first examples of this reasoning famously comes from Robert H. Jackson, in the opening address at the International Military Tribunal at Nuremberg:

That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.⁷³

Transitional justice literature, as we saw in the previous chapter, questioned at first the suitability of trials to the fostering of peace in situations where transitions had been negotiated. By now, though, the conviction that criminal trials can control non-rational impulses and thereby prevent individual revenge is much repeated in contemporary ICL jurisprudence. To provide but one example:

⁷¹Benjamin, 'Critique of Violence'.

⁷²Derrida, 'Force of Law'.

⁷³Jackson, 'Opening Statement', p. 99.

Criminal law aims at rendering acts of retaliation superfluous by establishing a catalogue of wrongs and expressing the injustice and the unacceptability of deviate behaviour in publicly pronounced judgement and the infliction of punishment . . . Channeling the feeling of vengeance in a public procedure and substituting retaliation with the imposition of a sentence serves to establish the rule of law and to prevent individuals to take the law into their own hands.⁷⁴

Trials that respond to state-sponsored violence with law are not only conceived as the rational alternative to individual revenge, but are furthermore considered to constitute symbols of the superiority of the successor state, which responds to the rule of violence with the rule of law.

In so far as they posit the liberal rule of law as non-violent societal order to follow the violent past, and criminal trials as both a manifestation of and a means to foster this particular juridico-political order, these accounts rehearse modern law's very own self-legitimation of its monopoly on violence. 'A legal judgment', as Christoph Menke summarises the central claim of theories of the rule of law, 'is not an equal deed but the deed of equality': qua the general rule, the person who is judged by law judges himself, because the law allegedly emanates from the legal subjects who are said to have agreed upon it.⁷⁵ Similarly, Martti Koskeniemi identifies the claim 'that social order should be based on the subjective consent of individuals' as the 'most fundamental claim' of the liberal tradition.⁷⁶ This fundamental claim, he notes, comes with a fundamental tension, namely, the need to determine under which conditions the social order thus created could enforce decisions against the free will of the individual. Liberal theory resolved this tension by arguing that '[a] legitimate community was one which could be referred back to uncoerced individual choice'.⁷⁷ It follows from this liberal argument that law enforcement by the state is thought of as self-imposed, consented-to violence, and consequently no violence after all.

law as mythical violence

Benjamin's essay *On the Critique of Violence*, published in 1921, famously contests this claim made by liberal theories of the rule of law. Inspired by his reading of George Sorel's *Reflections on Violence*, Benjamin sets out to analyse

⁷⁴Christoph Johannes Maria Safferling. *International Criminal Procedure*. Oxford: Oxford University Press, 2012, p. 65; The conviction, that international criminal law eliminates the violence of vengeance from the realm of international law can also be found in Gary Jonathan Bass. *Stay the Hand of Vengeance. The Politics of War Crimes Tribunals*. Princeton, New Jersey: Princeton University Press, 2000.

⁷⁵Christoph Menke. 'Law and Violence'. In: *Law and Literature* 22.1 (2010), pp. 1–17, p. 4,8; For a more detailed discussion of this question see Christoph Menke. *Recht und Gewalt*. Berlin: August Verlag, 2012.

⁷⁶Martti Koskeniemi. *From Apology to Utopia. The Structure of International Legal Argument*. Cambridge: Cambridge University Press, 2005, p. 74.

⁷⁷Koskeniemi, *From Apology to Utopia*, p. 475.

the relationship between law, violence and justice.⁷⁸ According to Benjamin, as we will see in more detail below, the institution and implementation of law sets in motion a cycle of mythical violence. This violence is mythical because it is doomed to reproduce itself, in an eternal cycle of what Benjamin calls law-positing and law-maintaining violence.

Benjamin starts his essay by arguing that for a critique of violence we cannot just adopt the distinction between sanctioned and unsanctioned manifestations of violence made by positive law.⁷⁹ Instead, in order to learn about violence, it is necessary to ask what it is that makes the distinction between legitimate and non-legitimate forms of violence possible in the first place:

The question that concerns us is, what light is thrown on the nature of violence by the fact that such a criterion or distinction can be applied to it at all, or, in other words, what is the meaning of this distinction?⁸⁰

To answer this question, Benjamin proposes a 'historico-philosophical view of law', which leads him to identify a cycle of law-making or law-positing violence on the one hand and law-preserving or law-maintaining violence on the other. It is a cycle in which modern law, for Benjamin, is inevitably caught. I will briefly expand on the nature of the law-making violence before summarising what Benjamin identifies as law-maintaining violence.

According to Benjamin,

The function of violence in lawmaking is twofold in the sense that lawmaking pursues as its end, with violence as the means, what is to be established as law, but at the moment of instatement does not dismiss violence; rather, at this very moment of lawmaking, it specifically establishes as law not an end unalloyed by violence, but one necessarily and intimately bound to it, under the title of power. Lawmaking is power making, and, to that extent, an immediate manifestation of violence.⁸¹

The first function of violence in the making of law is the violence as means with which a legal order is brought about or established, such as war or revolution. The second function of violence comes in 'under the title of power' insofar as the instituting violence of the foundational act is not backed by any law itself. Here, the function of violence is to impose '*what* is to be established as law'.⁸² 'Lawmaking is power making' because it establishes the line between those acts and interactions that will be considered to be violent according to the new order and those that will, conversely, be rendered permissive. This act is violent in that it imposes an order which is not legitimised, which cannot be legitimised, with reference to any other rule or order.

⁷⁸ Georges Sorel. *Reflections on Violence*. Cambridge: Cambridge University Press, 1999.

⁷⁹ Benjamin, 'Critique of Violence', p. 279.

⁸⁰ Benjamin, 'Critique of Violence', p. 279.

⁸¹ Benjamin, 'Critique of Violence', p. 295.

⁸² Benjamin, 'Critique of Violence', p. 295 (my italics).

This foundational violence inherent to any legal order has prominently been described by Jacques Derrida. In 'The Force of Law' he writes:

the operation that consists of founding, inaugurating, justifying law (*droit*), making law, would consist of a *coup de force*, of a performative and therefore interpretative violence that in itself is neither just nor unjust and that no justice and no previous law with its founding anterior moment could guarantee or contradict or invalidate.⁸³

Each instance of law-making violence, for Benjamin, is inevitably followed by a second form of violence, which he identifies as law-preserving violence. It is the reflex of every legal order to guard itself against instances of law-positing violence which would challenge the values set as law by that order. Benjamin names criminal law, and in particular the death-penalty, as one example of law-preserving violence, along with the police.⁸⁴ The purpose of a sentence 'is not to punish the infringement of law but to establish new law'; in the judgement, 'law reaffirms itself'.⁸⁵ Again for the case of the police, Benjamin identifies a 'spectral mixture' of these two forms of violence.⁸⁶ While merely pretending to enforce and thus to preserve the law, there is always a moment at which the police itself decides whether its use of violence is justified in the interest of the preservation of the legal order, thus also positing law.

The law-preserving violence, then, is not merely to be found in the means with which law is enforced, but also in the fact that it makes the preservation of its authority its very purpose.⁸⁷ It is in the coincidence of law-positing and law-making violence that 'something rotten in law is revealed', namely its reliance on a violence which cannot be accounted for by itself.⁸⁸ Insofar as it evidences this lack of foundation of the legal order which it seeks to preserve, every law-preserving violence eventually destabilises the law-positing violence. This is why, for Benjamin, every law-positing violence is doomed to set in motion its own decay. This movement is described by Benjamin as *Schwankungsgesetz* or 'law governing [the] oscillation' of law-making and law-preserving violence. It rests

on the circumstance that all law-preserving violence, in its duration, indirectly weakens the lawmaking violence represented by it, through the suppression of hostile counter-violence. ... This lasts until either new

⁸³Derrida, 'Force of Law', p. 241 (italics in original); This 'coup de force' is also excellently analysed by Derrida in his reading of the 'Declaration of Independence of the United States of America', in which he points us to the constative and performative function of the signatures. Derrida, 'Declarations of Independence'; See further discussion in Peter Fitzpatrick, *Modernism and the Grounds of Law*. Cambridge: Cambridge University Press, 2001, pp. 80-81.

⁸⁴Benjamin, 'Critique of Violence', pp. 285-287.

⁸⁵Benjamin, 'Critique of Violence', p. 286.

⁸⁶Benjamin, 'Critique of Violence', p. 286.

⁸⁷In this vein see also Menke, 'Law and Violence', pp. 10-12.

⁸⁸Benjamin, 'Critique of Violence', p. 286.

forces or those earlier suppressed triumph over the hitherto lawmaking violence and thus found a new law, destined in its turn to decay.⁸⁹

It is against this backdrop that Benjamin's claim that '[t]he critique of violence is the philosophy of its history' is to be understood.⁹⁰ For him, the history of historical and political change is marked by a 'dialectical rising and falling in the lawmaking and law-preserving formations of violence'.⁹¹

The characterisation of law's history as a cycle of mythical violence in the *Critique of Violence* poses the question of whether this cycle can somehow be interrupted. As Bettine Menke indicates, Benjamin exposes the cycle of law-making and law-sustaining violence that marks the fate of mythical violence in the law with the very aim of identifying the conditions for its rupture or cessation.⁹²

On the breaking of this cycle maintained by mythical forms of law, on the suspension [*Entsetzung*] of law with all the forces on which it depends as they depend on it, finally therefore on the abolition of state power, a new historical epoch is founded.⁹³

I will re-turn to this 'suspension of law' envisioned by Benjamin further below. For now, I wish to point out the implications of the discussion thus far for a critique of ICL as a concept of historical justice.

If we understand history, with Benjamin, as a cycle of law-positing and law-preserving violence, then criminal trials in response to state crime cannot any longer be thought of as the non-violent answer to individual longings for revenge, an answer that breaks with the cycle of violence by instituting the rule of law. Rather, we would need to think of this newly instituted rule of law, as well as of the trials, as part of this cycle of law-positing and law-preserving violence. As I will be arguing in the last section of this chapter, from such a perspective trials need to be understood as law-preserving violence insofar as they participate in clouding the law-positing violence of the liberal rule of law through the construction of the past as a negative reference.

Before developing this argument in more detail, I wish to anticipate and respond to two objections that could be raised in response to such a position. First, it could be demurred that a perspective that looks at history as a cycle of violence risks putting the violence inflicted and rendered invisible by the rule of law on the same level with the violence inflicted by authoritarian regimes. Indeed, both the *Critique* and *Theses* have earned Benjamin criticisms that he discarded any possibility of taking into account the differences in historical forms of (legal) violence.

⁸⁹ Benjamin, 'Critique of Violence', p. 300.

⁹⁰ Benjamin, 'Critique of Violence', p. 299.

⁹¹ Benjamin, 'Critique of Violence', p. 300.

⁹² Bettine Menke. 'Benjamin vor dem Gesetz: Die Kritik der Gewalt in der Lektüre Derridas'. In: *Gewalt und Gerechtigkeit*. Ed. by Anselm Haverkamp. Frankfurt am Main: Suhrkamp, 1994, pp. 217–275, p. 219.

⁹³ Benjamin, 'Critique of Violence', p. 300.

Michael Löwy, for example, sees the ‘great failing’ of Benjamin’s critique of progress put forward in the *Theses* in the fact ‘that it does not bring out the novelty of Fascism, particularly in its Hitlerian variant, in relation to the old forms of domination’. He immediately excuses Benjamin for he had not witnessed the ‘perfection’ of the destruction of human life by the Nazis.⁹⁴ This qualification, however, does not solve the general question of how to distinguish between different forms of violence if history is reduced to a single ‘catastrophe’ that is understood to be governed by a law of oscillation between law-positing and law-maintaining violence. In a similar vein, Bettine Menke concludes, in her comment on the *Critique*, that ‘the verdict according to which no law could possibly enable or realise justice, gives up very necessary distinctions’.⁹⁵

The second criticism to which a Benjaminian perspective on trials would have to respond is also raised by Bettine Menke. For her, the problem of Benjamin’s critique is the ‘rigorousness of the gesture of rejection’ of any law.⁹⁶ The ‘challenge’ or indeed that which is ‘not tolerable’ in Benjamin’s text is, she suggests, the possible consequences that follow ‘for the role of law and its institutions in dealing with the perpetrators responsible for the “final solution”’.⁹⁷ ‘With Benjamin’, she continues, ‘there cannot be *any* moral justification for the legal response, the judgment’.⁹⁸ If, according to Benjamin, law is always already violent and hence never the place of justice, what role can trials play at all in addressing past violence of authoritarian regimes without thereby instituting new violence?

I will respond to both criticisms in the remainder of this section. In doing so, I argue, firstly, that Benjamin offers a critical and analytical perspective on trials that precisely allows us to perceive both differences and continuities in the experience of state violence in the past and in the present; and that, secondly, the ‘rigorousness of the gesture of rejection’ of law does not necessarily mean, that, with Benjamin, we have to discard the possibility that these trials have anything to offer for the victims of state-backed violence. While I think that with Benjamin the promise of justice cannot lie with the application of law or the enforcement of the judgement, I will suggest that history enters these trials as a source of justice. Invoking Benjamin’s philosophy of history exposed in the last section, I will be suggesting that we can speak of a suspension of law where the past is invoked as dialectical image, exposing the violence of the past as well as the ‘rotten’ foundations of the present order.⁹⁹

⁹⁴ Löwy, *Fire Alarm*, p. 58.

⁹⁵ Menke, ‘Benjamin vor dem Gesetz’, p. 258 (my translation).

⁹⁶ Menke, ‘Benjamin vor dem Gesetz’, p. 258.

⁹⁷ Menke, ‘Benjamin vor dem Gesetz’, p. 257.

⁹⁸ Menke, ‘Benjamin vor dem Gesetz’, p. 257 (my translation, italics in original).

⁹⁹ Benjamin, ‘Critique of Violence’, p. 286.

exception and rule

Let me start by turning to the first potential criticism mentioned above, according to which, with Benjamin, we would be unable to identify the particularities of the violence of Nazi Germany or, in the context of this thesis, the Argentine 'Process of National Reorganisation', because he conceives of history as a single catastrophe that is driven by the oscillation between law-positing and law-maintaining violence and is indebted to the specific violence of capitalism. It is important to address this criticism because a recurrent theme in the three following chapters dedicated to the study of trials will be that, put crudely, the trials in response to state crime invoke the violence inflicted by the predecessor regime in a way that clouds both the foundational violence of liberal democracies and the specific structural violence not recognised as such by the liberal rule of law. I will be highlighting the implications of the liberal kaleidoscope for the way that trials write the economic out of their definitions of how force is applied in the name of the state, relegate excesses of state violence to the past and render permissive the 'silent compulsion' of the economic sphere here and now.

Benjamin's essay on the *Critique of Violence* has been central to critical legal scholarship interested in the link between law and violence. In this context, Derrida's famous reading of the *Critique* in *The Force of Law*, already mentioned above, has been highly influential. Derrida emphasises the unavoidable violence in law, such as its foundational violence or the interpretative violence inherent to any judgment.¹⁰⁰ In line with such a reading of Benjamin's text, the engagement with the trials will point us to the *foundational violence* of the liberal rule of law that consists in the unwarranted decisions about the organisation of society. In the case of the liberal rule of law, this is in particular the sanctioning of the use of force by the state, as well as the separation of the political and the economic as organising distinction. This organising distinction, as we have seen in the previous chapter has several implications, such as the fact that democracy is reduced to the realm of the political.

However, unlike Derrida, I do not read Benjamin's critique of law as merely concerned with the foundational violence proper to any legal order. If situated in the company of *Capitalism as Religion* and the *Theses*, Benjamin's critique of law can be read specifically as a critique of the law of the capitalist state.¹⁰¹ In the bibliographical notes under the fragment *Capitalism as Religion*, written around the same time as the *Critique*, Benjamin also references Sorel's *Reflections on Violence*. In a note that is not further elaborated he mentions the link between 'Capitalism and law [*Recht*]'.¹⁰² The page number given by

¹⁰⁰Jacques Derrida. 'Force of Law: The "Mystical Foundation of Authority"'. In: *Cardozo Law Review* 11 (1990), pp. 920–1045.

¹⁰¹For a critique of Derrida's neglect of Benjamin's critique of the 'legal codification of the capitalist mode of production' see Fritsch, *Promise of Memory*, pp. 148–149.

¹⁰²Benjamin, 'Capitalism as Religion', p. 290.

Benjamin refers to Sorel's analysis of the role of state violence in the institution of capitalism, as well as the importance of the state's monopoly of violence for the functioning of capitalist accumulation.¹⁰³

The claim that Benjamin was not only concerned with the violence of the founding act of every politico-legal order but also with the specific violence of the capitalist rule of law could also be substantiated with reference to the eighth of Benjamin's *Theses*. There, Benjamin writes that '[t]he tradition of the oppressed teaches us that the "state of emergency" in which we live is not the exception but the rule.'¹⁰⁴ The "state of emergency" in which we live' is a clear reference to the emergency laws enacted by the Nazis with the so-called *Ermächtigungsgesetz* ('Enabling Act') in 1933.¹⁰⁵

The remark that this exception is 'the rule', though, should not be read as mere reference to the fact that at the time of writing, in 1939, the emergency laws were still in force. If a perspective that focuses on the '[t]he tradition of the oppressed teaches us that the 'state of emergency' in which we live is not the exception but the rule', this means that the state violence and its arbitrariness, which became evident under the Nazi rule, are experienced by some in everyday life, even with the constitution in place.

Such a reading, again, can be supported with reference to a line from the *Critique*, in which Benjamin refers to the formal equality of law 'as mythical ambiguity of laws'. He then paraphrases Anatole France's famous statement that '[p]oor and rich are equally forbidden to spend the night under the bridges'.¹⁰⁶ A similar connection between both texts is also made by Herbert Marcuse, who writes in an epilogue to a collection of Benjamin's essays which features the *Theses* and the *Critique*:

The violence that is criticised by Benjamin is the violence of the status quo, which, in the status quo, preserves the monopoly of legality, truth, the law and within which the violent nature of the law has disappeared, in order to come to light deathly in the so-called 'states of exception' (which, in fact, are none).¹⁰⁷

Against the backdrop of the *Theses* and the *Critique* we are urged to re-assess the promise of justice upheld by the liberal rule of law. At present, such an explicit critique of the violence inherent to the pair of liberal democracy and market economy, a violence that cannot be perceived by political liberalism itself, is often contested with the argument that this violence does not compare

¹⁰³On Sorel's text as link between 'Capitalism as Religion' and the 'Critique' see Uwe Steiner. 'Die Grenzen des Kapitalismus. Kapitalismus, Religion und Politik in Benjamin's Fragment 'Kapitalismus als Religion'. In: *Kapitalismus als Religion*. Ed. by Dirk Baecker. Berlin: Kadmos, 2003, pp. 35–59, pp. 48–53.

¹⁰⁴Benjamin, 'On the Concept of History', p. 392 (Thesis VIII).

¹⁰⁵Wolfgang Michalka, ed. *Das Dritte Reich. Dokumente zur Innen- u. Außenpolitik*. München: Dtv-Taschenbuch-Verlag, 1985, p. 35.

¹⁰⁶Benjamin, 'Critique of Violence', p. 296.

¹⁰⁷Herbert Marcuse. 'Nachwort'. In: *Zur Kritik der Gewalt und andere Aufsätze*. Frankfurt am Main: Suhrkamp, 1978, pp. 99–107, p. 100 (my translation).

to systematically inflicted physical violence under authoritarian rule. And indeed, the forms of violence differ substantially. However, any perspective that simply adopts the fundamental distinction between sanctioned and non-sanctioned violence underlying the rule of law gives up on any criterion that could help us to identify the very ways in which they differ. It cannot but adopt the definition of violence provided by the law itself. While Benjamin challenges the clear-cut distinction that opposes the arbitrary rule of violence to the rule of law that is introduced by law itself, it does not follow from this position that one has to set equal different experiences of violence.

Still, it means that, if one accepts Benjamin's critique, neither the liberal rule of law as the aim of a transition from authoritarian rule, nor criminal trials as a means to do justice and guarantee the non-repetition of crimes, can be said to redeem the suffering of the victims of violence.

This brings me to the second criticism expressed above, namely that with Benjamin there cannot be any justification for the legal response to state crime. In what follows, I want to respond to this objection by suggesting that while the promise of justice of trials does not lie with some contribution to historical truth or the judgment – as usually claimed – trials can still be thought of as holding a promise of justice for the victims of state-backed violence. With Benjamin, though, this promise of justice can only lie where trials expose both the violence of the past as well as of the present order. I wish to make this point by linking the moment of *Entsetzung* or suspension of law envisioned by Benjamin to a third use of the 'state of emergency' that we find in the *Theses*. Both indicate that with Benjamin justice is only to be found in a moment of rupture.

the real state of emergency

As already indicated above, Benjamin's delineation of the law of oscillation between law-positing and law maintaining violence is followed by a brief remark on the possibility of the interruption of this cycle of violence. He speaks of a 'divine violence' necessary for law's suspension (*Entsetzung*). In order to gain a better understanding of the notion of the *Entsetzung* of law which, according to Benjamin, is the only possibility with which to interrupt the cycle of mythical violence, I want to briefly engage with a criticism put forward by Derrida in his reading of *Critique*. Towards the end of his reading of the *Critique*, Derrida writes:

What I find, in conclusion the most redoubtable, indeed (perhaps, almost) intolerable in this text, . . . is a temptation that it would leave open, and leave open notably to the survivors or the victims of the final solution, of its past, present or potential victims. Which temptation? The temptation to think the holocaust as an interpretable manifestation of divine violence insofar as this divine violence would be at the same time nihilating, expiatory and bloodless, says Benjamin, a divine violence that would

destroy current law through a bloodless process that strikes and causes to expiate.¹⁰⁸

Derrida fears that the state of exception of the Nazi rule, with its state apparatus aimed at the murder of millions of people, could be interpreted as a manifestation of the divine violence which interrupts the mythical cycle of violence by suspending the law.

Derrida's gesture, to relate Benjamin's 'divine violence' to a Schmittian state of exception, becomes untenable if we read the 'suspension of law' against the backdrop of the *Theses*.¹⁰⁹ Benjamin's observation in the *Theses* that "the state of emergency" in which we live is not the exception but the rule' is followed by the demand for a 'conception of history that is in keeping with this insight'.¹¹⁰ Only then, he continues, shall we 'clearly realize that it is our task to bring about a real state of emergency'.¹¹¹ It is this 'real state of emergency' envisioned by Benjamin in the *Theses*, I would like to suggest, that parallels Benjamin's demand in the *Critique* for a *Entsetzung* or suspension of law.

From the *Theses* it emerges clearly that the 'real state of emergency' is not the same as the "'state of emergency' in which we live', that is, the state of exception declared by the Nazi party and famously theorised and justified by Carl Schmitt.¹¹² I want to focus here on the fundamentally distinct temporality that underlies the state of exception that characterised both the Nazi state and the Argentine *Proceso* from the 'real state of emergency' envisioned by Benjamin. Through this distinction we gain better understanding of the temporality of this particular form of the suspension of law.

The fundamentally distinct temporality that distinguishes the Schmittian state of exception from the 'real state of exception' envisioned by Benjamin has been pointed out by the Spanish theologian Reyes Mate.¹¹³ In Schmitt's 'secularised gnosticism', Mate argues, the state of exception becomes a strategy of the katechon, that is, of the postponement of total chaos.¹¹⁴ The suspension of the law is justified with the aim of avoiding a collapse of the state. Historically, not only the Nazi Party, but also the Argentine junta made use of the argumentative figure of the suspension of the constitution for the purpose of

¹⁰⁸Derrida, 'Force of Law', p. 1044.

¹⁰⁹For further challenges to Derrida's interpretation see Cornelia Vismann. 'Das Gesetz »DER Dekonstruktion«'. In: *Rechtshistorisches Journal* 11 (1992), pp. 250–264, p. 259.

¹¹⁰Benjamin, 'On the Concept of History', p. 392 (Thesis VIII).

¹¹¹Benjamin, 'On the Concept of History', p. 392 (Thesis VIII); For a detailed distinction of the violence that characterises the different states of exception, albeit in a different context see Daniel Loick. *Kritik der Souveränität*. Frankfurt/M: Campus-Verlag, 2012, p. 215.

¹¹²Carl Schmitt. *Political Theology. Four Chapters on the Concept of Sovereignty*. Cambridge, Massachusetts: MIT Press, 1985.

¹¹³Reyes Mate. 'Retrasar o acelerar el final. Occidente y sus teologías políticas'. In: *Nuevas teologías políticas*. Ed. by Reyes Mate and José A. Zamora. Rubí: Anthropos Editorial, 2006, pp. 27–64.

¹¹⁴See Mate, 'Retrasar o acelerar el final', pp. 47–48.

rescuing the democratic state in the face of total chaos.¹¹⁵ This link between the logic of the katechon and the state of exception as the prevention of chaos – the collapse of the state or the coming of the Antichrist – is also captured by Argentine legal philosopher Claudio Martyniuk, when he writes, commenting on the rhetoric of the Argentine military junta:

Rhetoric: in the face of anarchy, in order to reestablish the public order, in the name of the values of civilisation, barrier against communism and dissolution, *katechon*.¹¹⁶

If the purpose of the state of exception in Schmitt's political theology is to prevent the coming of the end, in Benjamin's political messianism the task of bringing about the 'real state of exception' is the task of accelerating the coming of the 'end' – where that 'end' is understood as the redemption of past suffering. If we bring the discussion of Benjamin's political messianism in the last section to bear on the notion of *Entsetzung*, then suspension must not be read as a state that follows in time, but rather as an intervention out-of-time.¹¹⁷ It does not denote a condition or state that comes *after* mythical law, but its rupture.

If the time of the now (*Jetztzeit*) is 'the small gateway in time through which the Messiah might enter' every second, then *Entsetzung* is the structural possibility within law for suspending the cycle of mythical law and exposing its violence.¹¹⁸ Werner Hamacher draws attention to this temporality of Benjamin's *Entsetzung* when he links it to the idea of the affirmative.¹¹⁹ Hamacher introduces the notion of the *afformative* in order to describe the function of 'depositing' in relation to the positing of every performative (and one could say law-making) act: 'affirmations allow something to happen without making it happen'.¹²⁰ The 'pure violence' aimed at the depositing of law can be said to open up a gap; that is, it deposes without positing. From this vantage, the only promise of justice from the trials could lie with acts of suspension, with interventions out-of-time.

¹¹⁵See Hannah Franzki. 'A modo de (in)conclusión: Entre complicidad judicial y violencia jurídica'. In: *¿Usted también doctor?* Ed. by Juan Pablo Bohoslavsky. Buenos Aires: siglo veintiuno editores, 2015, pp. 415–426.

¹¹⁶Claudio Martyniuk. *Estética del nihilismo. Filosofía y desaparición*. Lanús: Ediciones La Cebra, 2014, p. 191 (my translation, italics in the original).

¹¹⁷On the notion of 'out-of-time' ('Unzeit' or 'contretemps') see Werner Hamacher. 'Des Contrees de Temps'. In: *Zeit-Zeichen*. Ed. by G. Christoph Tholen and Michael O. Scholl. Weinheim: VCH, 1990, pp. 29–36.

¹¹⁸Benjamin, 'On the Concept of History', p. 397 (Thesis B)..

¹¹⁹See in particular explanations provided in endnote 12 in Werner Hamacher. 'Afformative, Strike. Benjamin's 'Critique of Violence''. In: *Walter Benjamin's Philosophy*. Ed. by Andrew E. Benjamin and Peter Osborne. Manchester: Clinamen Press, 2000, pp. 108–136, p. 125–127.

¹²⁰Hamacher, 'Afformative, Strike', p. 125 (endnote 12); See also Menke, 'Benjamin vor dem Gesetz', p. 224.

3.4 Politics of Time

In this final section of the chapter, I will be bringing together Benjamin's philosophy of history and his critique of law to set out a framework for the study of trials in the chapters to come. With Benjamin, I will be arguing, trials in response to state crime appear to us as a site where different temporalities, and not merely different narratives of the past, compete.

trials as law preserving violence

Such a perspective constitutes, as mentioned before, a critique of and alternative to the transitional justice approach to trials which I discussed in the previous chapter. With the proliferation of ICL as an element of transitional justice, I have argued, the trials' constitutive function of political authority was put forward as an argument in their favour. In this context, the trials' contribution to the writing of history was put forward as a central element through which trials could contribute towards liberalising political change. Ruti Teitel, for example, writes in the conclusion of her book on *Transitional Justice*:

These rituals of collective history-making are part of what constructs the transition and so divides political time, creating a 'before' and an 'after.' The turn to law means that historical claims are made in the language of justice, in shared terms relating to rights and responsibilities for past wrongs.¹²¹

What could be read as mere analysis of the historiographical functions of trials appears in Teitel's account as a normative statement. Teitel's claim is part of her appeal for transitional justice to be recognised as a particular form of (incomplete) justice which will eventually help to foster the democratic rule of law — a political order that, according to her, would constitute the just answer to the atrocities that have been experienced.¹²² In making the rule of law the answer to and the opposite of violence, transitional justice literature on ICL reproduces the law's amnesia concerning its own relationship with violence.

Every politico-legal order, I argued with Benjamin in the previous section, is based on a violence that cannot be justified by preexisting laws. In order to claim its legitimacy, modern law needs to cloud this lack of ultimate foundation.¹²³ With the words of Derrida:

A 'successful' revolution, the 'successful foundation of a state' (in somewhat the same sense that one speaks of a 'felicitous performative speech

¹²¹Teitel, *Transitional Justice*, p. 116.

¹²²See discussion above in Chapter Two

¹²³On the unrelenting attempts to find ways to contain his absence of an ultimate foundation in legal theory see Marie Theres Fögen. *Das Lied vom Gesetz*. München: Carl Friedrich von Siemens Stiftung, 2007.

act') will produce after the fact [*après coup*] what it was destined in advance to produce, namely, proper interpretative models to read in return, to give sense, necessity and above all legitimacy to the violence that has produced, among others, the interpretative model in question, that is, the discourse of its self-legitimation.¹²⁴

Law-preserving violence, Cornelia Vismann argued in her reading of Derrida's text, translates the instituting violence of the new politico-legal order into a language of justice.¹²⁵ In the context of regime change, trials in response to state crime offer such a language of justice. It is a language of historical, 'transitional', justice that seeks to endow liberalising change with legitimacy.

To contextualise, with Benjamin, trials in response to state crime within the cycle of mythical violence, would require that the trials' role in constituting political authority be looked at with suspicion. From such a perspective Teitel's statement on the historiographical function of trials still appears as an adequate description, but the performative act which she describes would need to be problematised rather than endorsed.

We can do so by paying attention to the politics of time at work in trials. On a general level, to speak of a 'politics of time', borrowing from Peter Osborne, is to acknowledge that

alternative temporalizations of "history" . . . articulate the relations between "past", "present" and "future" in *politically significantly different ways*.¹²⁶

If we understand 'the political' as the '*moment* of institution of society' which itself lacks any ground, then to speak of a politics of time refers to the effect of alternative temporalisations in relation to this absent ground.¹²⁷ The way in which the past is brought to bear on the present can either work towards grounding a particular juridico-political order, or it can expose the absence of the ground on which a juridico-political order claims to rest. If we take into account the political implications of temporalisation, we have to pay attention not only to which story about the past is told in trials, but also how past and present are related to each other.¹²⁸

If the concept of 'transitional justice' endorses the performative dimension of the historiographical function of trials, the notion of periodisation, a concept which I take from Kathleen Davis, can help us to gain a critical understanding

¹²⁴Derrida, 'Force of Law', p. 270.

¹²⁵Vismann, 'Das Gesetz "DER Dekonstruktion"', p. 251; see also discussion in Fritsch, *Promise of Memory*, p. 120.

¹²⁶Osborne, *The Politics of Time. Modernity and Avant-Garde*, p. 200 (my emphasis); see also Osborne, 'Politics of Time'.

¹²⁷On post-foundational understandings of the political in political theory, see Oliver Marchart. *Post-foundational Political Thought. Political Difference in Nancy, Lefort, Badiou and Laclau*. Edinburgh: Edinburgh University Press, 2008, p. 8.

¹²⁸Berber Bevernage makes a similar argument for the institution of truth commissions, see Berber Bevernage. *History, Memory, and State-Sponsored Violence. Time and Justice*. London: Routledge, 2012.

of the role history acquires in the foundation of political authority.¹²⁹ Davis, herself a medievalist, develops the concept of periodisation in order to account for the role of the 'medieval' in the constitution of the 'modern'. It describes a sequencing of world history in which the Middle Ages and Modernity appear as two consecutive periods. Such a periodisation, she argues, authorises secular politics and modern law by constructing the modern as a self-contained epoch. The medieval, posited as the other of the modern, effectively works as a substitute for the absent foundation of sovereignty in modern law.¹³⁰ If we understand sovereignty as 'underived power', Davis argues with reference to Carl Schmitt, then periodisation functions as 'sovereign decision'.¹³¹ Thus understood, the notion of periodisation

does not refer to a mere back-description that divides history into segments, but to a fundamental political technique – a way to moderate, divide, and regulate – always rendering its services *now*.¹³²

Periodisation is a technique through which the violence of the foundational act, in the Derridean sense referred to above, is hidden. In this vein, Peter Fitzpatrick described, albeit in a different context, the operation of periodisation as a 'game' of the 'universal negative reference'. Through the universal negative reference, he writes,

a positive transcendent reference is avoided by delimiting a targeted period and by ascribing content to it. A supervening period is constituted thence as the opposite of that content. Bluntly, it becomes positively what the other egregiously is not. . . . A positive revelation of the inevitably particular content of the supervening period is thereby avoided.¹³³

In the context of trials by fiat of the successor regime, periodisation does not organise epochs (Middle Ages/Modernity) but rather performs a break through which the violent *ancién regime* becomes the Other against which the new order claims its authority. This periodisation rests on two moments: the *historical narrative* established by the court joins forces with the authorising *moment of judgment*, of re-claiming, claiming anew, the authority of the law.

With regards to the first moment, the writing of history in trials, I exposed in section three, above, that the investigative character of criminal trials dovetails both with the truth claim and the temporal structure underlying historicism.¹³⁴ The legal inquiry re-presents the crime, makes it present again, by means of its reconstruction. But the very need to 'reconstruct' the crime through

¹²⁹Davis, *Periodization*; Kathleen Davis. 'The Sense of an Epoch. Periodization, Sovereignty, and the Limits of Secularization'. In: *The Legitimacy of the Middle Ages*. Ed. by Andrew Cole and D. Vance Smith. Durham: Duke University Press, 2010, p. 39.

¹³⁰This particular argument is developed in the book's third chapter Davis, *Periodization*, p. 80.

¹³¹Davis, *Periodization*, p. 80.

¹³²Davis, *Periodization*, p. 5 (emphasis in original).

¹³³Peter Fitzpatrick. 'Imperial Ends'. In: *The Ends of History*. Ed. by Amy Swiffen and Joshua Nichols. Milton Park: Routledge, 2013, pp. 44–63, p. 46.

¹³⁴See above, p. 100.

testimonies and documents, locates the criminal act in the past. Foucault reminds us that the inquiry as a form of establishing the truth substitutes the '*flagrant délit*'.¹³⁵ The crime is made present *as past*. Similarly, Otto Kirchheimer remarks on law's work of temporalisation:

But fortunately for the criminal judge and the community which he serves, conflict situations have been narrowed down and treated as history before being submitted to him. They pertain to past segments of a still present conflict, allowing him to disregard its present elements and treat it exclusively as a past event.¹³⁶

In judging crimes of the predecessor state, the second moment of the periodisation, the legal institutions declare those crimes past, not part of the new order.

Through this movement, the historical account of the crimes committed by the earlier regime comes to function as a negative reference for the present juridico-political order. Trials provide *après coup* an interpretative framework that legitimises the newly instaurated rule of law – and the violence, on which it is based. In so far as trials in response to state-backed violence make the preservation of the foundational violence (here, the liberal rule of law) their own end, trials are a manifestation of law-preserving violence.

the dialectical image as law's *entsetzung*

If we conceive of law as inherently violent, does this mean that, following Benjamin, criminal trials in response to state crime cannot offer anything to those who became victims of state-backed violence and who lost their struggles in the past? I already advanced in the very first chapter that my answer to this question is twofold.

Indeed, with Benjamin the promise of justice attached to trials in response to state crime could not be found in their contribution to establishing some sort of 'historical truth' nor in any legal judgment on the responsibility of the accused. As we have seen in section two of this chapter, any attempt to show the past 'as it really was' tends to authorise present conditions of power. And these are, Benjamin holds, shaped by the victors of history. Furthermore, as we have seen in the last section, for Benjamin law can never be just as it is inevitably caught in the cycle of law-positing and law-maintaining violence.

But, as I have highlighted in both sections, for Benjamin the memory of past violence still holds a promise of justice and similarly he considers the possibility to break the cycle of mythical violence. In both his philosophy of history as well as his critique of law this weak possibility of justice is located

¹³⁵ Michel Foucault. 'La vérité et les formes juridiques'. In: *Dits et écrits I, 1954-1988*. Ed. by Daniel Defert, François Ewald, and Jacques Lagrange. Paris: Gallimard, 2001, pp. 1406–1514, p. 1452.

¹³⁶ Kirchheimer, *Political Justice*, p. 111.

in the idea of rupture or cessation – either in the ‘dialectical image’ or in law’s ‘*Entsetzung*’.

As we have seen, Benjamin’s dialectical image presents itself in a temporal register which Benjamin calls the ‘time of the now’, *Jetztzeit*, a time that is not a transition to a pre-defined order but which interrupts the continuum of time. Similarly, I have argued, the *Entsetzung* of law should be thought of not as a historical state that follows the cycle of mythical violence, but as an intervention out of time. If we think both concepts together, the only possibility to think the promise of justice in trials is there were they expose the violence of the past as well as of the present political order, without positing a new law.

If we accept Benjamin’s philosophy of history and his critique of law as our philosophical backdrop, this has implications for how we study trials. The task would be no longer to examine their ability to foster the liberal rule of law, but instead train our gaze on the ruptures which are produced by the rags of history unearthed throughout the legal proceedings. In the first chapter of this thesis, I already indicated that while the trials intend to invoke the past in order to produce closure and authorise the present juridico-political order as just answer to the past, they do not fully succeed in doing so. There are instances throughout a trial in which images of the past and testimonies, unearthed by the legal proceedings, enter into a constellation with the present, in a way that exposes the contingency of the legal decision.

