

Section Thématique 4

Métier : pacificateur. Professionnels internationaux de la paix et sorties de conflits depuis l'entre-deux-guerres

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Construire le « Bottom-Up State » par le haut - de « micro » trajectoires à l'analyse de marchés professionnels concurrents d'exportation de la paix sociale : Étude du cas de l'International Center for Transitional Justice

Inscrite dans des travaux de thèse, cette communication s'appuie sur des enquêtes empiriques auprès d'organisations non gouvernementales (ONG) basées au Nord proposant des « services » de fabrication d'un *bottom-up State* par de la médiation, des techniques d'*Alternative Dispute Resolution* ou des tool-kits de « transition ». Elle porte la focale sur la genèse de l'*International Center for Transitional Justice*, ONG basée aux États-Unis créée en 2001, comme point d'entrée pour retracer l'archéologie de techniques de « justice transitionnelle » et leurs modes de validations post-Guerre froide, en tant que modalité non seulement de contournement de l'État au Sud mais également de (re)fabrication du politique. L'histoire de cette organisation, spécialisée dans la fourniture de « services » de sortie de régimes autoritaires ou de violences armées, est étroitement liée au champ du pouvoir américain, et particulièrement à des investissements philanthropiques menés principalement par la Fondation Ford dans le contexte de la guerre froide « culturelle », ayant visé, dans le cadre de laboratoires « Sud-Sud » (dictatures Latino-Américaines et Afrique du Sud de l'apartheid) à former les élites de la relève dans le cadre d'une « société civile » d'opposition. Le développement de cette organisation permet en retour d'explorer un processus de juridification, i.e. de validation et d'objectivation sur le terrain du droit, de ces techniques de contournement de l'État au Sud.

Transitioning Justice. Bottom up development from the top: From Southern laboratories of transition to the International Center for Transitional Justice

Based on empirical work carried out in the framework of a PhD with non-governmental organizations (NGOs) based in the North providing “services” of fabrication of a bottom-up State through mediation, Alternative Dispute Resolution, or “transitional” tool-kits, this communication builds and expands on the genesis of an NGO, the *International Center for Transitional Justice* set up in New York in 2001, whose self-proclaimed specialty is that of “transitional justice” and which provides an expertise on “transition” from authoritarian rule

or from war on the basis of a number of tools – truth commissions, judicial arenas, reparations. The story of this organization is closely related to the US field of power and particularly investments promoted by US foundations, predominantly the *Ford Foundation*, first in the “cultural” Cold war, and later, through human rights, so as to form, in the shadow of authoritarian States in the Southern laboratories (Latin America and apartheid South Africa), the breeding ground of future elites. The story of the *International Center for Transitional Justice*, as an offspring of these earlier investments, is also key into understanding a successful process of juridification, i.e. the displacement towards the terrain of the law and judicial arenas, of techniques of bifurcation of the State in the South.

TRANSITIONING JUSTICE

Bottom-up development from the top: From Southern laboratories of transition to the International Center for Transitional Justice

There is no guarantee that a government will remain just, accountable, responsible and not abuse its power. You need civil society for checks and balances.
Alex Boraine¹

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¹ Interview with Alex Boraine by Tor Sellström, for the Nordic documentation on the liberation struggle in Southern Africa, Nordic Africa Institute, Uppsala, Sweden, updated 29 January 2010. <http://www.liberationafrica.se/intervstories/interviews/boraine/> (last accessed 12/3/2011).

Introduction

This paper builds and expands on the genesis and institutionalization of the *International Center for Transitional Justice* (ICTJ): set up at the beginning of the 2000s under the aegis of US foundations, prominently the *Ford Foundation*, as a non-profit institution, based in the North, in New York, mandated with centralizing all “transition” related expertise, the story of this institution is one of a successful strategy of *juridification*. Set up by three personalities - Alex Boraine, and Paul van Zyl, both renown for their role in the South African transition, and at the South African *Truth and Reconciliation Commission* and Priscilla Hayner, *Ford Foundation*, but also pioneer expert on “*truth commissions*”, this organization positioned itself explicitly and directly in opposition to established players in the international human rights field, particularly *Human Rights Watch*, in the US.

While it had built on the notoriety of the South African post-Apartheid transition and on the reliance, therefore, on “soft” alternatives to the “hard” human rights discourse of the struggle against impunity through the activation of tribunal forums, ten years after its creation, not only have such “soft” alternatives as Truth Commissions been integrated in the advocacy packaging of human rights established players, but these alternatives have been integrated, within legal fields, as part and parcel of a continuum of accountability to re-establish the rule of law in countries coming out of unstable periods. The purpose here is to explore the genesis of this organization to understand its recipe of success.

Key in this story is a description recounted by Thomas Carothers, vice president for studies at the *Carnegie Endowment for International Peace*, of the 1990s’ turn to “bottom-up” strategies. Those, he argued, were articulated with what he called the “*modern law and development movement*” which he had described as promoted by two “communities”: on the one hand “top down” people, first at the United States Agency for International Development (USAID), who, by the end of the 1990s turned to “bottom-up” strategies of bifurcation of unwilling or wrongdoing State recipients in the South, and second that of “bottom up” people at the *Ford Foundation*, *Human rights watch*, the *Lawyers Committee on human rights*. He had emphasized, however, that, “*sociologically they were two sets of people. Overtime these two communities got some contact, what is surprising is that they are still separate*”². As a

² Interview with Thomas Carothers, *Carnegie Endowment for International Peace*, Washington D.C., 15/11/2007.

direct offspring of investments led by the *Ford Foundation* in the Latin American Cone and South Africa from the 1970s – the capital invested in the *International Center for Transitional Justice* is one that made it part of the second set of “bottom-up” people.

Investments in “democracy promotion” are part of a flourishing international market - whose annual volume is estimated at \$700 million³ - of reform of State institutions, shaped and co-produced by non-governmental organizations, *think tanks*, professional associations or research centers and foundations, but also public institutions such as the World Bank or USAID that have turned since the late 1990s to the promotion of the “*rule of law*” and “*good governance*”. However, as underlined by Nicolas Guilhot, “*beyond the plurality of institutional sites, most of the democracy professionals are sociologically homogeneous, often occupying close and sometimes cumulative positions in the US field. Political scientists specialized in problems of ‘transition’ to democracy or in a branch of ‘area studies’, human rights lawyers, political activists, these actors are also, beyond the stated positions, multiple affiliations or punctual missions, placed in the orbit of a State policy that is all the less distinguished from their activity that it is built around a similar prescriptive discourse*”⁴.

Indeed, this structural collusion, that favors the interpenetration of official positions with positions outside formal State structure, is the defining feature of the US *Foreign policy establishment*⁵. As underlined by Nicolas Guilhot, “*these practices are closely articulated with the implementation of an expertise through which groups of individuals also partake in building the State (...) not only in the countries in which this expertise is applied (...) but also in the US, where the constitution of this field of activities is also that of all the agents that affirm a state competence and their legitimacy to take over the establishment*”⁶. Yves Dezalay and Bryant G. Garth have recounted the early, in the 1960s, “*concerted effort led by the foreign policy establishment*” in an approach to the Cold war deemed to be a “*cultural*

³ T. Carothers, “Democracy Promotion: A Key Focus in a New World Order”, *Issues Democracy*, 5(1), 2000, pp. 23-28.

⁴ N. Guilhot, “Les professionnels de la démocratie. Logiques militantes et logiques savantes dans le nouvel internationalisme américain”, 139, 2001, *Actes de la recherche en sciences sociales*, p. 53. My translation from French. See also N. Guilhot, *The Democracy Makers. Human rights and the politics of global order*, New York, Columbia University Press 2005.

⁵ Y. Dezalay and B. G. Garth, “Le ‘Washington Consensus’. Contribution à une sociologie de l’hégémonie du néolibéralisme”, *Actes de la recherche en sciences sociales*, 121-122, 1998, pp. 3-22.

⁶ N. Guilhot, *op. cit.* 2001, p. 53-54. My translation from French.

*Cold war*⁷, through an informal division of labor. What became known as the “*Law and Development*” movement was promoted in particular by the *Ford Foundation* as part of a strategy that was also a policy of containment, albeit heralded as one of “development”. After the coming into power of Fidel Castro, Latin America became a priority. “*These investments were directed toward building a new technocracy of development that was both competent and reformist and could be counted on to avoid polarizing the political field between an ultraconservative right and a radicalized left acting like revolutionaries*”⁸.

Thus, in the 1960s, the *Ford Foundation* became involved in the “*Law and Development*” movement, starting with the provision, in 1966, of \$3 million to establish the *International Legal Center* (ILC) in New York as a vehicle for mobilizing legal assistance to developing countries⁹, so as to initiate a movement for law school reforms and more globally a reform of the law¹⁰. Failure of such investments, in the face of the taking over of law schools by the most conservative law professors backed by the new military junta in 1974 in Chile, but also increased competition on the domestic front led the *Foundation* to re-orient its investments, towards supporting reformist strategies, such as the fight against poverty, community development, rights of minorities, and at the international level, starting with the Latin American Cone to strategically reorient its investments, “*from general programs supporting foreign universities to the creation of centers of research shielding leftist intellectuals from the threats of the military regimes in Latin America*”¹¹.

It is in this Latin American laboratory, later replicated in Apartheid South Africa, explored in the first Section, that “human rights” through research and public interest law were integrated within a strategy of preparing future elites, i.e. of building a “bottom-up”, future State. The strategy of reorientation of such investments was however in a continuity: using law as a neutral ground (this time against dictatorships), but also again as a tool for change and preparing the transition by training future elites. The institutional form of these

⁷ Y. Dezalay and B. G. Garth, *The internationalization of palace wars: lawyers, economists, and the contest to transform Latin American states*, Chicago University of Chicago Press, 2002, p. 64-65.

⁸ Y. Dezalay and B. G. Garth, *op. cit.* 2002, p. 65.

⁹ H. Frühling, “From Dictatorship to Democracy: Law and Social Change in the Andean Region and the Southern Cone of South America”, in M. McClymont and S. Golub, (eds.), *Many Roads to Justice. The Law-Related Work of Ford Foundation Grantees Around the World*, New York, The Ford Foundation, 2000, pp. 55-88.

¹⁰ See Y. Dezalay and B. G. Garth, *op. cit.* 2002.

¹¹ Y. Dezalay and B.G. Garth, *op. cit.* 2002, p. 69.

investments thus combined, like earlier investments, “research” and “activism” around the State. The *Ford Foundation* favored local agents and institutional ventures with international networks and relays. Therefore, “*despite the discontinuity resulting from political upheavals, the objective of exporting American values while supporting the emergence of new elites remained constant*”¹². Investments in South Africa took on the same logic, while being less massive until the 1980s.