With Benjamin, we can think of these instances of rupture as ‘dialectical images’. They are not intentional, but could rather be described as moments of unintended self-subversion. If captured, they expose the violence of the legal decision, and of the foundational moment which the decision repeats and reinvigorates:

The image that is read – which is to say, the image in the now of its recognizability – bears to the highest degree the imprint of the perilous critical moment on which all reading is founded.¹³⁷

These images are perilous because they allow us to get a glimpse of law’s ‘rotten’, unstable, foundations.¹³⁸ The act of depositing reveals ‘that the legal ends and political goals of a power are always posited and never natural or pregiven’.¹³⁹

With this emphasis on rupture, Benjamin’s philosophy of history, condensed in the notion of dialectical image, counters the ‘structural conformity of all forms of experience’¹⁴⁰ with a ‘*social production of possibility*’.¹⁴¹ That is, the critical force of history in trials is to be found not where it authorises the present relationships of power, but where ‘testimonial narrative gathers the

¹³⁷ Benjamin, *Arcades Project*, p. 462 (N3,1).

¹³⁸ Benjamin, ‘Critique of Violence’, p. 286: ‘There is something rotten (*morsch*) in law.’

¹³⁹ Fritsch, *Promise of Memory*, p. 126.

¹⁴⁰ Hamacher, ‘Now’, p. 47.

¹⁴¹ Osborne, ‘Politics of Time’, p. 7 (italics in the original).

novelty of political action and expands political emancipation'.¹⁴² Only thereby can we hope to open anew the avenue of praxis for those who lost the struggles of the past.

In my reading of León Ferrari's collage 'Martínez de Hoz and Boots' I suggested that the collage 'Martínez de Hoz and Boots' can be read as a comment on a sentence from the *Nunca Más* report, which stated that the case of Martínez de Hoz provides an eloquent example *of the link between the policy of state security and economic power*. His figure, I pointed out, evokes an economic rationale behind the authoritarian state, structural violence inflicted by the economic policies of the regime, and the complicity of individual companies in specific cases of abduction and torture; he stands for privatisation of state enterprises but also for state investments and points to the continuities between the authoritarian and democratic regime, continuities, to specify, in the use of state violence as well as in the distribution of wealth.

In my discussion of the collage, I emphasised the way in which this form of representation generates meaning. It challenges the established narratives about the *Proceso* – those that exclude economic dimensions altogether and those that relegate the economic to the sphere of the private – but does not offer one alternative narrative. Benjamin's dialectical image translates the technique of the collage into a concept of historical recognisability. It is a form of what Daniel Loick, in a different context, has described as aesthetic critique:

This deconstructive way of judging is, in the case of art, more an 'opening statement' than an 'opinion of the court': Instead of closing, concluding, or completing a discourse with one final verdict, it exposes the contradictions, tensions, and ambivalence the judge faces during the process of judging.¹⁴³

A reading of trials that focuses on the 'dialectical images' produced by the trials, on the fissures that emerge in the legal narratives, seeks to shed light on the role of the trials in founding political authority, without however offering an alternative diagnosis of the 'economic dimension of conflict' or a vision of a societal arrangement in which past violence would have found its redemption.

The following three chapters will adopt such an approach for the study of the trials that address the criminal responsibility of German industrialists following World War II (Chapter Four) and of the trials that investigate the responsibility of economic actors in Argentina (Chapters Five and Six). In my reading of the trials, I will focus on the fissures that appear in the moment in which the images, documents, impressions and testimonies generated by the legal proceedings are translated into juridical imaginaries of the criminal state

¹⁴²Bethania Assy and Florian Hoffmann. 'The Faithfulness to the Real: the Heritage of the Losers of History, Narrative, Memory and Justice'. In: *Direitos Humanos*. Ed. by Bethania Assy et al. Rio de Janeiro: Editora Lumen Juris, 2011, pp. 9–29, p. 27.

¹⁴³Loick, 'Creation, Not Judgment', p. 33.

and of individual responsibility. These fissures will allow us to formulate a critique of ICL as a liberal concept of historical justice.

4 | Instituting the Capitalist State

With the ‘Trial of the Major War Criminals Before the International Military Tribunal’ (IMT) still ongoing, the Allied Control Council – the governing body of the occupying powers in post-World War II Germany – already set the legal basis for further trials against war criminals.¹ One month after the formal opening of the IMT, on 20th December 1945, it passed Control Council Law N° 10 in order ‘to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders’.² Control Council Law N° 10 enabled the Allies to conduct trials in their respective zones for crimes against peace, war crimes, crimes against humanities and the membership in organisation declared criminal by the IMT. As such, it provided the legal grounds for the trials of German industrialists that were conducted by the US American, French and British occupying forces between 1947 and 1949 (hereafter ‘Industrialist Trials’).

In this chapter, I turn to the Industrialist Trials as a source of critique. I will be arguing that if read as part of a historical constellation, the Industrialist Trials allow us to identify some of the historical and conceptual instances that qualify International Criminal Law (ICL) as a *liberal* concept of historical justice.³ In order to substantiate this link between the object of study – the Industrialist Trials – and the object of my critique – ICL – the first section expands on some of the methodological issues that were briefly introduced in Chapter One. To this end, I will return to the work of Walter Benjamin; this

¹On the IMT, see *Trial of the Major War Criminals Before the International Military Tribunal: Proceedings Volumes (The Blue Set)*. 1947.

²*Law Nr. 10 (Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity)*. Control Council. 1945-12-20.

³Among the individuals tried by the Soviet Union on German grounds there was not a single businessmen. Instead, they focused on expropriation measures taken against big firms that had collaborated with the Nazis and did not pursue a single criminal trial against a representative of the German war economy, see Jörg Osterloh and Clemens Vollnhals, eds. *NS-Prozesse und deutsche Öffentlichkeit. Besatzungszeit, frühe Bundesrepublik und DDR*. Göttingen: Vandenhoeck & Ruprecht, 2011, p. 128; Mortiz Vormbaum. ‘An “Indispensable Component of the Elimination of Fascism”: War Crimes Trials and International Criminal Law in the German Democratic Republic’. In: *Historical Origins of International Criminal Law*: ed. by Morten Bergsmo et al. Brussels: Torkel Opsahl Academic EPublisher, 2014, pp. 397–410.

time, however, not in order to think through the role of history and historical time in war crime trials, but to get some clues for my own historiographical approach to the Industrialist Trials. As opposed to those historiographical accounts that look at the Industrialists Trials as legal precedent for contemporary cases of corporate accountability, I will be retrieving Benjamin's idea of the historical citation to propose a perspective that is interested in the capacity of the past to destabilise the present (4.1).

In the material Benjamin collected for his own (unfinished) historiographical project, later published as the *Arcades Projekt*, Benjamin notes that in order to rescue the critical force of a historical event, one has to focus on the fore- and after-history as they enter the historical object on a reduced scale.⁴ In this spirit, the introduction to the Industrialist Trials in section two presents the trials as they emerge in a force field between their fore- and after-history. I argue that their coming into existence – the fact that they were held at all – owes itself to the widespread impression among the four Allies that World War II and the destruction that came with it would not have been possible without the support of German big business for the war plans. That the trials eventually only came to exist in a pared down scale, however, testifies to the after-history – that is, the arising competition between East and West, and connected hereto, the fear that trials of German industrialists might appear to be anti-capitalistic (4.2).

Section three looks at what with Benjamin I call the 'bowels' of the Industrialist Trials, namely the arguments concerning the industrialists' legal responsibility for the crimes of plunder, forced labour and aggression of which they were accused.⁵ Behind seemingly technical legal reasoning, liberal ontological assumptions concerning the nature of the state and the relation between the political and the economic will be emerging. These assumptions, I argue, structure the way in which the sentences issued by the tribunals depict the political and economic order under Nazi rule, allowing it to operate as a negative reference for a liberal and market-based German post-war order (4.3).

For a large part of my analysis of the Industrialist Trials, I will be able to draw on research that has been published over the past few years, especially on the work of the legal scholars Grietje Baars and Dooren Lustig as well as the historians S. Jonathan Wiesen and Kim Christan Priemel.⁶ Baars and Priemel bring into the picture the international context of that time, most

⁴Benjamin, *Arcades Projekt*, p. 470 (N7a,1).

⁵Benjamin, *Arcades Projekt*, p. 475 (N10,3).

⁶S. Jonathan Wiesen. *West German Industry and the Challenge of the Nazi Past. 1945 - 1955*. Chapel Hill: Univ. of North Carolina Press, 2001; Priemel, "A Story of Betrayal"; Doreen Lustig. *Doing Business, Fighting a War. Non-State Actors and the Non-State: the Industrialist Cases at Nuremberg*. IILJ Colloquium Paper. 2011. URL: <http://www.iilj.org/courses/documents/2011Colloquium.Lustig.pdf> (visited on 03/21/2011); Grietje Baars. 'Capitalism's Victors Justice? The Hidden Story of the Prosecution of Industrialists Post-WWII'. In: *The Hidden Histories of War Crimes Trials*. Ed. by Kevin Jon Heller and Gerry J. Simpson. Oxford: Oxford University Press, 2013, pp. 163–192.

importantly the creation of the international economic order. In their works, both authors trace the ways in which this context has influenced the positions of the Allies towards the trials and the construction of the legal responsibility of the accused. Wiesen, in his important study on West German industry between 1945 and 1955, showed how the Industrialist Trials forced West German industrialists to position themselves as caring entrepreneurs. Doreen Lustig brings to bear political theory on the legal findings of the Industrialist Trials in order to highlight implicit assumptions on the nature of the state at work in the conceptions of criminal responsibility.

My research on the Industrialist Trials is indebted to these studies and tries to take the analysis one step further by looking not primarily at the international, but at the German context. In line with the theoretical framework introduced in the previous chapter, I will be focusing on the role of the trials in the foundation of the German juridico-political order following the end of the war. 'To get the legality of the state from the veridiction of the market: this is the German miracle,' Michel Foucault wrote in *The Birth of Biopolitics*, and I will be drawing on Foucault's analysis of the foundational process of West Germany to show how the image of the past produced by the Industrialist Trials ties in with that which was construed by the ordoliberal economist in order to put forward the *Soziale Marktwirtschaft* (social market economy) as the lesson to be learned from the past. Against this backdrop, the Industrialist Trials cannot be considered the first attempt to set bounds to the violence of capitalism, as the corporate accountability discourse suggests, but instead need to be understood as an important element in the salvation of capitalism's reputation (4.4).

The point of my reading of the trials that emphasises their role in the authorisation of the German social market economy, and the contingency of that order, is not to suggest that other conclusions should have been drawn from the experience of World War II. Rather, as mentioned above, I am interested in the trials as a historical object that can inform a critique of ICL as a concept of historical justice. In the concluding section, I will therefore point out how the analysis of the Industrialist Trials put forward in this chapter destabilises some central assumptions that are prevalent in the field of ICL and transitional justice (4.5).

4.1 The Industrialist Trials as a Historical Object

Contemporary scholarship in international law and transitional justice usually looks at the Industrialist Trials as a first instance of corporate accountability for human rights violations. In doing so, it frames an event that took place in the 1940s in the terms of an academic and political discourse that only emerges in the 1990s. In this section, I wish to problematise such a perspective. I want to suggest that this research mistakes a legal temporality – namely the logic of

precedent – for a historical one. As a result of this, it connects past and present by establishing a linear, temporal connection between the Industrialist Trials and present approaches to the study of economic dimensions of state crime. I will be turning, one more time, to the work of Walter Benjamin to propose a historiographical approach that looks at the trials of German industrialists not as legal precedent, but as part of a constellation. Such a perspective, I argue, rescues the critical potential of the trials of German industrialists.

precedent

The trials of German industrialists following World War II have been re-discovered only fairly recently. Focusing exclusively on the IMT, the literature on the historical origins of ICL from the 1990s often limited ‘Nuremberg’ as a foundational moment to the criminal persecution of military and political representatives of the Nazi rule, thereby sidelining the trials of other groups such as the industrialists.

‘Law looks to the past as it speaks to present needs’, Austin Sarat and Thomas R. Kearns write in the introduction to the edited volume *History, Memory, and the Law*.⁷ Indeed, the renewed interest in the Industrialist Trials can be linked to the civil litigation efforts which have been presented under the US American ‘Alien Torts Statute’ (ATS) since the 1990s. In this vein, Doreen Lustig argues that the civil litigation cases presented under the ATS cited the post-World War II jurisprudence concerning the responsibility of German big business, in order to illuminate the questions of legal subjectivity of corporate actors under international law.⁸

Today, a heterogeneous set of actors and institutions seeks civil and criminal responsibility of businessmen and corporations for human rights abuses under the heading of ‘business and human rights’ and ‘corporate accountability’, and the trials of German industrialists have become a central point of reference in this debate.⁹ In 2008, the International Commission of Jurists (ICJ) published a report comprising three volumes that identifies the relevance of the Industrialist Trials for corporate criminal accountability.¹⁰ The ICJ report, which

⁷Austin Sarat and Thomas R. Kearns. ‘Writing History and Registering Memory in Legal Decisions and Legal Practices: An Introduction’. In: *History, Memory, and the Law*. Ed. by Austin Sarat and Thomas R. Kearns. Ann Arbor: University of Michigan Press, 1999, pp. 1–24, p. 3.

⁸Doreen Lustig. ‘Three Paradigms of Corporate Responsibility in International Law. The Kiobel Moment’. In: *Journal of International Criminal Justice* 12.3 (2014), pp. 593–614, p. 599.

⁹United Nations. *Guiding Principles on Business and Human Rights. Implementing the United Nations “Protect, Respect and Remedy” Framework*. 2011. URL: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (visited on 05/17/2015); The Business & Human Rights report centre seeks to promote accountability through publishing information on alleged human rights violations committed by corporations, see *Business & Human Rights Recourse Centre*. URL: <http://business-humanrights.org/> (visited on 05/17/2015).

¹⁰International Commission of Jurists. *Corporate Complicity & Legal Accountability. Facing the Facts and Charting a Legal Path. Report of the International Commission of Jurists Expert*

contrary to the judgments of the German Industrialist Trials is available in Spanish, has also become an authoritative voice and central reference in the currently ongoing trials in Argentina that I will turn to in the last two chapters.

In the context of legal corporate accountability disputes, the reference to the Industrialist Trials serves to support the claim that non-state actors can be subject to international law, thereby challenging a focus on state institutions when prosecuting systematic human rights violations. In these disputes, the backward-facing logic of legal precedent is turned into a narrative of historical continuity in order to sustain a particular legal argument: the criminal responsibility of businessmen, it suggests, was always already part of ICL. The citation of the past in the form of a legal precedent follows a logic of authorisation.

The scholarly interest in the Industrialist trials follows the rediscovery of these trials as legal precedent. Perhaps as a result of this, most of the legal scholarship on the trials inadvertently adopt the temporal logic that underlies the legal citation of the past as precedent. These texts present a connection that results from a backward reference as a progressive, continuous development, thus converting the temporality of the legal citation into one of historical development.¹¹ Just as case law cites the past to authorise a particular legal opinion, the historiographical accounts reduce the Industrialist Trials to a first instance of corporate accountability.

In doing so, they reproduce some of the problems of historicist approaches to historiography that I discussed in the previous chapter.¹² I argued that just like historicism, ICL jurisprudence holds the task of historiography to consist of the adequate representation of the past. With reference to Benjamin's critique of historicism, I suggested that this understanding of truth in terms of adequacy is not only ontologically dubious, but that it is also politically

Legal Panel on Corporate Complicity. Vol. 1. Geneva: International Commission of Jurists, 2008; International Commission of Jurists. *Corporate Complicity and Legal Accountability. Criminal Law and International Crimes. Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes*. Vol. 2. Geneva: International Commission of Jurists, 2008; International Commission of Jurists. *Corporate Complicity and Legal Accountability. Civil Remedies. Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes*. Vol. 3. Geneva: International Commission of Jurists, 2008.

¹¹ See for example Juan Pablo Bohoslavsky and Veerle Openhaffen. 'The Past and Present of Corporate Complicity: Financing the Argentinean Dictatorship'. In: *Harvard Human Rights Journal* 23.1 (2010), pp. 157–203, pp. 159–163; Wolfgang Kaleck and Miriam Saage-Maaß. 'Corporate Accountability for Human Rights Violations Amounting to International Crimes. The Status Quo and its Challenges'. In: *Journal of International Criminal Justice* 8.3 (2010), pp. 699–724; Florian Jessberger. 'On the Origins of Individual Criminal Responsibility under International Law for Business Activity. IG Farben on Trial'. In: *Journal of International Criminal Justice* 8.3 (2010), pp. 783–802; Jonathan A. Bush. 'The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said'. In: *Columbia Law Review* 109.5 (2009), pp. 1094–1262; Contributions in Michalowski, *Corporate Accountability*; on the notion of progress in historical accounts of International Law, see Skouteris, *The Notion of Progress*, Chapter One.

¹² As often the case, the exception confirms the rule, see Baars, 'Law(yers) Congealing Capitalism: On the (Im)possibility of Restraining Business in Conflict through International Criminal Law'; Lustig, 'Three Paradigms'.

problematic. Because such an understanding of history denies the fact that each representation of the past is already shaped by the interests and concepts – the kaleidoscope – of the present, the historical narratives thus produced stabilise the present relationships of power. The present, cast as the result of a linear, continuous development, is presented as the inevitable consequence of the past.

What I discussed in the previous chapter for the histories written *in* trials is equally pertinent to the literature in international law on the Industrialist Trials. It looks at the trials through the kaleidoscope of the contemporary corporate accountability discourse. As a consequence, they are not able to take into account the differences between the legal and political discussions that surrounded the prosecution of economic actors after World War II on the one hand, and the contemporary debate on corporate accountability on the other. In this chapter, I suggest they rob the Industrialist Trials of their critical potential – that is, of their ability to help us understand the particularities and contingency of present ways to consider the responsibility of economic actors for state-backed violence.

citations

For the purpose of my own engagement with the Industrialist Trials, I propose to read the *legal* citation of the Industrialist Trials by contemporary trials as a *historical* citation, an idea which permeates Walter Benjamin's philosophy of history. I thereby wish to acknowledge the connection that is created by the legal citations of the Industrialist Trials in contemporary trials, without however constructing this link as one of continuous development.

Contrary to the legal citation that invokes a precedent with the aim to authorise a legal opinion, Benjamin is interested in the destructive, destabilising dimension of a citation. Citations in his work, he declares in one of the entries in *One Way Street*, are 'wayside robbers who leap out armed and relieve the idle stroller of his conviction'.¹³ It is the citation's irritating, disturbing effect on the reader that Benjamin is concerned with. We encountered this emphasis on the desirability of a disruptive effect already in the previous chapter, when looking at Benjamin's philosophy of historiography and the notion of the 'dialectical image'. Indeed, the notion of the 'dialectical image' can be taken to translate the critical impetus of the act of citation into a philosophy of history.¹⁴

Here, I wish to return to the notion of the dialectical image, this time not in order to write about history and historiography in trials, but to explicate my own methodological approach when looking at the Industrialist Trials as an historical object. As mentioned before, Benjamin developed his philosophy of history in the context of his work on the *Arcades Project*, which he never

¹³Walter Benjamin. 'One-way Street'. In: *One-way Street and Other Writings*. London: Penguin, 2009, pp. 45–106, p. 95, translation amended.

¹⁴See above, p. 85

completed. We are thus left to make our own sense of the scattered comments on a historiographical methodology that would correspond to what he envisioned as the dialectical image.¹⁵ I do not attempt to reconstruct or complete a definitive account of the dialectical image, but instead attend to those pointers in Benjamin's work that can orient a historiographical approach.¹⁶ In particular, I wish to return to the notion of citation as it helps us to illuminate the 'dialectics' of the dialectical image.

For his own historiographical work on the Paris Arcades in the 19th century, Benjamin wanted to 'develop to the highest degree the art of citing without quotation marks.'¹⁷ A longer entry from the Convolut N of the *Arcades Project* can serve as a starting point to explore what this 'art of citation' as a historiographical method might entail:

The events surrounding the historian, and in which he himself takes part, will underlie his presentation in the form of a text written in invisible ink. The history which he lays before the reader comprises, as it were, the citations occurring in this text, and it is only these citations that occur in a manner legible to all. To write history thus means to *cite* history.¹⁸

According to this quote, to write history, to write about a moment in the past – that is, to construct an historical object – means to cite it, that is to take it out of the past and insert it into the present. The implications of perceiving historiography as citation, history as text, have been explored by Bettine Menke.¹⁹ Her essay *Das Nach-Leben im Zitat. Benjamins Gedächtnis der Texte* construes the citation as a 'model and schemata of remembrance' by rescuing Benjamin's remarks on the notion of citation across his writings and bringing them to bear on his philosophy of history.²⁰

¹⁵For recent works in legal history and legal theory that draw on Walter Benjamin for their own methodology, see Christopher Tomlins. 'The Strait Gate: The Past, History, and Legal Scholarship'. In: *Law, Culture and the Humanities* 5.1 (2009), pp. 11–42; Christopher Tomlins. 'After Critical Legal History: Scope, Scale, Structure'. In: *Annual Review of Law and Social Science* 8.1 (2012), pp. 31–68; James R. Martel. *Textual Conspiracies. Walter Benjamin, Idolatry, and Political Theory*. Ann Arbor: University of Michigan Press, 2011; Martel, *Divine Violence*; Joseph Jenkins. 'Inheritance Law as Constellation in Lieu of Redress: a Detour Through Exceptional Terrain'. In: *Cardozo Law Review* 24.3 (2003), pp. 1043–1065; Joseph Jenkins. 'Heavy Law/Light Law: Walter Benjamin, Friedrich Nietzsche, Robert Bork, Duncan Kennedy'. In: *Law and Literature* 17.2 (2005), pp. 249–268; Andrew E. Benjamin. *Working with Walter Benjamin. Recovering a Political Philosophy*. Edinburgh: Edinburgh University Press, 2013.

¹⁶On the different strategies of Benjamin's readers to deal with the unfinished character, see Anthony Auerbach. 'Imagine no Metaphors: the Dialectical Image of Walter Benjamin'. In: *Image & Narrative* 16 (2007), n.a.

¹⁷Benjamin, *Arcades Project*, p. 458 (N1,10).

¹⁸Benjamin, *Arcades Project*, p. 476 (N11,3).

¹⁹Bettine Menke. 'Das Nach-Leben im Zitat. Benjamins Gedächtnis der Texte'. In: *Gedächtniskunst*. Ed. by Anselm Haverkamp and Renate Lachmann. Frankfurt am Main: Suhrkamp, 1991, pp. 74–110; See also Anselm Haverkamp. 'Notes on the Dialectical Image (How Deconstructive Is It?)' In: *Diacritics* 22.3/4 (1992), pp. 69–80, p. 71.

²⁰Menke, 'Nach-Leben im Zitat', p. 74 (my translation).

Menke's text emphasises the double movement inherent to the act of citation. The citation is 'read-out of' its context and 'cited into' a new one.²¹ In order to become manageable, the citation needs to be torn out of its con-text, the old text disrupted. This destructive gesture that accompanies the citation is simultaneously the condition for its preservation – for the text to be remembered, or in the words of Benjamin, rescued.

The dialectical image as a form of historiographical presentation can be understood as a citation of the past. It becomes historical only in the very moment in which it is actualised, that is, cited by the present and into the present. 'Actualisation', not progress, is the 'founding concept' of the dialectical image.²² Through this citation, the past becomes simultaneous with the present con-text.²³ Benjamin writes:

For the historical index of the images not only says that they belong to a particular time; it says, above all, that they attain to legibility only at a particular time. . . . Every present day is determined by the images that are synchronic with it: each 'now' is the now of a particular recognizability.²⁴

Put simply, the temporal nucleus that characterises the dialectical image consists of the fact that the historical object which I see is already the result of a particular constellation – namely the constellation formed between the historical object and the moment from which I look at it. We cannot separate the historical object from the constellations it forms with the time it is looked at, for it only appears to us in this constellation.

From the discussion of the dialectical image as a historical citation, which I will develop in more detail in the following, we can extract two directions of inquiry. The first concerns the way we look at and construct the historical object – in our case, the Industrialist Trials. The second relates to the relationship between the historical object and the moment in the present from which we look at it.²⁵ I will expand on both aspects in turn.

developing the image

In a note titled 'The Dialectical Image', Benjamin again compares history to the structure of a text. He writes:

²¹Menke, 'Nach-Leben im Zitat', p. 89.

²²Benjamin, *Arcades Project*, p. 460 (N 2, 2).

²³Menke, 'Nach-Leben im Zitat', p. 90.

²⁴Benjamin, *Arcades Project*, 463 (N3, 1).

²⁵Sami Khatib, in a similar vein, suggests to read the temporal nucleus at the heart of the dialectical image as pointing towards two complementary directions of inquiry. Sami R. Khatib, 'Walter Benjamin and the Subject of Historical Cognition'. In: *Annals of Scholarship* 21.1/2 (2014), pp. 23–42, p. 29.

If one looks upon history as a text, then one can say of it what a recent author has said of literary texts – namely that the past has left in them images comparable to those registered by a light-sensitive plate.²⁶

If the past contains images that are comparable to those captured by a photographic negative, the presentation of these images – their exhibition – demands that they be developed. In the same quote, Benjamin suggests that it is the task of the historian to ‘read that which was never written’.²⁷ David Ferris provides an insightful exploration of Benjamin’s threefold comparison between history, literature and photography in this quote.²⁸ He draws attention to a line from Benjamin’s essay on *The Work of Art in the Age of Mechanical Reproducibility*, in which Benjamin states that ‘from the photographic plate . . . a multiplicity of prints is possible; the question of an authentic print has no sense’.²⁹ Ferris consequently observes that

[t]his definition privileges what is produced from the negative, since it is the print that possesses the ability to exhibit what is present in the negative – not with respect to what is depicted in the negative . . . , but with respect to its purpose: to produce reproductions that have no priority in relation to one another and therefore no claim to authenticity since each is as authentic as the other.³⁰

The representation of this image – the print – is, to borrow Menke’s words, a ‘repetition», a «second present», the after-life of that which never existed as such’.³¹ Or, to say it with the words of Ferris: ‘to exhibit historical significance is, for Benjamin, to exhibit a relation to the past that is also a deviation from that past’.³²

That is, the historical meaning of a historical object is not related to its adequate representation, to the similarity of the print to the negative, but from the meaning the object acquires in relation to the present. This is why Benjamin speaks of a *dialectical* image. Such a construction of the historical object acquires meaning only in so far as it is endowed with something that could not have been seen by those that presented the moment. This is also why he emphasises that it is important to

²⁶Walter Benjamin. *Selected Writings. Volume 4, 1938-1940*. Cambridge, Massachusetts: Belknap Press, 1996, p. 405.

²⁷Benjamin, *Selected Writings*, p. 405.

²⁸David S. Ferris. ‘The Shortness of History, or, Photography in Nuce: Benjamin’s Attenuation of the Negative’. In: *Walter Benjamin and History*. Ed. by Andrew E. Benjamin. London and New York: Continuum, 2005, pp. 19–37.

²⁹Walter Benjamin. ‘The Work of Art in the Age of its Technological Reproducibility’. In: *The Work of Art in the Age of its Technological Reproducibility, and Other Writings on Media*. Ed. by Michael W. Jennings, Brigid Doherty, and Thomas Y. Levin. Cambridge, Massachusetts: Belknap Press, 2008, pp. 19–55, pp. 24–25.

³⁰Ferris, ‘Shortness of History’, p. 29.

³¹Menke, ‘Nach-Leben im Zitat’, p. 85 (my translation).

³²Ferris, ‘Shortness of History’, p. 28.

differentiate the construction of a historical state of affairs from what one customarily calls its 'reconstruction'. The 'reconstruction' in empathy is one-dimensional. 'Construction' presupposes 'destruction'.³³

If Benjamin's dialectical image repeats the logic of citation, it means that we have to rip the historical object out of its context in order to make it meaningful for the present. Rather than inserting the historical object into a linear historical development that pretends to connect past and present, the movement of history would need to be identified within the historical object itself. With the words of Walter Benjamin:

The fore- and after-history of a historical phenomenon [Tatbestand] show up in the phenomenon itself on the strength of its dialectical presentation. What is more: every dialectically presented historical circumstance [Sachverhalt] polarizes itself and becomes a force field in which the confrontation between its fore-history and after-history is played out.³⁴

Benjamin is clear about that which emerges to us as fore- and after-history within the historical object depends on the moment from which we look at it. He continues:

It [the past, H.F.] becomes such a field insofar as the present instant interpenetrates it. . . . And thus the historical evidence polarizes into fore- and after-history always anew, never in the same way.³⁵

To look at a moment historically in these terms means to take the historical object out of its context and search for the tensions and contradicting forces as they manifest themselves in it. These forces might become recognisable only years later. The dialectical image is an image developed with the help of time.

When I look at the Industrialist Trials in the next section, I will be focusing on the 'force field' that crystallises in the trials. For this purpose, I will be extracting the Industrialist Trials from that narrative of corporate accountability into which they have been inserted through the logic of precedent, focusing instead on the

historical confrontation that makes up the interior (and, as it were, the bowels) of the historical object, and into which all the forces and interests of history enter on a reduced scale.³⁶

thesis, antithesis, awakening

Above I indicated two directions of research that can be associated with the dialectical image as a historiographical method. The first concerned the

³³Benjamin, *Arcades Project*, p. 470 (N7,6).

³⁴Benjamin, *Arcades Project*, p. 470 (N7a,1).

³⁵Benjamin, *Arcades Project*, p. 470 (N7a,1); Similarly Benjamin, *Arcades Project*, p. 471 (N7a,8): 'It is the present that polarizes the event into fore- and after-history.'

³⁶Benjamin, *Arcades Project*, p. 475 (N10,3).

construction of the historical object as a dialectical image. The historical object, this citation of history, acquires its meaning only in constellation with the text of the present. This citation into the present context is the second movement associated with the reading of history as dialectical image: 'The true method of making things present is to represent them in our space (not to represent ourselves in their space)'.³⁷

As we have seen in the previous chapter as well as at the beginning of this section, Benjamin is interested in the disruptive potential of historiography. The task he sets the historiographer in the *Theses* is to grasp a particular constellation between past and present that is 'saturated with tensions'. In the *Arcades Project*, Benjamin compares this critical effect of the citation to the moment of awakening, in which the experience of the dream – still present but about to float away – alters our perception of the present:

The utilisation [Verwertung, H.F.] of dream elements in the course of waking up is the canon of dialectics. It is paradigmatic for the thinker and binding for the historian.³⁸

It is the notion of awaking that substitutes the one of synthesis in Benjamin's dialectics. The dialectical presentation of history does not lead to any insights about the movement of history, but can only aim to achieve an experience similar to the one of the moment of awakening, in which the images of the past – similar to dream images – alter our understanding of the present.³⁹ Because in the dialectical images past and present are not connected through continuous historical time, but rather through a temporal constellation, he speaks of them as a 'dialectics at a standstill'.⁴⁰ Against the backdrop of this second aspect of the dialectical image, to look at the Industrialist Trials as a historical citation requires us to pay attention to the tensions, differences and alterations that emerge between the historical object and the present. In other words, it means to conceive of the historical object as a source of critique.

The text 'written with invisible ink' into which I wish to cite the Industrialist Trials is given by the primary concern of this thesis, namely my critique of ICL as a concept of historical justice, and the way in which it addresses economic dimensions of state crime. In Chapter Two, I showed that ICL jurisprudence is indebted to political liberalism in so far as it pretends that the choice for liberal democracy is politically neutral. Such a perspective claims that liberal democratic institutions only constitute the framework in which deliberation concerning the right societal order can take place. Contesting this statement, I argued that political liberalism is not *only* political (that is, concerning only the institutions of the state), but *already* political in that it presupposes a particular relationship between the state and the economy. It

³⁷ Benjamin, *Arcades Project*, p. 206 (H2,3).

³⁸ Benjamin, *Arcades Project*, p. 464 (N4,4) (translation amended).

³⁹ Benjamin, *Arcades Project*, p. 464 (N4,4).

⁴⁰ Benjamin, *Arcades Project*, p. 462 (N2a,3).

makes a statement regarding what is considered to belong to the realm of the political.⁴¹ I furthermore indicated that recent attempts to include the economic in the picture are circumscribed by this very separation. That is, both economic dimensions of state crime and the way they should be addressed in the process of transition are not discussed as a problem of democracy.

Viewed from this perspective, the tension that emerges between the historical moment of the industrialist trials and contemporary corporate accountability discourse is precisely the (lack of) awareness of the contested nature of the notion of democracy, and the role the relationship between the state and the economy plays in guaranteeing a democratic future.

4.2 Mapping the Force Field

In line with the methodological reflections just set out, this section introduces the Industrialist Trials. The fore-history that materialised in the trials, I will suggest, is the Allies' unanimous conviction that World War II would not have been possible without the support of German industry and that an 'economic' case before the IMT was necessary to demonstrate the devastating effects that German state-sponsored capitalism had had on people's lives throughout Europe.

This fore-history to the Industrialist Trials contrasts with the after-history that is reflected in the way the trials eventually came into existence. In accordance with the general reorientation of a strategy of dismantling the German industry towards one supporting its *reconstruction*, the plan to prosecute economic actors also started to lose support and came to halt in 1947.⁴² What we know as the Industrialist Trials today is the eventual manifestation of the tensions between the conviction that the responsibility of the German economy for the crimes committed during World War II needed to be addressed and the fear that, against the backdrop of the emerging competition between East and West, any prosecution of economic actors could be perceived as anti-capitalist.

the economic case at the International Military Tribunal (IMT)

Towards the end of the war, as Kim Priemel highlights,

there was consensus that German economic might had allowed the Nazi regime to wage an all-out war of aggression thanks to the active participation of big business in the so-called master plan to dominate Europe, from whose implementation industry and finance had hoped to benefit.⁴³

⁴¹See Chapter Two, subsections starting p. 53 and p. 64.

⁴²Wiesen, *West German Industry*, p. 67.

⁴³Priemel, "A Story of Betrayal", p. 91; see also Kim Christian Priemel. *The Betrayal. The Nuremberg Trials and German Divergence*. Oxford: Oxford University Press, 2016, Chapter Six; Bush, 'The Prehistory of Corporations', p. 1107; Wiesen, *West German Industry*, p. 3.

The economic dimension of the war and the role played by cartels in organising the economy was a central aspect in conceiving the political measures to be adopted in a defeated Germany. In this vein, the so-called Potsdam Agreement adopted by the three heads of government of the USSR, USA, and UK at the beginning of August 1945 established among the 'principles to govern the treatment of Germany in the initial control period' a general de-industrialisation, in particular with respect to war-related production and de-concentration of the German industry:

At the earliest practicable date, the German economy shall be decentralized for the purpose of eliminating the present excessive concentration of economic power as exemplified in particular by cartels, syndicates, trusts and other monopolistic arrangements.⁴⁴

Equally as part of the Potsdam Agreement, the three governments reaffirmed 'their intention to bring these criminals to swift and sure justice' with the first list of defendants to 'be published before 1st September'.⁴⁵ The intention to bring the major war criminals before a court had been already discussed during the war, and a few days after the Potsdam Conference the Allies adopted the 'Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis' in London. Leo Drachsler, one of the US American prosecutors, presented the inner nexus between the policies adopted by the allied forces as follows:

German industry has been condemned by the flat declaration in the Potsdam Agreement, providing for total dismemberment of the cartel system. The Decartelization Division at OMGUS [Office of Military Government, United States, H.F.] is the agency executing this political judgment. It remains for us to complete this picture by establishing in judicial proceedings the guilt of representative German economic institutions.⁴⁶

In line with the conviction that German big business had been responsible for the rise of Hitler and his ability to wage war, it was decided that the IMT should also deal with the responsibility of economic actors.⁴⁷ Justice Robert H. Jackson, head of the US prosecution office, had already written about the topic to the President in June 1945, a month after his appointment as Chief of Counsel:

[w]e will accuse a large number of individuals and officials who were in authority in the government, in the military establishment, including the

⁴⁴'Potsdam Conference. Protocol of Proceedings Approved at Berlin (Potsdam) August 2, 1945'. In: *Treaties and Other International Agreements of the United States of America 1776-1949*. Ed. by Charles I. Bevans. Washington, DC: United States Government Printing Office, 1971, pp. 1206-1237, p. 1212.

⁴⁵Bevans, 'Potsdam Conference', p. 1212.

⁴⁶Quoted in Priemel and Stiller, *NMT*, p. 106.

⁴⁷For a discussion on the Industrialist Trials as part of the general political and economic programme of the Allies for post-war Germany, see Wiesen, *West German Industry*, especially Chapter Two and Chapter Seven.

General Staff, and in the financial, industrial, and economic life of Germany who by all civilized standards are provable to be common criminals.⁴⁸

A first list of defendants included only Walter Funk (Reich Minister for Economic Affairs), Albert Speer (Minister of Armaments and War Production), and Hjalmar Schacht (President of the Reichsbank).⁴⁹ Later, the Allies added Gustav Krupp to the list of defendants to be tried at Nuremberg, agreeing that the IMT would be incomplete if no individual businessmen were to be accused.⁵⁰ Gustav Krupp was director of the Krupp conglomerate which had come to stand for the support of the war by German big business. As the judges gave way to the motion of the defense council that Gustav Krupp was not healthy enough to stand trial, the allied prosecutors asked to include his son Alfried Krupp. This demand was rejected by the IMT, so that the trial took place without any businessmen in the dock.⁵¹ Although Gustav Krupp was finally not indicted, charges against him were still read out in indictment on day four of the IMT.⁵²

Given the failure to include the economic case at the IMT, the Allies discussed the possibility to have a second IMT that would focus on the responsibility of the industrialists.⁵³ However, the idea of a second IMT was soon rejected by the British Foreign Office that feared that ‘the trial may well deteriorate into a wrangle between the capitalist and communist ideologies’⁵⁴ and that it could be anti-capitalistic in appearance.⁵⁵ Jackson, in his last report, favored individual trials, writing that

[t]he quickest and most satisfactory results will be obtained, in my opinion, from immediate commencement of our own cases according to plans which General Taylor has worked out in the event that such is your decision.⁵⁶

By July 1946, it became clear that there would be no second international tribunal but that the occupying powers would instead conduct individual trials in the respective zones based on Control Council Law N° 10, already mentioned above.⁵⁷

⁴⁸Robert H. Jackson. *Report to the President on Atrocities and War Crimes*. United States Department of State Bulletin. Washington, 1945.

⁴⁹Matthew Lippman. ‘War Crimes Trials of German Industrialists: The “Other Schindlers”’. In: *Temple International and Comparative Law Journal* 9.2 (1995), pp. 173–267, p. 176.

⁵⁰Priemel and Stiller, *NMT*, p. 95.

⁵¹There is disagreement in the scholarship as to whether the inclusion of the elder Krupp was due to a misunderstanding between the Allies or a conscious decision, see Wiesen, *West German Industry*, p. 69; Bush, ‘The Prehistory of Corporations’, pp. 1111–1112.

⁵²Baars, ‘Capitalism’s Victors Justice’, p. 172.

⁵³Bush, ‘The Prehistory of Corporations’, p. 1110.

⁵⁴Quoted after Wiesen, *West German Industry*, p. 69.

⁵⁵Priemel and Stiller, *NMT*, p. 95; Baars, ‘Capitalism’s Victors Justice’, p. 178.

⁵⁶Robert H. Jackson. ‘Final Report to the President Concerning the Nurnberg war Crimes Trial’. In: *Temple Law Quarterly* 20 (1946), pp. 338–344, p. 341.

⁵⁷For a detailed reconstruction of the decision-making process based on memos, see Bush, ‘The Prehistory of Corporations’, pp. 1115–1118 and pp. 1123–1128.

subsequent trials

To write about how the 'economic case' was taken up in the subsequent trials presupposes a decision about which cases can be considered to touch upon the economic dimension of World War II. As stated above, it was the intention of the Allies to give a legal voice to their conviction, that Hitler could only have waged war thanks to the financial support of German big business, which was accused of having profited from cartelisation practices, spoliation in the occupied territories and the use of forced labour. For the Allies, the problem thus was not only the responsibility of individual businessmen for crimes committed under Nazi rule, but also the economic policies adopted by the government and the role of the state in fostering monopolist structures. The link between economic practices, the state and state-backed violence was at stake.

From this perspective, it would make sense to include trials investigating the responsibility of state officials that were in charge of planning the economic policies and structure of the Reich into the group of subsequent trials that take up the 'economic case' from the IMT. Here, however, I will focus on the trials against private actors. The reason for this is that I am interested in the process of translation needed in order to link the business activity of the economic actors to systematic crimes carried out with the help of the state apparatus.

The best-known trials against German industrialists are those conducted by the US American prosecutorial team. When it became evident that no second international tribunal would take place, Taylor and his team started to work on the preparation for individual trials against German industrialists. A document which was circulated by the prosecution team in August 1946 listed the names of almost 5000 industrialists that could possibly be charged with war crimes.⁵⁸ However, at no point did the US intend to carry out a large-scale and long-term trial programme, and the idea seems to have been that most of the industrialists should be dealt with by German denazification courts.⁵⁹

Once the plan for a second international tribunal was discarded, the decisions as to who should be prosecuted were made on two grounds. The first one, as Priemel and Stiller point out, was pragmatism. The team working on the indictment chose those cases on which some work had already been done. A second criterion, the authors add, was 'the paradigmatic and explanatory potential of the tableau of defendants'.⁶⁰ At that stage, in addition to outstanding industrialists, the prosecutorial team was still investigating individuals linked to the Dresdner Bank, Reichswerke Hermann Göring and Vereinigte Stahlwerke AG (United Steelworks of Germany). In the end, due to time pres-

⁵⁸Bush, 'The Prehistory of Corporations', p. 1132.

⁵⁹Bush, 'The Prehistory of Corporations', pp. 1133-1134.

⁶⁰Priemel and Stiller, *NMT*, p. 97.

sure and a reduced budget, there were cases against individuals from three enterprises – the so-called Flick, Krupp and IG-Farben cases. Furthermore, Karl Rasche from the Dresdner Bank was prosecuted as part of the so-called Ministries case.⁶¹

The first trial to take place was the one against Friedrich Flick and five other leading officials of the Flick combine. It was opened on 19th April 1947. All six defendants were indicted on the counts ‘war crimes and crimes against humanity, as defined by Article II of Control Council Law N° 10’.⁶² More specifically, they were accused of the use of slave labour (count one) and the plunder of public and private property and spoliation (count two).⁶³ Just over eight months after the indictment, on 22nd December 1947, the tribunal read out its judgment. Three of the defendants were found guilty and sentenced to seven (Friedrich Flick), five (Otto Steinbrinck) and two-and-a-half (Bernhard Weiss) years of prison. The other defendants (Odilo Burkart, Konrad Kaletsch and Hermann Terberger) were acquitted.⁶⁴

The second of the US-led trials investigated the responsibility of 24 leading officials of the Interessensgemeinschaft Farbenindustrie AG (IG Farben). On 3rd May 1947 Taylor filed the indictment with the military office responsible for the trials. Just as in the Flick Case, the defendants were accused of crimes against humanity and war crimes. In addition, under count one the defendants were indicted with having

through the instrumentality of Farben and otherwise . . . participated in planning, preparation, initiation, and waging of wars of aggression and invasions of other countries.⁶⁵

That is, the tribunal was not only fathoming the responsibility of the industrialists for business activities during the war, but for bringing about the war. What was at stake was the economic rationale of World War II. As we will see in the next subsection, the challenge the prosecution faced was to link the activities of the businessmen to the planning and initiation of a war, a decision that was predominantly associated with the NS Party. The tribunal did not follow the argument of the prosecution and found the defendants not guilty of waging aggressive war. Still, thirteen of them were sentenced for having

⁶¹Bush, ‘The Prehistory of Corporations’, p. 1173.

⁶²Nuernberg Military Tribunals N.M.T. *Trials of War Crimes before the Nuernberg Military Tribunals Under Control Council Law Nr. 10. October 1946 - April 1949. The Flick Case.* Vol. VI. Washington: United States Government Printing Office, 1952, p. 13.

⁶³Hermann Terberger was the only defendant not accused of plunder and spoliation. N.M.T., *NMT vol. VI*, p. 13.

⁶⁴N.M.T., *NMT vol. VI*, p. 1223; On the Flick case Axel Drecol. ‘Der Auftakt der Industriellen-Prozesse: Der Fall 5 gegen die Manager des Flick-Konzerns’. In: *NMT*. ed. by Kim Christian Priemel and Alexa Stiller. Hamburg: Hamburger Edition, 2013, pp. 376–404.

⁶⁵Nuernberg Military Tribunals N.M.T. *Trials of War Crimes before the Nuernberg Military Tribunals Under Control Council Law Nr. 10. October 1946 - April 1949. IG Farben.* Vol. VII. Washington: United States Government Printing Office, 1952, p. 14.

participated in war crimes and crimes against humanity and received prison sentences ranging from one-and-a-half to eight years.

The third case that explicitly dealt with the responsibility of the German industrialists was *United States vs. Alfried Krupp, et.al.* The hearings started on 17th November 1947. The twelve defendants were charged with Crimes Against Peace, War Crimes (Plunder and Spoilation), Crimes Against Humanity (Slave Labour), Membership in a Criminal Organisation as well as Conspiracy. Eleven of them received prison sentences between six and twelve years for War Crimes and Crimes Against Humanity, while Karl Pfirsch was acquitted. Furthermore, the tribunal ordered the confiscation of both the real and personal property of Alfried Krupp von Bohlen und Halbach.⁶⁶

The fact that only three trials of industrialists were listed under the subject 'economic' in the official publication of the materials of the 'Trials of War Criminals before the Nuremberg Military Tribunals' has resulted in the trial against Karl Rasche, member of the board of the Dresdner Bank since 1935 and chief executive officer from 1942 onwards, often being forgotten.⁶⁷ The Dresdner Bank had been at the centre of the investigations carried out by the OMGUS, and it was initially planned that it would get its own case.⁶⁸ However, as official support for the punitive approach towards Germany – and the 'economic case' in particular – started to ebb away, the prosecutors adopted a mix and match strategy for the last tribunal, usually called the 'Ministries case'. The case brought together four former ministers as well as undersecretaries of state from the German Foreign Office and the Home Office. Furthermore, it dealt with the responsibility of five representatives of the public and private economy – Rasche is one of them – as well as of two high-ranking SS officials.⁶⁹ Rasche was found guilty of War Crimes as well as membership in a criminal organisation (he had been a member of the SS) and sentenced to seven years in prison.

The US was not the only occupying power that tried industrialists. Following the decision not to hold a second international military tribunal, the French military government demanded the extradition of Hermann Röchling to bring him and other directors of the Röchling enterprises before the General Tribunal. The General Tribunal was the highest of the military courts in the

⁶⁶Nuernberg Military Tribunals. *Trials of War Crimes before the Nuernberg Military Tribunals Under Control Council Law Nr. 10. October 1946 - April 1949. The Krupp Case.* Vol. IX. Washington: United States Government Printing Office, 1952, p. 1450.

⁶⁷Ralf Ahrens. 'Die nationalsozialistische Raubwirtschaft im Wilhelmstraßen-Prozess'. In: NMT. ed. by Kim Christian Priemel and Alexa Stiller. Hamburg: Hamburger Edition, 2013, pp. 353–375, p. 357.

⁶⁸United States Office of Military Government for Germany. *Ermittlungen gegen die Dresdner Bank, 1946.* Frankfurt a.M.: Zweitausendeins, 1986.

⁶⁹On the 'economic case' within the Ministries case, see Ralf Ahrens. 'Der Exempelkandidat. Die Dresdner Bank und der Nürnberger Prozes gegen Karl Rasche'. In: *Vierteljahrshefte für Zeitgeschichte* 52 (2004), pp. 637–670; Ahrens, 'Nationalsozialistische Raubwirtschaft'; For a general overview on the Ministries Case, see Dirk Pöppmann. 'Im Schatten Weizsäckers? Auswärtiges Amt und SS im Wilhelmstraßen-Prozess'. In: NMT. ed. by Kim Christian Priemel and Alexa Stiller. Hamburg: Hamburger Edition, 2013, pp. 320–352.

French Zone of Occupation – in Rastatt.⁷⁰ Hermann Röchling, the head of the firm, joined the NSDAP in 1935 and was a board member of most German ironworks during Nazi rule. As of 1940, he was also the commissioner general (*Generalbeauftragter*) in charge of the administration of all ironworks in Alsace-Lorraine (Départements Morselle and Meurthe-et-Morselle).⁷¹

The French had already convicted Hermann Röchling and his brother, Robert Röchling, in 1919 for spoliation and willful damage to property during World War I, but the appeals court had repealed the decision on formal grounds.⁷² Following World War II, Hermann Röchling and five other managers were accused of having ‘encouraged and contributed to the preparation and conduct of the wars of aggression’, having ‘helped to bring about the economic enslavement of the occupied countries’ as well as of having participated ‘in systematic pillaging of public and private property’.⁷³ They were also indicted for having ‘employed under compulsion nationals from the countries then occupied, prisoners of war, and deported persons, who were subjected to ill-treatment at his orders or with his consent’.⁷⁴ Ernst and Hermann Röchling were both found guilty of Crimes Against Peace and War Crimes, with Hermann Röchling furthermore being convicted of Crimes Against Humanity, as were two other managers.⁷⁵ Prison sentences ranged from three to ten years. Ernst and Hermann Röchling were additionally deprived of their property.⁷⁶

Although a substantial part of the coal and steel manufacturing industry was located within the British Zone of Occupation, the British did not, contrary to the French and the US, conduct any trials against industrialists *after* the idea of a second international tribunal was discarded in 1946. However, in October and November 1945, the British had already arrested 83 industrialists in the Upper Rhine and Ruhr regions and brought them to Düsseldorf central jail, from where they moved on to other internment camps.⁷⁷ This mass arrest was coordinated with the other allied forces and formed part of the plan to denazify the industry, which was agreed upon at the Potsdam Conference. The denazification measures were still carried out under the impression that German industrialists bore responsibility for the Aggressive War and War Crimes and thus needed to be held to account. By January 1946, ‘over a

⁷⁰Françoise Berger and Joly Hervé. ‘Fall 13»: Das Rastatter Röchling-Verfahren’. In: *NMT*. ed. by Kim Christian Priemel and Alexa Stiller. Hamburg: Hamburger Edition, 2013, pp. 464–490, p. 470.

⁷¹Claudia Moisel. ‘Résistance und Repressalien. Die Kriegsverbrecherprozesse in der französischen Zone und in Frankreich’. In: *Transnationale Vergangenheitspolitik*. Ed. by Norbert Frei. Göttingen: Wallstein, 2006, pp. 247–282, p. 269.

⁷²Berger and Hervé, ‘Fall 13», pp. 465–466.

⁷³For the individual responsibilities as indicted by the prosecution, see Nuernberg Military Tribunals N.M.T. *Trials of War Crimes before the Nuernberg Military Tribunals Under Control Council Law Nr. 10. October 1946 - April 1949. The Ministries Case*. Vol. XIV. Washington: United States Government Printing Office, 1952, pp. 1072–1074.

⁷⁴N.M.T., *NMT vol. XIV*, pp. 1072–1074.

⁷⁵N.M.T., *NMT vol. XIV*, pp. 1095–1096.

⁷⁶Cf. tabular summary of sentences in Priemel and Stiller, *NMT*, p. 790.

⁷⁷Wiesen, *West German Industry*, p. 53.

thousand high-level officials had been removed from their positions' in the coal industry.⁷⁸ The denazification trials of German industrialists in the British Zone were conducted mainly by German courts. The arrested industrialists went through the denazification procedures rather smoothly and left the detention camps shortly after their arrest.⁷⁹

Also in the period immediately after the war, in May 1946, the British presented a case against Bruno Tesch, owner of a firm called Tesch & Stabenow (Testa), and two other high-ranking officers in the firm, Karl Weinbacher and Joachim Dosihn, 'of having supplied poison gas used for killing allied nationals interned in concentration camps, knowing that it was so to be used'.⁸⁰ Because of the name of the poison gas, this case is often referred to as the 'Zyklon B' case. After a swift trial in Hamburg that lasted 8 days, Tesch and Weinbacher were found guilty of war crimes and sentenced to death, while Dosihn was acquitted.⁸¹ Both Tesch and Weinbacher were hanged.

The heavy sentence of this early trial, and the fact that the sentence was carried out at all, stands in stark contrast to the sentences rendered by the US and French tribunals. Not only were the sentences rather lenient when compared with the death sentence of the British tribunal, but also very few of the industrialists convicted by the Americans and the French ever finished their sentence at all. John McCloy, US High Commissioner from 1949 onwards, created an 'Advisory Board on Clemency for War Criminals' which was to reconsider the sentences dictated by the US American tribunals. Eventually, Krupp and Flick were amnestied and their property restituted.⁸²

McCloy's push for amnesties for the imprisoned industrialists can be linked, according to Jonathan Wiesen, to two factors that are indicative of the changing political circumstances. First, the fact that most West Germans supported the Schuman Plan was taken by the Americans as 'a hopeful sign that German industry was now committed to peaceful competition and cooperation with its neighbors'.⁸³ Second, Wiesen highlights, the Korea War increased the demand for coal and steel and allowed German industry to present itself as a necessary ally in the fight against communism.⁸⁴ Against the backdrop of the Paris Treaty and the creation of the European Coal and Steel Community, the French released Röchling in 1951 and restored his property rights in 1956.⁸⁵ In addition to these wider political circumstances, German industry was quick

⁷⁸Wiesen, *West German Industry*, p. 67.

⁷⁹Bush, 'The Prehistory of Corporations', p. 1134.

⁸⁰United Nations War Crimes Crimes Commission, ed. *Law Reports of Trials of War Criminals*. London, 1947, p. 93.

⁸¹United Nations War Crimes Crimes Commission, *Law Reports I*, p. 102.

⁸²Wiesen, *West German Industry*, p. 214.

⁸³The Schuman Plan proposed to place Franco-German production of coal and steel under one common High Authority and lead, in April 1951, to the creation of the European Coal and Steel Community. See Wiesen, *West German Industry*, p. 209.

⁸⁴Wiesen, *West German Industry*, p. 212.

⁸⁵Berger and Hervé, '»Fall 13«, p. 488.

to reorganise itself to the point of financing an office that would coordinate the lobbying work on behalf of the industrialists that faced legal action.⁸⁶

small-scale history

In the first section of this chapter I suggested that with Benjamin, to look at the Industrialist Trials as a historical object requires one to zoom in on the small-scale history as it crystallises in the trials themselves. In line with this proposal, this section introduced the Industrialist Trials by focusing on the diverging historical forces and interests that enter the trials on a reduced scale. The trials, I argued, speak to their 'fore-history' in so far as they owe their very existence to the conviction that World War II and the crimes committed by the German state would not have been possible without the active participation of German big business.

However, the fact that after the exclusion of Krupp from the dock at the IMT the Allies decided against a second international tribunal reflects the changing political situation: the perceived threat of communism started to acquire more importance than worries about the violence of capitalism. As tensions with the Soviet Union grew, the Western Allies feared that the trials against German industrialists could be understood as anti-capitalistic at a time in which they needed to rescue capitalism's reputation. In hindsight, the lenient sentences, the amnesties and the restitution of property appear as the first signs of the after-history of Western Germany: the so-called social market economy, or *Soziale Marktwirtschaft*. This societal order was to demonstrate that capitalism is not a threat to, but a pre-condition for a stable and functioning democratic society.

The after-history becomes even more apparent once we turn to the legal reasoning at work in the trials. I conceive of the legal arguments presented by the prosecution and put forward by the judges to justify their decision as the 'bowels' of the Industrialist Trials. If dissected, they allow us to see the mirrors that make up the kaleidoscope of the politico-legal order that constructs the image of the past. These mirrors, as I will argue in the following section, organise the representation of the events as well as the responsibility of the accused according to liberal ontological assumptions about the state and the economy, thereby constructing the Nazi state as a negative reference for the post-war order.

4.3 The 'bowels': dissecting the legal arguments

In the previous chapter, I argued that the moment of judgment in a criminal trial encompasses two movements. It joins the construction of the events or actions that are under consideration with a statement concerning their legal

⁸⁶Wiesen, *West German Industry*, pp. 205-207.

nature and the legal responsibility of the accused. This drawing of a line is a performative act that 'masquerades' as a constative, in so far as it claims to merely implement a distinction which it in fact brings about in the moment of adjudication.⁸⁷ The first sentence of the opening statement given by Telford Taylor, head of prosecution in the Flick case, is an excellent example of this move:

The responsibility of opening the first trial of industrialists for capital transgressions of the law of nations imposes on the prosecution, above all things, the obligation of clarity. The defendants owned and exploited enormous natural and man-made resources and became very wealthy, but these things are not declared as crimes by the law under which this Tribunal renders judgment. The law of nations does not say that it is criminal to be rich, or contemptible to be poor. . . . The defendants were powerful and wealthy men of industry, but that is not their crime. We do not seek here to reform the economic structure of the world or to raise the standard of living. We seek, rather, to confirm and revitalize the ordinary standards of human behavior embodied in the law of nations.⁸⁸

What Taylor refers to as *confirming* and *revitalizing* the 'ordinary standards of human behavior embodied in the law of nations' must be read as: the tribunal *creates* the standards in *deciding* which aspect of the behaviour of the industrialists is considered to be a violation of the law of nations. Or, to re-phrase Kirchheimer's expression already invoked in the introduction: the tribunal introduces a distinction between those business practices that reflect the 'ordinary standards of human behavior embodied in the law of nations' on the one hand, and those that need to be considered criminal on the other.

corrupted capitalism

Contrary to what Taylor claims in the opening statement, in this section I will argue that the trials *are* involved in the 'reform the economic structure' in so far as they, in deciding the legal responsibility of the accused actors, produce an image of the past which comes to serve as a negative reference for the German post-war order. At the end of the previous chapter, I contended that the political function of such a negative reference constructed in criminal trials is that it clouds the foundational violence of the post-war order. That is, it clouds the contingent nature of the institutional arrangements by positing them as the necessary lesson to be learned from the violence experienced in the past.⁸⁹

This image of the past constructed in the Industrialist Trials, as we will see in more detail below, presents the involvement of the German industrialists in

⁸⁷For a rendering of political trials as sovereign performatives, see Chapters Two and Three in Ertür, 'Spectacles and Spectres. Political Trials, Performativity and Scenes of Sovereignty'.

⁸⁸N.M.T., *NMT vol. VI*, p. 31.

⁸⁹See discussion on pp.100–103

the crimes committed as the manifestation of a 'capitalism gone wrong'.⁹⁰ This wrong form of capitalism was specified as a monopoly capitalism, exemplified by cartels and syndicates that characterised the Nazi economy which was created with the aim of a self-sufficient industry for war. Monopoly capitalism and the consequent influence of the industrialists was, in the eyes of the judges, not so much the result of the logic of capital as such, but of a particular interaction and arrangement between the state and the economy.⁹¹

The idea of a capitalism gone wrong – namely a state-fostered monopoly capitalism – manifested itself in the legal strategy of the prosecutorial team that sought to establish the individual responsibility for crimes against peace by focusing on the manifestations of the association between the state and the economy: cartels, syndicates and self-governmental organisations of entire industry sectors. The American attitude towards German business following World War II, Priemel highlights, needs to be understood first and foremost against the backdrop of the anti-trust debate in the US and the Sherman Act of 1890. He writes:

The debate on cartels and monopolies ... assumed a morally and politically charged character, not by questioning capitalism but by differentiating between good and bad variants. Indeed, part of the rationale behind the attack on cartels was to defend the private-business/free-market model against attacks from leftist quarters.⁹²

Such a reading of the Nazi rule had important implications for the discussions regarding the economic and political organisation of the new German state. If cartels were problematic because a 'totalizing economy' served a 'total state', only a 'self-regulating economy', it was suggested, could be in agreement with democratic principles.⁹³ Importantly, the image of the 'totalizing economy' could be used to discredit the Nazi war economy as well as any centrally planned economy advocated by the left.

We will encounter similar arguments regarding the market as an organising mechanism for the economy – and its compatibility with democracy – again in a debate which is not revisited by Priemel, namely the ordoliberal studies of the Nazi state. As Foucault highlights in his analysis of the ordo-liberal renderings of World War II, it is the analytical distinction between the logic of capital on the one hand, and historical manifestations of capitalism on the other, that allowed a German state to be envisioned that was democratic *and* capitalist despite the supporting role of the industrialists in the Third Reich and World War II.⁹⁴ I will turn to these studies and their relevance for the foundation of the West German political and economic order in the next

⁹⁰I take this expression from Priemel, "A Story of Betrayal", p. 94.

⁹¹For a detailed development of this argument, see Priemel, "A Story of Betrayal".

⁹²Priemel, "A Story of Betrayal", pp. 76-77.

⁹³Priemel, "A Story of Betrayal", pp. 76, 79.

⁹⁴See Foucault, *The Birth of Biopolitics*, 165. See also discussion below, p. 144.

section. Together with the analysis of the legal arguments in this section, they show that what was at stake in the industrialist trials was the authorisation of a new juridico-political order.

aggressive war

The historian Elizabeth Borgwardt expressed her fascination about the fact that what 'Nuremberg' has come to stand for in the contemporary debate on corporate complicity 'would have been all but unrecognizable to our historical actors in real time'.⁹⁵ Rather than being primarily interested in holding to account individuals for human rights violations, the central concern of the prosecution was to outlaw aggressive war.

In this spirit, the prosecution charged the defendants in both *IG Farben* and *Krupp* with the 'planning, preparation, initiation and waging of wars of aggression and invasions of other countries'.⁹⁶ The charge of the individual commission of the crime against peace was complemented with a conspiracy charge. The defendants were accused of having

participated as leaders, organizers, instigators, and accomplices in the formulation and execution of a common plan or conspiracy to commit, or which involved the commission of, crimes against peace.⁹⁷

The prosecution thus needed to create a narrative that would be able to convince the tribunal, as well as the German and international public, of the responsibility of private individuals for bringing about the war. Josiah Dubois, who at the beginning of 1947 joined the prosecution team to spearhead the case against Farben, recalls a conversation he had with Mickey Marcus, a colonel from the War Crimes Division of the War Department, before travelling to Nuremberg. In this conversation, Dubois had suggested that in order to make their case, the prosecution would not necessarily have to show that the industrialists 'enjoyed pushing pins around on a map'.⁹⁸ 'Suppose', he continued, 'we could show that they had power far greater than any general in the field'.⁹⁹ According to Dubois, Marcus' objected to the War Crimes charge for industrialists, stating that

[m]aybe the Farben leaders were masters of economic warfare, but if I were a judge, I would want to know how you blame a war on men who weren't even in the Army or the Foreign Office.¹⁰⁰

⁹⁵Elizabeth Borgwardt. 'Bernath Lecture. Commerce and Complicity: Corporate Responsibility for Human Rights Abuses as a Legacy of Nuremberg'. In: *Diplomatic History* 34.4 (2010), pp. 627–640, p. 630.

⁹⁶For IG Farben, see N.M.T., *NMT vol. VI*, p. 14; for Krupp, see Nuernberg Military Tribunals, *NMT vol. IX*, p. 10.

⁹⁷For IG Farben, see N.M.T., *NMT vol. VI*, p. 59; for Krupp, see Nuernberg Military Tribunals, *NMT vol. IX*, p. 35.

⁹⁸Josiah E. DuBois. *The Devil's Chemists. 24 Conspirators of the International Farben Cartel who Manufacture Wars*. Boston: Beacon Press, 1952, p. 20.

⁹⁹DuBois, *Devil's Chemists*, p. 20.

¹⁰⁰DuBois, *Devil's Chemists*, p. 20.

With this statement, Dubois' interlocutor named a central challenge the prosecution faced with the aggressive war charges: how to link the industrialists to a decision and actions usually associated with the state and its military institutions?

Since the beginning of the preparation of the 'economic case' at Nuremberg, the prosecutors struggled to find a legal theory that could capture the political responsibility of the industrialists for waging war and translate it into some form of legal responsibility.¹⁰¹ German cartels – that is, the institutionalised cooperation between state and economy – did eventually provide the lens through which the prosecution tried to link the individual industrialists to the decision of waging war.

Taylor, head of prosecution, instructed his team to adopt the so-called 'institutional approach' which had been elaborated by team member Leo Drachsler, in order to conceive the responsibility of the accused. According to Drachsler the industrialists could be treated as a single organisation, a third pillar of power within the Nazi state next to the party and the military.¹⁰² If one was able to establish the complicity of the industry as organisation in the conspiracy to wage war, he argued, then one only would have to link the individual defendant to this third pillar. As Drachsler writes in a memorandum:

When the industrialists appear in the dock they will appear in their representative capacity, as officers of the leading German economic institutions, as corporate officials of their own organizations, and as individuals. They should be tried and convicted, not as representing merely 'German industry' or the 'German economic system', but in these three specific capacities.¹⁰³

Many commentators highlighted the influence of Franz Neumann's thoughts regarding this formulation of strategy for the US prosecution. Franz Neumann had left Germany following the victory of the Nazi Party in 1933 – first to the UK and then to the United States, where he worked with Max Horkheimer and others at the exiled Frankfurt Institute for Social Research until 1942.¹⁰⁴ In 1943, Neumann started working for the US government, namely in the Research and Analysis Branch of the Office of Strategic Services, where he prepared reports on Nazi Germany. Neumann had finished his *Behemoth* in 1942, and this study of the *Structure and Practice of National Socialism, 1933-1944* – as the subtitle reads – was widely circulated among his colleagues.¹⁰⁵

¹⁰¹For a detailed account of the discussions within the prosecution, see Bush, 'The Prehistory of Corporations'.

¹⁰²Quoted in Bush, 'The Prehistory of Corporations', p. 1158.

¹⁰³Drachsler, quoted in Bush, 'The Prehistory of Corporations', p. 1159.

¹⁰⁴See the introduction by Peter Hayes in Franz L. Neumann. *Behemoth. Struktur und Praxis des Nationalsozialismus 1933-1944*. Frankfurt am Main: Fischer Taschenbuch, 1994 (1942), pp. ix-x.

¹⁰⁵Neumann, *Behemoth*.

Neumann's central thesis was that the nature of National Socialism could not be captured by the usual idea of the state as one centralised political power, such as Hobbes' Leviathan.

Socialist constitutional theory ... clearly admits that it is not the state which unifies political power but that there are three (in our view, four) co-existent political powers, the unification of which is not institutionalized but only personalized.¹⁰⁶

According to Neumann, these co-existent powers were the party, the Wehrmacht, the bureaucracy and the monopoly economy which each functioned according to their own laws. Since National Socialism lacks any unification of political power, which in Neumann's view was necessary when speaking of a state, the Reich could only be defined as a non-state, the Behemoth.

Out of the various commentaries on the relationship between Neumann's analysis of National Socialism and the prosecutorial strategy at the industrialist trials, the work of Doreen Lustig stands out. She not only brings how Neumann's analysis of National Socialism coined the prosecutorial strategy into relief, but she also takes Neumann's idea of the non-state seriously.

She shows that neither the prosecution nor the judges followed Neumann's analysis right to the end. Neumann's 'leadership principle' was adopted and translated by the prosecution into the 'institutional approach'. The latter delineated the independent blocks of power before identifying the individuals that linked them. The prosecution did not, however, give up on the idea of a state as a centralised institution. It held on to the idea that the political institutions exercised the monopoly of force and constituted the locus of decision-making. Consequently, it needed to prove the influence of the economic actors on the party's decision-making if it wanted to argue their responsibility for aggressive war.

In *Farben*, the prosecution focused on a meeting that took place in February 1933 between Hitler and German industry representatives. In the opening statement, Dubois quotes from Hitler's speech:

Private enterprise cannot be maintained in the age of democracy; it is conceivable only if the people have a sound idea of authority and personality. ... It is not by chance that one person accomplishes more than the other. The principle of private ownership which has slowly gone into general conception of justice and has become a complicated process of economic life is rooted in this fact. ... It is, however, not enough to say we do not want communism in our economy.¹⁰⁷

Hitler's speech, Dubois continues, was followed by an appeal for funds for the Nazi party. He links the defendant Von Schnitzler, IG Farben's representative at the meeting, to the Nazi's rise to power. Von Schnitzler, Dubois holds,

¹⁰⁶Neumann, *Behemoth*, p. 469.

¹⁰⁷N.M.T., *NMT vol. VI*, p. 122.

went back and reported what he had heard to the other Farben officials. Farben contributed 400,000 marks for Hitler's campaign – the largest single contribution by any of the firms represented at the meeting. The payment was made on 27 February 1933. The next day the Reichstag building was set on fire, and on the same day Hitler and his Cabinet, utilizing the fire as a pretext, promulgated a decree suspending the constitutional guarantees of freedom.¹⁰⁸

The subtext of the strategy in *Farben* is one of converging interests of National Socialism and industrialists, and the conviction that Hitler could not have come to power without their financial support. They painted the image of one conspiracy to wage war: defendant Krauch, who had been 'put in charge of research and development in Goering's newly created Office for German Raw Materials and Synthetics' was seen as the link between the central planning of the war industry and IG Farben production.¹⁰⁹

In *Krupp*, the prosecution created a different conspiracy narrative. It described two different conspiracies to wage war, one 'Krupp' and one 'Nazi' conspiracy that eventually converged.¹¹⁰ Lustig summarises the difference between both prosecution strategies as follows:

In the Farben indictment, the defendants were depicted as part of the war machine, complicit in the grand scheme of war initiated by the Nazi government. In the Krupp indictment, the defendants resembled a group of conspiring pirates, ... a bunch of organized gangsters conspiring to achieve their aims by unlawful means.¹¹¹

In both cases, the prosecution failed to convince the Tribunals. The judges declared the defendants not guilty of aggressive war because in their view, the prosecution failed to prove that the defendants had any influence on policy-making. In line with the IMT judgment, both Tribunals argued that rearmament as such was not a crime and that only 'principals' could be held accountable for crimes against peace, but not 'followers'.¹¹² The *Farben* Tribunal sustained that

The evidence does not show that any of them know the extent to which general rearmament had been planned, or how far it had progressed at any given time.¹¹³

In *Krupp*, the Tribunal found that

¹⁰⁸N.M.T., *NMT vol. VI*, p. 124.

¹⁰⁹For a description of the conspiracy, see the indictment N.M.T., *NMT vol. VI*, pp. 22, 18-38; cf. summary in Lustig, *Doing Business*, pp. 990-993.

¹¹⁰Kim Christian Priemel. 'Der Sonderweg vor Gericht. Angewandte Geschichte im Nürnberger Krupp-Prozess'. In: *Historische Zeitschrift* 294.2 (2012), pp. 391-426, p. 408.

¹¹¹Lustig, *Doing Business*, p. 1000.

¹¹²Lustig, *Doing Business*, pp. 996-997.

¹¹³Nuernberg Military Tribunals. *Trials of War Crimes before the Nuernberg Military Tribunals Under Control Council Law Nr. 10. October 1946 - April 1949. IG Farben Case. Vol. VIII.* Washington: United States Government Printing Office, 1952, p. 1119.

the defendants were private citizens and noncombatants None of them had any voice in the policies which led their nation into aggressive war; nor were any of them privies to that policy. None had any control over the conduct of the war or over any of the armed forces.¹¹⁴

While the verdicts thus did not follow the indictments, in both cases the prosecution and judges presuppose – as Lustig highlights – the state's monopoly over violence 'through the insistence that only a close link to the policy-making realm can provide grounds for criminal responsibility'.¹¹⁵ For her, however, 'the notion of the state as a monolithic power that monopolizes violence is often a default-position in the theory of international legal responsibility' without necessarily reflecting the actual ability of the bureaucratic apparatus to exercise power.¹¹⁶

In line with the theoretical framework set out in the previous chapter, I wish to take the perceived mismatch between the images of the past brought up by the trials and the way in which they are organised by legal forms of responsibility as a point of entry for a critique of ICL. It is there where the confrontation with the past exposes the constructed nature of the concepts of legal responsibility; where these concepts, the mirrors of the kaleidoscope, are most visible.

One of these concepts that is starting to emerge is the state. It is construed by the prosecution and the judges in its Weberian definition, according to which the central quality of the modern state is its ability to 'successfully' claim 'the monopoly of legitimate force for itself'.¹¹⁷ Industrialists are, by definition, relegated to the private sphere. This ex-ante assumption of the separate realm of the state apparatus and the economy will become even more clear in the legal arguments which concern the industrialists' responsibility for Slave Labour as well as Plunder and Spoliation.

slave labour: necessity and moral choice

In November 1946, Drexel A. Sprecher, member of the US prosecution team and top deputy to Telfor Taylor, proposed to have a separate 'slave labour' case. This case was to take place in addition to the *Flick*, *Krupp* and *Farben* cases so that the dependency of the Nazi economy on forced labour would be demonstrated. Sprecher envisioned a case that, as Bush puts it,

crossed company boundaries and public-private lines, and would presumably need some theory to support the joinder of the defendants in a common case.¹¹⁸

¹¹⁴Nuernberg Military Tribunals, *NMT vol. IX*, p. 449.

¹¹⁵Lustig, *Doing Business*, p. 1001.

¹¹⁶Lustig, *Doing Business*, p. 968; Similarly Ahrens, 'Nationalsozialistische Raubwirtschaft', p. 375.

¹¹⁷Max Weber, 'Politics as Vocation'. In: *Max Weber's Complete Writings on Academic and Political Vocations*. Ed. by John Dreijmanis. New York: Agora, 2008, pp. 155–208, p. 156.

¹¹⁸Bush, 'The Prehistory of Corporations', p. 1170.

However, together with other plans for more trials addressing the economic dimensions of World War II, Sprecher's proposal got truncated when the US government signaled that it wanted the military tribunals to be finished as soon as possible.¹¹⁹ Still, in all three industrialist trials the defendants were charged with slave labour.

In the following brief account of the legal findings concerning the slave labour charge, I will focus on the grounds on which the judges invoke the defense of necessity in order to justify their verdicts. With the defense of necessity, the question regarding the extent to which the defendants had been able to decide freely when deploying slave labour was put on the table. In this context, as we will see, the ex-ante assumption about the state's monopoly of force is operative again in the process of defining the legal responsibility of the accused.

The *Flick* tribunal was the first to decide on the individual responsibility of the defendants for the use of slave labour. They had been charged for the deportation of workers and for 'deaths, inhuman treatment, and suffering of the workers while employed in enterprises under their control'.¹²⁰ Contrary to the IMT judgment, the *Flick* tribunal accepted the 'necessity' defense as an excuse for the employment of slave labour if certain criteria were met.¹²¹ The judges argued that only where the prosecution could prove that the defendants had taken initiative themselves, criminal responsibility for slave labour could be assumed. In line with this argument, two of the defendants, Weiss and Flick, were found guilty because they actively solicited Russian prisoners of war in order to be able to meet a self-set production quota for freight cars.

Similarly, the *Farben* tribunal, reviewing the legal reasoning in *Flick* and *Röchling*, agreed that

the defense of necessity is not available where the party seeking to invoke it was, himself, responsible for the existence or execution of such order or decree, or where his participation went beyond the requirements thereof, or was the result of his own initiative.¹²²

The *Flick* and *Farben* Tribunals thus both identified circumstances under which the defense of necessity was not available to a defendant. These circumstances, however, turned out to be the exceptions that confirmed the rule. In most cases the *Flick* Tribunal held, the defendants had not been able to act freely and therefore lacked the possibility of moral choice on which criminal responsibility rests:

The Reich, through its hordes of enforcement officials and secret police, was always 'present,' ready to go into instant action and to mete out sav-

¹¹⁹Bush, 'The Prehistory of Corporations', pp. 1170-1171.

¹²⁰N.M.T., *NMT vol. VI*, pp. 54-55, quote at p. 55.

¹²¹On this change in the jurisprudence on the necessity defense, see Baars, 'Capitalism's Victims Justice', p. 179.