One offspring outside these countries of investments in the South and their South-South boomerang effects is the *International Center for Transitional Justice*, created in 2001, whose story explored in the second Section, can be traced back, in the trajectory of its founders and the meetings that preceded its setting up, to these earlier investments: indeed, the end of the 1990s were, again, a moment of adaptation for the *Ford Foundation*. Either favor “flag-ship” organizations – the very ones that had accompanied and survived transitions in Latin America and South Africa – in a decentralized manner or set up an umbrella organization.

It is the latter option that was favored, but with the conscious strategy of transforming the international human rights field promoted by its founders: the aim was to import within this field the tools for social development and transition supported by the *Ford Foundation* in these earlier laboratories, by rationalizing them as forms of practical knowledge that could be devised to accompany “transitions” from any form of political instability – be it authoritarian rule, or war. From inception, thus, the story of the *International Center for Transitional Justice* and its founders and historical staff, has been one of *displacement*: the displacement of investments that had developed in the shadow of the State and in the shadow of the Court towards the terrain of the law. In turn, the success of the organization has lied in transforming the boundaries of the international human rights field, but also into integrating the hierarchies of the legal field *per se*, as a way to legitimize its activities by making them part and parcel of an “*accountability continuum*”.

South-South “rule of law” laboratories

Latin America and South Africa have been places of investment by the *Ford Foundation* specifically channeled through “NGOs”, “(f)ormer Ford Vice President William

¹² Y. Dezalay and B. G. Garth, *op. cit.* 2002, p. 140.

Carmichael note(d) that the Foundation's Latin America program had long before abandoned any assumption that 'our natural client is the host government'”¹³ and the Ford Foundation's other overseas programs, including South Africa, had rallied towards this direction by the late 1970s.

The strategy of the *Ford Foundation* first experimented in Latin America, was also deployed in South Africa as recalled by former *Ford* Vice-President William Carmichael (*see portrait below, together with that of Franklin A. Thomas*): with a continued objective of fostering the emergence of new elites, “*spot the movers and shakers*” that went from assisting decolonized countries to funding alternative social movements – which was a strategy developed by the Foundation to adapt to growing competition within the market of foundations in the US. The *Ford* indeed moved to “*ideological venture capitalism*”¹⁴ notably towards “*alternative*” movements including human rights in the 1960s and 1970s, and, in parallel, to respond to the failure of earlier “*law and development*” investments, and particularly in the Chilean laboratory, in the face of repressive military regimes, to invest into transition ventures. As recounted by Yves Dezalay and Bryant Garth, “(a)fter having been ‘*experimented*’ in a very pragmatic manner in the Latin America of the colonels, this model of smooth conversion was exported towards other continents by its inventors”¹⁵.

In this “*South-South laboratory*” a similar strategy of “*legal empowerment*” via institutional laboratories and investing in social reformers was deployed. In both sets of laboratories, the *Ford Foundation* invested in “*research*”, focusing on “*scholarly*” centers as a way to shield its *protégés* from political interference¹⁶, but also to promote an alternative form of “*governance*”: it thus accompanied the setting up of institutions that “*once created could later be reconstructed with a similar expertise*”¹⁷ elsewhere, but that could also shield and form future elites. In turn, these investments, particularly in Chile and Argentina, were thus moved to South Africa – later to be moved back home, in the US, as a further step into institutionalizing a field, this time, of “*transitional justice*”.

¹³ S. Golub, “Battling Apartheid, Building a New South Africa”, in M. McClymont and S. Golub (eds.), *op. cit.* p. 24.

¹⁴ Y. Dezalay and B.G. Garth, *op. cit.* 2002, p. 136.

¹⁵ Y. Dezalay and B. G. Garth, *op. cit.* 1998, p. 37. My translation from French.

¹⁶ Y. Dezalay and B.G. Garth, *op. cit.* 2002, p.123.

¹⁷ Y. Dezalay and B.G. Garth, *op. cit.* 2002, p. 118 (on Chile).

Revamping the promotion rule of law under authoritarian rule: the Southern Cone laboratory

Until the mid 1970s, the *Ford Foundation's* emphasis was put on the improvement of economic conditions and the training of professional elites¹⁸, with, at the beginning, a “modernization” impetus, underscored by the struggle against Communism, in what was termed the “*law and development*” movement. From the 1960s, the *Foundation* thus started providing support to social sciences in Latin America, with an emphasis on law reform as an instrument for economic development. The failure of its “*law and development*” investments, and the crisis opened by the arrival of repressive regimes in Latin America led to a reorientation of the *Foundation*. The “*law and development*” formula not only failed because these efforts at legal transplants did not “take” despite steady economic growth¹⁹ but also because of intensely repressive regimes, in Brazil (1964), Uruguay (1973), Chile (1973) and Argentina (1976). There was a particularly strong impact of Chile, considered as a model by the *Foundation*²⁰.

This reorganization was rationalized under Franklin D. Thomas (*see portrait below, along with that of William D. Carmichael*) when he became president of the *Foundation* in 1979. The latter institutionalized this reorientation through a focus on “*human rights and governance*” and “*social justice*”. By 1983, two human rights programmatic areas were defined in the Andean Region and the Southern Cone: civil and political liberties and access to social justice and legal services. The arrival of the military juntas had led to a total reversal of the *Foundation's* prior stance, with a focus on the protection of leftist opponents. The question raised by the adaptation of *Ford* activities to contexts of repressive regimes, led to a first response to the coup in Chile, with emergency efforts to protect intellectuals and the provision of grants for study abroad through the Santiago office without condition of affiliation to the *Foundation*.

¹⁸ S. Busby, “Making rights real: A history of the Ford Foundation’s human rights program in Latin America and the Caribbean”, December 1989, Ford Foundation Internal Archives, *Ford Foundation*, New York (visited in February 2009).

¹⁹ See D. M. Trubek, “The ‘rule of law’ in development assistance: past, present and future”, In D. M. Trubek and A. Santos (eds.), *The New Law and Economic Development. A critical Appraisal*, Cambridge, Cambridge University press, 2006, pp. 75-94.

²⁰ See S. Busby, *op. cit.*

This “*refugee*” focus shifted quickly into thinking about “preventive” measures – in this sense, “*investment in human rights only came as an outgrowth of earlier investments in social science*”²¹ for the *Ford Foundation*. A decisive shift occurred with the decision to provide a grant in 1978 to the *Vicariate of Solidarity*, for the elaboration of study on documenting the human rights record of the Chilean military government since the 1973 coup²²: from a “*law and development*” laboratory, Chile became a laboratory, again of using law as a neutral ground for change, but in view of preparing the ground for a post-dictatorship transition. This focus on “human rights” in repressive regimes accompanied investments in “alternative” legal development. The type of structures favored by the *Ford* displayed similar characteristics: all had links with international networks, documented human rights abuses and did litigation. In Chile, the *Ford* supported the legal work of the *Vicariate of Solidarity*, the documentation efforts of the *Academy of Christian Humanism* and in Argentina it gave support to the legal program of the *Center for Legal and Social Studies* (CELS) and to the *Grandmothers of the Plaza de Mayo*.

In the weeks following the September 1973 coup in Chile, the Catholic Church initiated a group to defend Chilean citizens, the *Committee of Cooperation for Peace* (COPACHI) with the support of the *World Council of Churches*, but it was dissolved in 1975 under government pressure. The Church responded by creating the *Vicariate of Solidarity* as an integrated part of the Catholic Church²³. There was less protection by the Church in Argentina. While a vigil was maintained by the *Madres of the Plaza de Mayo*, there was no institutional basis for the opposition to the Generals in a movement grounded in law.

The *Center of Legal and Social Studies* (CELS) was set up by a lawyer Emilio Mignone²⁴, whose daughter had been disappeared in 1980. The name of that institution

²¹ Y. Dezalay and B. Garth, *op. cit.* 2002, p. 147.

²² S. Busby, *op. cit.*, p. 15. A grant of \$40 000 for one year was provided to the Archbishopric of Santiago for the Vicariate of Solidarity (Vicaria), in 1978.

²³ See M. Keck and K. Sikkink, *Activists beyond borders*, Cornell University Press, 1998, on Chile as a laboratory, pp. 79-120 ; Y. Dezalay and B.G. Garth, *op. cit.* 2002, pp. 145-148.

²⁴ On Emilio Mignone’s profile, see V. Vecchioli, “Human Rights and the Rule of Law in Argentina. Transnational advocacy networks and the transformation of the national legal field”, In Y. Dezalay and B.G. Garth (eds.), *Lawyers and the rule of law in an era of globalization*, Routledge, 2011, pp. 93-111. Although of an earlier generation than that of Juan Méndez (*see his portrait below*), Mignone was a “newcomer” in that he lacked the traditional family credentials into the State and law profession. He entered the latter through his affiliation with the Peronist Party. As the Nation sub-secretary of Education under the Argentina Revolution government headed by General Onganía, he developed an important network, which was reinforced by international links through his participation to the “Alliance for Progress” in the first half of the 1960s.

mirrored that of the US based *Center for Law and Social Policy*. The latter had been set up in 1968 in Washington D.C. by Leonard Meeker, former director of the legal consultant's office of the US State Department, and was dedicated to public interest law. Emilio Mignone had met him in 1979 during a trip to Argentina of a delegation of the Bar Association of New York with the *Lawyers Committee for Human Rights*: “from Meeker, the *Center for Legal and Social Studies* (CELS) not only took the name but also the initial source of financing and a type of expertise specifically centered in the litigation of public interest causes according to the model of the ‘leading case’”²⁵. Emilio Mignone also used his contacts at the Interamerican Commission of human rights and at the Organization of American States as well as international relays that enabled him to affiliate the Center to the *International Commission of Jurists*. The *Center for Legal and Social Studies* became a grantee of the *Ford* in 1981, supporting its developing as a “training center” as much because it was away from specifically academic circles as because it de-politicized its position. It collected extensive information on the “disappearances” and provided the courts with information.

“By the late 1970s, according to a *Ford* official at the time, the ‘model was in place’, and it ‘worked in Chile’. *Ford* then saw and encouraged the building of ‘international networks that can help each other’ in the domain of human rights”²⁶. These organizations deployed a strategy of representation of cases of disappeared before the *Inter-American Commission of Human Rights* as well as UN bodies and prepared *habeas corpus* petitions. The *Ford* thus invested in “flagship” organizations, specifically the *Center for Legal and Social Studies* (CELS) in Argentina by devising a specific model: these organizations were institutionalized as arenas of scholars (those who could stay), did litigation activities (using research as a basis for litigation and public debate) and documented abuses. In turn, in the early 1980s, this model was exported to South Africa.