¹²²Nuernberg Military Tribunals, *NMT vol. VIII*, p. 1179.

age and immediate punishment against anyone doing anything that could be construed as obstructing or hindering the carrying out of governmental regulations or decrees.¹²³

Similarly, in *Farben*, the judges stated explicitly that it was the task of the prosecution to prove the 'initiative of a character to deprive [the defendant] of the defense of necessity which has otherwise been established'.¹²⁴ Out of the 25 defendants, five were found guilty according to this requirement. The tribunal found that the defendants Dürrfeld, Ambros, Bütetisch, Krauch and Ter Meer bore criminal responsibility for the use of slave labour at the plants at Auschwitz and Fürstengrube, as

these were wholly private projects operated by Farben, with considerable freedom and opportunity for initiative on the part of Farben officials connected therewith.¹²⁵

Given the victory of the 'necessity' defense in *Flick* and *Farben*, the defendants in *Krupp* expected the charges of slave labour to be equally dismissed by their tribunal. They erred. In *Krupp*, the judges emphasised that the defense of necessity could not be established on a general basis, but warranted an evaluation of the proportionality between the suffering the defendant might have had to endure if he had opposed the orders and the suffering that was actually endured by the workers:

If we may assume that as a result of opposition to Reich policies, Krupp would have lost control of his plant and the officials their positions, it is difficult to conclude that the law of necessity justified a choice favorable to themselves and against the unfortunate victims who had no choice at all in the matter. Or, in the language of the rule, that the remedy was not disproportionate to the evil.¹²⁶

There is, thus, no unanimous jurisprudence concerning the defense of necessity in relation to the slave labour charges.¹²⁷

What the legal findings in all three cases have in common, however, is that the judges assume the state's monopoly of force through which it was able to implement the slave labour programme also against the will of the businessmen.¹²⁸ In doing so, they project the liberal distinction of the public

¹²³N.M.T., *NMT vol. VI*, p. 1201.

¹²⁴Nuernberg Military Tribunals, *NMT vol. VIII*, p. 1195.

¹²⁵Nuernberg Military Tribunals, *NMT vol. VIII*, p. 1186.

¹²⁶Nuernberg Military Tribunals, *NMT vol. IX*, p. 1445.

¹²⁷For the Nuremberg trials' jurisprudence on the defense of necessity, see also Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law*. Oxford and New York: Oxford University Press, 2011, p. 302-305.

¹²⁸See also the discussion in Doreen Lustig, 'The Nature of the Nazi State and the Questions of International Criminal Responsibility of Corporate Officials at Nuremberg. Revisiting Franz Neumann's concept of Behemoth at the industrialist trials'. In: *New York University Journal of International Law and Politics* 43 (2011), pp. 965-1044, pp. 1026-1040 (emphasising the disaggregated responsibility that follows from a lack of understanding of the structure of the corporation).

and the private sphere onto the past. It is a distinction which comes to justify the tribunal's decisions regarding the (lack of) legal responsibility of the accused. Legal responsibility, the argument goes, presupposes moral choice – that is, the ability to act and decide freely.

The defense of necessity, as invoked in *Flick* and *Farben*, suggests that this freedom and the derived responsibility ceases to exist in the moment the state impinges upon the private sphere, namely upon decisions concerning production as well as the relation between capital owners and the labour force. Economic actors, it is suggested, can only be held to account for their actions if this realm of freedom is warranted by the state. The legal arguments concerning the count of slave labour suggest that with the set production quota and prescribed forced labour, National Socialism violated and thus canceled the condition under which legal responsibility can be assumed.

What exposes these decisions as liberal, is not the fact that economic actors (as opposed to the military personnel) were granted the defense of necessity, but the way in which these decisions were justified. In the judgments, the totalitarian state is defined as totalitarian not merely because it violated the physical integrity of millions of people, but because it violated the independence of the economic sphere. The state's infringement of the private sphere was assumed to be the rule against the backdrop of which the exceptions had to be proved. The role of this assumption that introduces the political as the realm of the monopoly of force, and the economy as the realm of voluntary interactions in delimiting the responsibility of the economic actors, becomes even more apparent in relation to the count of plunder and spoliation.

business as usual

In all three cases, the US prosecution charged defendants with plunder and spoliation in the occupied territories. The judges did not follow the indictments completely in any of the cases. Rather, they introduced a distinction between business transactions and the seizure of property that fulfilled the count of plunder and spoliation, and those that did not. The criteria introduced by the three tribunals to justify this distinction shed further light on the underlying assumptions about the nature of the Nazi state and the way in which it shaped the Tribunals' legal findings.¹²⁹ As we shall see, it is again the relationship between the public and the private sphere which served as the basis for the decisions on the defendants' legal responsibility.

The count of plunder and spoliation had already been negotiated at the IMT. There, the Tribunal came to the conclusion that the territories occupied by Germany

¹²⁹The following analysis benefits immensely from Doreen Lustig's work, although I do not agree with her in all of the claims she makes. See Lustig, *Doing Business*, pp. 1008-1026.

were exploited for the German war effort in the most ruthless way, without consideration of the local economy, and in consequence of a deliberate design and policy.¹³⁰

But it was only in *Flick* that a tribunal had to decide on the criminal liability of a private individual for these property offenses for the first time. These concerned, as the Tribunal specified,

[Otto] Steinbrinck's activities directing the production of coal and steel in the western territories, the Flick administration of the Rombach plant and the occupation and use of the Vairogs and Dnjepr Stahl plants in the East.¹³¹

The central question the Tribunal had to decide upon with regard to the count of plunder and spoliation was under which circumstances business transactions during war were lawful under international law. The central piece of relevant international legislation on plunder was the Hague Convention from 1907. According to the judges, the purpose of Articles 45 to 56 of the 'Convention Respecting the Laws and Customs of War on Land' was to protect private property and the economy of the occupied country.¹³² A violation of these articles was only to be found where the local economy was *effectively* damaged beyond the exceptions provided by the Hague Convention.

With respect to the accusations against Otto Steinbrinck in his capacity 'as Commissioner for Steel (Luxembourg, Belgium and northern France) from May 1941 until July 1942 and as Bekowest (Holland, Belgium, Luxembourg, and northern France with the exception of Lorraine) from March 1942 until September 1944', the judges couldn't find any 'intentional discrimination against local economy.'¹³³ The Tribunal substantiates the finding, arguing that

[i]n his administration he endeavored to disturb as little as possible the peacetime flow of coal and steel between industries in these countries. Of course the German economy benefited but not by confiscation or ruthless exploitation attributable to Steinbrinck. . . . The different companies were paid for their shipments in some cases at better prices than in peacetime.¹³⁴

The prosecution in *Farben* construed Plunder and Spoliation of private property as a double offense. It was, first, an attack against the private property of the respective owners, and second, a crime against the economy of the occupied country. From this perspective, even where business transaction had been agreed upon by the parties on a voluntary basis, such a transaction

¹³⁰ *Trial of the Major War Criminals Before the International Military Tribunal: Proceedings Volumes (The Blue Set)*.

¹³¹ N.M.T., *NMT vol. VI*, p. 1203.

¹³² N.M.T., *NMT vol. VI*, pp. 1203-1204.

¹³³ 'BeKo-West' (Beauftragter für Kohle - West) was the acronym for the Plenipotentiary for Coal in the Occupied Western Territories. N.M.T., *NMT vol. VI*, pp. 1210, 1212.

¹³⁴ N.M.T., *NMT vol. VI*, p. 1211.

could still be considered a crime against the local economy and thus was to be considered plunder.

The judges, however, disagreed with the view put forward by the prosecution. The *Farben* judgment offers a detailed summary of the crimes of Plunder and Spoliation as defined by the Hague Conventions before evaluating the individual responsibility of each of the defendants. It is worth quoting the summary at some length, for it clearly exposes the operative distinctions on which the Tribunal bases its decisions: free choice as criterion for the validity of business transactions and the presence of the occupying state forces ('coercion') as indicator for the lack of such freedom of choice. The judgment reads:

We look in vain for any provision in the Hague Regulations which would justify the broad assertion that private citizens of the nation of the military occupant may not enter into agreements respecting property in occupied territories when consent of the owner is, in fact, freely given. This becomes important to the evaluation of the evidence as applied to individual action under the concept that guilt is personal and individual. *If, in fact, there is no coercion present in an agreement relating to the purchase of industrial enterprises or interests equivalent thereto, even during time of military occupancy, and if, in fact, the owner's consent is voluntarily given, we do not find such action to be violation of the Hague Regulations.* . . . On the other hand, when action by the owner is not voluntary because his consent is obtained by threats, intimidation, pressure, or by exploiting the position and power of the military occupant under circumstances indicating that the owner is being induced to part with his property against his will, it is clearly a violation of the Hague Regulations.¹³⁵

With regard to the question of how to identify whether an agreement was made by free choice, the Tribunal states:

The mere presence of the military occupant is not the exclusive indication of the assertion of pressure. Certainly where the action of private individuals, including juristic persons, is involved, the evidence must go further and must establish that a transaction, otherwise apparently legal in form, was not voluntarily entered into because of the employment of pressure. Furthermore, there must be a causal connection between the illegal means employed and the result brought about by employing such intimidation.¹³⁶

As indicated above, the *Farben* Tribunal argued with respect to the charge of slave labour that the presence of the state triggered the defense of necessity unless individual initiative was proven. The effects of the supposed omnipresence of the Nazi state on property transactions were, however, judged differently. According to the tribunal, in each case it was necessary to individually scrutinise whether the presence of the occupied forces allowed one to deduce that

¹³⁵Nuernberg Military Tribunals, *NMT vol. VIII*, pp. 1135-1136 (my italics).

¹³⁶Nuernberg Military Tribunals, *NMT vol. VIII*, pp. 1134-1136.

consent (by the French or Belgian business partners) was not freely given. It concluded that in most cases in which

Farben dealt directly with the private owners, there was the everpresent threat of forceful seizure of the property by the Reich or other similar measures.¹³⁷

However, with regard to charges of spoliation in the Rhone-Poulenc region, the tribunal found that no threat of force was involved and that thus the 'transfer of property constituted normal business transactions'.¹³⁸

Again, the judges based their argument on the ex-ante assumption, that the Nazi state held the effective monopoly of force, and that, in principle, a private sphere existed in which individuals were still able to act freely. According to this logic – and contrary to the assumptions underlying the findings concerning the count of slave labour – the general qualification of the Nazi state as a totalitarian state applied only to the political sphere. The private sphere was affected by the totalitarian state in instances where the state tried to intervene in the economy by compelling business transactions with the threat of physical violence. As Lustig aptly puts it, invoking Ernst Fraenkel's analysis of the Nazi state as a 'Dual State':¹³⁹

The prerogative, and thus unlawful, behaviour of the state, was identified with its unlawful influence on the private sphere, rather than the absence of a rule of law in the occupied areas.¹⁴⁰

totalizing and dialectical images

At the beginning of this section, I quoted Taylor's words from the opening statement in *Flick*, with which he suggested that the only task of the tribunal was to 'confirm and revitalize the ordinary standards of human behavior embodied in the law of nations'. What, then, are these 'ordinary standards of human behavior' that emerge from the analysis of the bowels of the industrialist trials? As my reading of the legal arguments concerning the responsibility of the industrialists for Aggressive War, Slave Labour and Plunder and Spoliation in this section indicates, a central criterion for determining the (il-)legality of the behaviour of businessmen, was the general relationship between the Nazi state and its economy. In order to justify the legal findings concerning the criminal responsibility of the accused, the judges projected the liberal separation of the state and the economy as normative standard onto the past, finding illegal behaviour there where the Nazi state disregards this very separation.

¹³⁷Nuernberg Military Tribunals, *NMT vol. VIII*, p. 1140.

¹³⁸Nuernberg Military Tribunals, *NMT vol. VIII*, see p. 1150.

¹³⁹Ernst Fraenkel. *The Dual State. A Contribution to the Theory of Dictatorship*. Oxford: Oxford University Press, 1941.

¹⁴⁰Lustig, 'The Nature of the Nazi State', p. 1042.

In this vein, the indictments and judgments concerning the Aggressive War count insinuate that the 'leadership principle', according to which individuals simultaneously occupy public and private positions, and the organisation of the economy at the service of the state, were the main problem. Accordingly, it was not the logic of capital, but the disregard for economic principles that had lead to monopoly capitalism, which, in turn, had made the war possible. The fact that industrialists took advantage of this particular arrangement of the political economy made them less honorable businessmen, but was not considered a legal problem. As the tribunal in *Flick* stated unmistakably: 'To covet is a sin under the Decalogue but not a violation of the Hague Regulations nor a war crime'.¹⁴¹

Also with regard to the counts of Slave Labour and Plunder and Spoliation, the tribunals suggest that the economic rationale of the crimes is to be found where the state tries to impose its own interest, namely to increase resources for the war, on the economic sphere. It was the threat of physical force that converted the property transactions in occupied territories into a war crime. This very presence of the threat of physical force was at the same time reason enough to consider the defense of necessity for the accused.

In her study on the industrialist trials, Grietje Baars concludes that the trials of German industrialists 'spirited away' the 'economic dimension' of World War II.¹⁴² Because they expel the economic from the logic of state crime, she writes, the industrialist trials need to be qualified as 'capitalism's victor justice'. I agree with Baars that the industrialist trials can rightly be taken as 'capitalism's victors justice' in so far as they – now quoting Kim Priemel – 'salvage capitalism's reputation from the moral ruins of German business's complicity in Nazi crimes'.¹⁴³ However, this was not achieved by writing the economic out of the picture. Rather, as the discussion of the legal arguments in this section showed, the trials of German industrialists created an image of the past in which the economic rationale and causes of World War II were linked to a particular, 'baleful' relationship of the state and the economy.

That, in the context of state crime, the judgments on the (un-)lawfulness of individual behaviour necessarily imply a judgment on its institutional context has been shown by Gerry Simpson. As already referred to in the introduction, he reveals ICL 'at its origins as a composite of collective and individual notions of responsibility'.¹⁴⁴ Thus, while the trials probably do not 'reform the economic structure of the world', they participate in the definition of those interactions between the state and the economy which are considered legitimate and those that are not. The analysis of the bowels of the industrialist trials reveals ICL as a liberal concept, because it projects the liberal order,

¹⁴¹N.M.T., *NMT vol. VI*, p. 1210.

¹⁴²Baars, 'Capitalism's Victors Justice', p. 164.

¹⁴³Priemel, "A Story of Betrayal", p. 70.

¹⁴⁴Simpson, *War Crimes*, p. 71.

and that is a particular relationship between the state and the economy, as normative standard onto the past. In doing so, it simultaneously posits the liberal political-economic order as the just answer to the violence of the past.

Whether the image of the past constructed by the tribunals is successful in coming to operate as a negative reference, I argued in the introduction and the previous chapter, depends on whether it manages to appear as, once again quoting the words of Otto Kirchheimer, a ‘truthful replica of reality’. In the case of the industrialist trials, the judges failed to live up to the ‘duty of clarity’ demanded by Taylor in his opening statement. Rather than offering a clear-cut image of the alleged responsibility of the German industrialists for the crimes committed under National Socialism, the tribunals in *Flick*, *Krupp* and *Farben* expose the problem facing the judges to link the economic actors to the state-backed violence. As Doreen Lustig puts it in her analysis of the industrialist trials: ‘The industrialists’ involvement in the war brought the historical contingency of the state’s monopoly over violence to the courtroom’.¹⁴⁵

In the first chapter of this thesis, I advanced my argument that the trials dealing with the responsibility of economic actors are particularly critical to ICL as they expose the political implications of one of the concepts at the heart of ICL: the modern state. It is precisely because the question regarding the economic actors’ responsibility for state crimes challenges the assumptions of the state’s monopoly over violence that the trials shed light on the implicit theory of the state at work in ICL.

4.4 Founding the German State

The legal strategies adopted by the prosecution and the judges are often explained with reference to either the international context or the US anti-trust debate. Kim Priemel, for example, argues that through the Industrialist Trials, the US sought to construct a

dichotomous relationship between a Western, and especially an American, model of good governance – both corporate and political – and its flawed German rival.¹⁴⁶

In this section, I want to look at a different debate in order to further substantiate the argument made in the last section, namely that what is at stake in the Industrialist Trials is not merely the individual responsibility of the defendants, but the authorisation of a particular juridico-political order. As a space in which economic causes of World War II and the criminal responsibilities of German big business representatives are negotiated and defined, the Industrialist Trials coincide with a wider societal debate about the lessons to

¹⁴⁵Lustig, ‘The Nature of the Nazi State’, p. 985.

¹⁴⁶Priemel, “A Story of Betrayal”, p. 70.

be learned from the role of the German *Wirtschaft*¹⁴⁷ in National Socialism for a new German *Gesellschaftsordnung*.¹⁴⁸

Apart from the German nationals working for the OSS, such as Franz Neumann, Germans had, of course, little influence on the Industrialist Trials. We cannot therefore take the trials as a straightforward attempt at sovereign foundation by the German state. The link I wish to establish between the trials and the German context is a different one. On the one hand, the trials constituted a point of reference in the German debate. For example, and as mentioned before, several industrialists and German banks paid the defense council in *Krupp* and *Flick* and also funded an office in order to support the case of the industrialists at Nuremberg.¹⁴⁹ They also prepared pamphlets in response to the trials in which they presented themselves as apolitical businessmen who had suffered from the intervention of the totalitarian state.¹⁵⁰ Rather than being identified as profiteers, capitalists and societal parasites, they actively tried to regenerate a new image as innovators.¹⁵¹ As Wiesen summarises:

For West German industry the trials in Nuremberg represented at once the worst publicity disaster imaginable and, paradoxically, the chance for an aggressive attempt at professional regeneration.¹⁵²

Thus, the argument could be made that the Industrialist Trials are important for the German debate in so far as they allow the actors to position themselves.

Indeed, I suggest that with the Industrialist Trials, certain positions regarding what was to be learned from the alliance between German big business and National Socialism were backed while others were not. In order to illuminate and expand on what is at stake in the legal arguments which were extracted in the last section, it is helpful to turn to the German debate.

In doing so, I wish to substantiate two claims advanced in the introduction to this chapter. The first is that criminal trials in response to state crime do not break with the principle of sovereignty, but form part of the sovereign foundation of a new political order. The second is that in the case of the Industrialist Trials, the image constructed in the trials seeks to authorise a juridico-political order that places the market as a guarantor of democracy.

This observation is important for a critique of contemporary corporate accountability discourse – as I will be arguing in more detail in the last section

¹⁴⁷As Wiesen notes, the German word *Wirtschaft* denotes both the 'economy' as well as 'economic actors', see Wiesen, *West German Industry*, p. 7.

¹⁴⁸See Ralf Ptak. *Vom Ordoliberalismus zur sozialen Marktwirtschaft. Stationen des Neoliberalismus in Deutschland*. Opladen: Leske + Budrich, 2004, pp. 155-156. See also the discussion of the *Laender* constitutions below, p. 150.

¹⁴⁹Ahrens, 'Der Exempelkandidat. Die Dresdner Bank und der Nürnberger Prozes gegen Karl Rasche', p. 656; Wiesen, *West German Industry*, p. 72.

¹⁵⁰Wiesen, *West German Industry*, p. 658.

¹⁵¹Jan-Otmar Hesse. 'Der Staat unter der Aufsicht des Marktes' - Michel Foucaults Lektüren des Ordoliberalismus'. In: Michel Foucaults »Geschichte der Gouvernementalität« in den Sozialwissenschaften. *Internationale Beiträge*. Ed. by Susanne Krasmann and Michael Volkmer. Bielefeld: transcript, 2007, pp. 213-238, p. 230.

¹⁵²Wiesen, *West German Industry*, p. 70.

– because it questions the historical accounts that present the Industrialist Trials as a critique of the violence of capitalism. Furthermore, it reminds us that the notion of democracy was essentially contested and that the aim of liberal democracy posited by ICL and transitional justice is not neutral, but implies a particular economic order.

neue soziale marktwirtschaft and ordoliberalism

Despite the apparent continuities within the political and economic elites, Western Germany has sought to draw its legitimation by establishing a break between post-war Germany and National Socialism.¹⁵³ In the immediate aftermath of World War II, an important aspect of this work of creating a distance to and difference from Nazi Germany concerned the organisation of the economy.

The experience of the destructive forces of capitalism that dominated the immediate aftermath of World War II and which had motivated the Allies to trial German businessmen, was also reflected in the political positions that were voiced by the German political parties as they were reorganising after the end of World War II. The official position of the Christian Democratic Union of Germany (*Christlich Demokratische Union Deutschlands*, CDU), the party that in 1949 came to win the first general elections in West Germany, as formulated in the Ahlen Programme from 1947 reads as follows:

The capitalist economic system has served neither the state's nor the German people's vital interests. After the terrible political, economic, and social collapse that resulted from criminal power politics, a new order is required, and it must be built from the ground up. The content and goal of this new social and economic order can no longer be the capitalistic pursuit of power and profit; it must lie in the welfare of our people.¹⁵⁴

However, the anti-capitalist sentiments within the CDU did not last for long. In 1949, the party abandoned the vision of a new German economy formulated in the Ahlen Programme and expressed its conviction that only the market can handle and solve the problems that post-war Germany was encountering. In the 'Düsseldorf Guidelines for Economic, Agricultural and Social Policies and Housing' of July 1949, the party introduced for the first time the notion of the *Soziale Marktwirtschaft* – or social market economy – as guiding principle for the structuring of the economy and design of related public policies. By means of introduction, the pamphlet stated:

After the war, the economic and social life of the German people moved closer and closer to a state of utter dissolution.

¹⁵³On German 'Vergangenheitspolitik', see Norbert Frei. *Vergangenheitspolitik. Die Anfänge der Bundesrepublik und die NS-Vergangenheit*. München: Beck, 1996, p. 7.

¹⁵⁴For the English translation, see CDU Zone Committee in the British Occupation Zone. *The Ahlen Programme*. 1947. URL: <http://germanhistorydocs.ghi-dc.org/pdf/eng/Parties%20WZ%205%20Eng.pdf> (visited on 04/11/2013).

The turnaround came on June 20, 1948. The currency reform alone did not bring it about, but it did create the proper technical preconditions. The most essential impulse came from the implementation of market economic principles. On June 20, 1948, the 'social market economy' espoused by the CDU made these principles the foundation of German economic policy.¹⁵⁵

June 20th, the date referred to in the guidelines, was the day of the currency reform, the first measures to reduce price controls towards a liberalisation of the market. For the CDU, as we read, it was not the currency reform itself that initiated the change from a social crisis towards economic growth. Rather, the political measure of the currency reform only enabled the 'implementation of market economic principles' which were the 'most essential impulse' for the turnaround. The currency reform was right, the paragraph suggests, not because of the economic growth that followed, but because it was directed at creating a functioning market.

The social market economy advocated by the CDU does not merely describe a programme for economic policy. Rather, it is to function as the 'foundation of the envisioned economy and social order'.¹⁵⁶ Within this order, the state's main function is to enable market forces to operate by securing competition (*Leistungswettbewerb*) and by preventing the formation of monopolies (*Monopolkontrolle*).¹⁵⁷ Competition and the control of monopolies become the cornerstones for a 'social and economic democracy' that in turn was considered necessary to 'fulfill and secure' political democracy.¹⁵⁸ When Ludwig Erhard became Minister of Economic Affairs in 1949, the phrase 'social market economy' became both the legitimation for the economic programme as well as an explanatory narrative for the German 'economic miracle'.

Those familiar with German economic theory will easily recognise the language and concepts of the economists usually grouped under the label of ordoliberalism in the Düsseldorf Guidelines.¹⁵⁹ The importance of ordoliberal thinking for the legitimation of the German state following World War II was first highlighted by Michel Foucault in his lectures on the *Birth of Bio-Politics*.¹⁶⁰

¹⁵⁵For the English translation, see CDU. *Düsseldorf Guidelines for Economic Policy, Agricultural Policy, Social Policy, and Housing*. (July, 15th). 1949. URL: http://germanhistorydocs.ghi-dc.org/pdf/eng/Parties%20WZ%206_Eng.pdf, p. 1.

¹⁵⁶CDU, *Düsseldorf Guidelines*, p. 3, translation amended.

¹⁵⁷CDU, *Düsseldorf Guidelines*, p. 1.

¹⁵⁸CDU, *Düsseldorf Guidelines*, p. 3.

¹⁵⁹On the influence of these scholars on the design of the economic policy, see Stefan Scholl. *Begrenzte Abhängigkeit. Wirtschaft und Politik im 20. Jahrhundert*. Frankfurt a.M.: Campus-Verlag, 2015, p. 231.

¹⁶⁰Foucault, *The Birth of Biopolitics*; Later historiographical research has shown that Foucault's representation of the different ordoliberal groups is not completely accurate, however, this does not have any implications for his central argument concerning the logic of governance at work in their theory. See Hesse, 'Der Staat unter der Aufsicht des Marktes' - Michel Foucaults Lektüren des Ordoliberalismus'.

While the ordo-liberal economists were by no means as homogenous a group as the name suggests, there were important common threads.¹⁶¹

Ordoliberal theory initially was formulated in response to the economic problems during the Weimar Republic, and during the war would already dedicate itself to the analysis of the political economy of the Third Reich. This is also why they were able to effectively influence the political and economic discourse in the immediate aftermath of the war while other social forces were still trying to organise themselves.¹⁶²

In his lectures, Foucault is interested in the new liberalism made in Germany, for it marks an important shift in liberal thinking. The central argument he develops in his lectures is that by making it the central task of the state to enable the market, the ordoliberals radicalise economic liberalism. This is because, in ordoliberal theory, the market comes to function as organisational principle not merely for the economy, but also for the state. With the social market economy, Foucault argues,

[t]he state rediscovers its law, its juridical law, and its real foundation in the existence and practice of economic freedom. History had said no to the German state, but now the economy will allow it to assert itself.¹⁶³

Foucault's analysis emphasises the shift that occurs in liberal thinking with respect to the legitimisation of the political order. What he mentions only in passing is that this shift in theory is systematised and gains its impact on Germany policy-making in opposition to the 'collectivism' which, according to the ordoliberals, characterised the Nazi state and its economy.¹⁶⁴

If, to adapt Foucault's phrasing, in the wake of World War II the economy allowed the German state to assert itself, the envisioned relationship between the economy and the state drew, in turn, its legitimisation from National Socialism as a negative reference. According to the ordoliberal economists, history had not only said 'no' to the totalitarian state which was in violation of the rule of law, but also to a totalitarian state that had violated the rules of the market. In their view, the concentration of economic power in the form of cartels and monopolies was the direct consequence of a state that had failed to fulfil its central task: to guarantee the functioning of the market.

I wish to illustrate how ordoliberal theory and the political positions derived from its analysis were framed as 'lessons learned' from the Nazi economy by expanding on two concepts that are central to ordoliberal thinking. This is, first, the identification of all evil as 'collectivism', and second, the proposed solution to this problem, namely to secure competition.

¹⁶¹For a detailed account of the differences, see Ptak, *Vom Ordoliberalismus*.

¹⁶²Ralf Ptak. 'Soziale Marktwirtschaft und Neoliberalismus: ein deutscher Sonderweg'. In: *Neoliberalismus: Analysen und Alternativen*. Ed. by Claus Butterwegge, Bettina Lösch, and Ralf Ptak. VS Verlag für Sozialwissenschaften, 2008, pp. 69–89, p. 71.

¹⁶³Foucault, *The Birth of Biopolitics*, pp. 85,86.

¹⁶⁴See for example Foucault, *The Birth of Biopolitics*, pp. 81–82,116.

collectivism vs. competition

Already in 1942, Wilhelm Röpke, a prominent exponent of ordoliberal theory, had defined the task of the ordoliberals in opposition to the phenomenon of collectivism. In his book *The Social Crisis of our Time*, he wrote:

The struggle against collectivism . . . will only have tangible prospects of success if we manage to reactivate the liberal principle in a manner that offers satisfactory solutions to all of the evident damages, failure symptoms and mistakes of liberalism and capitalism without consequently questioning neither the inner structure of the market's competition system nor the functionality of our economy.¹⁶⁵

According to Röpke, 'collectivism' encompassed the social welfare state, as well as the coordinated economy in its communist or national socialist variant.¹⁶⁶ In Röpke's work, war and collectivism become inevitable twins, and only liberalism would be able to provide a convincing answer to the controlled economy under National Socialism.¹⁶⁷ For the ordoliberal economists, liberal theory was not only a theory that attempted to identify or explain the law's of the market (as classical economic liberalism would), but importantly it posited itself as a social theory related to the economic *and* political order. As such, it predicted two alternatives for a German future: on the one hand there was the prospect of liberty, consumption and democracy, and on the other there was a lack of liberty and goods in addition to totalitarian socialism.

Now, as Röpke himself foresaw, to convince the public that only the market could guarantee economic and political freedom, it was necessary to show that the 'new' liberalism they were championing had learned from the failures of classical liberalism. The ordoliberals had formulated their critique of classical liberalism in response to the global economic crisis of the 1930s. When European liberals met in 1938 in Paris, both Röpke and Alexander Rüstow suggested that classical liberalism had failed to take into account the social embedding of the economy. Competition, which they considered a precondition for political and economic freedom, could not establish itself automatically. Rather, the state needed to secure the conditions.¹⁶⁸ Foucault summarises the reasoning of ordoliberal theory as follows:

. . . [S]ocial intervention, the *Gesellschaftspolitik*, legal interventionism, the definition of a new institutional framework of the economy protected by a strictly formal legislation like that of the *Rechtsstaat* or the Rule of Law, will make it possible to nullify and absorb the centralizing tenden-

¹⁶⁵ Wilhelm Röpke. *The Social Crisis of our Time*. London, Edinburgh, and Glasgow: Hodge, 1950; quoted in Ptak, *Vom Ordoliberalismus*, p. 167 (my translation).

¹⁶⁶ See in detail Ptak, *Vom Ordoliberalismus*, p. 157ff.

¹⁶⁷ Ptak, *Vom Ordoliberalismus*, p. 159.

¹⁶⁸ Cf. Hesse, '»Der Staat unter der Aufsicht des Marktes« - Michel Foucaults Lektüren des Ordoliberalismus', p. 217.

cies which are in fact immanent to capitalist society and not to the logic of capital.¹⁶⁹

Just as the judgments in the Industrialist Trials, ordoliberalism positioned monopolies and the centralisation of economic power at the centre of its critique. Using the Nazi political economy as a negative reference, the central concept of their theory became the importance of competition for the functioning of the market (as opposed to consumption or exchange in classical liberalism).¹⁷⁰ A strong state was needed in order to secure competition and thus the functioning market economy, but it was not to intervene into the market, as the Nazis had done.

In the literature, the ordoliberal position is often presented as a compromised liberalism that, in reaction to the economic crisis, sought to strengthen the role of the state vis-a-vis the market. Foucault, on the contrary, sees in this move an expansion of the liberal rationale in so far as the political order is also measured against its economic performance.¹⁷¹ As Ralf Ptak observes, what was new about this liberalism was not the assumption regarding the functioning and the effects of the logic of the market, but rather that this functioning was not explained with reference to natural laws. Instead, a functioning market was conceived of as the result of a political decision regarding the organisation of the juridico-political order.¹⁷²

In Chapter Two, I contended that liberal theory is never free from contradictions, and even less so when it comes to the translation of the economic principles into actual economic policies. In fact, as Ptak shows in his detailed study of the works of the ordoliberal thinkers, the awareness of inner contradictions constituted a substantial element of the development of ordoliberal theory.¹⁷³ One of this contradictions concerned the problem that ordoliberal theory could only be proven right if it was possible to create a *tabula rasa*-like scenario in which all market participants had the same starting positions.

Now, post-World War II Germany by no means presented a blank slate, especially not with regard to the concentration of economic power. Despite the initial attempts of the allies to dismantle the industry and work towards its deconcentration, the economic elite was still organised enough to lobby the Allies.¹⁷⁴ Faced with a de facto impossibility to create a situation for the perfect market, the ordoliberal economists conceived of 'competition' no longer as a pre-condition for economic and consequently political democracy, but instead converted it into an ideal intended to orient political decisions.

¹⁶⁹Foucault, *The Birth of Biopolitics*, pp. 178–179.

¹⁷⁰On this shift in focus see Foucault, *The Birth of Biopolitics*, p. 166.

¹⁷¹For a comparison between Foucault's analysis of ordoliberal thinking and accounts from within German economics, see Hesse, '»Der Staat unter der Aufsicht des Marktes« - Michel Foucaults Lektüren des Ordoliberalismus'.

¹⁷²Ptak, *Vom Ordoliberalismus*, p. 172.

¹⁷³See in detail Ptak, *Vom Ordoliberalismus*, pp. 174–189.

¹⁷⁴Wiesen, *West German Industry*, p. 55.

Accordingly, state interventions were to be measured against their ability to realise competition.¹⁷⁵ With the victory of the CDU in 1949, 'competition' indeed became the guiding principle for the economic policies adopted under the Minister of Economic Affairs Ludwig Erhard.

The notion of the social market economy continues to figure prominently in German debates on economic policies.¹⁷⁶ While there is no 'true' meaning of the phrase 'Social Market Economy', it is important to remember the political rationale that it introduced in post-World War II Germany. The CDU called the economic order they sought to realise *social* market economy not because they saw the necessity to counter the negative effects of capitalism through a welfare state. 'We call it "social market economy"', the Düsseldorfer guiding principles summarise, because only the economic order based on competition and the control of monopolies leads to a 'true economic democracy'.¹⁷⁷ In short, the 'social' in the social market economy envisioned by the ordoliberal thinkers and the first German government refers to the claim that the market should be foundational for both the economic and the political organisation of a democratic society.¹⁷⁸

Foucault's analysis of the ordoliberal argument and its influence on public political discourse leads him to the conclusion that '[i]n contemporary Germany, the economy, economic development and economic growth, produces sovereignty'.¹⁷⁹ It 'produces legitimacy for the state that is its guarantor', that is, it 'creates public law' and brings 'a juridical structure or legal legitimization to a German state that history had just debarred'.¹⁸⁰ The performance of the German economy is not only taken as sign of good economic governance, but is

the way in which the founding consensus of a state – which history, defeat, or the decision of the victors had just outlawed – is constantly manifested and reinforced. . . . History had said no to the German state, but now the economy will allow it to assert itself.¹⁸¹

The 'forgetting of history', Foucault suggests in this context, is crucial to the freedom promised by the juridico-political order of the social market economy.¹⁸²

However, as the brief discussion of ordoliberal theory in this section showed, it was not so much the 'forgetting of history', but a particular explanation of

¹⁷⁵On the identification of the problem, and the subsequent shift in the discourse, see Ptak, *Vom Ordoliberalismus*, pp. 182-187.

¹⁷⁶On the transformation of the concept of the social market economy in German politics, see Ptak, 'Soziale Marktwirtschaft'.

¹⁷⁷CDU, *Düsseldorfer Guidelines*, p. 3 (translation amended).

¹⁷⁸See also Foucault, *The Birth of Biopolitics*, p. 116: 'Let's ask the market economy itself to be the principle, not of the state's limitation, but of its internal regulation from start to finish of its existence and action.'

¹⁷⁹Foucault, *The Birth of Biopolitics*, p. 84.

¹⁸⁰Foucault, *The Birth of Biopolitics*, p. 84.

¹⁸¹Foucault, *The Birth of Biopolitics*, pp. 85-86.

¹⁸²Foucault, *The Birth of Biopolitics*, p. 86.

what had gone wrong in Nazi Germany that was central to the foundation of the post-war German political and economic order. If the West German state founded its sovereign claim in relation to the market, as Foucault suggests, this move was rendered plausible through a reading of World War II that presented the violence as the consequence of a 'collectivist' and 'monopolist' state-corporate nexus.

Just as in the Industrialist Trials, in the political debates concerning the post-war political, social and economic order, the past came to operate as a negative reference for the authorisation of the *Soziale Marktwirtschaft*. The latter was put forward as the 'lessons learned' from the violence experienced in the past, as the only juridico-economic order that could prevent history from repeating itself.

What the legal arguments rehearsed in the trials and the ordoliberals have in common is that they locate the causes of 'evil' in the violation of the liberal principle that demands that the state does not restrict the freedom that is supposed to govern the economic sphere. The reference to ordoliberal theory and its critics brings into relief that the legal arguments put forward in the Industrialist Trials concern not merely the individual responsibility of the defendants. They also echo theoretical assumptions and introduce normative standards that concern the societal 'management and organization of the conditions in which one can be free'.¹⁸³ Importantly, these conditions concern not merely the juridico-political institutions (such as the legislative, the judiciary and the government), but the very relation between the state and the economy.

economic democracy

It is one of the central differences between contemporary ICL jurisprudence and literature on the one hand and the discussion that surrounded the Industrialist Trials on the other, that the political implications of these institutional arrangements were made explicit. In the discussion of contemporary academic literature on transitional justice and ICL in Chapter Two, I showed that it begs the question of liberalisation. That is, it posits liberal democracy as the aim of transition without, however, justifying why this particular political arrangement should be considered desirable. I argued that this move can be explained with the assumption prevalent in political liberalism that conceives of the liberal rule of law as a politically neutral order. That is, it thinks of the rule of law as a framework within which political debates about the organisation of society can take place.¹⁸⁴

Challenging these assumptions, I referred to existing critiques of political liberalism that point out that the very decision of what belongs to the political

¹⁸³Foucault, *The Birth of Biopolitics*, p. 63.

¹⁸⁴See above section 2.2, p. 52

realm, and thus can be subjected to public debate and decision, already constitutes a political decision. In this context, I highlighted that the economic enters transitional justice discourse as a depoliticised, technical issue.¹⁸⁵ That is, in contemporary discussions about the economic dimensions of state crime and how they should be addressed, these questions are not related to the problem of a just social and political order.

If we look at the Industrialist Trials merely as a legal precedent for corporate accountability, we miss the traces they bear from the wider debates at that time that discussed democracy as a problem of the economy's organisation. While the social market economy eventually became the economic order of post-World War Germany, this was not the only vision in relation to the past that was expressed, nor was liberal democracy considered the only form of democracy. Susan Marks reminds us in her book *The Riddle of all Constitutions* that while after World War II human rights entered the realm of international law, the decision not to include a democratic norm in international treaties was owed to the contested meanings of democracy.¹⁸⁶

The contested nature of the notion of democracy within Germany can be illustrated with regard to disputes about the legal determination of the German political and economic order. Parallel to the two discussions we have already looked at – the Industrialist Trials as well as the ordoliberals – were various German politicians debating and adopting the *Länder* constitutions. Some of them were adopted before the German constitution (*Grundgesetz*) came into force. Those *Länder* constitutions adopted before the division into East and West Germany contained provisions that allowed for¹⁸⁷ or ordered¹⁸⁸ the socialisation of private property. Many of the *Länder* constitutions also encompassed regulations for broad employee participation in the remaining private enterprises' decision-making bodies.¹⁸⁹ These decisions lead German constitutionalist Wolfgang Abendroth to the conclusion that

The *Länder* constitutions in the Western occupation zone, thus, understood the social mandate of the modern constitutional democracy not merely as obligation to provide a minimum of wealth through social and political measures by the ruling body government, but as a problem of democratic reorganisation of the economic society¹⁹⁰

¹⁸⁵See also Olarte Olarte, 'Constitutionalism, Economy and the Evacuation of the Political: Transitional Justice and Biopolitics in the Colombian Case'.