Portrait 1. Franklin A. Thomas and William D. Carmichael: “spotting the movers and shakers”

The trajectories of Franklin A. Thomas and William D. Carmichael, are exemplary of what Yves Dezalay and Bryant G. Garth have portrayed as “hybrid careers of brokers, combining contradictory social resources, between knowledge, money and politics”²⁷. Their work at the

²⁵ V. Vecchioli, *op. cit.* p. 101.

²⁶ Y. Dezalay and B.G. Garth, *op. cit.* 2002, p. 148.

²⁷ Y. Dezalay and B. G. Garth, *op. cit.*, 1998, p. 37. My translation from French.

Ford Foundation - respectively as President and Vice-President - is in turn illustrative of a reorientation effected by the *Ford* in its Southern laboratories that was validated in the post-Cold war era: towards a support to “governance” by circumventing the State apparatus in the South. In particular, its program on “human rights and governance” institutionalized under the Presidency of Thomas, relied on a continuation of the *Ford*’s work – i.e. “spot(ting) the movers and shakers” – not, however, to “(prop) up governments and (help) them do their jobs”²⁸ but to emulate alternative political elites and modes of government that could lay the ground for the post-authoritarian/Apartheid regimes in Latin America and South Africa.

Philanthropist, administrator, lawyer, Franklin A. Thomas, dubbed one of the four “kingmakers” in corporate America by *Fortune* magazine in 2003, because of a position and trajectory giving him the “power to make other people powerful”, headed the *Ford Foundation* between 1979 and 1996. Born in 1934, the youngest child of “a proud but poverty-wracked West Indian family”, Franklin A. Thomas, brilliant basketball player, graduated from Columbia university in 1956 - with an academic scholarship - where he obtained an LLB in 1963. After working as an assistant U.S. attorney in New York from 1964 to 1965 and as New York’s deputy police commissioner in charge of legal matters until 1968, and was subsequently appointed by New York senator Robert Kennedy as president of the newly created *Bedford-Stuyvesant Restoration Corporation*, a nonprofit community development agency with public and private funding – which he headed for ten years. In 1979, John Knowles, the president of the *Rockefeller Foundation*, asked him to prepare a study on apartheid in South Africa and he subsequently headed the *Study Commission on United States Policy Towards Southern Africa* (whose report, *Time running out*, was published in 1981). That same year, he was appointed president of the *Ford Foundation*, following the retirement of McGeorge Bundy, at a time when the *Ford* was suffering from both shrinking assets (\$2.2 billion as opposed to \$4 billion in the mid-1960s) and overextension. Franklin A. Thomas subsequently effected a reorientation of the *Foundation*’s organizational structure and priorities towards a concentration on broader programs for the allocation of moneys and the definition of six thematic priorities: human rights and social justice; urban poverty and the disadvantaged; rural poverty and resources; education; international, economic and political issues; and governance and public policy, bringing the assets of the *Ford* up to \$7.7 billion. He resigned from the *Ford Foundation* in 1996 and was succeeded by Susan Berresford. Since 1996, Franklin A. Thomas has continued to seat on the board of several powerful companies, including Citicorp, Lucent Technologies and Pepsico, while working as a consultant for the *TFF Study Group*, a nonprofit organization dedicated to development in South Africa²⁹.

William D. Carmichael, born in 1928, obtained a B.Litt. in Economics at Oxford University, where he was honored as a Rhodes Scholar, and also took an M.P.A. in Economics, obtained at the Woodrow Wilson School and a Ph.D. in Economics from Princeton, as well as an honorary LL.D. from the University of the West Indies. After serving as Dean of the S.C. Johnson Graduate School of Management at Cornell University, between 1962 and 1968, he started working for the *Ford Foundation*, first as representative of the Foundation in Brazil (between 1968-1971), then head of its Office for Latin America and the Caribbean (1971-

²⁸ Y. Dezalay and B.G. Garth, *op. cit.*, 1998, p. 37.

²⁹ See “Franklin A. Thomas Biography”, <http://biography.jrank.org/pages/2487/Thomas-Franklin.html> (last accessed 10/3/2011).

1977) and as Vice-President of the Developing Country Programs (1981-1989). From late 1989 through mid-1993, he served as Executive Director of the (former) Soviet Union and Eastern European Programs of the *Institute of International Education* (a nonprofit created in the US in 1919, which administers international education programs such as the *Fulbright program*). Since 1993, William D. Carmichael has worked as an independent consultant, including to *Ashoka*, an international nonprofit founded in the US in 1980, which specializes in the promotion of “*social entrepreneurship*” as well as serving on the board of *Human Rights Watch*.

Exporting Latin American experiments within a South African laboratory

The *Ford Foundation*’s work in South Africa had started, albeit meekly, through a support mostly to scholar exchanges, as early as the early 1950s – mostly through sustained funding to the *South African Institute of Race Relations*, in support of research and publications focused on racial policies and practices. An impetus was drawn by the *Foundation*’s Program Officer Melvin J. Fox from 1959 into promoting “*productive links between American and South African scholars*”³⁰ and substantial grants were made during the 1960s to fund exchanges and meetings among scholars, businesspeople, government officials and religious leaders, including support to the United States-South Africa Leadership Development Program at the *Ford*³¹. The scope of activities of the *Foundation* was broadened in the 1970s with support to providing legal defense to South Africans detained on political charges. “*The partnership between the Ford Foundation and law-related groups in South Africa has been the most sustained – and, at its height, the largest – undertaking of Foundation programming outside the United States*”³².

A first change came in 1973, with a *Ford*-funded conference on “*Legal Aid in South Africa*” at the law school of the University of Natal-Durban, which included experts on legal services and clinical legal education in the United States, as well as South African lawyers – such as John Dugard and Felicia Kentridge³³, who then went on to help launching two key

³⁰ M. J. Fox, “Trip to the Union of South Africa – December 1959”, January 4, 1960, Report n°0020765, Ford Archives, *Ford Foundation*, New York (visited in February 2009).

³¹ J. Moske, Research Associate, Research Center and Archives, Ford Foundation, “The Ford Foundation in South Africa: a Bibliography of Research Materials”, January 2008, Ford Archives, *Ford Foundation*, New York (visited in February 2009).

³² S. Golub, *op. cit.* p. 8.

³³ S. Golub, *op. cit.* p. 23.

organizations and grantees of the Ford, respectively the *Centre for Applied Legal Studies* (CALS) and the *Legal Resources Centre* (LRC). The two centers were modeled as a “*South-African version of the US based Lawyers’ Committee for Civil Rights under law*” for public interest litigation³⁴. In parallel, the Foundation provided support to the *Lawyers’ Committee for Civil Rights under Law* in Washington D.C. to establish and administer a Southern Africa program in 1973 – a program which the *Foundation* funded until 1994³⁵.

The Soweto uprising of 1976³⁶ prompted the more active support of the *Ford Foundation* – a turn which was accelerated under Thomas A. Franklin’s presidency of the *Foundation* from 1979. In what he refers to as “*soft solutions to hard problems*”, David Bonbright, who was one of the *Ford Foundation* program officers engaged in the South Africa program between 1983 and 1987, recalls both the personal implication of then *Ford Foundation* President Thomas A. Franklin towards South Africa and the context of the reorientation of the *Foundation*³⁷. Thomas A. Franklin had headed the *Rockefeller*-funded *Study Commission on US Policy Towards South Africa*, which published a report in 1981, entitled “*South Africa: Time Running Out*”, which while warning that “(f)undamental political change without sustained, large-scale violence is still possible, (...) time is running out”³⁸, took the cautious position of arguing that Apartheid could only be abolished by South Africans themselves – the US could however have some influence. The context indeed was that, amidst international call for trade sanctions and compulsory trade bans on South Africa and the beginning a mobilizations in the US and Europe for “divestment”, i.e. de-investment of businesses to South Africa, of the launching of President Reagan’s policy of “constructive engagement” with South Africa, so as to combine punitive measures with incentives to

³⁴ S. Golub, *op. cit.*, p. 23.

³⁵ M. Picken, “Paper on the Ford Foundation’s International Human Rights Program: A History and an Agenda”, 30 January 1995, Ford Archives, *Ford Foundation*, New York (visited in February 2009).

³⁶ The Soweto uprising or riots, which erupted in 1976, were triggered by the *Afrikaans Medium Decree* of 1974, which imposed Afrikaans as the main language of instruction in Black schools from 1975. The uprising started with school children and student strikes followed by a protest rally on June 16, 1976, orchestrated by the Soweto Students’ Representative Council’s Action Committee with the support of the wider *Black Consciousness Movement*, which was met by a violent police backlash, causing a bloodshed. Considered a turning point in the opposition against Apartheid, the Soweto uprising triggered the beginning of violent opposition to Apartheid within the country and international reactions, including the adoption by the Security Council of Resolution 392 on June 19, 1976, which strongly condemned the incident.

³⁷ D. Bonbright, “The Ford Foundation in Apartheid South Africa – Soft solutions to hard problems”, *Alliance magazine*, 1st September 2003.

³⁸ Study Commission on U.S. Policy toward Southern Africa, *South Africa : Time Running Out*, Berkeley, University of California Press, 1981, p. xxiv.

provoke change in South Africa. This was epitomized by then President Reagan’s assistant secretary of state for Africa affairs, Chester Crocker’s 1980 *Foreign Affairs* article “South Africa: A strategy for Change”³⁹ – with the aim, in part, of accommodating South Africa as a strategic partner in the struggle against Communism, amidst USSR and US covert interventions in the Angolan conflict since 1975.

The strength of Franklin A. Thomas’ strategy in developing the *Ford’s* activities in South Africa revolved precisely in its historical orientations in “spotting” reformers so as to fight against communism – by using however, through the involvement at the head of the South Africa program, the “know how” developed by William D. Carmichael as the head of the Office for Latin America and the Caribbean during the previous decade. Indeed, as recounted by David Bonbright, “(w)hen (William D. Carmichael) came to South Africa for the first time in 1978, he brought along the creative human rights-based approach to confronting military governments that he had developed in Latin America”⁴⁰. By the time, in 1985, when the South African government declared the first of a series of states of emergency that signed the start of the unraveling of the Apartheid regime in the early 1990s, the strategy of the *Ford* was in place – and William D. Carmichael could indeed pride himself “that the most eminent members of the new elite have benefited from Ford grants, which helped them familiarize with the ideas (and values) of America”⁴¹. This, three-pronged, strategy revolved around supporting and promoting “social justice reformers”, ranging from community “advice officers” and church based “social justice workers” to trade union support groups as well as public interest lawyers.