¹⁸⁶Marks, *Constitutions*, pp. 31-32.

¹⁸⁷Art. 160 in Bavaria, Art. 98 in Württemberg-Hohenzollern.

¹⁸⁸Art. 61 in Rhineland-Palatinate; Art. 45 in Baden; Art. 28 Württemberg-Baden; Art. 39ff Hesse; Art. 42ff in Bremen; Art. 52 Saarland.

¹⁸⁹Wolfgang Abendroth. *Das Grundgesetz. Eine Einführung in seine politischen Probleme*. Pfullingen: Neske, 1973, p. 28.

¹⁹⁰Abendroth, *Grundgesetz*, p. 28, my translation; On the work of Wolfgang Abendroth see Andreas Fischer-Lescano, Joachim Perels, and Thilo Scholle. *Der Staat der Klassengesellschaft. Recht- und Sozialstaatlichkeit bei Wolfgang Abendroth*. Baden-Baden: Nomos, 2012.

The question of whether the ‘social and democratic order’ mentioned in the Basic Law entrusted the German state with the mandate to realise a socialisation of the German economy, as Abendroth suggested, became the centre of a polarising debate with his colleague, the constitutional lawyer Ernst Forsthoff.¹⁹¹ This debate was not confined to the realms of academia. Several businessmen filed a complaint with the German Constitutional Court arguing that the *Investitionshilfe* Act was unconstitutional because, among other things, it allegedly violated the principles of the market. In its decision published in July 1954, the court responded that the German Basic Law did not protect the market economy itself, and that the ‘the present economic and social order, while in accordance with the Basic Law, is by no means the only possible one permitted by the Basic Law’.¹⁹²

4.5 Awakening

I began this chapter discussing the methodological implications that result from an approach to the Industrialist Trials as dialectical image, understood as a historical citation of a moment in the past by the present. The concept of the dialectical image, I suggested, invites us to look at the Industrialist Trials as the crystallisation of the force field as it emerges between its fore- and after-history – or, in the language of dialectics, thesis and anti-thesis. This force field was described throughout the chapter as revealing itself between the condemnation of capitalism for its role in bringing about the war and state violence on the one hand (the fore-history), and the rescue of capitalism as the guarantor of individual freedom and a democratic order on the other (the after-history).

The founding concept of Benjamin’s ‘dialectics at a standstill’, as we have seen in the previous chapter, ‘is not progress but actualization’.¹⁹³ That is, the tension between fore- and after-history, thesis and anti-thesis, does not resolve into some sort of synthesis. Rather, the dialectical construction of a historical event emerges through a constellation with the present which brings the latter into a critical state. Benjamin, as we have seen, compared this form of historical recognition to the moment of ‘awakening’ in which the images of the past allow us to perceive the present differently. In Benjamin’s dialectics, the synthesis does not aim at reconciling tensions. Instead, it can only be thought of as the disruption of the present.

By means of conclusion, I will summarise the argument presented in this chapter and point out how it destabilises present assumptions about the Industrialist Trials and their relevance for a critique of ICL as a concept of historical justice.

¹⁹¹On the so-called Forsthoff-Abendroth debate, see Joachim Perels. ‘Der soziale Rechtsstaat im Widerstreit’. In: *Kritische Justiz* 39.3 (2006), pp. 295–302.

¹⁹²*Investitionshilfe*. 4, 7. BVerfG. 1954-07-20, (my translation).

¹⁹³Benjamin, *Arcades Project*, p. 460 (N 2, 2).

foundational violence

In this chapter, I looked at the Industrialist Trials in the context of the re-foundation of the German post-war order. Following World War II, Germany did not exist as a sovereign state. The founding of the new societal order was accompanied by a controversial debate among the Allies and within the German population. The still-looming experience of the Nazi rule and the war were turned into a negative reference for the new order to be created. For the ordoliberal economists, a new democratic state needed to ensure competition. The CDU took up these arguments and adopted the phrase of the Social Market Economy to advocate for a social order in which the market would become the place where citizens would interact as free individuals.

A different understanding of ‘economic democracy’, I pointed out, was coined by SPD jurist Wolfgang Abendroth. Against the backdrop of the experience of National Socialism and the role of German big business, he advocated a democratisation of the economy – that is, the socialisation of the companies and the participation of workers in their administration. This vision of an economic democracy consequently was inscribed into many of the early *Länder* constitutions. With reference to the judgement of the German Constitutional Court, I argued that in 1952, the German Basic Law was still considered to be indeterminate regarding the organisation of the economy.

The rather simple point I want to emphasise here is that the crucial difference between the political context of the IMT and the Industrialist Trials on the one hand, and the context of the resurgence of ICL following the end of the Cold War on the other, is that the notion of democracy – and in particular of economic democracy – was contested back then, but not in the 1990s. That in transitional justice literature, ‘transition to democracy’ is automatically understood as transition to liberal democracy and market economy reflects the fact that a particular understanding of democracy has become hegemonic in certain academic and political circles. This, then, is the first destabilisation: that the notion of democracy in the academic literature on ICL and transitional justice is neither obvious nor politically neutral, but already presupposes the normative superiority of a particular arrangement of the state and the economy.

law-repeating violence

The sentences against German industrialists, I furthermore argued in this chapter, depict an image of the economic dimension of Nazi dictatorship that ties in with the ordo-liberal analysis of Nazi rule. Despite sitting over individuals, the industrialist trials were not concerned only (or maybe not even primarily) with the individual responsibility of the accused, but rather with determining the economic rationale of World War II. This economic rationale was theorised through the anti-trust discourse, according to which trusts

had inherently anti-democratic tendencies. The decision concerning the legal responsibility of the defendants drew on pre-existing assumptions about the nature of the state and the way it (should) relate to the economy. As I have shown, the sentences communicated that the overall economic rationale of state violence was to be found in the merger of a political and an economic logic, or, in other cases, the undue influence of the state onto the private economic sphere.

In pre-supposing the existence of a state with a monopoly of force, and the existence of a free economic sphere, the judges (and here I borrow Foucault's words for my own purposes) turned the 'distinction between state and civil society into an historical universal enabling us to examine every concrete system' as opposed to seeing 'in it a form of schematization peculiar to a particular technology of government'.¹⁹⁴ The judging legal order organises – like Benjamin's kaleidoscope – the past according to its own categories. As a consequence, it creates an image of the past that only depicts the violence recognised as such by the judging juridico-political order. Because this image of the past, as negative reference, comes to cloud and thereby repeats the foundational violence of the German post-war order, the Industrialist Trials can be understood as law-repeating violence. When the contemporary academic debate on corporate accountability invokes the Industrialist Trials as legal precedent to counter the most extreme forms of violence inflicted under current manifestations of capitalism, it is important to remember that these trials were part of a wider effort not to counter, but to rescue the reputation of capitalism following World War II.

Perhaps it is the irony of history that while the ordoliberal economist sought to rescue the market as the guarantor of democracy following World War II, it is precisely this heralding of the market as guarantor of democratic stability that served as justification for the Argentine junta to suspend the rule of law in the name of the National Reorganisation Process (*Proceso Nacional de Reorganización*) – as the junta euphemistically called the authoritarian regime instituted with the coup in 1976. The next two chapters will look in detail at two trials that attempt to address the economic dimension of the last Argentine dictatorship. Through the reading of these trials, I will take up the issues that emerged in this chapter for a critique of ICL as a liberal concept of historical justice. In particular, we will return to the underlying notion of the state at work in ICL and the way it sets bounds to both the construction of the legal responsibility of private actors and to the interpretation of the economic dimensions of state-backed violence.

¹⁹⁴Foucault, *The Birth of Biopolitics*, p. 319.

5 | Plata Dulce / Sweet Cash

This chapter borrows its title from an Argentine tragi-comedy directed by Fernando Ayala, released during the last year of the Argentine National Reorganisation Process (*Proceso*).¹ *Plata Dulce* tells the story of two friends, Carlos Bonifatti and Ruben Molinuevo, who own a furniture factory in Buenos Aires. The business struggles to survive as the economic policies adopted by the Minister of Economic Affairs appointed by the junta open the national economy for cheap imports. When Bonifatti is offered a job in a financial firm by an old acquaintance named Arteché, he sells his share in the factory to Molinuevo and starts working as a manager for the bank.

The life of luxury and new wealth that immediately follows comes to an end as suddenly as it started: during a weekend trip with his mistress, he is informed that the bank has gone bankrupt. As Bonifatti returns to Buenos Aires to sort things out, he discovers that Arteché had only used him as a straw man to sign loan agreements with made-up firms. While Arteché escapes to the US just in time, Bonifatti is arrested by the police, accused of fraud. Under the eye of his family, he is taken to prison.

The movie coined the phrase ‘era of the sweet cash’, denoting the period which began with the economic reforms of the *Proceso*, when the liberalisation of the financial markets in combination with a state guarantee for deposits made financial speculation highly profitable – until the system started to crash in 1980. The case that is at the centre of this chapter can only be understood against the backdrop of the ‘era of the sweet cash’. It originates in a legal investigation of several businessmen who, in 1978, were accused of ‘economic subversion’.² Just like Bonifatti, the businessmen at the centre of the case discussed in this chapter ended up in prison.

However, unlike Bonifatti, they were abducted without a judicial order by the police or military forces and taken to *Campo de Mayo*, a clandestine detention centre outside Buenos Aires. At the camp they were interrogated, sometimes under torture, questioned about their businesses and in some cases forced to sell the shares of the joint stock companies that they owned. Importantly, some of the detainees later reported that in addition to the military personell, staff

¹Fernando Ayala. *Plata Dulce*. 1982.

²This term was used to refer to a set of economic crimes – which, for now, can be summarised under the notion of fraud – that were penalised by the National Security Act.

from the National Securities Commission (*Comisión Nacional de Valores*, CNV) were present at *Campo de Mayo* to assist with the interrogations. It was the head of the CNV that had tipped off the military about the alleged irregularities at the firms. This is why the case investigates the legal responsibility of not only three military officers, but also of Juan Alfredo Etchebarne, former head of the CNV.

All of the victims were, at some point, transferred from the clandestine detention centre to an ordinary prison, and the materials obtained during the military 'summary trial' were integrated into the file opened by the ordinary judiciary. It is this detour via the repressive state apparatus which distinguishes the crimes investigated in the case discussed in this chapter from Bonifatti's imprisonment in *Plata Dulce*. The fact that these businessmen passed through the system of clandestine detention centres means that the detentions and torture they suffered are now being investigated as part of the systematic plan of repression that characterised the *Proceso*.

In 1994, a national court had decided that by that time, the crimes had fallen under the statute of limitations. However, following the decision of the constitutional court that crimes against humanity do not fall under the statute of limitations, the legal investigations of three military officers and Etchebarne were reopened nearly twenty years later. In 2013, the judge in charge, Daniel Rafecas, concluded the pre-trial stage of the case by passing the indictment (*auto de procesamiento*) that ordered the opening of a public trial. On 428 pages, Rafecas tries to make plausible, why one should understand the persecution and prosecution of businessmen as belonging to the repressive logic of the *Proceso*. This chapter offers a critical reading of the way in which the document constructs the economic dimension of state-backed violence in the Argentine case.

In line with the perspective set out in Chapter Three, I look at the legal proceedings as a site of competing politics of time. In the indictment, the *Proceso* is invoked as a negative reference against which the juridico-political order that sits in judgment over the past seeks to claim its own authority. However, as we will see, it does not succeed in offering a clear-cut image of the economic dimensions of the *Proceso*. Instead, the indictment also produces images of the past that cannot be accounted for by its own interpretative framework and that therefore expose the contingency of the latter. If read, these images destabilise the very periodisation attempted by the trial.

The first section situates the trial of Etchebarne within the re-foundational project that was introduced by Nestor Kirchner following the Argentinian financial, economic, political and social crisis which began in 2001. Taking up the notion of the negative reference from Chapter Three, I contend that the trials that address the economic dimension of the *Proceso* create a link between the temporality of debt and the temporality of guilt. Kirchner conceived of

the debt crisis of 2001 as the long-term result of the neoliberal policies first introduced with the help of the dictatorial state. In addressing the link between the human rights violations committed during the *Proceso* and its neoliberal economic project in the trials, the new government sought to establish itself as the political project that finally broke with the dictatorial past as well as with its economic legacy (5.1).

This interpretation of the *Proceso* as a political and economic project directed against societal demands for social justice also provides the framework through which the indictment construes the legal responsibility of the three military actors and Etchebarne for the abduction and disappearance of 27 businessmen. Section Two provides an overview of the case (5.2). I will then start to trace the ways in which the judge links the prosecution of businessmen for economic crimes to the systematic plan of repression. I will argue that because the judge associates the *Proceso* with the violent implementation of a societal and economic project that oppressed the working class, he has troubles linking the prosecution of businessmen for economic crimes to the economic rationale of the *Proceso*. Instead, and against his intention, he ends up separating the prosecution and persecution of businessmen from the logic of the repressive state by presenting the abduction and torture of the businessmen as the capture of the state apparatus by private interests. Similarly to what we witnessed in the last chapter with regard to the Industrialist Trials, such a reading of the economic dimensions of state crime adopts the separation of the political and the economic as a norm which is projected onto the past. The violation of this norm, namely the capture of the state by private interests, becomes the explanation of the crimes under investigation (5.3).

The framework which the judge adopts for his analysis of the economic dimension of the *Proceso* is, at the same time, challenged by quotes, documents and information that are included in the text. The second part of the chapter focuses on what with Benjamin we can conceive of as dialectal images that expose the kaleidoscope through which the pre-trial decision makes sense of the past. In the fourth section, I will be attending to quotes that the judge cites from the economic subversion cases. Through these materials, the prosecution and persecution of businessmen can indeed be connected to the overall rationale of the *Proceso*: they show that in the eyes of the new regime, those threatening the stability of the financial system by not acting as responsible consumers constituted a threat to national security and the newly implemented model. Understood in this manner, the prosecution of businessmen by the military directs us towards the tensions and contradictions of neoliberalism, namely the responsibility of the state to account for the failure of the market (5.4).

The fifth section concludes the chapter by picking up on a quote included in the pre-trial decision that suggests that the crimes under investigation can

be understood as instances of primitive accumulation. This interpretation makes the use of force in the property transactions a central category that distinguishes the violent past from what is suggested to be a non-violent present. I will draw on Marx's account of primitive accumulation as well as Benjamin's fragment *Capitalism as Religion* to challenge this periodisation.³

5.1 Debt – Guilt

In the fragment *Capitalism as Religion*, Walter Benjamin suggests that '[c]apitalism is probably the first cult that produces debt/guilt (Schuld) rather than atonement'.⁴ It bases its promise of a better future on the systematisation of deficit: economic growth (profit) is generated through debt (investment). According to Benjamin, '[c]apitalism is entirely without precedent, in that it is a religion which offers not the reform of existence but its complete destruction'.⁵

Benjamin's generalising description of capitalism applies astonishingly well to the Argentinian context. In December 2001, Argentina declared default on its foreign debts. This debt crisis was both preceded and followed by an economic, social and political crisis.⁶ Over a couple of years, the state had avoided defaulting by taking on new loans from the International Monetary Fund (IMF) that were tied to the usual conditions of structural adjustment policies, also known as the 'Washington Consensus'.⁷ Since the beginning of 2000, political protest against austerity policies started to grow and it gained intensity when bank accounts were frozen at the beginning of December 2001.⁸ In the face of massive protest, elected president Fernando de la Rúa fled the government. Between December 2001 and January 2002, the country was led by four successive presidents, one stepping down after the other. The protest slogan 'Qué se vayan todos!' (Go home all!) epitomised the population's frustration with what was considered to be a corrupted political system.

With the crisis of 2001, the failure of the neoliberal economic programme to deliver on its promises of a prosperous future had become manifest. The public debt, inherited from both the authoritarian regime as well as its constitutional successors, led to the 'downfall of a monstrous movement' which left large parts of the population in poverty.⁹ In the wake of the crisis, unemployment affected at least 20 per cent of the working population (30 per cent if one includes underemployment), and real income decreased by 30 per cent in

³Benjamin, 'Capitalism as Religion'.

⁴Benjamin, 'Capitalism as Religion', p. 288.

⁵Benjamin, 'Capitalism as Religion', p. 289.

⁶See Mónica Peralta Ramos. *La economía política argentina: poder y clases sociales (1930-2006)*. Buenos Aires: Fondo de Cultura Económica, 2007, pp. 345-378.

⁷Christian Kellermann. *Die Organisation des Washington Consensus. Der Internationale Währungsfonds und seine Rolle in der internationalen Finanzarchitektur*. Bielefeld: transcript, 2006.

⁸Miguel Teubal. 'La crisis del 2001-2002 y el colapso del neoliberalismo en la Argentina'. In: *Realidad Económica* 40.261 (2011), pp. 58-85.

⁹Benjamin, 'Capitalism as Religion', p. 259.

2002. Large sectors of the former middle class suddenly found themselves in situations of poverty.¹⁰

The profound impact on the living conditions of large sections of the Argentine population unleashed a debate on the causes and origins of the crises.¹¹ The histories of the public debt that emerged were, at the same time, histories of guilt. To look at the causes and origins of the debt crisis meant also to identify those policies and policymakers that had initiated the cycle of public debt and that were thus considered to be guilty of having brought about the social crisis. The trials addressing economic dimensions of the *Proceso* can be understood as part of the attempt of Peronism under Néstor Kirchner (2003-2007) and Cristina Fernandez de Kirchner (2007-2015) to position its political movement as the one which would finally break not only with the *Proceso*, but also with the economic model implemented by the regime that was held responsible for the breakdown of the country in 2001.

state affair

It was a central claim of the governments of both Néstor Kirchner and Cristina Fernández de Kirchner that it was only under Néstor Kirchner that the government made the prosecution of crimes against humanity into public policy. Indeed, it was not until Néstor Kirchner assumed office in 2003 that the Constitutional Court declared the amnesty laws to be unconstitutional. However, the emphasis on Néstor Kirchner's role tends to downplay previous efforts driven by civil society to push for trials that would investigate the human rights violations committed during the *Proceso*. There is a fair amount of literature discussing these efforts in detail, so I will not provide a complete overview. Instead, I will only mention key moments.¹²

The end of *Proceso* was initiated not through internal resistance, but through defeat in the Falklands War in June 1982. The victory of Great Britain over the Argentine military led the middle class to withdraw their support for the military junta, and the media took an increasingly critical stance towards the *Proceso*.¹³ In April 1983, the junta published the *Final Document of the Military*

¹⁰Eduardo Basualdo. 'Evolución de la economía argentina en el marco de las transformaciones de la economía internacional de las últimas décadas'. In: *Los condicionantes de la crisis en América Latina*. Ed. by Enrique Arceo and Eduardo Basualdo. Buenos Aires: CLACSO, 2009, pp. 321–382, p. 358.

¹¹Alfredo Raúl Pucciarelli. 'Introducción'. In: *Empresarios, tecnócratas y militares. La trama corporativa de la última dictadura*. Ed. by Alfredo Raúl Pucciarelli. Buenos Aires: siglo veintiuno editores, 2004, pp. 7–23, p. 7.

¹²For more detailed accounts, see Centro de Estudios Legales y Sociales, ed. *Hacer justicia: nuevos debates sobre el juzgamiento de crímenes de lesa humanidad en Argentina*. Buenos Aires: siglo veintiuno editores, 2011; Francesca Lessa. *Memory and Transitional Justice in Argentina and Uruguay. Against Impunity*. New York, NY: Palgrave Macmillan, 2013; Wolfgang Kaleck. *Kampf gegen die Straflosigkeit. Argentinien's Militärs vor Gericht*. Berlin: Wagenbach, 2010.

¹³Carlos H. Acuña. 'Transitional Justice in Argentina and Chile. A Never Ending Story?' In: *Retribution and Reparation in the Transition to Democracy*. Ed. by Jon Elster. Cambridge: Cambridge University Press, 2006, pp. 206–238, p. 209.

Junta on the War Against Subversion and Terrorism, in which it emphasised that it had acted on behalf of the elected government. In September of the same year, it decreed the 'National Pacification Law', an amnesty law for the military which was, however, revoked by the first elected Parliament in December 1983.¹⁴

Also in December 1983, the elected president, Raúl Alfonsín, responded to the demands of local human rights organisations and initiated an investigation into the forced disappearances that took place during the *Proceso*. The final report, *Nunca Más*, which we already encountered in Chapter One, gives an account of the systematic practice of forced disappearance. It sheds light on the administration of the clandestine detention centres and the hierarchies within the military apparatus. *Nunca Más* tends to portray the disappeared as non-political, random victims of human rights violations that were committed by the authoritarian state.¹⁵ They are victims of what the prologue to *Nunca Más* construes as a war-like situation. 'During the decade of the seventies', it reads there, 'Argentina was shaken by a terrorism that came both from the right and the extreme left'.¹⁶

The interpretation of the dictatorship as a conflict between the military and the guerrilla groups has been called the theory of the 'two daemons'.¹⁷ This understanding, according to which the *Proceso* was the result of a circle of left- and right-wing violence, is also reflected in the decision to prosecute not only members of the military, but also seven former leaders of the guerrillas. Eventually, though, the trial against the members of the three military juntas, which took place in 1985, received much more media attention than did the trials against the guerrilla leaders.¹⁸

According to Alfonsín, the National Commission on Forced Disappearance (*Comisión Nacional sobre la Desaparición de Personas*, CONADEP) as well as the trial against the members of the junta served as necessary conditions for a new foundation of Argentine democracy. As the title of the CONADEP report, *Nunca Más*, suggests, this new foundational project was initially defined through that which it was not. It positioned itself as the opposite of a system that employed and accepted the prevalence of violence. The 'never again' promised by the title of the CONADEP report and the junta trial was that

¹⁴*Ley Nr. 22.924. Ley de Pacificación Nacional.* Presidente de la Nación Argentina. 1983-09-22. URL: <http://servicios.infoleg.gob.ar/infolegInternet/anexos/70000-74999/73271/norma.htm> (visited on 02/14/2016).

¹⁵Crenzel, *Historia política*, pp. 44-48.

¹⁶CONADEP, *Nunca Más*, p. 5.

¹⁷Marina Franco. 'La teoría de los dos demonios: consideraciones en torno a un imaginario histórico y las memorias de la violencia en la sociedad argentina actual'. In: *Vielstimmige Vergangenheiten - Geschichtspolitik in Lateinamerika*. Ed. by David Mayer and Berthold Molden. Münster: LIT, 2009, pp. 267-285.

¹⁸Emilio Crenzel. 'From Judicial Truth to Historical Knowledge: The Disappearance of Persons in Argentina'. In: *African Yearbook of Rhetoric* 3.2 (2012), pp. 53-64, p. 53.

there would never again be political violence and systematic human rights violations.¹⁹

Against the intention that the trial of the juntas might serve as exemplary, it turned out to be an incentive for many relatives of the disappeared to file criminal complaints with the judiciary. With the intention of stopping the wave of newly initiated proceedings, in December 1986 Parliament passed the so-called ‘Full Stop Law’.²⁰ It determined that the statute of limitations applied to those crimes committed between 24th March 1976 and 26th March 1983, unless the accused had been indicted or would be indicted within 60 days. Again, this measure failed to produce the intended outcome. Public prosecutors immediately started to pass an increasing number of indictments of military actors.²¹

Following increasing pressure from the military apparatus, six months later Parliament passed the so-called ‘Law of Due Obedience’, which declared that all military actors below the ranks of the junta had only carried out orders and thus lacked legal responsibility.²² It further demanded an end to all ongoing legal proceedings. In June 1987, the Supreme Court confirmed that both laws were in accordance with the constitution, a decision to only be revoked by the same institution in 2005.²³

Alfonsín’s time in office was accompanied by a major debt crisis, and before the end of his term he handed over the government to Carlos Meném. Meném issued an amnesty for about fifty individuals who had been indicted but had not yet stood trial, as well as for the convicted members of the junta.²⁴ The human rights legacy of the *Proceso* was not a central issue for Meném, who had won the election with his promise to stabilise the economy. During his time in office, he implemented wide-ranging neoliberal economic reforms as well as the currency board that tied the Argentine peso to the US dollar.²⁵

While these policies had devastating effects on large parts of the population, they produced minimal social unrest as the labour movement and social organisations had not yet recovered from the severe repression they had suffered during the *Proceso*.²⁶ It is against this backdrop that Argentine

¹⁹Crenzel, *Historia política*.

²⁰*Ley Nr. 23.492 (Punto Final)*.

²¹Parenti, ‘Jurisprudencia Argentina’, p. 85.

²²*Ley 23.521 (Obediencia Debida)*.

²³*Causa incoada en virtud del decreto 280/84 del Poder Ejecutivo Nacional s/ recurso extraordinario*. Corte Suprema de Justicia de la Nación. 1987-06-22; *Simón*.

²⁴*Decree 1002/89*. Indulto. Guerra antisubversiva. Personal militar comprendido en determinadas causas. 1989-10-06.

²⁵Enrique Arceo and Eduardo Basualdo, eds. *Los condicionantes de la crisis en América Latina. Inserción internacional y modalidades de acumulación*. Buenos Aires: CLACSO, 2009; Eduardo Basualdo. *Estudios de historia económica Argentina. Desde mediados del siglo XX a la actualidad*. Buenos Aires: siglo veintiuno editores, 2010.

²⁶Alfredo Raúl Pucciarelli. ‘La patria contratista. El nuevo discurso liberal de la dictadura encubre una vieja práctica corporativa’. In: *Empresarios, tecnócratas y militares. La trama corporativa de la última dictadura*. Ed. by Alfredo Raúl Pucciarelli. Buenos Aires: siglo veintiuno editores, 2004, pp. 99–171, p. 156.

scholar Ana Tedesco claims that, after the *Proceso*, '[p]olitical inclusion was established simultaneously with the imposition of domination by economic and social exclusion'.²⁷ The effective transformation of the social forces during the *Proceso* as well as the continuity of the neoliberal economic project in post-dictatorship Argentina is what Hugo Vezzetti describes as the core of a left memory that established itself during the 1990s.²⁸

Néstor Kirchner made this reading, according to which the transition to democracy was characterised by a continuity of the economic project initiated under the *Proceso*, his own when he became president in 2003.²⁹ In the new prologue to the thirtieth anniversary edition of the *Nunca Más*, for example, the government made clear that it understood a true 'Never Again' to rest on two pillars: first, the memory and prosecution of the human rights violations committed in the name of the state during the *Proceso*; and second, the reversal of the situation of social injustice which he understood to be the consequence of the neoliberal policies that were first implemented during the National Reorganisation Process and which had eventually led to the social crisis of December 2001.

During the first years of the Kirchner government, these two pillars seemed to translate into different policy fields. On the one hand, Kirchner explicitly supported the abrogation of the amnesty laws and, once the trials were re-opened, assigned extra funds to enable the widespread prosecution of the crimes committed during the *Proceso*. The aim of social justice, on the other hand, was to inform economic policies and social security programmes, but initially was not connected to a *legal* investigation of the economic dimensions of the *Proceso*. However, this distinction between a reversal of a situation of impunity and a reversal of the situation of economic violence and social injustice collapsed with the case of Papel Prensa S.A., which entered the political arena in 2010.

'crimes against humanity committed for economic reasons'

In an move against powerful newspapers sympathising with the opposition, president Cristina Fernández de Kirchner (2007 – 2015) pointed out that the three biggest newspapers in the country owed their position to the fact that, during the dictatorship, they had bought shares in the paper factory 'Papel Prensa S.A.' from the Graiver brothers. They had been forced to sell

²⁷Laura Tedesco. *Democracy in Argentina. Hope and Disillusion*. London: Frank Cass, 1999, p. xiii; see also Pilar Calveiro. 'Formas y sentidos de lo represivo entre dictadura y democracia'. In: *Hacer justicia: nuevos debates sobre el juzgamiento de crímenes de lesa humanidad en Argentina*. Ed. by Centro de Estudios Legales y Sociales. Buenos Aires: siglo veintiuno editores, 2011, pp. 111–142, p. 124.

²⁸Hugo Vezzetti. *Pasado y presente. Guerra, dictadura y sociedad en la Argentina*. Buenos Aires: siglo veintiuno editores, 2002, p. 208.

²⁹See in detail Emilio Crenzel. 'El estigma sobre la militancia todavía tiene vigencia. Entrevista por Alejandra Dandan'. In: *Página/12* (2011-07-31). URL: <http://www.pagina12.com.ar/diario/elpais/1-173435-2011-07-31.html> (visited on 08/07/2011).

their shares while detained in a clandestine detention centre. In 2010, the presidency launched an official investigation into the issue and the Ministry of Justice, Security and Human Rights filed a criminal complaint, demanding the investigation of the illegal appropriation of Papel Prensa S.A.³⁰ According to the complaint, the owners of *Clarín*, *La Nación* and *La Razón* had been enabled to buy the shares through a criminal enterprise involving ‘extortion and abduction’ by state forces.³¹

Papel Prensa consequently became synonymous with the long-term economic consequences of the dictatorship, and the case put the spotlight on those who had profited from the violence inflicted by the authoritarian regime. The fact that the state now took on the topic of corporate complicity also worked as a catalyst for other legal investigations concerning the economic dimensions of the *Proceso* which had not moved forward in previous years.

With the case of Papel Prensa S.A., the notion of ‘crimes against humanity committed for economic reasons’ entered official rhetoric and soon became institutionalised in a commission dedicated to the investigation of these crimes.³² Although one might infer so from the phrase, it does not in fact refer to the complicity of corporations in the abduction and disappearance of their workers.³³ Instead, it denotes the transferral of shares during the dictatorship with the help of the repressive state apparatus. The newspapers that had profited from the Papel Prensa S.A. deal were suspicious of what they considered to be a ‘new’ and purely politically motivated reinterpretation of ‘crimes against humanity’ which, in their eyes, was not warranted by the respective international treaties.³⁴

Some of the circumstances surrounding the transfer of Papel Prensa S.A. have been well known before, and have given rise to an array of conspiracy theories.³⁵ However, official investigations into the issue only date back to 2010. In various trials that were investigating crimes against humanity, victims

³⁰*Papel Prensa. La Verdad*. 2010. URL: http://www.mecon.gov.ar/basehome/pdf/papel_prensa_informe_final.pdf (visited on 05/13/2013); Ministerio de Justicia, Seguridad y Derechos Humanos. *Papel Prensa - Querella presentada por la secretaría de Derechos Humanos con el patrocinio de la Procuración del Tesoro de la Nación en el Juzgado Criminal y Correccional Federal Nr. 3 de la Ciudad de La Plata*. 2010. URL: http://www.ambito.com/diario/aw_documentos/archivospdf/2005/id_doc_5557.pdf (visited on 01/30/2013).

³¹Ministerio de Justicia, Seguridad y Derechos Humanos, *Papel Prensa - Querella presentada por la secretaría de Derechos Humanos con el patrocinio de la Procuración del Tesoro de la Nación en el Juzgado Criminal y Correccional Federal Nr. 3 de la Ciudad de La Plata*. P. 201.

³²*Créase la Unidad Especial de Investigación de los Delitos de Lesa Humanidad Cometidos con Motivación Económica*. Nr. 3216/2010. Ministerio de Justicia, Seguridad y Derechos Humanos. 2010-11-19. URL: <http://legislacion.elderecho.com.ar/index.php?accion=8&record=7157> (visited on 08/07/2011).

³³I will look at one of trials that investigates the responsibility of businessmen for the illegal detention of their workers in the next chapter.

³⁴See e.g. ‘Vamos por todo. Una consigna kirchnerista descubre otra peligrosa metodología basada en persecuciones ideológicas’. In: *La Nación* (2011-03-24). URL: <http://www.lanacion.com.ar/1359900-vamos-por-todo> (visited on 08/07/2011).

³⁵See e.g. Irene Capdevila. *El Caso Graiver. Lo que ocultan Kirchner y Clarín sobre Papel Prensa*. Buenos Aires: Editorial Agora, 2010.

reported that they had been forced to sell their property. In order to confirm that the alleged property transactions had taken place, judges started to request the relevant documents from the CNV.³⁶ Confronted with an increased number of requests for information from the courts, the then director of the institution, Alejandro Vanoli, decided to create an 'Office for Human Rights, Memory, Truth and Justice' to deal with the requests, conduct an independent investigation, and to train staff in current human rights issues related to the stock exchange.³⁷ The final report of the investigation was published in March 2013.³⁸ In the report, the team at the Human Rights Office identified 250 cases in which forced property transaction took place under the eye of the CNV during the *Proceso*.

As mentioned in the introduction to this chapter, the then head of the CNV, Juan Alfredo Etchebarne, is now being investigated together with three military officers for his role in the abduction of 23 individuals. Etchebarne's indictment is of particular interest in the context of this thesis, as it forces the prosecution and the judge to offer an explanation for the CNV's cooperation with the repressive forces.

5.2 N° 8405/2010: The History of a Case

D'Alessandri, Francisco Obdulio y otros s/ privación ilegal de la libertad is the judicial document that concludes the pre-trial stage of the criminal investigation against three former military officers, Francisco Obdulio D'Alessandri, Raúl Antonio Guglielminetti and Víctor Enrique Rei, as well as the former head of the CNV, Etchebarne, accused of having abducted and tortured 23 individuals.³⁹ All defendants are awaiting the opening of the public trial in pre-trial custody.⁴⁰ As I mentioned in Chapter One, so far no case dealing explicitly with the economic dimensions of the *Proceso* has been concluded.

³⁶The main purpose of the CNV was (and is) to ensure the transparency of Argentina's securities markets, to watch over the market price formation process and to protect investors. It supervises those corporations which are authorised to issue securities to the public, the secondary markets where these securities are traded, and all persons and corporations involved in any capacity in the public offering and trading of these securities. CNV. URL: <http://www.cnv.gov.ar/> (visited on 02/06/2016).

³⁷Hannah Franzki. *Interview with María Celeste Perosino, Bruno R. Napoli and Walter A. Bosisio (Office for Human Rights Memory Truth and Justice, Comisión Nacional de Valores)*. Buenos Aires, 18/03/2013.

³⁸CNV. *Economía política y sistema financiero*. 2013. URL: http://www.cnv.gob.ar/Publicaciones/InformeDDHH/INFORME_ECONOMIA_POLITICA_Y_SISTEM_FINANCIERO-DDHH.pdf (visited on); The report was later expanded and published as a book: María Celeste Perosino, Walter Bosisio, and Bruno Nápoli. *La dictadura del capital financiero. El golpe militar corporativo y la trama bursátil*. Colección Autonomía. Buenos Aires: Ediciones Contenente, 2014.

³⁹*D'Alessandri y otros (8405/2010)*, p. 380.

⁴⁰As per February 2016. There was a back and forth regarding the pre-trial custody of Etchebarne. His appeal against the decision had first been granted but was later denied. See 'Rechazan planteos del ex titular de la Comisión Nacional de Valores durante la dictadura'. In: *Radio Nacional* (2015-11-10). URL: <http://www.radionacional.com.ar/?p=83783> (visited on 02/13/2016).

Still, the indictment of Etchebarne and the three military officials documents on 428 pages the evidence gathered during the pre-trial and advances the legal framework through which the judge casts the legal responsibility of the four defendants. As such, it allows us to get a glimpse of the way in which the present juridico-political order defines what it understands to be the economic dimensions of the *Proceso*. In my reading of the document, I will focus on the responsibility attributed to Etchebarne, whose activity, to the court, constitutes a crucial piece of evidence in the link between the economic project of the *Proceso* and the repressive state apparatus.

Etchebarne was appointed by Jorge Rafael Videla, head of the first military junta, and José Martínez de Hoz, Minister of Economic Affairs under Videla, on 9th June 1976.⁴¹ As stated above, the institution's purpose is to ensure that the stock market functions. In 1978, Etchebarne reported alleged irregularities in relation to three economic groups – 'Graiver', 'Chavanne' and 'Industrias Siderúrgicas Grassi S.A.' (Grassi) – to both the judiciary and the military. Between 14th September and 8th November 1978, 23 individuals linked to these economic groups were abducted. All 23 of them eventually arrived at the clandestine detention centre *Campo de Mayo*, where they were interrogated under torture about the companies they owned and worked for. Because the military personelle working at *Campo de Mayo* did not have the expertise needed to conduct interrogations concerning economic crimes, they asked for support from the CNV. Etchebarne agreed, and for several months, four members of the CNV had their office at *Campo de Mayo*, where they assisted in the interrogation of those accused of 'economic subversion'. Later, the detainees were handed over to the ordinary judiciary and transferred to a normal prison. The civil and military investigations were united into a single case handled by a civil judge.⁴²

Because he was the one who referred the case to the military, and because he provided staff to help with the interrogations, Etchebarne is now indicted as a 'necessary participant' in the abduction of the individuals. Most of the evidence presented by the judge comes not from testimonies, but from legal documents, products of the investigations that Etchebarne himself initiated in 1978. The case was filed as N° 40.528.

case n° 40.528

On 31st August 1978, Etchebarne reported irregularities relating to financial transactions carried out by the metal works 'Industrias Siderúrgicas Grassi S.A.' (Grassi S.A.) to the civil court.⁴³ The complaint identified four issues to be investigated. It highlighted, first, irregularities with respect to exchange of cheques; second, the transfer of money to another firm, 'Industrias Celulósicas

⁴¹He stayed in office until 4th June 1983.

⁴²*D'Alessandri y otros (8405/2010)*.

⁴³*D'Alessandri y otros (8405/2010)*, p. 60.

Regionales S.A.'; third, financial operations alien to the social purpose of the joint stock company; and fourth, irregularities regarding credit which Grassi S.A. had granted Chavanne in order to buy part of the Hurlingham Bank (*Banco de Hurlingham*).⁴⁴ Etchebarne reported these observations as possible violations of the the National Security Act, which, as I will discuss in more detail below, contained one article relating to economic offences.⁴⁵ About two weeks later, on 13th September, Etchebarne furthermore reported the observed irregularities to the military.⁴⁶

As a consequence, the financial transactions between owners of Grassi S.A. and Banco de Hurlingham were subject to two parallel investigations: one civil and one military. It was not until December 1978 that the civil judge realised that both the civil and the military judiciary were investigating the same facts and sent a request to the military to hand over the material they had gathered so far. The civil judge integrated both investigations, including all documents obtained by the military from house searches and the information resulting from interrogations at *Campo de Mayo*. The case was filed under N° 40.528. Based on this 'evidence', on 19th January the judge ordered that the accused be held in pre-trial custody. He thereby legalised – *ex post* – the situation of the detainees who, by that time, had been detained for four months without any judicial order.⁴⁷

Between 1980 and 1982, as the investigation continued, several judges decided that insufficient evidence had been presented to justify the imprisonment of some of the accused.⁴⁸ In 1983 – after the military junta handed over the government to the first elected president Raúl Alfonsín – four of the defendants were still in prison.⁴⁹

In December 1984, yet another judge declared that all legal action which had taken place thus far was void and furthermore ruled that the detention suffered by the accused had been illegal.⁵⁰ This decision was confirmed by the appeals court on 11th February 1986.⁵¹

The trajectory of case N° 40.528 over the course of almost 10 years evidences the change of jurisprudence in accordance with the regime change. What started as two parallel investigations for alleged crimes amounting to economic subversion during the *Proceso* was eventually dismissed as juridical farce by the courts following the transition.

⁴⁴ D'Alessandri y otros (8405/2010), p. 117.

⁴⁵ Ley Nr. 20.840 (*Seguridad Nacional*).

⁴⁶ Act 21.460 decreed by the military junta established that those crimes defined by the National Security Act can also be investigated by a military summary trial *Ley Nr. 21.460. Seguridad Nacional*. Junta Militar. 1976-11-18. URL: http://www.infojus.gob.ar/legislacion/ley-nacional-21460-seguridad_nacional.htm (visited on 02/06/2016).

⁴⁷ D'Alessandri y otros (8405/2010), p. 58.

⁴⁸ D'Alessandri y otros (8405/2010), p. 59.

⁴⁹ These were: Luis Arnoldo Grassi, Luis Constanzo Pignatoro, Edgardo Humberto Cardona and Aristodemo Raúl Alberici. D'Alessandri y otros (8405/2010), p. 60.

⁵⁰ D'Alessandri y otros (8405/2010), p. 67.

⁵¹ D'Alessandri y otros (8405/2010), p. 69.

case n° 41.712

Also following the regime change in 1983, Marcelo Augusto Chavanne, who had been arrested in October 1978, filed a criminal complaint against Etchebarne for his participation in the crimes that had been carried out by military actors. After seven years of gathering testimonies, on 21st December 1990, the judge conducting the investigations during the pre-trial stage ordered Etchebarne be taken into custody. There was, he declared, *prima facie* enough evidence to assume that Etchebarne had been a necessary participant in five cases of abduction, as defined by Article 142 of the Criminal Act.⁵² The evidence gathered indicated that Etchebarne filed the complaint with the military knowing that this would likely lead to the abduction of the individuals. Furthermore, several witnesses reported that Etchebarne had been present during abductions, house searches and interrogations at *Campo de Mayo*.⁵³ It was also Etchebarne who had signed the document agreeing to the four CNV officers being sent to assist the military during the investigation. However, the pre-trial investigations never led to a public trial itself. In April 1994, the case was discontinued as the statute of limitations was applied.⁵⁴

5.3 Economic Subversion

I suggested that the present case against the three military officials and Etchebarne (N° 8405/2010) stands out from the hundreds of criminal investigations currently ongoing because it forces the tribunal to engage with the economic dimensions of the *Proceso*. In making sense of the persecution and prosecution of the businessmen, and having to determine Etchebarne's responsibility in the crimes, it participates in defining the economic dimensions of the *Proceso*.

The judge at pre-trial stage, Daniel Rafecas, was aware of this particularity. The fact that the victims arrived at the clandestine detention centre *Campo de Mayo* following accusations of *economic* subversion – rather than *political* subversion – constitutes, in the judge's eyes, the singularity of the case which distinguished the latter from other cases the tribunal had dealt with to that point.⁵⁵ He writes:

All victims, as already indicated, were related to the economic groups 'Chavanne' - 'Insturias Sierúrgicas Grassi S.A.', and some of them were related to operations concerning the transfer of the Hurlingham Bank. Their belonging to these companies and the suspected prosecution of

⁵² D'Alessandri y otros (8405/2010), p. 276.

⁵³ D'Alessandri y otros (8405/2010), pp. 387, 392, 395.

⁵⁴ The crimes to which the statute of limitations was applied are not part of the present case D'Alessandri y otros (8405/2010), pp. 277, 381.

⁵⁵ D'Alessandri y otros (8405/2010), p. 20 (all translations from the document are mine).

crimes qualifying as 'economic subversion' were the alleged motives for their illegal abduction.⁵⁶

These circumstances, he contends, demand that the 'civil-military character' and 'politico-economic dimension' of the *Proceso* be made visible even though 'it might not enter the terrain of the justiciable'.⁵⁷

According to the judge, the economic project of the *Proceso* shows itself firstly in the violent repression of all those groups and individuals that had been fighting for distributive justice, and secondly, in the shift of a production-based economy into one based on finance. However, because he identifies the working class and distributive claims as targets of the repression, the judge has trouble explaining why the repressive state would abduct and torture a group of businessmen accused of economic crimes. He eventually suggests that their persecution can be explained as the 'subjection of the public to the private': once the repressive structure that had been put in place was no longer used for the repression of political opponents, he argues, it could be used to extract money for private purposes. Against his own intentions, as we will see, the 'economic' dimension is written out of the repressive apparatus and linked to private interests.

'the subordination of public to the private'

The economic dimension of the *Proceso* has been subject to a number of recent scholarly and journalistic publications, many of which are quoted in the pre-trial decision that was elaborated by Rafecas. In the document, the at times contradictory interpretations of how the economic project is linked to the repressive state are thereby woven into one single yet incoherent narrative.

The judge starts elaborating on what he calls the 'civil-military character of the *coup d'état*' by quoting the work of Paula Canelo.⁵⁸ Canelo contends that the military had its own institutional logic, values and interests which at points coincided with those of the economic elite, thereby giving rise to strategic alliances. The text then specifies, now referring to Vicente Muleiro's *El Golpe Civil*, how this links to the 'iconic' figure of de Hoz and his role as minister of economic affairs.⁵⁹ In the quotes that follow, the economic policy implemented by the regime (the shift from a production-based economy to one centred around financial capital) and violent repression are presented as two different strategies intended to reach the same goal, namely the weakening of the political force of the working class and their distributional demands. In

⁵⁶ D'Alessandri y otros (8405/2010), p. 382.

⁵⁷ D'Alessandri y otros (8405/2010), p. 21.

⁵⁸ D'Alessandri y otros (8405/2010), p. 21; Paula Canelo. 'La política contra la economía: los elencos militares frente al plan económico de Martínez de Hoz durante el Proceso de Reorganización Nacional (1976-1981)'. In: *Empresarios, tecnócratas y militares. La trama corporativa de la última dictadura*. Ed. by Alfredo Raúl Pucciarelli. Buenos Aires: siglo veintiuno editores, 2004, pp. 219-312.

⁵⁹ D'Alessandri y otros (8405/2010), p. 22; Muleiro, *Golpe civil*.

this context, the physical violence and persecution carried out by the military is described as a means that was necessary to introduce the economic reforms against the resistance of wide parts of the population. That is, the implementation of the new economic project is presented as the central rationale of the *Proceso*.⁶⁰ In sum, describing at times a strategic alliance between military institution and economic elite, at other times a capture of the state apparatus by the economic elite, the first subsection of the document establishes the working class, with its re-distributional demands, as the target of the repression.

The document then goes on to describe the weakening of the labour movement by military, political, legal and economic means: unions and workers were persecuted, unions intervened in by the military, labour rights abolished and the importance of industry weakened.⁶¹ Here, the economic project figures not so much as a rationale for the physical oppression. Rather, the economic reforms adopted by the regime and the repression are presented as two strategies aiming at destabilising the workers' movement. This alliance was possible, it is argued, due to a shared understanding by economic and military actors about the origins of the social chaos that in their eyes made the coup necessary: the unresolved class struggle.

The figure of the subversive, the judge continues to argue, functioned as an empty signifier which automatically disqualified political opposition.⁶² If the notion of subversion or the subversive generally functioned as the common denominator for every person identified as putting into danger the national interest, the document argues, *economic* subversion specifically described those acts that were identified as attacks on the economic order put into place by the *Proceso*.

Having reconstructed the notion of 'economic subversion' as understood by the *Proceso* in these terms, the judge then struggles to accommodate the prosecution and abduction of businessmen within this framework. How could the economic offences of which the victims were accused be understood by the state as attacks on, or challenges to, the economic order which it sought to implement? How can economic offences be qualified as 'economic subversion' if the latter has been defined specifically in terms of a challenge to the state's politics from the political left?

The indictment does not provide an answer to this question. Rather than arguing why the acts that the defendants were accused of – such as fraud and illegal lending practices – constituted a threat to the economic order, the document jumps straight to describing the means by which the junta fought 'economic subversion'.

⁶⁰ D'Alessandri y otros (8405/2010), pp. 22-23.

⁶¹ D'Alessandri y otros (8405/2010), pp. 23-26.

⁶² D'Alessandri y otros (8405/2010), pp. 26-27.

On the use of the repressive state apparatus in the fight against economic subversion, the document highlights that it was only as of 1978, two years after the coup, that the military began to go after economic actors. This is explained as follows:

The fact that the fight against the 'subversion' had been in large part accomplished left a repressive structure of both repressors as well as institutions free to be used for other purposes. This implies not only repressive tasks such as abductions in order to fight 'economic subversion', but also 'private activities' by organised gangs within the repressive structure that under the pretext of this 'fight' would carry out abductions.⁶³

The alleged necessity to fight against 'economic subversion' became, the indictment suggests, 'cause and excuse' in order to generate funds for the regime or for private purposes.⁶⁴

What starts to emerge from the judge's reasoning is an explanation of the repression of businessmen in terms of a 'subordination of the public to the private', a phrase which appears on various occasions throughout the document. According to this explanation, the capture of the state apparatus for private interests results in the fight against economic subversion. The judge adopts this description of the events from the report that was published by the Human Rights Office of the CNV in 2013.⁶⁵ In the pre-trial decision, Judge Rafecas quotes extensively arguments presented by the prosecutor. He concurs with the prosecutor when the latter affirms that:

The superior interests of the nation, the threat against a western and Christian lifestyle were, maybe, the repercussions of history's mud – class struggle, the dispute over models of accumulation and distribution – whereas a certain number of *opportunists took over the institutions and, in the name of the public, favoured the private*; or, to avoid the description making it sound elegant, their own pockets.⁶⁶

The imprecise legal definitions that characterised the National Security Act, it is argued, led to a 'repressive schizophrenia' which enabled private interests to hide behind and act in the name of the state.⁶⁷

At a closer look, what is called the 'subordination of the public to the private' on various occasions in the document are, in fact, different ways of defining the relationship between the economy and the state during the *Proceso*. At the beginning, the 'private' is defined as the particular interest of a determined group of economic actors that captured the state apparatus, in order to implement an *economic programme* for its own benefit.

⁶³ D'Alessandri y otros (8405/2010), p. 48.

⁶⁴ D'Alessandri y otros (8405/2010), p. 47.

⁶⁵ CNV, *Economía Política*.

⁶⁶ D'Alessandri y otros (8405/2010), p. 42 (my italics).

⁶⁷ D'Alessandri y otros (8405/2010), p. 42.

But as used in the document, the private also refers to personal initiatives of individuals that took advantage of the existing state structure which was originally established for the fight against communism. From this point of view, the fight against 'economic subversion' with the help of the military apparatus appears not so much as part of the rationale of the *Proceso*, but as the result of individual initiatives with the aim of personal enrichment.

'domination of the act'

This reading is also reflected in the adjudication concerning the legal responsibility of Etchebarne. Let us recall that the crimes that are being investigated in the trial of Etchebarne and the three military officials are the abduction and torture of 23 individuals. The judge proposed that the three accused military actors be tried as co-authors, while Etchebarne's role in the commission of the crimes was defined as 'necessary participant'. He justifies the distinction between authorship and participation based on the link each of the accused had with the repressive state apparatus:

[T]he role of the cited officials, *with the exception of Etchebarne*, is directly linked to the incidents proper to the systematic plan of illegal repression insofar as they were either intelligence officials – D'Alessandri and Guglielminetti – or head of a structure defined as illegal such as the Comando de Subzona – the case of Rei.⁶⁸

Even though Etchebarne was also a state employee, he is not considered to be directly linked to the repressive state apparatus, probably because he was in charge of a state institution directed at the economy. Underlying this distinction is a vision of the *Proceso* that is similar to Ernst Fraenkel's description of National Socialism as a dual state, referred to in the last chapter.⁶⁹ On the one hand, the judge identifies the illegal repressive apparatus that belongs to the prerogative state; on the other hand, he assumes the existence of a normative state that continues, among other things, to ensure that the economy functions.

Etchebarne is accused as a necessary participant because he set the repressive state apparatus in motion.⁷⁰ He must have known, the judge holds, that in reporting the alleged economic crimes to the military (and not only to the civil judiciary), the accused would enter the repressive apparatus 'with which he later came to collaborate'.⁷¹ The document continues by highlighting this later collaboration as 'material contribution' to the crime:

The circumstances pointed out before link the defendant to several events of the repressive state apparatus, but it is without any doubt the intervention of the task force of the CNV . . . that allows us to qualify the presence

⁶⁸ D'Alessandri y otros (8405/2010), p. 405 (my italics).

⁶⁹ Fraenkel, *Dual State*.

⁷⁰ D'Alessandri y otros (8405/2010), p. 397.

⁷¹ D'Alessandri y otros (8405/2010), p. 414.

of the CNV at *Campo de Mayo* as material contribution to an enterprise over which he lacked control (*dominio de hecho*) because it was under the control of the military perpetrators.⁷²

That is, according to judge Rafecas, Etchebarne, as head of the CNV, cannot be charged as author of the crime because he was not part of the *repressive* state apparatus and thus did not have control over it. Still, the fact that Etchebarne reported the alleged crimes of economic subversion to the military and that he provided staff to assist with the interrogations at *Campo de Mayo* makes him, in the eye of the judge, a necessary participant in the abduction and torture of the businessmen.

At the beginning of this section, I highlighted the judge's awareness that the particularity of this case is that it forces the people concerned with it to engage with the economic dimension of the *Proceso*. According to him,

[t]he question to debate is whether the activities of the directorate of the CNV imply that the latter installed itself on top of the dictatorial structure in order to go after and dismantle certain agents, financiers and businessmen or whether its activities formed part of a larger strategic plan, the self-proclaimed National Reorganisation Process.⁷³

As we saw in this section, the document sets out to construct an image of the past that places an economic rationale at the centre of the *Proceso*. According to this image, the repression of the labour movement served the implementation of a new, neoliberal economic programme that once and for all would break the class alliance between workers and petty bourgeoisie. However, the way in which Judge Rafecas eventually makes sense of the fight of economic subversion as well as of the individual responsibility of Etchebarne does exactly the opposite: he inadvertently separates the persecution of businessmen during the *Proceso* from both the rationale of the repressive state policies as well as the economic reforms implemented by Martínez de Hoz.

To be more concise: *because* the judge defines the 'strategic plan' of the National Reorganisation Process only in terms of the violent repression of distributive demands, the disappearance of economic actors belonging to the financial sector can only be explained with the capture of the state apparatus for private interests. A framework that defines Peronism as the sole opponent to neoliberalism is unable to accommodate the prosecution of businessmen within the strategic plan of the *Proceso*. The only way the judge manages to make sense of the abductions, torture and forced property transactions is by locating the reason for the persecution of businessmen in the undue capture of the existing repressive structure by private interests, the 'subordination of the public to the private'.

⁷² D'Alessandri y otros (8405/2010), p. 392.

⁷³ D'Alessandri y otros (8405/2010), p. 43.

In the following section, I will be drawing on quotes from the economic subversion case (case N° 40.528 introduced above) cited by the pre-trial decision in order to offer a different explanation for the persecution and prosecution of the businessmen accused of economic subversion. The citations disrupt the text of the pre-trial decision insofar as they indicate that the ‘irresponsible’ business practices of those accused of economic subversion constituted a problem for the *Proceso* not because they challenged the economic logic of the free market by making redistributive demands, but because they exposed the market’s susceptibility to failure. Thus understood, the prosecution of businessmen for allegedly endangering the national economy is not at odds with a free market economy – as the indictment at one point suggests.⁷⁴ Rather, it is a way to account for the failure of the market without questioning the suitability of the latter as an organising principle of the economy.

Such a reading shifts the focus from the violation of liberal principles, such as the capture of the state for private purposes, to the contradictions at the heart of economic liberalism. As such, I will be arguing in the last section, it complicates the clear-cut distinction between the authoritarian past and a present governed by the rule of law that is introduced by the pre-trial decision.

5.4 Liberal Contradictions

In order to substantiate this argument, I first want to look at the crimes relating to economic offences as they are defined in the National Security Act before turning to the manner in which the act was enforced with the help of a repressive state apparatus.

redefining economic subversion

These economic offenses are often referred to as ‘economic subversion’ even though this term cannot be found in the National Security Act itself. The act was decreed by Isabel Martínez de Perón in 1974 – two years before the coup.⁷⁵ Against a backdrop where national guerilla groups were operating all over the country, it was intended to enable the state to fight ‘subversion in all its manifestations’ in the supposed interest of national security. Article 1 criminalises all acts that, ‘in order to attain their ideological postulation, intend or proclaim by any means to change or oppress the constitutional order or the social peace of the nation’.⁷⁶ Articles 2 to 5 penalise different forms of

⁷⁴Rafecas writes that ‘despite the liberal discourse, paradoxically, it was necessary to exercise unrestricted state control’ in order to carry out the National Reorganisation Process. See *D'Alessandri y otros (8405/2010)*, p. 28.

⁷⁵*Ley Nr. 20.840 (Seguridad Nacional)*, The criminalisation of economic offences as a matter of national security in Argentina dates back to the Onganía dictatorship which lasted from 1967 to 1973.

⁷⁶*Ley Nr. 20.840 (Seguridad Nacional)*, Art. 1.

participation in the crimes defined by Article 1. Article 6 then defines economic offences amounting to a threat to national security. It reads:

Article 6 – Those who improperly alienate, destroy, damage, produce the disappearance, hide, or fraudulently diminish the value of raw materials, products of any kind, machines, equipment or other capital assets, or unjustifiably compromise its patrimony, for profitmaking or maliciously, under risk of affecting the normal development of an establishment or commercial, industrial, agricultural or mining exploitation or services' establishments, shall be punished with two to six years' detention and ten thousand to one million pesos' fine, if it does not result into a more severe crime. Penalties shall aggravate one third: a) if the act affects the normal supply or provision of goods or services of public use, b) if it leads to the closure, liquidation or bankruptcy of the establishment or commercial exploitation. Penalties shall increase one half: a) if the act cause prejudices to the national economy, b) if it puts at risk the security of the state.⁷⁷

As we can see, most of Article 6 of the National Security Act criminalises activities that are usually regulated by criminal law relating to economic offences. The increase of the penalty for criminalised economic behaviour that damages the national economy or that puts in danger the security of the state is the culmination of a logic found in criminal law relating to economic offences more generally. The last two lines, I would like to suggest, only explicate a rationale which serves as justification for the criminalisation of certain economic behaviours in general, namely the protection of the economic system.

In Argentina, criminal law relating to economic offences is usually considered an area of law distinct from criminal law proper.⁷⁸ This is justified with regard to the passive subject of criminal offences. While criminal law is usually justified with regards to a national normative order that is considered to be under attack whenever an individual right is violated (such as the right to property, physical integrity, etc.), criminal law relating to economic offences, it is argued, does not protect individual rights but a supra-individual good, namely the economic order.⁷⁹ In this vein, the Argentine legal scholar Ventura Gonzáles defines economic crime as follows:

We speak of economic crime when an act violates the state's interest in the integrity and conservation of its economic system. So-called economic crimes are those acts that are declared illegal and which affect the economic structure of a country.⁸⁰

⁷⁷ *Ley Nr. 20.840 (Seguridad Nacional)*.

⁷⁸ See e.g. Eugenio Raúl Zaffaroni, Alejandro Alagia, and Alejandro Slokar. *Derecho Penal. Parte General*. 2nd ed. Buenos Aires: EDIAR, 2002, pp. 214-215.

⁷⁹ Ventura González. *Nociones generales sobre el derecho penal económico*. Mendoza: Ediciones Jurídicas Cuyo, 1998, p. 24 (my translation).

⁸⁰ González, *Nociones generales*, p. 22.

For González, the Sherman Act constitutes the origin of criminal law concerning economic offences worldwide.⁸¹ We encountered this piece of US American anti-trust legislation in the last chapter.⁸² There, I highlighted the importance of the anti-trust debate for the prosecutorial strategy in the Industrialists Trials. The moral condemnation of trusts by the US prosecution, I argued, tied in with the ordoliberal reading of the causes of World War II, namely the lack of competition. This reading, I suggested, became the reverse blueprint for the new German social order which saw competition as a precondition for a stable democracy, thus making it the function of the state to create the conditions necessary for the market to operate.

The justification of criminal law as it relates to economic offences found in González' text echoes the basic ordoliberal assumptions about political economy. The 'economic law' is the law of the 'organised economy', an organisation which is necessary to secure the 'public economic order'.⁸³ In light of this, criminal law relating to economic offences is presented as the 'penal projection' of state intervention which is necessary to ensure the markets functions without affecting the market's regulatory forces.⁸⁴ If criminal law relating to economic offences is legitimised with reference to the protection of the economy in general, then linking it explicitly to the protection of national security, as done by the National Security Act, does not introduce a new rationale characteristic of authoritarianism. Rather, it can be read as a blunt statement on the rationale underlying criminal law relating to economic offences in general.

prosecuting economic subversion

The pre-trial decision reproduces verbatim entire sections from the sentences on economic subversion – 10 pages in total – and thereby unearths textual material produced by the juridico-political order of the *Proceso* that is now on trial. As we will see, the explanations given by the judges in order to justify their verdicts on economic subversion echo the ordoliberal justifications of state intervention, exposing the fight against economic subversion as being inherently linked to the economic project of the *Proceso*.

In the January 1979 decision to convert the abductions carried out by the military into official pre-trial detention (case N° 40.528, see above), the judge in charge describes in detail the financial operations which he considers to fall within the law of economic subversion. The crimes of which the businessmen were accused all related to illegal financial transactions. In the case of Grassi, the court held that the profit which the firm had made from financial transactions was higher than that made from the industrial production of

⁸¹González, *Nociones generales*, p. 19.

⁸²See above, p. 128

⁸³González, *Nociones generales*, p. 27.

⁸⁴González, *Nociones generales*, pp. 45–46.

steel – the registered social purpose of the firm. The court acknowledged that compared to the previous six months production had decreased by 57.39 per cent between January and June 1978. However, given that the credits issued by the firm were conceded to one single beneficiary, without having checked the entity's creditworthiness, it could not be argued that the financial business was intended to compensate for the risks that resulted from reduced production.⁸⁵ In a similar vein, the judge accuses the owners of Hurlingham Bank of having endangered the stability of the bank by offering unsecured credits, thereby putting the shareholders and the nation at risk.⁸⁶

According to the judge acting in the economic subversion cases, instances of economic subversion can be linked to political subversion, but they do not necessarily have to.⁸⁷ Economic subversion, he holds, endangers the national interest and security of the Argentine community in and of itself. In the case of the Hurlingham Bank, for example, the judge identifies the threat to national security in the potential collapse of the bank due to its irresponsible lending practices:

It is necessary to highlight the important and disastrous consequences that result from bank breakdowns for state assets, public trust, legal and commercial security – ultimately for the Argentine economy; therefore, the reckless management of the loan portfolio beyond a careful and reasonable tolerance, in putting into danger the assets of the Hurlingham Bank, violates the protected legal goods . . . and needs to be described as 'economic subversion'.⁸⁸

The judge then offers his view on the rationale behind the legal regulation of financial activity, linking the law on economic subversion to the economic policies introduced by the *Proceso*. It is worth quoting the explanations at some length, as they clearly show the argumentative link established between the discourse on economic freedom and the necessity of state control:

It is clear that under the current organisation of the Argentine state, banks and financial entities have a singular significance for the modern national economy, insofar as they are holders of public credit that permits the confidence of the inspector or depositor . . .

Hence the necessity of the state to intervene in order to supervise, regulate and establish precise norms that guarantee the respective operations. This is why the Bank Act (*Ley de Bancos*), the Financial Entities Act (*Ley de Entidades Financieras*) and related legislation were passed; this is why the Argentine Central Bank was given the power to audit the operations of these entities. In the moment in which the premises of a state guarantee [for deposits, H.F.] are based on credits managed by banks and financial entities, this guarantee is defrauded by irregular activities and fraudulent

⁸⁵ D'Alessandri y otros (8405/2010), pp. 158-159.

⁸⁶ D'Alessandri y otros (8405/2010), pp. 110, 162.

⁸⁷ D'Alessandri y otros (8405/2010), p. 58.

⁸⁸ D'Alessandri y otros (8405/2010), p. 163.

behaviour of the management . . . , and there exists subversion insofar as an entire judicial economic-financial system, established in favour of the people that believe in its institutions, is ruined, destroyed, violated and disrupted.⁸⁹

It is possible to make sense of these accusations when they are looked at against the backdrop of the tensions at the heart of the liberalisation of the Argentine economy pursued by de Hoz, namely the active role attributed to the state in guaranteeing the market's functioning. As we saw in the last chapter, the innovation of the *new* liberalism in the wake of World War II proposed by ordoliberal thinkers was that the market was no longer conceived of as a natural given. Instead, it had to be created and secured by the state. In the case of Germany, I argued in my discussion of the ordoliberal economists, this new theory was developed based on the diagnosis of the failure of a particular capitalist society – the Third *Reich*. Against monopolist tendencies, they held, the state had to work towards the creation of a competitive market.

For the case of Argentina, Ana Lucía Grondona has argued that liberal theory carried out the same trick, linking a diagnosis of the past with a programming of future economic policies. In the local translation of the ordoliberal argument, she claims, Argentine liberals suggested that the interventionist Keynesian policies adopted by Juan de Perón would lead to their 'totalitarian' deformations – such as the 'developmentalism' that informed the economic policies adopted by Argentine president Arturo Frondizi (in office from 1958 to 1962), in line with the economic programme developed by the Economic Commission for Latin America and the Caribbean (ECLAC/CEPAL).⁹⁰

De Hoz suggested that because the population had become used to years of state intervention in the economy, it needed to be 'taught' how to act as free individuals on the market.⁹¹ This is why according to him, in order to make the public trust the new economic and financial order, the liberalisation of the financial market had to be accompanied by a state guarantee of deposits.⁹²

The liberalisation of the financial markets in combination with the full guarantee of deposits, many economists have highlighted, led to the rapid growth of the financial market followed by its breakdown in 1980. Reflecting on the causes of the crisis in 1981, de Hoz writes:

The reform of 1977 implied the introduction of market freedom and competition for deposits as the basis of the system. This required a responsibility that was presupposed but which did not exist in all cases. A certain fraction of financial firms did not have the necessary maturity to use this

⁸⁹ D'Alessandri y otros (8405/2010), p. 172; For a brief overview of the financial reforms initiated by de Hoz, see Fridman, 'New Mentality', p. 288.

⁹⁰ On the reception of ordoliberal thinking in Argentina, see Ana Lucía Grondona. 'Las voces del desierto. Aportes para una genealogía del neoliberalismo como racionalidad de gobierno en la Argentina (1955-1975)'. In: *La revista del CCC* 5.13 (2011).

⁹¹ Fridman, 'New Mentality', p. 280.

⁹² Fridman, 'New Mentality', p. 294.

freedom with responsibility, which resulted in abnormal credit practices and offers of interest rates significantly higher than the market average in order to attract deposits, and thus, the abuse of the guarantee of deposits.⁹³

While de Hoz at first had been ambivalent about introducing the guarantee of deposits by the Central Bank, he recognised that it was necessary in order to make the consumer trust the market. When this system started to fail, the failure was presented as evidence of the fact that the Argentine consumer had not learned to use their newfound freedom responsibly.⁹⁴

The alleged failure of the individual to act responsibly reappears in a court decision from January 1979 concerning the proceeding status of the defendants that were investigated for economic subversion. It conceives of the National Security Law's criminalisation of economic offences as a necessary corollary to the new freedoms:

It is obvious that the intention of the legislator was both harmonious and coherent: a regime with more liberties in the financial sphere needed to be matched by an increased responsibility in the management of the firm. Consequently it was necessary to repress more severely those criminal conducts susceptible to impede, because of their corrupting and subversive effect, the full enjoyment of those liberties.⁹⁵

In attributing the collapse of the banks to the behaviour of individuals, attention is distracted from the fact that the overall setup, with the state's guarantee of deposits and the high interest rates, offered significant incentives for the 'rational' market actor to engage in financial speculation. The wish to make profit is identified as the reason for the malfunction of the economic and financial system insofar as the actors involved took irresponsible risks.⁹⁶ Still, the judge is keen to clarify, the law does not want to repress 'private activity motivated by the natural motor of commercial activities'.⁹⁷ It does not punish the wish to make profit as such, but only where this wish implies a risk to the stability of the national economy.⁹⁸ With this argument, the judge tries to mediate the contradiction that arose from placing the rational entrepreneur at the core of the new Argentine economy: the entrepreneur, if acting too rationally, puts the entire system at risk.

In this section, I focused on fragments from the economic subversion cases from the 1970s that are cited by and into the pre-trial decision concerning the legal responsibility of Etchebarne and three military officials for the abductions and torture of several businessmen. These citations cannot be contained by the explanatory framework offered by judge Rafecas in the pre-trial decision.

⁹³ Martínez de Hoz, *Bases*, p. 82; translation taken from Fridman, 'New Mentality', p. 295.

⁹⁴ Fridman, 'New Mentality', pp. 294-295.

⁹⁵ *D'Alessandri y otros (8405/2010)*, p. 164.

⁹⁶ *D'Alessandri y otros (8405/2010)*, p. 165.

⁹⁷ *D'Alessandri y otros (8405/2010)*, p. 172.

⁹⁸ *D'Alessandri y otros (8405/2010)*, p. 172.

This framework, as we saw, defines economic subversion as a threat to the economic project of the *Proceso* by the left and consequently explains the abductions of businessmen in terms of the capture of the state by private interests. Instead, I suggested in this section, the citations refer us to the ambivalent role that the state comes to play in the neoliberal imaginary as the guarantor of economic freedom. From this perspective, the prosecution of businessmen does not contradict the neoliberal logic, but is perhaps its logic carried to the extreme.

5.5 Remembering Primitive Accumulation

In the first section of this chapter, I situated the trials that address the economic dimensions of the *Proceso* within the re-foundational project under the presidencies of Néstor Kirchner and Cristina Fernández de Kirchner. Following the financial, economic and social crisis in 2001, the new regime under Néstor Kirchner not only presented itself as the opposite of the *Proceso*, but, in finally dealing with the human rights legacies and by introducing a change in the political economy, it also claimed superiority over what it denounced as the pseudo-democratic regime which had been in place until 2001.⁹⁹ The trial of Etchebarne has to be understood in this context.

fabricated legality

In Chapter Three I introduced a perspective that conceives trials as a site of a competing politics of time. I invoked the notion of periodisation in order to describe a specific temporalisation of history in trials. Trials in response to state-backed violence, I argued there, participate in the periodisation of history in that they construct an image of the past which is then, by means of the judgement, turned into a negative reference against which the new order claims its own legitimacy. The account of the past produced, I furthermore established, is framed by the kaleidoscope of the juridico-political order that sits in judgment over the past. That is, the line that the judgment draws between 'atrocities beyond the pale' and 'legitimate state policies' of the previous regime is informed by the laws of the political order of the present.

In the case against Etchebarne much of the document is dedicated to the economic project of the *Proceso* and its negative impacts on the living conditions of the population. However the violence that is recognised as such by the indictment is the violence that results from the absence of the rule of law. The fact that much of the evidence presented by Judge Rafecas consists of documents produced by the *Proceso*'s ordinary judiciary forces him to distinguish the legal system of the *Proceso* from the rule of law for which he

⁹⁹On the change in economic policies under Kirchner, see Christopher Wylde. '¿Continuidad o cambio? Política económica argentina posterior a la crisis y el gobierno de Néstor Kirchner, 2003-2007'. In: *íconos* 16.2 (2012), pp. 109–133.

speaks. This work is done by the concept of the '*normalidad fraguada*', which can be translated as 'made-up legality' or 'fabricated legality'. According to this concept, the *Proceso* has to be understood as a mere legal state rather than a truly constitutional order.¹⁰⁰ The (lack of) the rule of law comes to serve as the criterion that distinguishes the violent past from the supposedly non-violent present.

Insofar as the pre-trial decision focuses on the appropriation of wealth via the use of state violence as well as on the forceful implementation of an economic project that resulted in the redistribution of income and the release of capital for financial investment, it construes the *Proceso* as a form of 'primitive accumulation'.¹⁰¹ The category of 'primitive accumulation', which I claim is central to understanding the periodisation at work in the pre-trial decision, can be taken from the document itself. Judge Rafecas, in support of his own argument, cites a paragraph from a document that had been submitted by the prosecution during pre-trial proceedings:

The fact is that, in cases like the present one, 'for purely economic reasons a repressive machine started to move which was then whitewashed with the help of judicial records. This is because, ... as is well known, in a capitalist context property is protected with much actuarial and notarial zeal (do not dare to remember the primitive accumulation!), it is necessary to create the titles, certificates and property rights which otherwise would have appeared as arbitrary appropriation by the stronger; that is, it is necessary to regulate the exception'.¹⁰²

According to this citation, and in line with the general reading of the crimes put forward by Rafecas, the businessmen were abducted and tortured with the aim of appropriating their properties. The quote refers to the legalisation of the detainees' situation – their transfer from the clandestine detention centre *Campo de Mayo* to an ordinary prison – as the 'legalisation of the exception' and describes these activities as the attempt to cover the moment of coercion in the economic transactions. Legal titles for the transactions that took place at *Campo de Mayo* were to convert a transaction resulting from threat into one that had been voluntarily agreed upon by all parties involved.

'Do not dare to remember the primitive accumulation!', Rafecas quotes the prosecutor's submission. What happens if we dare to remember the crimes under investigation as instances of primitive accumulation? (This is, after all, what the text wants us to do.)

¹⁰⁰ D'Alessandri y otros (8405/2010), p. 18; while the pre-trial decision itself does not make this connection, it could be argued that the concept of the 'legal state' as it appears in the document corresponds with Ernst Fraenkel's normative state as developed in Fraenkel, *Dual State*.

¹⁰¹ On the release of capital as a result of the economic policies adopted by Martínez de Hoz, see Jorge Schvarzer. *Martínez de Hoz: La lógica política de la política económica*. Buenos Aires: CISEA, 1983, p. 23.

¹⁰² D'Alessandri y otros (8405/2010), p. 42.

forms of violence

One of the most prominent accounts of primitive accumulation is given by Karl Marx in the chapter titled 'The Secret of Primitive Accumulation' near the end of *The Capital*.¹⁰³ '[P]rimitive accumulation', Marx writes, 'plays approximately the same role in political economy as original sin does in theology'.¹⁰⁴ This parallel drawn by Marx alludes to the function that both ideas fulfill in explaining the coming about of the present state of the world. Just as the figure of 'original sin' in Christian teaching explains the existence of sin and evil in the world, the tale of primitive accumulation in political economy explains the coming about of the division of the worker from the means of production that is central to capitalist accumulation.¹⁰⁵ As Marx observes in the opening of his chapter on primitive accumulation:

The whole movement [of capitalist accumulation, H.F.]... seems to turn around in a never-ending circle, which we can only get out of by assuming a primitive accumulation (the 'previous accumulation' of Adam Smith) which precedes capitalist accumulation; an accumulation which is not the result of the capitalist mode of production but its point of departure.¹⁰⁶

The concept of primitive (or 'previous') accumulation was not Marx's invention, but was already developed in those works that constitute the object of his critique, with one important difference: Marx highlights the extra-economic violence and the role of the state in the process of primitive accumulation.¹⁰⁷ According to Marx, primitive accumulation was enabled by the forceful expulsion of the peasantry from their land, colonial rule, the contraction of public debt, the implementation of a tax system and the rise of international financial markets.¹⁰⁸ With the emphasis on the element of force in primitive accumulation, he contests what he calls the 'tender annals of political economy' that he accuses of presenting the division of labour from the means of production as the result of there being two sorts of people: one hardworking, 'diligent and intelligent', the other 'lazy rascals, spending their substance... in riotous living'.¹⁰⁹ While according to orthodox political economy '[r]ight and "labour" were from the beginning of time the sole means of enrichment', Marx

¹⁰³Karl Marx. *Capital. A Critique of Political Economy, Volume I*. London: Penguin, 1990.

¹⁰⁴Marx, *Capital*, p. 873.

¹⁰⁵On the development of early teachings of the original sin as theodicy, and its systematisation through Augustine, see Ian Alexander McFarland. *In Adam's Fall. A Meditation on the Christian Doctrine of Original Sin*. Maldon, MA: Wiley-Blackwell, 2010, pp. 29-45.

¹⁰⁶Marx, *Capital*, p. 873.

¹⁰⁷Adam Smith's work indeed manifests a strong theological influence, but from Stoic thinking. That is, in Smith's political economy, the separation of work force and capital is not portrayed as original sin, but as part of God's plan in which human beings – each working for its own profit – together create a harmonious nature. On the Stoic influence in the work of Adam Smith, see Hans Christoph Binswanger. 'Die Glaubensgemeinschaft der Ökonomen'. In: *Die Glaubensgemeinschaft der Ökonomen. Essays zur Kultur der Wirtschaft*. Ed. by Hans Christoph Binswanger. Hamburg: Murmann, 2011, pp. 11-32.

¹⁰⁸Marx, *Capital*, pp. 874-875.