Box 1. Timeline of South African history – From Apartheid to Post-Apartheid

1948: Elections won by the main Afrikaner nationalist party, the *Herenigde Nasionale Party* (Reunited National Party) under the leadership of Protestant cleric Daniel François Malan, one of the ideologues of architect of

³⁹ C. A. Crocker, “South Africa : A strategy for Change”, *Foreign Affairs*, 59, Winter 1980, pp. See more generally, for an overview on Reagan’s policy towards South Africa, P. H. Baker, *The United States and South Africa : the Reagan Years*, New York, Ford Foundation, Foreign Policy Association, 1989 ; see also J. Herbst, “Incentives and Domestic Reform in South Africa”, in D. Cortright (ed.), *The Price of Peace: Incentives and International Conflict Prevention*, New York, *Carnegie Commission on Preventing Deadly Conflict*, 1997, pp. 205-222.

⁴⁰ D. Bonbright, *op. cit.*

⁴¹ Y. Dezalay and B. G. Garth, *op. cit.* 1998, p. 37. My translation from French.

apartheid. Formation of a coalition government with the *Afrikaner Party*: the two parties later merged into the **National Party** (NP), which held power until 1993.

1949: revival of the **South African Congress** (set up in 1912 as the *South African Native National Congress* - ANC).

1949-1953: Adoption of “**Grand Apartheid**” laws aiming at introducing “separate development” between a “White South Africa” and African “homelands” (or “Bantustans”), including 1) the **Population Registration Act**, formalizing racial classification and introducing an identity card for all persons over the age of eighteen, specifying their racial group. Setting up of Boards to determine the classification of individuals whose race was unclear; 2) the **Groups Areas Act**, allocation populations to different geographical areas according to their race. 84% of the land was given to the Whites, even though they accounted for only 15% of the total population. Blacks were attributed lands known as the “Tribal Homelands”.

1950-1953: Adoption of “**Petty Apartheid**” laws introducing segregation, including 1) the **Mixed Marriages Act** making it a crime for any marriage to take place between a White person and a person of any other racial group; 2) the **Immorality Act** criminalizing any sexual act between a White person and a person of any other racial group; 3) **Pass Laws** making it compulsory for Blacks to carry pass books (Identity cards) at all times, with limited permission to be in White areas.

1958: Accession to power Prime Minister Hendrik Verwoerd (who remained in power until his assassination in 1966) known as the main architect of Apartheid. Implementation of “separate development” through the “homeland structure”. Under the latter, South African citizenship was removed for Blacks deemed to be citizens of ten nominally independent homelands. This was accompanied by policies of “resettlement” throughout the 1960s, 1970s and 1980s, including the well-known eviction in 1955 of the 60 000 Black residents of Sophiatown, in Johannesburg, who were forcibly moved to an area called Meadowlands, which became part of Soweto (abbreviation for South Western Townships).

1960: *Sharpeville massacres*. Government banning of the ANC. Founding of the military wing of the ANC - *Umkhonto we Sizwe* (“Spear of the Nation”) by Nelson Mandela.

1961: Campaign of sabotage by *Umkhonto we Sizwe*.

1962-1963: Arrest and trial of Nelson Mandela, to be imprisoned for 27 years.

1962: Adoption of UN General Assembly Resolution 1761 condemning South Africa’s Apartheid policies.

1963: Adoption of UN Security Council Resolution 181 calling for a voluntary arms embargo against South Africa – which became compulsory with UN Security Council Resolution 418 of 1977. Economic sanctions were never made compulsory.

1973: Adoption of *UN International Convention on the Suppression and Punishment of the Crime of Apartheid*.

1976: *Soweto uprising* in protest to forced tuition of Afrikaans in Black schools.

1977: Arrest of Steve Biko leader of the *Black Consciousness Movement*, murdered in detention.

1978-1983: Condemnation of South Africa at the UN World Conference on Racism. Start of a massive campaign of “divestment” in the US and Europe (aiming at shaming businesses into ceasing all dealings with South Africa).

1983: First attempt at reforming Apartheid by Prime Minister Willem Botha, with the adoption of a new constitution setting up a Tricameral giving voting rights to Coloreds and Indians – but Blacks were excluded.

1985: “State of emergency” declared by South Africa President Peter Willem Botha, extended to cover the whole country in 1986. It continued until 1990, when it was lifted by President Frederik Willem de Klerk.

1986: Adoption of Federal legislation in the US imposing trade sanctions on South Africa, including the United States Comprehensive Anti-Apartheid Act – similar laws adopted in various countries. Massive campaign of divestment in the US. Severe economic crisis in South Africa as a result.

1986-1988: repelling of a number of Petty Apartheid laws.

1989: Accession to the Presidency of South Africa of Frederik Willem de Klerk. Lifting of ban over opposition parties, including the ANC.

1990: Release of Nelson Mandela from prison.

1990-1993: Abolition of the juridical apparatus of Apartheid. Negotiations between the NP and ANC under the aegis of the *Convention for a Democratic South Africa* (CODESA) amidst spiraling waves of violence in the country.

1994: General elections. Victory of the ANC, with the NP as main opposition party. Nelson Mandela sworn in President.

1995: Setting up of the Truth and Reconciliation Commission, which presented its report in 1998 and finished its activities in 2001.

The *Ford*, together with the *Rockefeller Fund* and the *Carnegie Corporation* thus provided support for the setting up of the *Centre for Applied Legal Studies* (CALS) at the

University of Witwatersrand in 1978. The following year, the *Ford* helped founding the *Legal Resources Centre* (LRC) by devising a strategy of recruiting “*legal talent*” such as Arthur Chaskalson, a then preeminent commercial and human rights lawyer, who went on to be appointed president of the new Constitutional Court, after the break-up of Apartheid⁴². The *Legal Resources Centre* and the *Centre for Applied Legal Studies* mounted judicial cases at the beginning of the 1980s, during an era dubbed “*apartheid in crisis*”, through a strategy of selective “*impact*” litigation on an appellate level, and follow-up compliance cases⁴³ challenging not acts of Parliament, and thereby not apartheid *per se* - which were beyond judicial review - but government ministries’ implementation processes and regulations⁴⁴. Indeed, in the words of William D. Carmichael, the aim of the *Ford* was “*to help black South Africans use the peculiar space allowed by the country’s constitution to empower themselves*”⁴⁵. In parallel, the *Ford* invested in social development: it funded labor research to support the labor movement⁴⁶ with the aim of imparting negotiation skills to trade-unionists as well as litigating labor cases.

These two centers were also research centers or, according to Former Program Officer McCutcheon “*reform centers*”⁴⁷. And this was part of the second arm of the strategy of the *Foundation* in South Africa, i.e., “*the beginning of the transformation of the elite, historically white, universities through the creation of units that affirmatively prepared young black social scientists for careers in academic and public services*”⁴⁸. In turn, and linked to this, the *Ford* provided funding to “*support organizations*” composed predominantly of young professionals, mostly academics, that did research as well as offered technical assistance on issues like access to housing, land, health and welfare services and schooling. The

⁴² S. Golub, *op. cit.* p. 24

⁴³ S. Golub, *op. cit.* p. 29.

⁴⁴ One of such landmark judicial victories, the 1980 *Komani* case revolved around an initial target of the *Legal Resources Centre*, i.e. pass laws, where, rather than challenging the underlying Black (Urban Areas) Act restricting black residence in white zones, the Centre succeeded in convincing the South African Supreme Court that the act did not grant the authorities the power to issue regulations barring, in this case, a wife from living with her husband where he legally worked and resided (see S. Golub, *op. cit.* p. 25-26).

⁴⁵ Quoted in S. Golub, *op. cit.* p. 25.

⁴⁶ Funding was thus provided to the *Centre for Applied Legal Studies* (CALS) in 1980 to launch a Labor Law Project and CALS in turn helped set up two other *Ford*-funded bodies in the mid-1980s, the *Centre for Socio-Legal Studies* at the University of Natal and the *Labor Law Unit* at the University of Cape Town.

⁴⁷ S. Golub, *op. cit.* p. 31.

⁴⁸ D. Bonbright, *op. cit.*

Foundation established an in-country presence in 1993. While the South African overseas office did not provide direct support to the *Truth and Reconciliation Commission*, it provided core support to the *Centre for the Study of Violence and Reconciliation*, and helped in particular in the setting up of the Centre's Transition and Reconciliation unit (*see the portrait of Graham Simpson below*) which played a crucial role in drafting the legislation setting up the South Africa truth commission. Another of its core grantees, the CALS, played a prominent role in the drafting of the country's interim and permanent constitutions. There was indeed, post-transition, a government drain of these centers, as they were drawn into government positions⁴⁹.

Portrait 2. Graeme Simpson and the Centre for the Study of Violence and Reconciliation "Making" the Transition from opposition to political engineers

When asked about his background, Graeme Simpson, the current Director of Thematics Program at the *International Center for Transitional Justice*, evokes the "formal" and the "real" answer. That, formally, he got a Master's degree in history from the University of the Witwatersrand, in Johannesburg, and "came to the law quite late"⁵⁰, in 1990.

"But the reality is that my training was much more in activism (...). I finished high school in 1976, it was a symbolic year - it was the year of the Soweto uprising - I was finishing my schooling as a White South-African, it would have been difficult not to realize that Blacks were on the streets, fighting. That was extremely politicizing. Immediately after finishing high school, I was confronted with the prospect of serving in the military as a compulsory conscript, I studied as long as I could to dodge the draft, for about seventeen years, before it was completely abolished. My third political exposure was my involvement with the student movement in the late 1970s and early 1980s. 1976 was described as the "Year of fire. Year of ash"⁵¹ and the decade after was really at the heart of the liberation movement's shift to people's power and the militarization of the movement".

Active in the *National Union of South African Students* (NUCAS), he became its national research officer in 1985, the first year ever this old student organization, founded in 1924, saw its annual meeting banned by the government. *"I would say that probably NUCAS was the most instrumental organization in building a non-racial discourse in South Africa, so the anti-apartheid movement was not just fought as a Black consciousness movement against a White oppressor, the alternative that was framed was non-racialism and there was an attempt to forge alliances between Black and White organized resistance"*. He then went on to work for the *Committee Resource Information Centre*, dealing primarily with local trade-unions *"at a time in the late 1980s when trade-unions became a critical surrogate for banned political organizations, it was the only institutional space"*.

⁴⁹ See S. Golub, *op. cit.*

⁵⁰ Interview with Graeme Simpson, *International Center for Transitional Justice*, Director of Thematics Program, New York, 27/11/2007. All other quotes in this portrait are based on this interview.

⁵¹ See B. Hirson, *Year of fire, year of ash: the Soweto revolt : Roots of a revolution*, London, Zed Press, 1979.

Graeme Simpson set up the *Project for the study of violence* in 1989, under the umbrella of the University of Witwatersrand in Johannesburg, “because it provided a greater degree of protection”, with the aim of converting into theoretical research and practical projects the combination of academic credentials and activism of its members, while privileging a focus on societal violence, rather than the “Black-White” dichotomy. The name of the Centre was quickly changed into the *Centre for the Study of Violence and Reconciliation*⁵² - “the term reconciliation (...) it was virtually a year later that the ANC was unbanned and that the formal negotiations process began...at that point there was no anticipation of a reconciliation discourse”.