¹⁰⁹Marx, *Capital*, p. 873.

emphasises that the history of the 'so-called primitive accumulation' is 'written in the annals of mankind in letters of blood and fire'.¹¹⁰

There is disagreement about the adequacy of Marx's historical descriptions of the process that he summarises under the heading of primitive accumulation, as well as concerning the temporal demarcation of primitive accumulation as a distinct historical phase which precedes the capitalist mode of accumulation.¹¹¹ Before entering these debates, I wish to highlight the analytical distinction between both forms of accumulation according to the kind of violence in their respective processes. Primitive accumulation is described by Marx as being tied to open, physical violence and coercion. What he defines as capitalist accumulation, in turn, rests on the differentiation of the moments of *appropriation* and *coercion*, and as such is closely linked to the emergence of the modern state with its monopolisation of physical violence.¹¹² In this vein, Marxist and neo-Marxist state theory made a point in arguing that the modern state is a capitalist state not because it directly serves the interest of capital owners. Instead, it is capitalist because with its claimed monopoly of violence it is constitutive of the supposedly free economic sphere in which the owner of capital and the owner of labour force meet:

If we are to understand the unique development of capitalism, then, we must understand how property and class relations, as well as the functions of surplus-appropriation and distribution, so to speak liberate themselves from – and yet are served by – the coercive institutions that constitute the state¹¹³

Contrary to liberal economic theory that conceives of both the labour market and the market for goods as a sphere in which individuals freely enter into contract, economic theory in the Marxist tradition revealed – in the words of Rosa Luxemburg – how

the right of ownership changes in the course of accumulation into appropriation of other people's property, how commodity exchange turns into exploitation and equality becomes class-rule.¹¹⁴

While liberal economic theory usually presents capitalist accumulation as being non-violent and constituting the fulfilment of individual liberty, critical theories of the state have emphasised both the role of state force in upholding

¹¹⁰Marx, *Capital*, p. 874,875.

¹¹¹I will turn to this point in more detail below.

¹¹²Max Weber. *Economy and Society. An Outline of Interpretive Sociology*. Berkeley: University of California Press, 1978; Joachim Hirsch. *Materialistische Staatstheorie. Transformationsprozesse des kapitalistischen Staatensystems*. Hamburg: VSA, 2005, p. 19.

¹¹³Ellen Meiksins Wood. 'The Separation of the Economic and the Political in Capitalism'. In: *New Left Review* 127 (1981), pp. 66–95, p. 84; Similarly, Guillermo O'Donnell. 'Apuntes para una teoría del Estado'. In: *Revista Mexicana de Sociología* 40.4 (1978), pp. 1157–1199, pp. 1162–1165; Winter, 'Beyond Blood and Coercion: A Study of Violence in Machiavelli and Marx', pp. 299–300.

¹¹⁴Rosa Luxemburg. *The Accumulation of Capital*. London and New York: Routledge, 2003, p. 432; see also Marx, *Capital*, p. 899.

the supposedly free economic sphere as well as the structural violence that governs the economic sphere.

temporalisations

Liberal economic theory and, it could be argued, even Marx himself, treat both forms of accumulation as separated historical phases. In *Capital*, for example, primitive accumulation appears to be for the most part a development which antedates the capitalist mode of production and which will, eventually, be replaced by the latter. However, various (Marxist and non-Marxist) scholars have taken issue with this claim, arguing that primitive accumulation continues to exist parallel to a purely economic process of accumulation and that the capitalist economy depends on it for its own reproduction.¹¹⁵ Luxemburg was one of the first to criticise Marx for confining the phenomenon of primitive accumulation to a pre-capitalist historical phase; she argues that it is, in fact, a recurring phenomenon that belongs to capitalist accumulation ‘as an actual historical process’.¹¹⁶ More recently, David Harvey prominently introduced the notion of ‘accumulation by dispossession’ to describe contemporary forms of extra-economic accumulation that play a considerable role in shaping the neoliberal capitalist mode of production.¹¹⁷

As far as primitive accumulation is a necessary condition for capitalist accumulation, extra-economic force is present and repeated in the everyday interactions between buyers and sellers, owners of capital and owners of the labour force. Or, as Gavin Walter puts it:

the process of primitive accumulation (which is not a period, but a cyclically reproduced logical moment) describes the installation of ‘real abstraction’ into history, and the fact that this moment *is repeating everyday* shows us the paradoxical nature of the historical temporality that characterizes capitalist society.¹¹⁸

This ‘paradoxical nature of the historical temporality’ characteristic of capitalist societies, I would like to suggest, consists in the fact that primitive accumulation, understood as a necessary condition to enable capitalist accumulation, is treated as belonging to the past while being repeated within it. It is repeated within capitalist accumulation for the latter would not have come into existence without it – what Walker calls the ‘installation of “real abstraction” into history’ – but also because extra-economic accumulation continues to take place in capitalist societies.

¹¹⁵For a brief summary of this debate, see Jim Glassman. ‘Primitive Accumulation, Accumulation by Dispossession, Accumulation by ‘Extra-Economic’ Means’. In: *Progress in Human Geography* 30.5 (2006), pp. 608–625, pp. 615–616.

¹¹⁶Luxemburg, *The Accumulation of Capital*, p. 432.

¹¹⁷David Harvey. *The New Imperialism*. Oxford: Oxford University Press, 2003, pp. 144–152.

¹¹⁸Gavin Walker. ‘Primitime Accumulation and the State-Form: National Debt as an Apparatus of Capture’. In: *Viewpoint Magazine* 4 (2014), my italics.

I suggested above that primitive accumulation and original sin can be taken as two figures through which the reference to a previous state, which is claimed to be radically different, is inscribed into the present condition of the world. Thus, Werner Hamacher emphasises that guilt is not merely a category of moral relations, but more importantly one of provenance.¹¹⁹ Capitalist accumulation, despite being different from primitive accumulation, is structurally indebted to it. Writing not about Argentina, but about primitive accumulation and state debt in the context of the 2008 financial crisis, Walker states:

The original sin at the beginning of the capital-relation might as well be understood as an 'original debt', an historical appearance of something given, a gift. . . . If at the beginning, there is a debt or gift, capital cannot ever truly 'begin'.¹²⁰

What can it mean, against the backdrop of these elaborations, to remember the *Proceso* as primitive accumulation? Marx's interest in revealing 'the secret of primitive accumulation' was to expose the physical violence that was necessary to bring about the division of labour and capital required for the development of the capitalist form of accumulation. In this vein, Matthias Fritsch also understands Marx's chapter on primitive accumulation as an exercise in remembrance.¹²¹ It is the memory of the physical violence that was the necessary condition for the capitalist economy.

With this in mind, one might say that to remember the persecution of economic actors as instances of primitive accumulation draws attention to the fact that the property relations of the present were partly brought about by the application of physical violence. It would mean recognising the present as a present that is indebted to the physical violence of the past. Furthermore, the reference to Marx's *The Capital* invites us to recognise the silent compulsion and planned misery inflicted by capitalist forms of accumulation also in the context of formal democratic regimes. As Pilar Calveiro points out for the Latin American context:

The end of the dictatorships and the return to democracy did not imply, neither in Argentina nor elsewhere, the end of *domination* but rather its organisation under different parameters that implied new forms of organising politics, the economy, subjectivity, and, consequently, new modalities of an repressive practice.¹²²

The pre-trial decision, however, recalls the instances of primitive accumulation in order to convert them into a negative reference for the present juridico-political order. It does so, I would like to suggest, by converting the analytical distinction between primitive and capitalist accumulation to a normative and a temporal one. In focusing on the illegality of the abductions

¹¹⁹Hamacher, 'Guilt History', pp. 83-85.

¹²⁰Walker, 'Primitive Accumulation'.

¹²¹Fritsch, *Promise of Memory*.

¹²²Calveiro, 'Formas y sentidos', p. 124 (italics in the original).

and the force applied to initiate the property transactions, what is converted into a negative reference are not the economic policies implemented during the *Proceso* or their effects on the population (which constituted the focus of the judge at the beginning of the document), but the fact that they were implemented with the help of uncontrolled state violence. In making the rule of law the criteria of distinction, the judging juridico-political order casts itself as an order that respects not only the rule of law, but also the laws of capitalist accumulation. There is thus a danger that in implementing this distinction, the trials addressing the economic dimensions of state crime render forms of silent compulsion invisible at best and permissive at worst.

The next chapter looks in detail at a second trial which deals with the economic dimensions of the *Proceso*. Here, businessmen appear not as victims of state violence, but as accomplices. They are accused of having collaborated with the military regime in the disappearance of their unionised workers. I will focus on the strategies adopted by the prosecution and joint plaintiffs to connect individual responsibility to structural explanations of state-backed violence. As we will see, the attempt to translate the relationship between structure and agency into a language of legal responsibility provokes ruptures in the account of historical and legal duties constructed throughout the proceedings. The fissures that emerge on the surface of the legal narrative shed light on an underlying ontological conflict about the nature of the state and the place that the economic holds in relation to it. The detailed reconstructions of the cooperation between the military, state officials and businessmen challenge the classical liberal separation of the state and the economy. However, this distinction reemerges when the judges subsume the actions under the available norms and forms of individual responsibility. It is in the labyrinth of legal theories on commission and participation that we see precisely how the law structures the definition of economic responsibility through its underlying concepts of the state.

6 | The Ledesma Trial

In his reading of Franz Kafka's novel *The Trial*, Peter Fitzpatrick observes that, '[w]ith "The Trial", the work of negative formation begins with the title. There is no trial.'¹ This remark also holds true for the trial that stands at the centre of this chapter. What the title of the chapter announces as the Ledesma trial is no trial, and has little prospect of ever becoming one. Still, the legal proceedings that could have resulted in a public trial present us with questions and insights concerning the concept of historical justice underlying International Criminal Law (ICL). The trial's suspended nature, I will argue in this chapter, presents us – just like Kafka's story – with a law in which we do not cease to place our hope, despite the continuous experience of its failure.

What I am calling the 'Ledesma trial' for the purposes of this chapter are the proceedings concerning the legal responsibility of Carlos Pedro Tadeo Blaquier and Alberto Enrique Lemos for crimes against humanity committed during the National Reorganisation Process (*Proceso de Reorganización Nacional*, hereafter *Proceso*).² Blaquier was the director of the Ledesma company from 1970 until 2013, when his two sons took over the management. Founded in 1912 as a sugar mill in Argentine's most northern province of Jujuy, the family-owned company has grown into an important agro-industrial complex.³ Alberto Lemos was the company's manager (*administrador general*) during the time of the *Proceso*. Both defendants are accused of having provided company vehicles to the local police that were used in the abductions of several individuals which took place during the first months following the coup. More specifically, Blaquier and Lemos are indicted as participants in the illegal detention of three representatives of the 'Union of the Sugar Workers at Ledesma' (*Sindicato de*

¹Peter Fitzpatrick. 'Political Agonism and the (Im)possibility of Law. Kafka's Solution'. In: *Teoria e critica della regolazione sociale* 2 (2016), pp. 97–115, p. 102.

²*Aredez, Luis Ramón y otros*, (all translations from the document are mine).

³Between 1908 and 1912, the French settlers Henri Wollman y Charles Delcasse bought the Ledesma farm and, with the help of foreign capital used to buy machines, they funded the 'Ledesma Sugar Estates and Refining Company Limited'. Ana A. Teruel, Marcelo Lagos, and Leonor Peirotti. 'Los valles orientales subtropicales: Frontera, modernización azucarera y crisis'. In: *Jujuy en la Historia*. Ed. by Ana A. Teruel and Marcelo Lagos. Jujuy: EdiUnju, 2006, pp. 437–464, p. 448; Today, 90.4% of the company's capital is owned by the family. Juan Manuel Compte and Andrea del Rio. 'Hablan los Blaquier: "Algún día, quien gane dinero será bien visto en la Argentina"'. In: *Apertura* (2015-06-08). URL: <http://www.apertura.com/clase/Hablan-los-Blaquier-Algun-dia-quien-gane-dinero-sera-bien-visto-en-la-Argentina-20150618-0005.html> (visited on 12/05/2016).

Obreros del Azúcar del Ingenio Ledesma) on 24th March 1976 – the day of the coup – and of twenty-six individuals from three neighbouring villages during power cuts in July 1976 – commonly remembered as *La Noche Del Apagón* (the night of the blackout).⁴

After many years in the labyrinth of the Argentine judiciary, the pre-trial proceedings investigating the legal responsibility of Blaquier and Lemos only started to advance in 2012. The case was formally reopened in 2003 after the first Argentine court declared that the amnesty laws were in violation of Argentina's obligation, under international law, to investigate crimes against humanity. However, the investigating judge assigned to the case did not proceed with the committal proceedings.⁵ As national newspapers started to report on the delay, pressure from politicians and human rights organisation beyond the borders of the province of Jujuy started to increase. On 24th March 2012, the anniversary of the *coup d'état*, local social and human rights organisations took to the streets, demanding that investigations be advanced. They were supported by people from all over the country. In total approximately seventy thousand people marched that day. Four days later the responsible judge resigned, and the interim judge assigned to the case initiated the pre-trial inquiry.

In November of the same year, the judge published the indictment (*auto de procesamiento*) of Blaquier and Lemos, which subsequently was appealed by the defendants. It was not until March 2015 that the National Chamber of Criminal Appeals in Cassation pronounced on the case. It granted the appeal arguing that, so far, insufficient evidence had been presented to show that the accused knew what the vehicles would be used for.⁶ A decision on the legal responsibility of Blaquier and Lemos for the abduction of the former Ledesma workers was thereby postponed.

The eternal postponement of a decision is not the only parallel that can be drawn between Kafka's *The Trial* and the Ledesma trial. As we will see throughout this chapter, many elements of the Ledesma trial could be taken from Kafka's representation of the law in *The Trial* in general, and in the parable *Before the Law* in particular.⁷ They epitomise the dystopian law that

⁴The judge found *prima facie* enough to indict the accused for the participation in the abductions of Luis Ramón Aredez, Omar Claudio Gainza and Carlos Alberto Melián. He rejected the prosecutor's accusations in the cases of Ramón Luis Bueno and Antonio Filiu, arguing that while they had been detained in the same context and on the same day, not enough evidence was provided to prove the use of Ledesma's vehicles *Aredez, Luis Ramón y otros*, pp. 1-15, 149.

⁵Alejandra Dandan. 'La carta de Blaquier para su querido Joe'. In: *Página/12* (2012-03-22). URL: <https://www.pagina12.com.ar/diario/elpais/1-188062-2012-02-22.html>.

⁶*Blaquier, Carlos Pedro Tadeo y otros s/recurso de casación*. Casación. Cámara Federal de Casación Penal. 2015-03-13.

⁷Benjamin observes that 'it looks as if the novel were nothing but the unfolding of the parable'. Walter Benjamin. 'Franz Kafka. On the Tenth Anniversary of his Death'. In: *Illuminations*. Ed. by Hannah Arendt. New York: Harcourt, Brace & World, 1968, pp. 111-140, p. 122; On the relationship between both texts, see also Gunther Teubner. 'The Law Before its

many recognise in Kafka's texts: its absurd formations, its evasiveness, its violence.

While in *The Trial* it is the accused K. who suffers the evasiveness of the law, in the case of the Ledesma trial it is the former political prisoners and the relatives of the disappeared who are waiting for a legal judgment. Many of the victims who fought for over twenty years to see Blaquier and Lemos in the dock, who made their way from small villages in the mountain region to the court in San Salvador de Jujuy, not unlike Kafka's man from the countryside, feel that they waited in vain before the law.

Read in this way, to tell the story of the Ledesma trial would mean to tell a story of the failure of the law to deliver on its promise of justice by failing to produce a sentence. It would tell a story of the entanglement of local elites and the informal influences leading to a sentence. It would be the story of a law unduly influenced by power politics.

There is another story that can be told about the Ledesma trial, equally inspired by its parallels with Kafka's representation of the law in *The Trial*. Such a story could draw on those interpretations that read the irresolution in Kafka's representation of the law as a description of the law's necessary condition.⁸ In this vein, Gunter Teubner invites us to imagine that in *Before the Law* 'it is the *decisionmaking practice of the legal process*, in all the confusion of life, that stands before its own law and has no idea what it is doing'.⁹ Such a reading might understand the hopes placed in the proceedings as indicative of law's reliance on its claim to justice. And it would read the failure to live up to that hope as a structural aspect of the law. Such a reading brings us back to the question posed at the very beginning of this thesis, about the promise of justice that trials in response to state crime hold for those who became the victims of state violence.

My reading of the Ledesma trial in this chapter bears traces from both accounts, even though it privileges the second one. Bringing the theoretical argument set out in Chapter Three to bear on the Ledesma trial, my reading focuses on the politics of time at work in the trial. That is, it looks at the way the temporalisation of history in the trial participates in the grounding and ungrounding of political authority. As with the trial of Juan Alfredo Etchebarne discussed in the previous chapter, the Ledesma trial can be situated within the Peronist re-foundational project, which sought to authorise itself in opposition to both the human rights violations and the economic project of the *Proceso*. Even though the coming about of the Ledesma trial was the result of years of

Law: Franz Kafka on the (Im-)Possibility of Law's Self-Reflection'. In: *Ancilla Iuris* (2012), pp. 176–203, p. 188.

⁸Jacques Derrida. 'Before the Law'. In: *Acts of Literature*. Ed. by Derek Attridge. New York: Routledge, 1992, pp. 181–220. See for example; Fitzpatrick, 'Kafka's Solution'; Teubner, 'The Law Before its Law'; Andreas Fischer-Lescano. 'Franz Kafka's Critique of Legal Violence'. In: *Revista Brasileira de Sociologia do Direito* 3.1 (2016), pp. 9–51.

⁹Teubner, 'The Law Before its Law', p. 172.

political and legal struggle which preceded the governments of Néstor Kirchner and Christina Fernandez de Kirchner, the fact that the legal proceedings eventually gathered momentum can be linked to the explicit commitment of the government to investigate the economic dimensions of the *Proceso*. In line with countrywide practice, it appointed an ad-hoc prosecutor who came to support the ordinary prosecutor in cases investigating crimes against humanity committed during the *Proceso*. Furthermore, the Chief Public Prosecutor created an office to coordinate the prosecutorial strategies for trials investigating the legal responsibility of economic actors.¹⁰

Kirchnerism, I argued in the last chapter, sought to posit itself as the non-violent answer to the authoritarian state, as well as to the violence inflicted by the neoliberal adjustment policies of the government of Carlos Menem (1989-1990). Similar to the investigations of Etchebarne in the last chapter, the legal investigation of the responsibility of Blaquier and Lemos links both aspects, insofar as it forces the public to engage with the economic dimensions of the *Proceso*. I will argue in this chapter that the indictment constructs the participation of the two businessmen in the crimes as a negative reference, against which the present claims its own superiority. At the same time, the testimonies and evidence unearthed during the committal proceedings produce what, in Chapter Three, I conceptualised as dialectical images. That is, they produce images of the past that cannot be accommodated by the concepts of legal responsibility on which the judge draws in order to make sense of the violence of the past. As such, these images expose the contingency of the legal kaleidoscope of the juridico-political order that sits in judgment over the past and sheds light on its 'rotten' foundations.¹¹ They provide evidence that there is something 'before' the law, something on which the latter rests but for which it cannot account.¹²

I will expose this double movement of opening and closure, which enables the critique of criminal law as a concept of historical justice, in relation to two issues arising from the indictment. In the first section I will pick up the indictment's discussion of the relationship between the company and the state. In line with my critique of ICL as a liberal project, developed in the preceding chapters, I will argue that the conceptions of individual responsibility are defined by a liberal imaginary of the state.

To recap: in my analysis of the Industrialist Trials, I argued that the liberal imaginary of the state informs the judgments, in that the judgments presume both the state's monopoly on violence and the existence of an economic sphere of the free individual. In the last chapter, I showed how the indictment of

¹⁰Hannah Franzki. *Interview with Lisando Pellegrini (Ministerio Público Fiscal, Secretaría General de Coordinación Institucional)*. Buenos Aires, 6/07/2012.

¹¹This is a reference to Walter Benjamin's statement that in the coincidence of law-positing and law-preserving violence 'something rotten in law is revealed'. See discussion in Chapter Three, p. 92.

¹²Fitzpatrick, 'Kafka's Solution', p. 109.

Etchebarne reproduces the liberal presumption of these separated spheres when it analyses the prosecution of businessmen in terms of the illegitimate appropriation of the state for private purposes. In the case presented against Blaquier and Lemos, these limits become evident when the evidence produced throughout the pre-trial stage challenges the imaginary of the Weberian bureaucratic state that is projected onto the past in order to make sense of the interaction between state forces and business actors (6.1).

The second section picks up another thread from the discussion in the previous chapter, namely the judge's focus on the lack of the rule of law during the *Proceso*, which then became the criterion which distinguished between the violent past and the allegedly non-violent present. In my reading of the indictment of Etchebarne, I dwelt on the notion of primitive accumulation that was introduced by the prosecutor as a way of making sense of the forced property transactions. I suggested that this description can be read in two ways. On the one hand, it unmasks the self-description of capitalism according to which capitalism relies solely on economic forms of accumulation. From this perspective, the subsequent legalisation of the property transaction that took place at *Campo de Mayo* constituted an attempt to render invisible the element of force in the moment of appropriation.

On the other hand, I highlighted that, in condemning the use of physical violence in the property transaction, the judge introduced the distinction between primitive and capitalist accumulation as a periodisation: he opposed the violence of the primitive accumulation, associated with the *Proceso*, to the allegedly non-violent rule of law. I suggested that this particular periodisation has two effects on the present: first, the part of Marx's analysis that aims at revealing the violence operative in economic forms of accumulation is thereby elided; second, instances of non-capitalist forms of accumulation are relegated to a pre-democratic past.

The second part of this chapter continues the discussion of the periodisation that follows from the focus on the lack of the rule of law. It does so by contrasting two different narratives which explain the absence of the body of Jorge Weisz, a union activist at Ledesma who was arrested in 1974 and disappeared in 1976. In the indictment, his absence, as with that of the other victims, is explained with reference to the systematic practice of disappearance carried out with the help of the clandestine state machinery. As such, he becomes a '*desaparecido*', a figure closely associated with the suspension of the rule of law during the *Proceso*. Testimonies reveal that Weisz's co-workers assumed that he had been fed to the *Familiar*, a vicegerent of the devil. The legend of the *Familiar*, as we will see, inscribes the disappearance into a continuous experience of the violence of capitalist accumulation, thereby challenging the periodisation introduced by the indictment (6.2).

6.1 The State of Ledesma

The committal for trial order in the case ‘Fiscal Federal n° 1 Solicita Acumulación (Aredez, Luis Ramón y Otros)’ has 155 pages. The first fifty pages of the document summarise the prosecutor’s accusations and the contestation presented by the defendants, followed by an overview of the relevant evidence that was gathered during the committal proceedings.¹³ The document then proceeds to evaluate the merit of the evidence. It first emphasises that the crimes under investigation constitute ‘crimes against humanity’ and therefore, where applicable, the relevant international norms need to be applied. Quoting verbatim from the judgment in the trial of Miguel Etchecolatz – the first judgment to be issued following the abrogation of the amnesty laws in 2005 – it affirms that

the nature of crimes against humanity produces a fundamental effect on the process of the knowledge of the incidents, as a consequence of which one cannot understand the crime that is treated in an isolated or fragmented way – individually –, without keeping in mind its consideration as a collective phenomenon that is inserted within a plan or a system.¹⁴

According to the judge, the context is not only important in order to appreciate the quality of the crimes as crimes that violate ‘the most fundamental norms of humankind’, but it furthermore acquires a evidentiary function.¹⁵ In line with the Argentine jurisprudence on crimes against humanity, he emphasises that, because the crimes were carried out by a clandestine state apparatus and because most of the victims remain disappeared, it is in the nature of the crimes under investigation that there is hardly any direct evidence. Against this backdrop, ‘circumstantial’, ‘presumptive’, ‘indicative’ and ‘indirect’ evidence is considered an important and valid means with which to establish the responsibility of the accused.¹⁶

These clarifications are then followed by an extensive elaboration on the ‘historical context of the crimes under investigation’, deemed necessary by the judge as ‘this would allow us to understand what happened in its true dimension’.¹⁷ This statement echoes what I identified in Chapter Three as the first dimension of the latent theory of historical justice underlying ICL. ICL jurisprudence, I argued, seeks to legitimise trials in response to state crime by claiming that they have an ‘historiographical function’. The trials’ ability to contribute towards establishing the truth about the crimes under investigation thereby seems to become a procedural aim; the adequate representation of the past becomes a requirement of justice.¹⁸

¹³ Aredez, *Luis Ramón y otros*, pp. 1-54.

¹⁴ Aredez, *Luis Ramón y otros*, p. 59.

¹⁵ Aredez, *Luis Ramón y otros*, p. 59.

¹⁶ Aredez, *Luis Ramón y otros*, pp. 60-61.

¹⁷ Aredez, *Luis Ramón y otros*, p. 72.

¹⁸ See section 3.2 (Historical Truth as Justice) starting on p. 79

The historical context is also relevant to the second dimension of the latent theory of historical justice, namely: the judgment of those found responsible of having committed international crimes (in the present case, crimes against humanity). On the legal relevance of the historical context – albeit in relation to inheritance law – Joseph Jenkins writes:

Obligation pre-supposes relation, and so the far-from-evident decision as to just what constitutes historical ‘context’ (i.e., the with-text, the related-text) is the first moment of judgment concerning obligation. In a kind of summary judgment motion, the reader/writer of history brings texts to bear – or doesn’t.¹⁹

As we will see in the following reading of the indictment, the evidence produced during committal proceedings as well as the historical context can be read as a ‘first moment of judgment’ which creates obligations. The obligations that are invoked by the ‘rags’ of history unearthed by the proceedings produce tensions with those obligations which are put on the accused by the concepts of legal responsibility. As the judge tries to translate the carefully constructed historical context into doctrines of individual responsibility, the limits of the concepts of individual responsibility come into relief. This process therefore exposes the way in which current forms of constructing criminal responsibility privilege certain relations established by ‘circumstantial’ and ‘indirect’ evidence over others.

The ‘clear-cut image’ of the events and the related responsibility which the indictment seeks to present is thus interrupted by what can be conceived of as ‘dialectical images’. These are instances that are critical to the present juridico-political order because they cannot be accommodated by the ways in which it seeks to turn the past into a negative reference. As we will see in the analysis that follows, these ruptures emerge, again, where the trial attempts to decide upon the economic dimensions of the violence inflicted by state terrorism.

the state within the state

The narrative axis constructed in the indictment centres around the physical violence exercised against the labour movement in the seventies, framing it as an instance of the permanent struggle between labour and capital. The repression of the labour movement passes from constituting merely one dimension of the *Proceso* to holding a central explanatory force. The union activism of the (captured, tortured, disappeared) workers is invoked in order to explain why it was they who were deprived of their liberty, tortured and in some cases disappeared. Moreover, as in the pre-trial decision concerning the responsibility of Etchebarne, discussed in the previous chapter, the redistributive demands for which they stand come to explain the *Proceso* as a collective, political and

¹⁹Jenkins, ‘Inheritance Law’, p. 1046.

economic project.²⁰ In this sense, the judge closes the section on the historical context by concluding that:

the purpose of the imprisonments, tortures, assassinations and disappearances carried out by security forces during the last civil-military dictatorship was not only the preservation of a certain ideology, but an illegal repression aimed in addition at establishing and defending a economy with neoliberal characteristics free from threats such as demands and claims from the trade unions.²¹

This general interpretative outlook concerning the rationale of the *Proceso*, mostly based on historiographical publications, also frames the discussion of the local situation in Jujuy where the crimes took place. The indictment describes the particular social place occupied by Ledesma with reference to the labour struggles in 1973 and 1974, which demanded the construction of adequate housing.²² 1973 was the year in which the military dictatorship that had been initiated with the coup of 1966 came to an end, and in which Peronist candidate Hector Cámpora won the national election. The labour union of the workers at Ledesma asked the company to comply with a law which, although passed in 1947, had not been put into practice. It obliged companies with more than two hundred workers to build housing, primary schools and hospitals. Following several strikes, the local government signed a bill which forced the company to build five thousand houses with the help of credit provided by state banks.

The indictment traces the connection between this conflict and the detentions and disappearances that took place in 1976: the demand for housing, the judge holds, was one of the important labour conflicts that took place before the *coup d'état* and which threatened the profit of the company. In 1975 the local police had already detained several union leaders who, following the coup, were transferred to a clandestine detention centre. They remain disappeared.

The discussion that evolves around the housing issue in the indictment is noteworthy because it gives rise to several statements on the relationship between the company and the state that challenge the way in which the judge later seeks to frame the responsibility of the defendants. In giving account of different views on the topic, the judge cites a passage from a statement made by Blaquier, who had pointed out that:

Ledesma exceeded its role as a company and took on functions similar to those of a state in its role as provider of social assistance and development, such as the building of housing, urbanisation, and economic contribution to sanitary and educational institutions.²³

²⁰ Aredez, *Luis Ramón y otros*, pp. 73-92.

²¹ Aredez, *Luis Ramón y otros*, p. 92.

²² Cf. Aredez, *Luis Ramón y otros*, pp. 88-95.

²³ Aredez, *Luis Ramón y otros*, pp. 19-20.

The document also quotes from a statement submitted by Lemos. He declared, in a similar vein:

We enabled thousands of families who used to live in rural areas to build their own house through the provision of very accessible loans. The important donations of hectares [of land] for the construction of housing, sports facilities and the preservation of the environment, as well as the construction and maintenance of hospitals in the area of Ledesma and El Talar, required a substantial economic effort which we assumed because we were aiming at modernisation and social corporate responsibility.²⁴

Reacting to this self-representation of the 'corporation-state', the judge then puts forward a different reading of the situation. He emphasises the power and control which Ledesma had over the local population as a result of its dominant position in the region. The judge states:

Thus the company exercised a dominant control through the employer-employee relationship over most of the inhabitants in these localities, which without any doubt must have made very difficult any opposition against or complaints about the employer that could have endangered its economic interests.²⁵

Both Blaquier's and Lemos' declarations and the conclusions drawn by the judge, challenge the presumption of a strict division between state and private institutions. In both narratives, the corporation is the place in which economic and political power converge.²⁶

ledesma's police station

The line between state and company also becomes blurred when the document examines the evidence for the abductions carried out on 24th March and in July 1976. Both operations were carried out by joint forces (that is, police and military personnel) who – according to the indictment – used vehicles and drivers from Ledesma. Those deprived of their liberty on 24th March were known union leaders and doctors from the company's medical facility. The operations in July were carried out during electricity cuts in the surrounding villages and were aimed at unionised workers, family members and individuals linked to local protest movements. In total, about 400 individuals were detained and transferred to local detention centers. While some were soon released, others were sent to clandestine detention centers all over the country, some of whom remain disappeared. The indictment discusses the role of the vehicles sourced from Ledesma and the relationship between the corporation and the local security forces.

²⁴ Aredez, *Luis Ramón y otros*, p. 16.

²⁵ Aredez, *Luis Ramón y otros*, p. 88.

²⁶ The figure of the 'state within a state' was also invoked by the prosecution in the *Krupp* case to describe the organisation and de facto power of the Krupp Company. Nuernberg Military Tribunals, *NMT vol. IX*, p. 129.

In the story told by the (ex-)workers, Ledesma appears inscribed into the scene of the abductions not only through the vehicles, but also through the way in which the workers speak about the security forces. In the reproduction of their testimonies, we learn that:

[Carlos Hector] Brandan states that he was deprived of his liberty during the night of 20th July 1976 in Calilegua; tied and blindfolded, he was brought to the police station in Calilegua where they gave him number nineteen and from there he was transferred to *Ledesma's police station*, later to Guerrero, to the detention center and to La Plata . . .²⁷

The defence lawyers picked up the notion of 'Ledesma's police station'. They explained that the phrasing was a confusion produced by the way that the village life is organised around the factory:

The confusion evoked by the fact that the notions 'Ledesma' and 'sugar company' are used to designate interchangeably the company, the village, the police station or the neighborhood that bears the company's name, does not mean that there exist dependencies of the security forces within the private property of the firm.²⁸

The court took this controversy as an opportunity to investigate the nature of the 'confusion'. It collected and compared documents and testimonies, and in this context came across decree 2.379, passed in 1966, according to which the national government installed the 'dependency Ledesma of the National Gendarmerie' within the premises of the corporation.²⁹ The judge then evaluates the information. He states:

According to the documentary and testimonial evidence accumulated throughout the proceedings, the branch 'Ledesma' of the gendarmerie was created in order to control the security zone along the border, taking advantage of the buildings provided by the company regardless of the fact that it is located outside the border territory, that is, more than 160 km away from the border with Bolivia. . . . In this context, right from its beginnings the new police section did not rely on its own infrastructure, and even less so its own vehicles, which would be supplied by the company in exchange for security services which included, among other things, the control and suppression of union activities.³⁰

In light of this interpretation, the alleged 'confusion' becomes a 'relation'. The decree mentioned above produced an exchange between company and policemen in a territory declared a 'border zone'. In another part of the document, the judge explains what he means when he speaks of a 'border zone'. 'According to the military', he writes, 'promoting the development of

²⁷'Gendarmería del Ingenio Ledesma' Aredez, *Luis Ramón y otros*, 79, my italics.

²⁸Aredez, *Luis Ramón y otros*, p. 22.

²⁹Sección Ledesma de Gendarmería Nacional

³⁰Aredez, *Luis Ramón y otros*, pp. 133-134.

Ledesma would allow for the strengthening of the border area, something considered fundamental in their fight against communism'.³¹

This 'collaboration' between security force and company was officially renewed in 1979, with an agreement between the then director of the national gendarmerie and general of the divisions I and III, Antonio Domingo Bussi and Blaquier. The document, included in the body of evidence, indicates the goods and properties that Ledesma already had transferred and was still to transfer to the police in exchange for security services. Ledesma also committed itself to provide one thousand litres of fuel per month to secure the functioning of the unit.³² The testimonies of the victims, which speak of 'Ledesma's police station', can be read as the (perceived) unification of economic power and physical force.

from state to accomplice

At the beginning of the section on the legal responsibility of the accused, the judge summarises the historical context by attributing the motivation for the human rights violations committed during the *Proceso* to economic interests. He reiterates that 'security services of the local gendarmerie in fact served the aim of restraining local union demands that were expressed with increasing organisation and strength'.³³ A few lines later, he concludes that:

the symbiotic relation constructed between the company and the security forces which participated in the state repression was able to keep in line those individuals adverse to its plan of economic growth.³⁴

When it comes to the translation of this historical account into the individual responsibility of the accused, however, several fissures appear in the narrative. In the process of defining legal responsibilities, the judge dissolves this 'symbiotic relation', constructed throughout the document, into one of 'author' and 'participant' in the crimes.

As pointed out in Chapter One, Argentine courts investigating the systematic human rights violations committed during the *Proceso* adopt the principle of 'double subsumption': the individual crimes are first contextualised within a systematic plan and subsumed under the count of 'crimes against humanity', as defined by ICL, in order to argue that they do not fall under the statute of limitations and that the state has a duty to prosecute the human rights violations. In order to define and decide upon the criminal responsibility the incidents are then subsumed under Argentinian criminal law.

In the present case, Blaquier and Lemos are indicted as participants in the crime of deprivation of liberty by civil and military state officials as defined in

³¹ Aredez, *Luis Ramón y otros*, p. 77.

³² Aredez, *Luis Ramón y otros*, pp. 44-45.

³³ Aredez, *Luis Ramón y otros*, p. 133.

³⁴ Aredez, *Luis Ramón y otros*, p. 133.

Article 144 b (1) of the National Criminal Act.³⁵ It follows from this decision that the author of the crime by definition needs to belong to the state apparatus. This is why, even though the indictment strictly speaking only concerns the responsibility of Blaquier and Lemos, the judge nonetheless refers to General Luciano Benjamín Menéndez who, according to him, has to be considered the indirect author of the crimes, since he was the ‘highest responsible in the military chain of command that concerned the area’.³⁶

Menéndez’s responsibility for the illegal detentions under investigation in this case, as well as the responsibility of four other military officials, was investigated in the first public trial in Jujuy, which began in July 2012 and that, at the time of issuing the indictment against Blaquier and Lemos, was still ongoing. So, while he was not indicted in this case, Menéndez had been indicted as an indirect author of the crimes under investigation in a different case. In the indictment of Blaquier and Lemos, the judge briefly summarises the arguments according to which Menéndez should be considered the indirect author, on the basis of Claus Roxin’s theory of perpetration of a crime through an organised power structure.³⁷ Blaquier’s and Lemos’ responsibility is consequently cast as merely participation, through the supplying of vehicles, in crimes that were orchestrated by the state :

Thus, with the company’s provision of the vehicles there is a relation of ‘co-casuality’ between the action taken by the accused, Blaquier and Lemos, and the result of the act of the author (illegal deprivation of liberty of the victims), according to the application of the theory of objective imputation.³⁸

While the historical analysis included in the indictment alludes to a structural understanding of power when it describes the effective control of Ledesma over the population and the economic dependency of the local police stations on the corporation, the definition of legal responsibility (the attribution of authorship), relies on the assumption that control of the action is exercised via a bureaucratic state or military apparatus. The economic dimension of these crimes is thereby written out of the rationale of the *Proceso* and located in the ‘cooperative conduct’ by Blaquier and Lemos ‘in the actions of others through the furnishing of means of transport’.³⁹

structure and agency

The difficulty that criminal law faces when translating structural relationships of power into forms of individual responsibility is, as pointed out in Chapter

³⁵ Aredez, *Luis Ramón y otros*, p. 114.

³⁶ Aredez, *Luis Ramón y otros*, p. 127.

³⁷ Aredez, *Luis Ramón y otros*, p. 127; on Roxin’s theory see Claus Roxin. ‘Crimes as Part of Organized Power Structures’. In: *Journal of International Criminal Justice* 9.1 (2011), pp. 193–205.

³⁸ Aredez, *Luis Ramón y otros*, p. 135.

³⁹ Aredez, *Luis Ramón y otros*, p. 132.

Three, a recurrent subject in the literature interested in the historiographical function of trials in response to state crime.⁴⁰ As I argued there, the analysis of the writing of history in trials is often truncated with an argument discussing the (in)ability of trials to contribute towards historical truth, with truth being (implicitly) defined as the adequate representation of the past. That is, in order to assess whether trials can make a contribution to the writing of history, most contributions to the scholarly debate ask whether ICL has the means to represent the complexities of state crime adequately. Faced with the gap that opens between the historical 'reality' of state-backed violence and the attribution of individual responsibility, scholars either call for giving up on the historiographical function of ICL or, instead, demand that more adequate concepts of legal responsibility be developed, in order to be able to grasp the complex interactions that are at the core of the crimes outlawed by ICL.

In the following, I emphasise the gap which opens up precisely where the historical context constructed in the pre-trial decision is translated into forms of legal responsibility. However, this is not in order to make an argument about the (in)adequacy of legal concepts of responsibility. Rather, in line with the theoretical perspective set out in Chapter Three, I wish to explore how the histories of the role of Ledesma during the *Proceso* destabilise and thereby expose the contingency of the way in which ICL constructs individual responsibility.