He recalls, “we set that Centre up with, very early on, the understanding that the patterns of violence that were playing themselves out in the society had increasingly spilled over beyond the dividing lines between the political ends of the cleavage. There was a growing indication that the violence had become internecine. There was a big discourse at the time about Black violence over Blacks, Black on Black policing and racialized references about the way violence took place that were problematic but indicated the way the society was turning in and on itself in a lot of ways (...) all indicated a culture of violence in the society that was taking hold and that was not simply reducible to the macro-level patterns of the political conflict. So our organization was to look specifically at the nature of violence, its characteristics, and ways to address it (...) Of course, because of the political tradition I was coming from, our primary concern was with the legacy and effect of State violence (...) but we were very mindful of the fact that there were no neat dividing lines between political violence and criminal violence”.

Now with a yearly budget of about 22 million RANDES ZAR (in 2008, equivalent to about 2 million Euros), with funding originating mostly from US foundations (with the *Ford Foundation* as a core donor from the start) and a staff of 44 people, and offices in Cape Town and Johannesburg, one characteristic of this organization is that it was one of the few organizations set up before the end of Apartheid to have survived the transition. “In this transition, one of the things that happened to NGOs was that they became drawn more and more towards policy work because the new democratic government so desperately needed that assistance and this often operated at the expense of the historical role of ‘civil society’ (during the Apartheid era), that in the context of an undemocratic government, civil society played this critical intermediary role between policy makers, repressive authorities and communities”.

The other critical issue in “surviving” the transition was that of funding: “the critical point, between those civil society organizations that survived the transition and the others, was the funding crisis”. The massive investments of international funds channeled through civil society during the Apartheid era had meant at bypassing the pariah Apartheid government: “suddenly with democratization, and the normalization of aid relations, there was a drastic draining of resources to civil society organizations (...) it wasn’t necessarily the best organization that survived (...). But the critical thing about those organizations that came out

⁵² See its website <http://www.csvr.org.za/> (last accessed 10/3/2011).

⁵³ See Chapter III and the trajectory of Susan Collin-Marks.

of the anti-apartheid tradition, that for a decade or more had lived a discursive relationship with the government (i.e. that the government was the enemy) with an oppositional mode of operation. It was the organizations that could make the shift in a new embryonic democratic government, from opposition to critical partner that survived the transition". The Centre for the Study of Violence and Reconciliation was one of them. The Center for Conflict Resolution⁵³ was another. And both served as providers of expertise and as a recruitment pools for the Truth and Reconciliation Commission.

Graeme Simpson was one of the drafters of the National Crime Prevention Strategy, adopted by the South African cabinet in May 1996, as well as being a member of the drafting team for the South African White Paper on Safety and Security. *"I had taken a class on post-apartheid law at Wits. That period was visionary (...) it was strategically important, it was a year before the election, we were anticipating the transition (...). I had studied the Stasi, did a comparative study on Latin-American transitions (...). I submitted that project intact with all the references to the case studies in June 1996 when the new Minister of Justice called for submissions on the proposal for the setting up of a South African truth commission. In the intervening three years, I had set up a unit (at the Centre for the Study of Violence and Reconciliation) and fund raised for it, on transition and reconciliation".* He recruited Paul van Zyl to head it. *"We were supposed to graduate together in 1994. I gave him his first job (at the Centre for the Study of Violence and Reconciliation) in 1993. I thought he was young and talented, and needed nurturing. I was his mentor initially, though he doesn't acknowledge it anymore".*

The *Centre for the Study of Violence and Reconciliation* played an active role designing the structure of the Commission before it was up and running, *"we were afraid that the Commission would have thousands of files of all security apparatus dumped on its desk and end up looking only at the documentary evidence provided by the former security forces. So we organized a coalition of fifteen civil society organizations involved in monitoring work, we trained our staff, and we produced a database of 15 000 records of human rights violations, which on the day that the Commission started we put on their desk – whether they used it or not, is another thing (...)"*. He was nominated as a Commissioner but did not get to the final selection process. *"The selection involved a lot of political horse-trading, there was a need to create a political balance inside the Commission (...) what it meant is that the human rights organizations that had historically been opposed to Apartheid were judged not by their credentials as defenders of human rights, but (...) by their historical role in the anti-apartheid struggle (...). The irony is that we had made the greatest contribution before the Commission was set up"⁵⁴*. After being executive director of the Centre from 1995 to 2005 he was *"head-hunted"*, while the *Centre for the Study of Violence and Reconciliation* *"was more and more engaged as a reference point globally, a little bit in the region, in Indonesia, Cambodia"* to the *International Centre for Transitional Justice*.

The history of this Centre, and the trajectory of its founder, Graeme Simpson, who now heads the Thematic Program of the *International Center for Transitional Justice* are exemplary of a shift from opposition to Apartheid to converting into nonprofit, non-State political engineers. It is also exemplary of a re-orientation of the *Foundation* by the mid-

1990s into securing the position of its grantees in post-transitions' thriving and extremely competitive domestic human rights fields in both Latin American countries and South Africa.

Institutionalizing the “transition” legacy: the case of the International Center for Transitional Justice

Following the transitions in the Latin American cone and South Africa, the *Ford Foundation* devised a three-pronged strategy: rationalizing, first, the institutional form taken for the political transitions in the two contexts, i.e. “truth commissions”, supporting its “flag-ship” grantees in the South to adapt to the new context, while the *International Center for Transitional Justice* was the result of the third strategy: i.e. centralizing and rationalizing its earlier investments under one umbrella organization.

Transitioning the transition: shifting Ford’s support to opponents of arbitrary regimes towards transforming them into State experts

While the *Ford foundation* provided no funding to *Truth commissions*, it accompanied pre-and post-transitions by preparing future elites (strategy of change in the continuity) and re-arming of NGOs post-transition (social rights and legal clinics). A central produce of these early investments is the *International Center for Transitional Justice*. In this story, the *Ford Foundation* and directions taken by its investments post-transitions are again central. A first direction involved looking into the institutional forum devised for transitions, the “*truth commission*” model. This was done in particular by Priscilla Hayner as a consultant to the *Ford Foundation*.

The *Ford* focused, secondly, on “*flag-ship*” organizations, both in Latin America and in South Africa, this time to help adapting them to a growing international market of non-profit development and human rights work and push them into opening their sphere of activities to “societal violence” as part of adapting a shift in human rights work, from opposition to human rights monitoring.

The third direction, linked to the second, led to the setting up of the *International Center for Transitional Justice* in 2001. The aim indeed was to rationalize previous investments in the Latin cone and South Africa. As recounted by Louis Bickford, a political scientist, currently Director of the Policy makers and civil society unit at the *International*

Center for Transitional Justice, “I started in this ‘field’ when it was called something different, at least we called it something different. I started when it was called ‘historical memory’”⁵⁵. He had worked as a consultant to the Ford Foundation in Chile, Argentina and Uruguay on a “historical memory initiative” launched by the Foundation in 1996-1997. As he recalls, “my memory was that it was really the Santiago office that had funded stuff. It was Alex (Wilde)⁵⁶ and me. Certainly there was funding in South Africa (...). But on the other hand, we’re talking about simultaneous stuff because we’re talking about the mid-1990s (...) Alex had come into that office in 1993 (...) The Russian office were funding this organization called Memorial, dealing with stuff about Staline (...). So it was really those two, the Southern Cone and South Africa”⁵⁷.

Centralizing the strategy: the creation of the International Center for Transitional Justice

The *International Center for Transitional Justice* (ICTJ), whose headquarters are based in New York, was created in March 2001, following a meeting organized by the *Ford Foundation* in 2000, under the aegis of three personalities it had solicited for that purpose: Alex Boraine, and Paul van Zyl, both renown for their role in the South African transition, and at the South African *Truth and Reconciliation Commission* (see portraits below) and Priscilla Hayner, *Ford* but also world expert on “truth commissions”. The organization is registered as a non-profit organization under US Federal law (Internal Revenue Service 501 (C) (3) of the United States Department of the Treasury). Its official mission consists in “assist(ing) countries pursuing accountability for past mass atrocity or human rights abuse. The Center works in societies emerging from repressive rule or armed conflict, as well as in established democracies where historical injustices or systemic abuse remain unresolved. In order to promote justice, peace, and reconciliation, government officials and nongovernmental advocates are likely to consider a variety of transitional justice approaches including both judicial and non-judicial responses to human rights crimes. The ICTJ assists in the development of integrated, comprehensive, and localized approaches to transitional

⁵⁵ Interview with Louis Bickford, *International Center for Transitional Justice*, Director, Policymakers and Civil Society Unit, New York, 17/12/2007.

⁵⁶ The Director of the Santiago office.

⁵⁷ Interview with Louis Bickford, *International Center for Transitional Justice*, Director, Policymakers and Civil Society Unit, New York, 17/12/2007.

justice comprising five key elements: prosecuting perpetrators, documenting and acknowledging violations through non-judicial means such as truth commissions, reforming abusive institutions, providing reparations to victims, and facilitating reconciliation processes”⁵⁸.

The initial program of five years of the organization relied on funding provided by the *Ford Foundation*, the *MacArthur Foundation*, the *Carnegie Corporation*, the *Rockefeller Foundation* and the *Andrus Foundation*. This funding basis was later expanded to other donors: foundations, primarily American, governments, international organizations, as well as individual donors. Its budget (in 2007) of about \$15 million has tripled since the launching of the organizations. Currently headed by David Tolbert⁵⁹ (since January 2010), the ICTJ is not a membership organization but answers to a Board of directors of 18 members, presided by Alex Boraine. It employs about 100 people and about 15 consultants, in a dozen of offices (New York, Brussels, Cape Town, Geneva, Kinshasa, Monrovia, Bogota, Jakarta and Nepal) and currently carries out activities in 25 countries.

The creation of the *International Center for Transitional Justice* in 2001 resulted from two meetings orchestrated by the *Ford Foundation*⁶⁰. As recounted above, the *Ford* had been funding a number of transition to democracy projects, particularly in Latin America, since the 1980s and the “boom” triggered by the South-African Truth and Reconciliation Commission opened the question of the sustainability of these activities, through either the continuation of decentralized support to small, local entities, or the centralization of its funding towards the

⁵⁸ See <http://www.ictj.org/en/index.html> (last accessed 9/3/2011).

⁵⁹ A lawyer – with a BA from Furman University and a JD from the University of North Carolina as well as an LLM obtained at the University of Nottingham, David Tolbert pursued his career at the UN and international criminal tribunals. He was named president of the *International Center for Transitional Justice*, after resigning from the position of Registrar for the United Nations’ Special Tribunal for Lebanon, where he served from August 2009 to March 2010. From 2004 to 2008, he served as deputy chief prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY). He had previously been the deputy registrar of the ICTY and at an earlier time served at the ICTY as chef de cabinet to President Gabrielle Kirk McDonald and Senior Legal Adviser, Registry, serving a total of 9 years at the ICTY. From 2000 to 2003, David Tolbert held the position of executive director of the *American Bar Association’s* Central European and Eurasian Law Initiative (CEELI), which manages rule-of-law development programs throughout Eastern Europe and the former Soviet Union. He also held the position of chief, General Legal Division of the United Nations Relief Works Agency in Vienna, Austria, and Gaza, parallel to teaching international law courses in various universities in the UK and the U.S. David Tolbert was Jennings Randolph Senior Fellow at the *United States Institute of Peace* and served as a member of the *American Society of International Law Task Force on United States Policy Toward the International Criminal Court (ICC)* during 2008 and 2009.

⁶⁰ I was not authorized to have access to Ford files from 1999 because of a 10 year confidentiality rule, the only thing I could find was a letter to Susan Berresford from Anthony Romero dated 11/30/00, which “*tides Center for \$140 000 for planning grant for development of an International Center for Transitional Justice*” recommendation for presidential approval”.

creation of a core entity. The objective, for the *Ford Foundation*, was to create an organization to assist existing small structures in the South, by reinforcing their capacities as well as disseminating research work.

And three personalities, emblematic of this investment, were selected to carry out this project: Alex Boraine, the vice-chair of the South-African Truth and Reconciliation Commission (*see portrait below*), Paul van Zyl, a South-African lawyer (*see portrait below*) also involved in the work of the South-African Truth and Reconciliation Commission, and Priscilla Hayner, then consultant for the *Ford Foundation* and Truth commissions' specialist.

Portraits 3. Alex Boraine and Frederik Van Zyl Slabbert, the moral reformists: from political opposition to Apartheid to transition entrepreneurs

The trajectories of Alex Boraine, co-founder and first president of the *International Center for Transitional Justice* and Frederik Van Zyl Slabbert, known as the leader of political opposition during Apartheid in South Africa are exemplary of a combination of resources - religious, political, academic, even business - emblematic of the political and moral reformist turned political engineer of the transition in South Africa.

Currently president of the *Justice and Truth Commission* in Mauritius, since January 2010, tasked with assessing the consequences of slavery, Alex Boraine was born in 1931 in Cape Town in South Africa, in a working-class family. After entering the ministry in 1956, he obtained an M.A. at Oxford and a PhD in Systematic Theology and Biblical Studies at Drew University (New Jersey, USA) and was named *honoris causa* in various universities. He was appointed youngest-ever President of the *Methodist Church of Southern Africa* in 1970, a position he held until 1972. He joined the Progressive Party and was elected to Parliament as an MP in 1974.

He resigned in 1986 and, together with Frederik Van Zyl Slabbert, founded the *Institute for a Democratic Alternative in South Africa* (IDASA) as an independent, nonprofit, public interest organization, that could, as such, obtain external support and funding - and work up an effective opposition to the Apartheid regime from within the country - as explained by Alex Boraine, “one of the laws at that time was that a political party could not receive financial assistance”⁶¹. Under the aegis of IDASA, Alex Boraine and Frederik Van Zyl Slabbert contacted members of the African National Congress in exile, including top leadership Thabo Mbeki so as to organize a meeting with Afrikaner politicians, academics and businessmen, which culminated with a 1987 conference in Dakar – one of the first steps towards the break-up of the Apartheid system, but which at the time triggered a strong backlash by the Botha government in South Africa. This venture, however, got the support of the South African Council of Churches, and its head, Beyers Naudé, with whom Alex Boraine maintained friendly terms. One of their “coups de force” was also to obtain the support of Nordic countries – Denmark, Sweden, Norway, Finland, at a time, when, according to Alex Boraine,

⁶¹ Interview with Alex Boraine by Tor Sellström, for the Nordic documentation on the liberation struggle in Southern Africa, Nordic Africa Institute, Uppsala, Sweden, updated 29 January 2010. <http://www.liberationafrica.se/intervstories/interviews/boraine/> (last accessed 12/3/2011).

“the Nordics were extremely suspicious of white liberals. At that time (...) the Nordic people only saw the possibility of ANC overthrowing the regime. It was fairly simplistic. There was a feeling that they did not want to assist anybody inside South Africa. Only those outside were the heroes. The people in exile”⁶².

After leaving IDASA, Alex Boraine founded the *Institute for Justice in Transition* (now closed down) with the aim of documenting human rights violations in South Africa in 1960, so as to help the planned *Truth and Reconciliation Commission*. Alex Boraine was one of the main architects of the *Truth and Reconciliation Commission*, and served beside Desmond Tutu as its deputy chairperson from 1996 to 1998. He became the founding president of the *International Center for Transitional Justice*, which he headed for three years, from 2001-2004, after teaching “transitional justice” at New York University School of Law’s Justice in Transition program, between 1998 and 2001.

In turn, academic, politician and businessman, Frederik van Zyl Slabbert (1940-2010) was the leader of the official opposition - the Progressive Federal Party (PFP) - in South Africa in the House of Assembly from 1979 to 1986. Born in Pretoria, he obtained a D.Phil in Sociology from the University of Stellenbosch in 1967 after giving up theological studies and a first project of becoming a Dutch Reformed Church Minister. Lecturer in sociology at Stellenbosch University, he was later, in 1973, appointed head of the sociology department of the University of the Witwatersrand. He joined the Progressive Party and stood as a parliamentary candidate for the constituency of Rondebosch on behalf of the Party in 1974, and retained this seat in the parliamentary elections of 1979 and 1981. He became leader of the Progressive Federal Party in 1979, a grouping formed after the merging of the Progressive party with various other liberal groups, including Harry Schwartz’s Reform Party, and of the opposition until 1986. He launched the *National Convention Movement* with Mangosuthu Buthelezi, leader of the *Inkatha Freedom Party* in an unsuccessful attempt to pressure the government to negotiate with all political groups. He resigned from that position in 1986 in protest of the inefficiency of the South African Parliament’s lack of capacity to change the situation. Following this, he set up the IDASA with Alex Boraine. He also worked as regional facilitator for the George Soros-backed organization, the *Open Society Foundation of Southern Africa*. He also co-founded *Khula*, a black investment trust in 1990.

The first meeting, in Santiago, Chile, in 1999, was organized by Susan Beresford, then president of the *Ford Foundation*, Alice Henkin, director of the “Justice and Society” program of the Aspen Institute⁶³ and Anthony Romero⁶⁴, currently executive director of the

⁶² See interview with Alex Boraine by Tor Sellström, for the Nordic documentation on the liberation struggle in Southern Africa, Nordic Africa Institute, Uppsala, Sweden, updated 29 January 2010. <http://www.liberationafrica.se/intervstories/interviews/boraine/> (last accessed 12/3/2011).

⁶³ This *think tank* based in Washington D.C., created in 1950, had organized in 1988 one of the first conferences on the management of State crimes in the context of transitions towards democracy (“State crimes: Punishment or Pardon?”).

⁶⁴ Anthony Romero, a lawyer – with a B.A. in international affairs obtained at the Woodrow Wilson School of Public and International Affairs and a J.D. from Stanford, had alternated consultancy positions at the Rockefeller Foundation and the Ford Foundation, before heading the Rights and Social Justice Program of the Ford, and subsequently the Human Rights & International Cooperation program, T. Lewin, “Civil Liberties Union Chooses New Executive”, *The New York Times*, May, 1st, 2001.

powerful *American Civil Liberties Union*, and then director of the human rights and international cooperation program at the *Ford Foundation*, with the aim of focusing on “historical memories”. This meeting gathered, in particular, Alex Wilde, in charge of Ford projects in the Southern Cone, and Louis Bickford, a political scientist, then consultant for the Ford in Chile and currently head of the Policy Makers and Civil Society Unit at the ICTJ. According to the latter, “*the only paper trail for that meeting that I know about was a memo that had been written that basically said there’s very interesting stuff going on out there around the issue of dealing with the past (...) and we should invest in it*”⁶⁵.

He recalls, that among the other participants were José Zalaquett and Gonzalo Vial Correa – both Chilean lawyers and future members of the *Rettig Commission*⁶⁶, Patricia Valdez, member of the *Center for Legal and Social Studies* (CELS), Elizabeth Lira, a human rights activist in Chile and future member of the *Valdek Commission*⁶⁷. Alex Wilde initiated the idea with Susan Beresford, with Chile “*as a starting ground*”⁶⁸. As recounted by Louis Bickford, “*the question was: should the Ford Foundation invest money in this new field, and if so, what should it look like (...). There was a sense that there was a huge amount of expertise in this field, and that any monies that the Ford should invest should go towards strengthening existing organizations like the Center for Legal and Social Studies (CELS) (...) or the Centre for the Study of Violence and Reconciliation) in South Africa (CSVR)*”⁶⁹.

The second meeting, also organized by the *Ford Foundation*, in April 2000, brought together about forty members or heads of human rights organizations and lawyers and aimed at “testing” the project of a new organization specialized in “transition” within the human rights community. As recalled by Juan Méndez, the historic director of the Americas office of *Human Rights Watch* (see portrait below), “*it was a very important meeting organized by the Ford Foundation (...). There were a lot of us, a lot of people doing similar work. And there was an argument as to whether a single organization should be created and should the Ford*

⁶⁵ Interview with Louis Bickford, *International Center for Transitional Justice*, Director, Policymakers and Civil Society Unit, New York, 17/12/2007.

⁶⁶ *National Commission on Truth and Reconciliation*, or “Rettig Commission”, set up in 1990-1991.

⁶⁷ Second Truth commission in Chile, *National Commission on political imprisonment and torture*, or “Valdek Commission”, set up in 2003.

⁶⁸ Interview with Louis Bickford, *International Center for Transitional Justice*, Director, Policymakers and Civil Society Unit, New York, 17/12/2007.

⁶⁹ Interview with Louis Bickford, *International Center for Transitional Justice*, Director, Policymakers and Civil Society Unit, New York 17/12/2007.

*Foundation be encouraged to distribute the wealth*⁷⁰. Originally, the Ford planned for smaller programs, with a three-year grant to the Center for Civil and Human Rights, which Juan Méndez directed at the University of Notre Dame (between 1999 and 2004).