In adopting such a perspective, I join those scholars who take the gap that emerges between the complex interactions of systematic state-backed violence and concepts of individual responsibility not as indicative of a need to reform ICL, but instead as an invitation to analyse the structure of ICL. Martti Koskenniemi, for example, explains the gap that opens up by means of a paradox that is at the heart of ICL.⁴¹ The crimes defined by ICL all have a 'context element', which requires that the individual crime under investigation be part of a 'widespread' or 'systematic practice'. It is this context that qualifies a crime as an *international* crime, understood as defined in Chapter Two, namely a crime that is considered to affect the international community as such.⁴² At the same time, the court needs to link the crime to an individual and prove their criminal intent.

This 'awkward task', to 'prove a personal guilt without ignoring the broader context in which crimes take place' and the 'perpetual tension between the collective and the individual' at the heart of ICL more generally, has also been thoroughly analysed by Gerry Simpson.⁴³ Simpson shows how ICL jurisprudence attempted to solve these tensions through novel doctrines of individual responsibility and collective conspiracy which, however, never manage to to-

⁴⁰See above, p. 82

⁴¹Koskenniemi, 'Between Impunity', p. 16.

⁴²See discussion on p. 46

⁴³Simpson, *War Crimes*, pp. 58, 71.

tally disguise the fictional element which is contained in the assumption of individual responsibility.⁴⁴ In pointing out that, even where responsibility is attributed to an individual, courts tend to invoke the collective, he contests that which George Fletcher has identified as the 'liberal bias' of ICL, namely the primacy of agency over structure.⁴⁵

Expanding on Simpson's critique, I want to suggest that, while ICL has a liberal bias, this bias does not manifest itself in the primacy of agency over structure. Rather, what I call ICL's liberal bias consists in the way it links the individual to the structure, that is, how it links the crime under investigation in a case to the widespread and systematic practice. Once again we will encounter the imaginary of the Weberian state as an organising principle of the way in which ICL imagines state crime and related legal responsibilities. This time, as we will see, this imaginary structures the legal doctrines that seek to overcome the distance between crime scene and accused, with the aim of holding to account those who are considered to bear the 'actual' responsibility.

the laws of causation

ICL jurisprudence developed a wide range of doctrines with which to grasp individual responsibility in the context of state crime. Conspiracy, joint criminal enterprise and command responsibility serve as legal constructs which bridge the physical distance between the accused and the scene of crime.⁴⁶ Elies van Sliedregt distinguishes these doctrines according to two rationales, namely the naturalistic and the normative model.⁴⁷ The first, she holds, focuses on the causes of the *actus reus*, the second on the moral responsibility of the accused. According to the naturalistic model, the principal perpetrator is the person who physically committed the crime, while the normative model focuses on the intellectual perpetrator. The first model constructs the crime from the bottom up, while the second adopts a top-down approach. Van Sliedregt argues that, while both can be found in ICL, jurisprudence increasingly resorts to the normative model.

In *Tadic*, for example, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia famously read joint criminal enterprise as a

⁴⁴Simpson, *War Crimes*, pp. 66-78; The problem of anchoring 'responsibility for causation in individuals in the context of causal sequences that predate and postdate individual agency' is, of course, characteristic of criminal law in general. See Alan W. Norrie. *Crime, Reason and History. A Critical Introduction to Criminal Law*. London: Butterworths, 2001, p. 135.

⁴⁵George P. Fletcher. 'Liberals and Romantics at War: The Problem of Collective Guilt'. In: *The Yale Law Journal* 111 (2002), pp. 1499-1573.

⁴⁶See contributions in Gideon Boas, James L. Bischoff, and Natalie L. Reid. *Forms of Responsibility in International Criminal Law*. Cambridge and New York: Cambridge University Press, 2007; Tracy Lynn Isaacs and Richard Vernon, eds. *Accountability for Collective Wrong Doing*. Cambridge: Cambridge University Press, 2011.

⁴⁷Elies van Sliedregt. *Individual Criminal Responsibility in International Law*. Oxford: Oxford University Press, 2012, pp. 71-73.

form of commission into article 7 (1) of the statute.⁴⁸ Subsequently, liability as per joint criminal enterprise entered the jurisprudence of the Yugoslavia tribunal.⁴⁹ Article 7(1) establishes individual responsibility for ‘a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime’.⁵⁰ In the opinion of the Appeals Chamber, the article should be read as follows:

Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offense in question. It follows that the *moral gravity* of such participation is often no less – or indeed no different – from that of those actually carrying out the acts in question.⁵¹

In the next paragraph, the judges add that to hold those who made the crime possible liable ‘only as aiders and abettors might understate the degree of their criminal responsibility’.⁵²

In line with the *Tadic* judgment, van Sliedregt justifies the shift towards a normative model as follows:

[S]igmatization through the principal status is important bearing in mind the expressive value of prosecuting and punishing international crimes and the denunciatory and educational function of punishment. Making clear who masterminded crimes by referring to him/her as the ‘principal’ who ‘commits’ crimes is important in communicating to victims and the international community as a whole, who was the ‘real’ culprit.⁵³

What is at stake in the normative model, then, is linking the causation of a crime to a judgment about the blameworthiness of individual behaviour. The ‘principal’ or perpetrator is no longer the person who held the weapon, but rather the person who is found to be most ‘responsible’ for the commission of the act. However, that which sounds like a natural category in *Tadic* as well as in van Sliedregt’s account is in fact a highly contingent decision. Who is identified as the most responsible person for bringing about a certain situation depends on non-legal concepts, analyses and ontological assumptions for which criminal doctrine alone cannot account.

The highly dynamic development of doctrines of individual responsibility in ICL follows a movement of circular reasoning which renders invisible the

⁴⁸ *Prosecutor v. Tadic*, IT-94-I-A, Judgement (Appeals Chamber). International Criminal Tribunal for the former Yugoslavia. 1999-07-15.

⁴⁹ In fact, the tribunal developed three different forms of joint criminal enterprise. For more detail, see Allison M. Danner and Jenny S. Martinez. ‘Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law’. In: *California Law Review* 93 (2005), pp. 75–169.

⁵⁰ International Criminal Tribunal for the former Yugoslavia. *Statute*. 2009 (updated). URL: <http://www.icty.org/sid/135> (visited on 04/14/2013).

⁵¹ *Tadic*, ¶191.

⁵² *Tadic*, ¶192.

⁵³ van Sliedregt, *Individual Criminal Responsibility*, p. 80.

pre-legal conceptions of responsibility on which the legal doctrines draw in the first place. New doctrines are introduced and developed in line with the argument that they are needed in order to represent the 'actual' responsibility of the accused. However, it is not made explicit on which grounds this 'actual' responsibility or the 'actual' perpetrator are identified. Once these doctrines have become accepted, they serve as frameworks through which to establish legal guilt. At this point the verdict on the individual responsibility of the accused is presented as an objective finding of responsibility. The politics of individual responsibility for mass crimes can be seen in the way that ICL naturalises the line it draws between legally relevant forms of contributions to a crime and those not taken into account.

organised power structure

The destabilising dimension of the Ledesma trial consists in its exposure of the underlying assumptions that inform Roxin's theory of the perpetration of a crime through an 'organised power structure'. This theory has become central to definitions of individual responsibility for state crime in Argentina. In line with the move towards normative theories of individual responsibility, Roxin's theory fosters the distinction between perpetrator and accessory in relation to a supposed moral blameworthiness of their respective contributions. It establishes legal responsibility on the basis of the assumption that the author has control of an act through organised power structures typical of the bureaucratic state.⁵⁴ That is, power – understood as the ability to influence the actions of others – is found to be exercised only through hierarchical structures and (military) authority.

As already mentioned above, the application of Roxin's theory results in Menéndez being indicted as the indirect author of the crimes under investigation. As commander in chief, responsible for the northern provinces of the country, Menéndez is identified as the perpetrator behind the perpetrator, controlling the acts through an organised power structure. The figure of the 'organised power structure' by now has become accepted to such an extent that reference to the position of Menéndez is enough to indict him as indirect author; no further evidence concerning his knowledge of the particular crimes or his criminal intent is needed.

Having established authorship thus, Blaquier and Lemos are indicted *prima facie* as participants in a crime orchestrated by the state. The economic dimension of the crimes is thereby written out of the rationale of the *Proceso* and allocated to the private sphere. All the evidence that speaks of the powerful position of the company in the region, with the entanglement of local police and local business, cannot be translated into a notion of influence that is construed exclusively in terms of organised hierarchy.

⁵⁴Roxin, 'Organized Power Structures'.

As we have seen in the course of this thesis, the conceptual separation of the state (the public sphere and the structure) and the economy (the private sphere) is characteristic of the dominant approach to corporate responsibility. The latter assumes ex-ante the existence of the state which holds the monopoly on force when, as Raymond J. Michalowski points out,

treating government as organizationally distinct from economic institutions and civil society is more a statement of how free-market societies are supposed to operate than a description of how they actually operate.⁵⁵

In the Ledesma trial, the testimonies and evidence that were gathered and unearthed during the pre-trial proceedings expose the mirrors through which the legal kaleidoscope frames the responsibility for the disappearance of the former workers from Ledesma. The ‘circumstantial’ evidence and the historical context presented in the indictment suggested a symbiotic relation between the state and the company. The legal framing of responsibility, however, mirrors the ontological separation of the state and the economy that is proper to liberalism; a separation which is projected onto the past in order to make sense of the economic dimensions of state crime. Against the apparent intentions of the judge, the ‘economic’ is written out of the logic of the *Proceso* and identified solely with the economic actors. In sum, rather than offering a clear-cut image that might appear to be a truthful replica of Ledesma’s role in the disappearances of their workers, the indictment exposes the lines along which legal responsibility is constructed.

6.2 States of Exception

I now want to turn to the second issue that is brought up by the Ledesma trial, which, as I will argue, exposes the mirrors of the kaleidoscope through which the current juridico-political order frames the violence of the *Proceso*. Again, this glimpse of the particularity of the legal concepts under consideration is enabled by the double movement of opening and closure: the investigations of the crimes experienced by the workers of Ledesma during the *Proceso* produce evidence that cannot then be accommodated by the legal concepts. In this section, I will not focus on the concepts of responsibility, but on the kind of violence that is recognised as such.

desaparecidos

The violence that is recognised and condemned by the indictment is the violence of the state of exception. Blaquier and Lemos are indicted as participants in the crimes of unlawful deprivation of liberty, aggravated by the use of threat and aggression in the context of a systematic plan.⁵⁶ This plan is described

⁵⁵Michalowski, ‘State Crime Studies’, p. 14.

⁵⁶As defined by art. 144 bis inc. 1° and art. 142 inc. 1 of the Argentine Criminal Act *Aredez, Luis Ramón y otros*, p. 131.

as the widespread and organised practice of illegal detentions and forced disappearances carried out with the help of the state apparatus.

In the discussion of the collage 'Martínez de Hoz and Boots' in Chapter One, I alluded to the double structure of the state apparatus during the *Proceso*. On the one hand, it claimed to stand on legal grounds. On the other hand, it established a system of clandestine detention centres in which the rule of law was suspended.⁵⁷ Those who were brought to one of these centres were exposed to arbitrary violence, torture, death.

As systematic as the violence inflicted by this system was, so too was the negation of its existence by official state institutions. Consequently, the existence of those caught in the circle of clandestine detention centres was also negated. Most of those sucked into the clandestine state machinery were never seen again. This systematic and institutionalised practice of detaining political opponents while simultaneously negating their detention has become known as the practice of 'disappearance'.⁵⁸ It creates a space in which no law applies, in which the human body is exposed to uncontrolled violence in the name of the state. It is the violence enabled by the suspension of the rule of law in the name of the rule of law.⁵⁹

The notion of the 'disappeared' furthermore emphasises the continuing absence of a body. Many people have written on the long-lasting effect that this continuing absence has on family members as well as on a society.⁶⁰ Not to know what has happened to loved ones after they were abducted is described as barrier to both individual and collective closure. The categorisation of an absent body as *desaparecido* is usually followed by a demand that the circumstances of the disappearance be investigated, that the circulation of the body through clandestine detention centres be traced, until these traces lead us to the depths of the Rio de la Plata or to some anonymous mass grave. Maybe it is because the disappeared body constitutes the beginning of a legal problem (where there is no harmed body, there is no crime), that it is linked to the demand for a judicial truth: where, when, who?⁶¹

However, the indictment also refers us to a different way of making sense of the disappearances of the unionised workers from Ledesma, namely, to the legend of the *Familiar*. Taking up an argument made by literary scholar Kirsten Mahlke, I hold that this tale offers a different way of making sense of

⁵⁷On the role of law and legal institutions during the *Proceso*, see Crespo, 'Legalidad y dictadura'; see also the contributions in Juan Pablo Bohoslavsky, ed. *¿Usted también doctor? Complicidad de funcionarios judiciales y abogados durante la dictadura*. Buenos Aires: siglo veintiuno editores, 2015.

⁵⁸Pilar Calveiro. *Desapariciones. Memoria y desmemoria de los campos de concentración argentinos*. México D.F.: Taurus, 2002.

⁵⁹Giorgio Agamben. *State of Exception*. Chicago: University of Chicago Press, 2005.

⁶⁰Daniel Feierstein. *El genocidio como práctica social. Entre el nazismo y la experiencia argentina. Hacia un análisis del aniquilamiento como reorganizador de las relaciones sociales*. Buenos Aires: Fondo de Cultura Económica, 2007.

⁶¹See in detail Crenzel, 'Judicial Truth'.

the disappearance of human bodies.⁶² It links the disappearance of people not primarily to the (Schmittian) state of exception but rather to the condition which with Benjamin I called the 'state of exception that is the rule' – namely the violence of the capitalist rule of law.

el familiar

In the body of evidence that was gathered to establish the responsibility of Blaquier and Lemos, we repeatedly find the name of Jorge Osvaldo Weisz. Weisz started working at Ledesma in 1970 and soon after his arrival engaged in union activism. In 1974, Jorge Weisz and his wife, María Dora Revechi de Weisz, were arrested for alleged subversive activities on the basis of the emergency laws enacted by Isabel Peron in the same year.⁶³ While Dora was released several years later, Jorge remains disappeared.

The abduction and subsequent disappearance of Jorge Weisz is not part of the accusations made against Blaquier and Lemos. However, evidence concerning his detention was included by the judge in order to point out the close relationship between the security forces and the company. Among the materials that were confiscated during the searches of the Ledesma office in 2012, the judiciary found the personnel file on Weisz. It gives evidence of the supervision and control of union activities that had been ordered by the company.⁶⁴ According to the testimony of Dora Weisz, her husband's disappearance was explained by his fellow workers at the sugar plantation with reference to the *Familiar*.⁶⁵

The legend of the *Familiar*, which has roamed the sugar plantations of the Argentine northwest since the 1880s, also tells a story of the disappearance of bodies.⁶⁶ There are different versions of this story, which have been passed on from generation to generation. However, as Mahlke highlights, despite being an oral tradition, its core has remained remarkably stable over the years.⁶⁷ It is summarised by Mahlke as follows:

A black, huge, evil dog with sharp claws and luminous red eyes resides in the basement of the sugar factories. He is called 'el Familiar', meaning 'the Relative', and is the representative of the devil with whom the owner of the sugar factory made a pact. According to this pact, the owner of the

⁶²Kirsten Mahlke. 'El capital del diablo: desapariciones y economías fantásticas en el mito argentino de *El Familiar*'. In: *Narrativas del terror y la desaparición en América Latina*. Ed. by Liliana Ruth Feierstein and Lior Zylberman. Sáenz Peña: EDUNTREF, 2016, pp. 13–33, pp. 16–18.

⁶³*Ley Nr. 20.840 (Seguridad Nacional)*.

⁶⁴*Aredez, Luis Ramón y otros*, p. 137.

⁶⁵See interview with Weisz in Fernando Krichmar. *Diablo, Familia y Propiedad*. 1999.

⁶⁶Gastón Gordillo. 'The Breath of the Devils: Memories and Places of an Experience of Terror'. In: *American Ethnologist* 29.1 (2002), pp. 33–57; Mahlke, 'El capital del diablo'; Kirsten Mahlke. 'El mito de El Familiar. Memoria social de la cultura del terror en los ingenios azucareros del Noroeste argentino'. In: *(Des)memorias*. Ed. by Adriana Lopez Labourdette, Silvia Spitta, and Valeria Wagner. Barcelona: Linkgua, 2016.

⁶⁷Mahlke, 'El capital del diablo', pp. 19–21.

plantation is guaranteed immense wealth while the *Familiar*, in return, is regularly fed a worker. This usually happens during harvest when the working conditions are particularly hard and many migrant workers are present at the plantation. The chosen reaper is called into the basement on the pretext that it needs cleaning, from where he usually does not return. In this case, his colleagues and relatives know that it was the *Familiar* who ate him, and that there is no point in looking for the remains as the *Familiar* eats men completely.⁶⁸

The legend of the *Familiar* was told by both the foremen and the workers. This can be explained, according to Argentine anthropologist Gastón Gordillo, with reference to two dimensions of the tale.⁶⁹ On the one hand, it entails a threatening, disciplinary function. It signals to the workers that he should not raise his voice or else he might be the next to be eaten by the *Familiar*. On the other hand, the tale has a critical function, which explains why it is also told by the workers over generations.

Mahlke emphasises this critical function when she reads the legend of the *Familiar* as a form of cultural knowledge that condenses the experience of systematic exploitation that accompanied the implementation of capitalist forms of production in the northwest. The wealth of the owner of the sugar company is literally bought with the body and blood of the worker. It is a business sanctioned by the treaty that was agreed between the devil and the owner of the sugar mill and which has been signed in blood.⁷⁰ Unlike many other devil's pacts, it is not only the soul that is sold, but also the body. And, more importantly, the signatory does not offer his own soul or body, but that of his workers.

progress as catastrophe

The legend of the *Familiar* is a cultural rendering of Marx's analysis of the capitalist mode of production and the violence it inflicts on those who do not have anything to sell but their labour. It tells the experience of the mostly indigenous migrant workers who, during harvest time, left their territories to work on the sugar plantations. In this vein, Mahlke warns us not read the legend of the *Familiar* as a mere anecdote.⁷¹ That it was continuously retold over many years can only be explained with the fact that it grasps an actual experience: it is the experience of the continuous disappearance of bodies which went hand in hand with the formation of the Argentine nation

⁶⁸Kirsten Mahlke. *El Familiar. Bestie, Bürokrat, Diener der Inquisition*. 2014. URL: <https://www.exzellenzcluster.uni-konstanz.de/mahlke-familiar-inquisition.html> (visited on 11/17/2016), (my translation.)

⁶⁹Gordillo, 'The Breath of the Devils: Memories and Places of an Experience of Terror', p. 44.

⁷⁰Mahlke, 'El capital del diablo', p. 16.

⁷¹Mahlke, 'El mito de El Familiar. Memoria social de la cultura del terror en los ingenios azucareros del Noroeste argentino', p. 2.

and its integration into the global economy.⁷² As such, it speaks to Benjamin's philosophy of history which, as we saw in Chapter Three, demands that the 'concept of progress must be grounded in the idea of catastrophe'.⁷³

The absent body of Jorge Weisz, then, can be explained with reference to two different states of exception. As a *desaparecido*, Weisz is, in the first place, a victim of the military state apparatus that is characterised by the absence of the rule of law. As someone who was devoured by the *Familiar*, the violence he experienced is not merely that of the state of exception with which the junta justified the suspension of the rule of law. Rather, the violence he suffered is that of a state of exception that is the rule under the laws of capitalist accumulation. This second state of exception, as I argued with reference to Benjamin in Chapter Three, is the one rendered permissive by the liberal rule of law. That is, it refers to a violence that is not recognised as such by the liberal rule of law.

At various points in this thesis I have showed that, according to liberal theories of the rule of law, the monopolisation of physical violence by the state corresponds with the constitution of the economy as a realm that is claimed to be governed not by coercion but by voluntarily agreed contracts. This justification of the state's monopoly on violence, along with the constitution of the economy as the realm of freedom, have been challenged by various authors, including by Marx. With Ives Winter, we can summarise Marx's critique as follows:

[T]he constitution of the modern political state occurs not only through the doubling of the human in bourgeois and citizen, but also through the distinction of the kind of violence that is avowed (rebranded as 'force') and the kind of violence that is disavowed because it takes place outside the institutional setting and because it does not correspond to the juridical grammar of subjective violence.⁷⁴

The juridical grammar of subjective violence that Winter identifies is one that privileges visible, spectacular forms of violence that moreover can be attributed to an individual.⁷⁵ It is the very grammar on which the narrative of the *desaparecidos* rests.

The legend of the *Familiar*, evoked by the figure of Jorge Weisz, renders visible the selectivity and the periodisation at work in the indictment. As opposed to the legal rendering of the role of Ledesma in the illegal detentions, it links the disappearance of the workers to an economic rationale: the disappearance of

⁷²On the history of Jujuy and the development of the local sugar industry, see contributions in Ana A. Teruel and Marcelo Lagos, eds. *Jujuy en la Historia. De la Colonia al Siglo XX*. Jujuy: EdiUnju, 2006; For an English introduction into the history of Jujuy, see Ian Rutledge. 'Agrarian Change and Integration in an Interior Province of Argentina: a Sociological and Historical Study of Jujuy, c.1550-1960'. PhD thesis. Cambridge: University of Cambridge, 1973.

⁷³Benjamin, *Arcades Project*, p. 472 (N9a,1).

⁷⁴Winter, 'Beyond Blood and Coercion: A Study of Violence in Machiavelli and Marx', p. 297.

⁷⁵Yves Winter. 'Violence and Visibility'. In: *New Political Science* 34.2 (2012), pp. 195-202.

his body appears as intimately linked to the wealth of Ledesma.⁷⁶ Contrary to criminal law, which focuses on perpetrator and victim, the legend of the *Familiar* thinks repression in relation to the beneficiaries of violence.

Furthermore, the *Familiar* challenges the assumption that the experience of the disappearance of people is confined to the time of the *Proceso*, that is, to the absence of the rule of law. The fact that the figure of the *Familiar* was invoked again to make sense of the disappearances of unionised workers at the sugar plantations in the northwest of Argentina, suggests that for a part of the Argentine population the violence inflicted by the *Proceso* was perceived not as something qualitatively new, but as a variation on a theme.

6.3 Conclusion

In the introduction to this chapter, I drew a parallel between the Ledesma trial and the representations of law found in Kafka's *The Trial*, and in particular in the parable *Before the Law*. I suggested that the suspended nature of the trial allows for two different readings, each drawing on a different strand of interpretation of Kafka's text. The first focuses on the relation between the individual and law, the second on a movement within law. By means of conclusion, I want to highlight the implications of both readings for the question of what the promise of the Ledesma trial might be for those whose struggles were violently repressed during the *Proceso*.

lack of imagination

The first line of interpretation focuses on the hopes placed in the law, despite its exclusive character and its tendency to produce decisions that, in the eyes of laypeople, would be described as 'kafkaesque'. These hopes are reflected in the long-lasting struggle of former political prisoners and relatives of disappeared workers to gain legal recognition that Ledesma, and not only the local armed forces, participated in the disappearances.⁷⁷ The vehemence with which human rights organisations insisted on the company's role in the crimes was matched by the company's insistence that they had had no involvement.⁷⁸ As mentioned at the beginning of this chapter, the defense lawyers appealed the pre-trial decision and won.

Given that the *actus reus*, that is, the provision of vehicles by the company, was the contested element on which both prosecution and defense focused during pre-trial proceedings, the grounds on which the Appeals Chamber

⁷⁶Mahlke, 'El capital del diablo', p. 30.

⁷⁷See for example the testimonies collected in Ricardo Nelli. *La injusticia cojuda. Testimonios de los trabajadores del azúcar del Ingenio Ledesma*. Buenos Aires: Puntosur editores, 1988.

⁷⁸In addition to letters to the public, the official account of the company is exposed in the company history published on the occasion of its 100th anniversary. See Ledesma S.A.A.I. *Ledesma. Una Empresa Argentina Centenaria. 1908 - 2008*. Buenos Aires: Fundación CEPPA, 2008, p. 109; *La Verdad sobre Ledesma*. Buenos Aires, 10.07.2012. URL: http://www.ledesma.com.ar/archivos/art_archivo/128.pdf.

granted the appeal came as a surprise to many. The Chamber confirmed without much ado the objective participation of the accused, namely the provision of the vehicles for the abduction of Ledesma's workers. However, the judges argued that this fact did not prove the criminal intent of the accused and that there was therefore not enough evidence to open the main trial:

We do not discuss here whether the accused were powerful or influential. Even if this was the case, we cannot deduce any indication from it able to corroborate the hypothesis that the accused imagined that they were contributing to somebody's conduct who knowingly deprived other persons of their liberty. . . . That is, the fact that it was verified that the detentions took place in April using Ledesma's vehicles does not prove the criminal intent of the participants in any of the cases.⁷⁹

Consequently, the Chamber of Appeals concludes that:

at this stage of the investigation there is not enough evidence to allow us to assume that the accused Blaquier and Lemos imagined that they were contributing to a crime carried out by the armed forces.⁸⁰

During a press conference given a few days after the Appeals Chamber decision became public, Federico Gatti, the current manager of the company, declared that Ledesma received the news with satisfaction. 'What this sentence does', he stated, 'is to re-affirm what we have been saying from the beginning: that neither the company nor its management had anything to do with the dictatorship'.⁸¹ In a similar vein, the defense lawyer claimed that 'the Chamber of Appeals was clear that the the company's participation was not proved and did not exist'.⁸² These affirmations contain an important slip: to sustain that something was not proved is not to say that it did not exist. In theory, new evidence can be submitted in the future.

The case of Ledesma is one the of few cases in which the responsibility of businessmen for the disappearance of their employees has been dealt with by the courts.⁸³ It was the hope of those who spent years working towards the opening of the case – former political prisoners as well as family members of the disappeared, lawyers, journalists and human rights activists – that the Ledesma trial would be the first to confirm the participation of economic actors

⁷⁹Blaquier, *Carlos Pedro Tadeo y otro s/recurso de casación*, p. 29.

⁸⁰Blaquier, *Carlos Pedro Tadeo y otro s/recurso de casación*.

⁸¹'Caso Blaquier: familiares rechazaron la sentencia'. In: *Todo Jujuy* (2015-03-17). URL: http://www.todojujuy.com/todojujuy/caso-blaquier-familiares-rechazaron-la-sentencia_32255 (visited on 02/05/2016).

⁸²'Caso Blaquier: familiares rechazaron la sentencia'.

⁸³On the systematic repression of the labour movement during the Argentine *Proceso*, see Dirección Nacional del Sistema Argentino de Información Jurídica, *Responsabilidad empresarial I*; Dirección Nacional del Sistema Argentino de Información Jurídica, ed. *Responsabilidad empresarial en delitos de lesa humanidad. Represión a trabajadores durante el terrorismo de Estado*. Vol. 2. Buenos Aires: Editorial Ministerio de Justicia y Derechos Humanos de la Nación, 2015; For the legal investigations of businessmen, see Horacio Verbitsky and Juan Pablo Bohoslavsky, eds. *The Economic Accomplices to the Argentine Dictatorship. Outstanding Debts*. New York, NY: Cambridge University Press, 2016.

in the crimes committed during the *Proceso*. Now, they fear that the Appeals Chamber's decision might set a legal precedent for other cases investigating the responsibility of economic actors.

However, it is hard to imagine what kind of evidence would satisfy the judge's criteria for the *mens rea* of the accused. Against the backdrop of the evidence produced by the trial, to argue that Blaquier and Lemos could not have imagined what was going to be done with the vehicles speaks to a lack of imagination of the judges who constitute the Appeals Chamber. The legal framing of guilt in the absence of a *mens rea*, as the central problem of criminal trials in response to state crime, has been famously discussed by Hannah Arendt, in her report on the Eichmann Trial. Her phrase the 'banality of evil' does not denote the psychological condition of Eichmann, so much as it poses the question of how to legally capture the guilt of an individual within a system built around systematic crime.⁸⁴

But maybe the problem is much simpler. Maybe, it is not located at the level of legal arguments. In June 2015, following the decision of the Appeals Chamber, I attended a meeting at the University of Jujuy, at which lawyers working on cases investigating the responsibility of economic actors all over the country, journalists and social researchers came together, in order to discuss what kind of evidence and legal arguments were required to win the next cases.⁸⁵ It was the prosecutor who had acted in the Ledesma trial who suggested that the prosecution had falsely relied on their arguments, when perhaps it would have been more useful to be present on the floors of Comodoro Py.⁸⁶ This argument seems like a lesson drawn from *The Trial*, where, as Fitzpatrick observes, '[o]fficialdom can only be approached unofficially – through "influence" or "connections"'.⁸⁷ Blaquier's lawyers, it seems, have the right connections. One of them was the first federal judge to which the case had been assigned. A second lawyer of Blaquier's was the secretary of the court where the dossiers of the case were initially processed. Against this backdrop, the absence of a judgment in the Ledesma trial might be read as evidence of a law that, in the end, is still the law of the powerful.

suspensions

I indicated that there is a second way of reading Kafak's representations of the law, which suggests that *The Trial* and *Before the Law* might be read not as reflecting on the relationship between the individual and the law, but as reveal-

⁸⁴Arendt, *Eichmann*; See further discussion in Felman, *Juridical Unconscious*, pp. 107-108; and David Luban. *Hannah Arendt as a Theorist of International Criminal Law*. 2011. (Visited on 10/23/2011), pp. 2-3.

⁸⁵The meeting on 'Responsabilidad empresaria en delitos de lesa humanidad' was convened by Gabriela Alejandra Karasik and Elizabeth L. Gomez at the Universidad Nacional de Jujuy on 5 and 6 June 2015

⁸⁶Avenida Comodoro Py is the street in which most of the courts in Buenos Aires are located, among them the Federal Criminal Court with the Chamber of Appeals.

⁸⁷Fitzpatrick, 'Kafka's Solution', p. 103.

ing a fundamental tension at the heart of the law itself. In this vein, Fitzpatrick finds in Kafka a law that is both determinate and illimitable.⁸⁸ A similar tension is cast by Teubner, when he reads *Before the Law* as a reflection on the relationship between Law (*Recht*) and law (*Gesetz*).⁸⁹ According to Andreas Fischer-Lescano, correspondingly, every gesture of Kafka's that unmasks the violent and alienating character of law is followed by an indication that there is still hope that one might experience a non-violent law.⁹⁰

In Chapter Three, I read Benjamin's philosophy of history together with his critique of legal violence, thereby advocating a perspective on trials as sites of competing politics of time. Such a perspective, I argued, allows us to perceive the violence inherent to the trials, without taking our eyes off law's claim to justice. On the one hand, I suggested that trials should be understood as a manifestation of law-preserving violence. They invoke the violence of the past as a negative reference which clouds the foundational violence and thereby also the contingency of the juridico-political order of which they are part. This contingency, the possibility of being otherwise, concerns – among other things – the relationship between the state and the economy, as well as the line between sanctioned and non-sanctioned forms of violence.

As occurs in the readings of *The Trial* and *Before the Law* alluded to above, I then considered the possibility that there might still be a gesture towards justice to be found in the trials in response to state crime. This possibility can be linked to what Benjamin identified as the 'real' state of exception that we need to bring about. The 'real' state of exception envisioned by Benjamin, as discussed in Chapter Three, does not denote some determinate future, but a moment of the suspension or the *Entsetzung* of law. Werner Hamacher named this moment the 'afformative'.⁹¹ It parallels the generation of meaning proper to the collage, which, in Chapter One, was described as depositing without positing. In sum, I argued that with Benjamin, the promise of justice in trials could not be found in those instances in which, with the help of the law, we wish to expose the violence of the past in order to authorise the present juridico-political order. Instead, it might found only at the point where the past is invoked in a way that exposes the violence of both the past and the present.

My reading of the Ledesma trial in this chapter focused on two instances in which the 'rags' of history unearthed during the legal proceedings expose the foundational violence of the juridico-political order which they seek to preserve. The first focused on the construction of legal responsibility for state-backed violence, the second on the violence that is identified as such and condemned by the present juridico-political order as it looks at the past. In both instances, the order in the name of which the judgment was made was shown to construct

⁸⁸Fitzpatrick, 'Kafka's Solution', pp. 100-101.

⁸⁹Teubner, 'The Law Before its Law'.

⁹⁰Fischer-Lescano, 'Franz Kafka's Critique of Legal Violence', pp. 25-26.

⁹¹Hamacher, 'Afformative, Strike'.

the image of the past through a liberal kaleidoscope. 'Liberal', in this context and as pointed out in Chapter Two, refers not merely to a position that is interested in the individual, but to a particular way of linking the state to the economy, the public to the private.⁹²

In the first section of this chapter, I showed that, despite the intention of the judge to emphasise the economic rationale of the *Proceso*, the economic dimensions were eventually located in the private sphere. While 'circumstantial' evidence is accepted as connecting the individual and the structure, only the evidence that can be accommodated within the idea of the bureaucratic state is taken into account. In the second part of the chapter, I showed that the indictment explains the illegal detentions of which Blaquier and Lemos are accused, with reference to the state of exception that is epitomised by the clandestine detention centres and the systematic practice of forced disappearance. I then turned to the legend of the *Familiar*, arguing that it offers a narrative according to which the disappearance of bodies is not the exception but the rule. In connecting the experiences of (economic) exploitation and (physical) repression, I suggested, the tale exposes the violence rendered permissive by constitutional regimes.

To remember the repression of the workers at Ledesma merely as belonging to the dictatorial state of exception opens the possibility of locating it in the past and conceiving it as merely an 'object of contemplation'.⁹³ Describing this effect in the Argentine context, Claudio Martyniuk observed that

what is present is a past that is encapsulated and crystallised, which is assumed to belong to the past, without projecting it into debates about public security, the exercise of exceptional authority of executive power and the treatment of the marginalised and of minorities, those imprisoned without sentence and under torture.⁹⁴

That a critique of this violence is necessary today can be hinted at by returning to Ledesma. On the morning of 28th July 2011, 700 families living on land officially belonging to Ledesma were evicted. During the police intervention, four individuals died (three adolescents and one police officer) and 63 were injured.⁹⁵ The police intervened after a local judge granted the request for eviction which had been filed by Ledesma. Several witnesses mentioned that Ledesma's private security force participated in the eviction too. If it had not been for what was presented in the news as an excess of violence which resulted in the deaths and injuries, the eviction in itself would probably not

⁹²See discussion on p. 53.

⁹³See discussion on p. 103

⁹⁴Claudio Martyniuk. 'Desapariciones, Bicentenario y Pobreza: Humillación'. In: *Herramienta* 15.46 (2011).

⁹⁵'Cuatro muertos por un desalojo pedido por el Ingenio Ledesma'. In: *Tiempo Argentino* (2011-07-29). URL: <http://tiempo.infonews.com/notas/cuatro-muertos-desalojo-pedido-ingenio-ledesma> (visited on 06/07/2014); 'Tierra arrasada en los dominios de la familia Blaquier'. In: *Página/12* (2011-07-29). URL: <http://www.pagina12.com.ar/diario/elpais/1-173325-2011-07-29.html>.

have caused a stir. Because the rule of law protects private property, the occupation of the land, and not the eviction, was perceived as an infringement of individual rights.

Postlude

In this thesis, I contrasted the latent philosophy of history at work in International Criminal Law (ICL) with Walter Benjamin's philosophy of history and his critique of law. In doing so, I wanted to bring into relief the political implications of the latent theory of historical justice that is at work in ICL. Furthermore, I wanted to offer an alternative perspective on the role of history in trials that address state-sponsored violence.

I argued that ICL seeks to draw its own legitimacy from the alleged ability of trials to shed light on the violence inflicted by a previous regime as well as from its alleged contribution towards a liberalising change. The promise of justice that is attached to the representation of past violence is therefore linked to the authorisation of a pre-conceived juridico-political order, namely the rule of law. As a consequence, I suggested, the foundation of political authority in and through trials is no longer subject to scrutiny, but has instead become a central concern underpinning the study of trials.

I challenged this latent theory of historical justice on both ontological and political grounds by drawing on the writings of Walter Benjamin. The claim that trials are able to offer a truthful image of the past conceals that this representation is shaped by the concepts of the juridico-political order of which the trials form a part. The politically problematic aspect that arises when the trials' promise of justice is attached to the adequate representation of past, is that historical truth thus understood authorises the distribution of power of the present. It can only recognize those contributions to a crime that can be captured by the definitions of legal responsibility provided by the current law; and it can only recognize the forms of violence that are defined as such.

In the context of my discussion of Benjamin's philosophy of history, I referred to the image of the kaleidoscope to illustrate this problem. I suggested that the elements of crime and theories of individual responsibility that make up the field of ICL can be compared to the mirrors of a kaleidoscope through which the material produced by a trial is structured and organized. In my reading of the trials I focused on those instances in which the images of the past that are brought up by the trials cannot be accommodated by legal concepts. I argued that they allow us to perceive the patterns according to which the 'mirrors' of the legal kaleidoscope structure and make sense of the economic dimensions of state-sponsored violence.

Based on the study of the trials addressing the economic dimensions of state crime in post-World War II Germany and contemporary Argentina, these mirrors can be described as representing a liberal order. Throughout the analyses I showed that this does not merely mean that the trials prosecuting international crimes such as crimes against humanity or war crimes respond to the violation of individual rights, focus on individual responsibility or seek to foster the liberal rule of law. ICL is liberal, I argued, because it reproduces two conceptual assumptions that are at the core of liberalism. The first of these assumptions is the strict juxtaposition of the public and the private, the state and the economy, force and freedom. The second concerns the classification of violence according to its sanctioned and its non-sanctioned manifestations. They delimit the way in which the courts relate economic actors to the state, and to the violence that is applied in its name.

In the prelude to the thesis I asked: if criminal law as a concept of historical justice is historically indebted to a liberal project, in so far as it seeks to endow liberalising social change with a claim to justice, what promise does it hold for those whose suffering is not redeemed by the couple of liberal rule of law and market economy?

My answer to this question is at the same time a reflection on the methodology underlying this thesis: the trials' potential to expose and denounce not only the violence of the past, but, also that of the present juridico-political order, might be the only promise of justice these trials have to offer. It is the weak promise to produce images that do not serve as provisions of a just future, but that are provisions for opening the present anew for contestation.

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