Making it “legal”: positioning the International Center for Transitional Justice as a credible human rights organization

The initial funding of \$4 million provided by the *Ford Foundation*, an amount and length (five years) unheard of for a non-governmental organization and the setting-up of such an organization in New York - head-quarters of major donors - had rendered the positioning of the *International Center for Transitional Justice* problematic in relation to and within the human rights field. While the reaction of *Amnesty International* was “neutral” - in part, due to the fact that its funding relies on membership, and would not thus be severely affected by the emergence of a new player - that of *Human Rights Watch*, by contrast, whose funding relies predominantly on American foundations, and particularly the *Ford Foundation*, was acerbic. As recounted by Paul van Zyl, “*the thing is, people recognized that there was a growing trend, you hadn’t had yet the Special court for Sierra Leone, East Timor, the International Criminal Court, you did have the two ad hoc tribunals, but the human rights movement’s engagement on these issues was essentially advocacy oriented, you really had Amnesty International or Human Rights Watch saying that it was essential to have people held accountable, but nobody to tell you how to go about setting up a truth commission, or a tribunal (...). Now, some people were worried about how we were going to create this 800 pound gorilla and this organization is going to stack up all the resources*”⁷¹. According to Louis Bickford: “*Reed Brody*⁷² *was very grumpy about us (...). They had two concerns. One was philosophical: that this was going to create pressure to soften the field. Basically they saw truth commissions as kind of an easy way out and an alternative to justice (...). The other*

⁷⁰ Interview with Juan Méndez, *International Center for Transitional Justice*, (then) President, New York, 6/12/2007.

⁷¹ Interview with Paul van Zyl, *International Center for Transitional Justice*, Executive Vice-President, New York, 2/11/2007.

⁷² Reed Brody, then vice director of *Human Rights Watch*, had thus voiced strongly his opposition to such an organization in an *Op-ed*, “Justice : the first casualty of truth ?”, *The Nation*, April 30 2001.

*reason was just a pure good old fashioned turf stuff (...) they felt that if the Ford Foundation is going to put money into this, why are they creating a new organization, we're doing good stuff, we can handle this stuff, it's not that new. The only new stuff is the soft one and we're opposed to that (...) and we can do it by ourselves (...)*⁷³.

It is however deliberately in relation to the human rights field that the organization initially positions itself. Described by Louis Bickford, as an “*organizational entrepreneur*”⁷⁴, Paul van Zyl was invited by the *Ford Foundation* at the 2000 meeting, and presented a plan of action for the setting-up of the organization, with a focus on the *legal* obligations incumbent on successor States of dictatorships. His motivations were primarily strategic, as clearly recounted by Louis Bickford: “(Paul van Zyl carried out) *a very shrewd assessment of what an organization like the ICTJ needs to do to be accepted by sister organizations in the field (of human rights), and if the ICTJ had pulled a hoist in the flag with the South-African commission in its early days, it wouldn't have survived, no way, it needed to show credentials in prosecutorial stuff, and in the Inter-American system, because the Inter-American system is you know really, Latin America is the birth place of human rights as we know them, and Latin America has a lot of authority on this stuff, a lot more than the South African truth commission, so if you're going to talk to Ken Roth*⁷⁵ *at Human Rights Watch, and you're going to say 'we're starting a new organization and our job is dealing with the past', and Ken would say 'ok...so where's your source of authority to do that?' And you say 'well our source of authority is the shining example of the South-African truth commission'. And Ken starts deriding you for the soft way out, for not looking at international law, for a million other things, but if you say, 'our source is the decisions of the Inter-American system, that give us guidance on how to deal with the past', then Ken has no reply to that, so I think that Paul was intellectually convinced that these were the boundaries of the field (...) but I think on some level there was some very shrewd assessment of a strategic use of this epistemology of what we do*”⁷⁶.

⁷³ Interview with Louis Bickford, *International Center for Transitional Justice*, Director, Policymakers and Civil Society Unit, New York, 17/12/2007.

⁷⁴ Interview with Louis Bickford, *International Center for Transitional Justice*, Director, Policymakers and Civil Society Unit, New York, 17/12/2007.

⁷⁵ Current Executive Director of *Human Rights Watch*.

⁷⁶ Interview with Louis Bickford, *International Center for Transitional Justice*, Director, Policymakers and Civil Society Unit, New York, 17/12/2007.

As Louis Bickford explained further, “*it really could have gone either way, I think it’s possible to develop a counter-factual proposition that says in 1999 somebody like Patricia Valdez for instance swoops in for a great plan for a great organization that is going to be highly networked, strengthening the whole field, exactly like the ICTJ is, but the focus is going to be about connecting with grass root organizations, and it’s going to be about strengthening social movements, and it’s going to be about memory and it’s going to be about cultural inference to deal with the past, and in all that it’s going to connect with prosecutorial initiatives, and it’s going to strengthen truth commissions, and that could have happened. But because of Paul (van Zyl) (...) it went to this much more legalistic kind of direction (...)*”⁷⁷.

Portrait 4. Paul Van Zyl, the institutional entrepreneur

Nominated by the *World Economic Forum* as “*Young Global Leader*”, and elected one of the “*15 top lawyers under 40*” by *New York Lawyer Magazine*, the trajectory of South-African Paul van Zyl, one of the co-founders and current vice-president of the *International Center for Transitional Justice* is emblematic both of a generation of South-African shaped by anti-Apartheid activism – in particular within the student trade-union *National Union of South African Students* and what he describes as a “*political*” family – and the produce of the particular context of the South-African transition.

He obtained a BA at the Witwatersrand in Johannesburg – where he met Graeme Simpson - and an LLM in international law at Leiden University in the Netherlands. He was recruited by Graeme Simpson in 1993 at the *Centre for the Study of Violence and reconciliation* where he was tasked with heading and mounting a unit specifically dedicated to research and input on the South African transition. Paul van Zyl was recruited as executive secretary of the Truth and Reconciliation Commission, between 1995 and 1998: “*when the Truth Commission’s Statute was being drafted, I was asked by the Minister of Justice to help in that process, and then when the Commissioners were appointed, Desmond Tutu and Alex Boraine asked me to come and make a presentation on how it should work (...) When it ended, people started calling us and we got dozens of calls to go places, and we started to think that there should be a way to canalize this knowledge in a systematic way. So we went to the Ford with Alex Boraine and Priscilla Hayner. The Ford was interested anyway, so there was a combination of them being interested and us being interested. We put together a proposal and a business plan, with a \$15 million budget. And they gave it to us and the amazing thing was that...it worked*”. The end result was the setting up of the *International Center for Transitional Justice*.

As explained further by Louis Bickford, “*it’s like the story of James Madison coming to the constitutional convention (...). James Madison came and brought a document, a rough draft, and everybody focused on that, you know, that became the constitution, because you*

⁷⁷ Interview with Louis Bickford, *International Center for Transitional Justice*, Director, Policymakers and Civil Society Unit, New York, 17/12/2007.

*bring a document to a meeting and that's what people focus on you know, and the person who brought the document to that meeting was Paul (van Zyl) (...). There was no alternative document brought in these early days. So that was that: these four legal obligations introduced in the Velásquez case (...). It's actually pretty arbitrary (...). You could have looked at other systems”*⁷⁸. This reliance on the Inter-American system of human rights, the first which, within both judicial and quasi-judicial fora, i.e. respectively the Interamerican Court and Commission, to have set legal criteria to carry out transitions to democracy⁷⁹ thus enabled the organization to have a “strong” legal basis, with a focus on the four set of State obligations emerging out of the *Velásquez* case, namely, truth, punishment, institutional reform and reparations. Indeed, as emphasized by Paul van Zyl, “*the concept of reconciliation is still debated within the organization. And the question of memories was only included afterwards*”⁸⁰, which is reflected in the initial mission of the organization with its focus on criminal prosecutions and reparations.

This positioning is also reflected in the background - legal - of the great majority of the staff of the organization. Hence a form of division of labor with “traditional” human rights organization – something that Louis Bickford refers to as an opposition: “*denuncia versus proquesta*”. According to him, the organization does not aim at “*looking for above the fold* (i.e. of the newspaper, like advocacy human rights organizations). *That's not what we do. We roll up our sleeves and sit at a table (...). It's more than style, it's also content, we're not researching human rights violations, we are researching best practices*”⁸¹.

⁷⁸ Interview with Louis Bickford, *International Center for Transitional Justice*, Director, Policymakers and Civil Society Unit, New York, 17/12/2007.

⁷⁹ See the two seminal cases of the Inter-American Court: *Barrios Altos* in 2001, in which the Court decided that two Peruvian amnesty laws were invalid and incompatible with the American Convention on human rights and *Velásquez-Rodríguez* case (OAS Doc. OEA/Ser.L/V/III.19, doc. 13 (1988), which set the obligation for successor States to investigate and prosecute severe violations of human rights.

⁸⁰ Interview with Paul van Zyl, *International Center for Transitional Justice*, Executive Vice-President, New York, 2/11/2007.

⁸¹ Interview with Louis Bickford, *International Center for Transitional Justice*, Director, Policymakers and Civil Society Unit, New York, 17/12/2007.

Breaking away with the advocacy model: institutionalizing the model of the “State advisor”

As recalled by Louis Bickford, “*the first year we were very anarchic, we were working all over the map*”⁸². A consultant firm was brought in – the Association management group – funded by the *Ford Foundation*, after a year, “*and they pulled together an organization structure that said that one of the main units of the organization had to be capacity building*”⁸³. “*Capacity building was for a long time defined in two ways. One of them was networks, and the other was training programs (...). Recently we’ve added a new component (...) my role has always changed (...) the most recent change is that a year ago we added “policy makers” to the unit, they’re two kinds of approaches to capacity building (...) the policy side is capacity building of the elites basically (...) the other is NGOs (...) That made sense for me (...) you know the Ford is really into this idea of capacity building, and at that meeting in 1999, the main thing was to strengthen other organizations in the field*”⁸⁴.

This positioning is also operated through the objectivation and institutionalization of a concept, that of “transitional justice”. The strength of the positioning of the organization stems thus precisely from the fuzzy and contested character of the notion of “transitional justice” and in an approach that combines research and practice. A research unit, currently headed by Pablo de Greiff was set up for that purpose. The latter was hired by Alex Boraine with the task of “developing a niche” of expertise. “*The idea of research (in the institution) has changed over time. Originally, people thought that the International Center for Transitional Justice was going to be at least in part something like a clearing house of information and contacts (...) so that people interested in processes of transitional justice would know whom to contact (...) so when I arrived there were very heated disputes about the sort of research that was supposed to be done, and they ranged a predictable spectrum, given that a lot of the staff even at that time came from the human rights world (...) we had the choice, we could do reporting (...) but then we would have been a human rights organization like the others. My position was institutional. It consisted in saying that*

⁸² Interview with Louis Bickford, *International Center for Transitional Justice*, Director, Policymakers and Civil Society Unit, New York, 17/12/2007.

⁸³ Interview with Louis Bickford, *International Center for Transitional Justice*, Director, Policymakers and Civil Society Unit, New York, 17/12/2007.

⁸⁴ Interview with Louis Bickford, *International Center for Transitional Justice*, Director, Policymakers and Civil Society Unit, New York, 17/12/2007.

*'transitional justice' was a contested notion (...) and that the novelty was to fill a gap between research and advocacy (...) without that in a very short time, under the pressure of everyday ongoing technical assistance missions we would turn into yet another human rights organization*⁸⁵. The idea of a research unit independent from field missions – assigned to the in-country unit – was pushed forth by Alex Boraine, deemed, according again to Pablo de Greiff, to be “*very much in favor of doing normative research*”.

The research unit was tasked specifically with undergoing research projects that had the following characteristics: they had to be “*global in nature, normative in approach, they had to contribute to the content of transitional justice and they had to help the Center develop a niche expertise*”⁸⁶. He thus explains, “*so the original research that was easy. We knew we were going to start with four directions: criminal prosecutions, truth telling, reparations and institutional reform, we didn't do what we wanted to do with institutional reform which is huge and eventually we gravitated towards vetting as an entry point and we didn't know what to do with reconciliation which was part of the original statement of purpose of the institution, but how that connected with the rest of the work of the organization, no one knew for sure, but that was the object of acrimonious debates, at least because some people had the experience of Latin America where the concept of reconciliation is a complete non-starter. And that clashed very deeply with Alex's experience with South Africa. So the research unit work consisted in filling the gaps with respect to these four elements. There was no need to do a major research project on truth telling because there was a great deal of research already about that, there was no need to do a big research project on criminal prosecution because most of the staff were human rights lawyers that had prosecutorial experience. We didn't know at the time what we meant by institutional reform so of course the remaining topic was obvious, it was reparations – so we started with that and it was the biggest research project on the topic in the world at the time. Then we broadened (...)*”⁸⁷.

This academic anchoring is reinforced by university teaching positions – in particular at New York University and Columbia – of a number of staff members, as well as by the valorization, by the organization, of their academic publications. Thus, “*(t)hey had the*

⁸⁵ Interview with Pablo de Greiff, *International Center for Transitional Justice*, Director, Research Unit, New York, 6/12/2007.

⁸⁶ Interview with Pablo de Greiff, *International Center for Transitional Justice*, Director, Research Unit, New York, 6/12/2007.

⁸⁷ Interview with Pablo de Greiff, *International Center for Transitional Justice*, Director, Research Unit, New York, 6/12/2007.

logistics and the moral authority. They could say, we know more, we have done all this. The whole apparatus of the organization is into producing this kind of knowledge”⁸⁸.

In turn, the selection of the countries on which the organization focuses its work was initially triggered by the background and specialization of the first staff: Louis Bickford thus “brought in” Chile, the lawyer Paul Seils Guatemala, and Alex Boraine and Paul van Zyl, due to the aura of the South-African experience, were invited as consultants in a number of countries. As explained by Louis Bickford, “*I would say the same thing happened to all of us (...). I brought Chile elsewhere (...) Paul Seals brought the Guatemalan experience, (he) had a very different input in the organization, that is bringing forth domestic prosecutions as opposed to international ones (...) and he was very influential in the early years in pushing us in that direction (...) I would say Alex and probably Paul were being invited all over the place (...), but in fact it wasn't about only South Africa (...) I always say that the interesting thing about transitional justice is that it's a South-South field, you know Timor learning from Sierra Leone, there's always been this bouncing around (...)*”⁸⁹.

At the beginning, this strategy relied on a two-fold criterion, mirroring Latin-American situations: there had to be a transition from dictatorship to democracy, in a country with already developed institutions. The recent investment of the organizations on the African continent and in countries emerging from violent conflicts has led the organization to revise these criteria and disrupt again the frontiers of existing fields of practices. According to Louis Bickford, “*we are exploring the boundaries with established fields of conflict resolution, peace building, coexistence studies (...) some of the things like DDR (Disarmament, Demobilization and Reintegration) (...) so we've been overlapping with those other fields, touching up against them, sometimes the touch has been soft, other times it's been more dramatic, but we're trying to communicate in those boundary areas. The one thing that's totally clear is that we are being pulled in, or finding ourselves talking about these topics in conflict zones and early peace building zones, so we're working in Columbia (...) in DRC and we work in Sierra Leone, Liberia (...) when we do that we are engaging with people who are*

⁸⁸ Interview with Jonathan van Antwerpen, Research fellow at the SSRC, November 2007, New York.

⁸⁹ Interview with Louis Bickford, *International Center for Transitional Justice*, Director, Policymakers and Civil Society Unit, New York, 17/12/2007.

in the peace-building field and the conflict resolution field, and we're influencing those fields"⁹⁰.

This investment in countries at war or post-conflict, has led the organization to promote "transitional justice" as a conflict resolution mechanism, a shift which was triggered by Juan Méndez. As Pablo de Greiff recalls, "*a big impetus was when Juan (Méndez) came to the Center, and we started thinking for the first time about the relationship between transitional justice and peace processes, at least in part because of Juan's work at the UN on genocide prevention*"⁹¹. Indeed, as recounted by Louis Bickford, "*during our first retreat, which was in 2001, there was a conversation about whether or not we should hire somebody with conflict resolution skills and overall we said no, we are not interested, we do post-authoritarian stuff, not post-conflict, and that was just six years ago*"⁹².

Making it "legitimate": turning "transitional justice" into a legal profession

As recalled by Louis Bickford, "*you know, Reed (Brody), it's funny, he came to us two or three years ago, and he asked us to help on Chad – around the Habré case – so we all came around to liking each other. (...) What he said is that everybody sees him as the rabid, crazy, you know, foaming at the mouth kind of prosecutor. So that is the way people treat him. So the African Union won't even see him for example, whereas he felt that we had a very different relationship with actors on the ground, so that in fact we could go to the African Union, or a variety of other places, ECOWAS or whatever, and we could say 'we'd like to do a seminar on the pros and cons of the Habré case' (...) that we could do all kinds of different engagements, that could actually support the work that he's doing and that people would let us in, because they see us as a very different kind of actor (...) We didn't do that much on the Habré case unfortunately (...) we are doing a case on Heads of States immunities that*

⁹⁰ Interview with Louis Bickford, *International Center for Transitional Justice*, Director, Policymakers and Civil Society Unit, New York, 17/12/2007.

⁹¹ Interview with Pablo de Greiff, *International Center for Transitional Justice*, Director, Research Unit, New York, 6/12/2007.

⁹² Interview with Louis Bickford, *International Center for Transitional Justice*, Director, Policymakers and Civil Society Unit, New York, 17/12/2007.

overlaps with his stuff (...) But it was a nice moment because basically he was saying ‘we have complementary roles, we’re all on the same side, but we have very different styles’”⁹³.

Portrait 5. Juan Méndez, the human rights gentleman: legitimizing the struggle as an international profession

The trajectory of Juan Méndez is exemplary of the profile of a generation of lawyers in Argentina⁹⁴ who, lacking a capital of inherited social relations, entered the legal profession as “labor lawyers” in the late 1960s, reconverted themselves as “criminal lawyers” in the defense of trade-unionists – a professional shift transformed into a moral capital in the defense of “prisoners of opinion” through international relays in the 1970s, to reconvert themselves in the 1980s as “human rights” lawyers.

Born in 1944 in Lomas de Zamora in Argentina, Juan Méndez, was invited by Alex Boraine in 2004 to take over the presidency of the *International Center for Transitional Justice* – a position he held until 2009 (he is now is President Emeritus). He obtained a JD from Stella Maris University. Specialized in labor law, he “*was caught up very rapidly into the political aspects of this legal practice*”⁹⁵, in a context of state repression over extremely violent disputes. “*That quickly brought me to criminal law, and that’s what eventually took me to prison as well*”. After moving to Buenos Aires, he worked for a labor law firm, continuing his criminal defense work on his own time – “*It was a very dangerous work. A lot of well-known criminal defense lawyers were not doing it anymore because some had been killed and arrested (...) so a lot of young lawyers like me continued to do this in a semi-clandestine way (...) I got very lucky because I got arrested before the launch of the disappearance campaign (he got arrested under Isabel Perón). You would get arbitrarily arrested and tortured, but at least they didn’t disappear you – which was not the case for six of my friends who got disappeared a year later. I got lucky again, because I spent only a year and half in prison*”.

He had spent a year as a foreign exchange in the US: his host family organized a campaign on his behalf and *Amnesty International* adopted him as a prisoner of conscience. Sent into exile by the military junta– which used the “*state of option*” clause in the Constitution – i.e. the choice between indefinite detention or exile - he went to the US. He started by working with migrant workers for the Catholic Church in Illinois, “*but I wanted to do international work, to help my friends*”, and thus “*got a job as a paralegal with a public interest firm*” – the *Lawyers’ Committee for Civil Rights Under Law*, an organization based in Washington DC, created at the instigation of President Kennedy in 1963 – where he worked on immigration and refugee matters.

“*I got very lucky again, because I was able to go to law school at night and in a couple of years I was ready to take the Bar exam, which I did in 1981, and then all kinds of opportunities turned up*”. One of them was his encounter with Aryeh Neier, founder of

⁹³ Interview with Louis Bickford, *International Center for Transitional Justice*, Director, Policymakers and Civil Society Unit, New York, 17/12/2007.

⁹⁴ See V. Vecchioli, *op. cit.*

⁹⁵ Interview with Juan Méndez, *International Center for Transitional Justice*, (then) President, New York, 6/12/2007. All quotes derived from this interview.

Helsinki Watch, who tasked him with opening the Americas branch of *Human Rights Watch* in Washington D.C., in 1982, where he worked for fifteen years, becoming general counsel of the organization in 1994, tasked with the organization's litigation and standard-setting activities.

Between 1996 and 1999, Juan Méndez held the position of Executive director of the *Interamerican institute of human rights* in Costa Rica – an independent international academic institution created in 1980 under an agreement between the Inter-American Court of Human Rights and Costa Rica – while doing litigation work before the Inter-American Court and Commission.

Between 1999 and 2004, he taught law and was director of the Centre for Civil and Human Rights at the University of Notre Dame (Indiana), while being nominated as a member (and president in 2002) of the Inter-American Commission of Human Rights for one term between 2000 and 2003. Between July 2004 and March 2007, he was appointed as United Nations special adviser on the prevention of genocide, a position created on the occasion of the 10th anniversary of the genocide in Rwanda.

He headed the *International Center for Transitional Justice* between 2004 and 2009, and is now its President Emeritus. In 2009, he was appointed Special Advisor on Prevention by the Office of the Prosecutor of the International Criminal Court and co-chair of the *Human Rights Institute* of the International Bar Association. In September 2010, he was approved by the United Nations Human Rights Council as Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

The trajectory of Juan Méndez recounted above illustrates the success of the *International Center for Transitional Justice* into gaining the recognition of the field of human rights: Juan Méndez had been tightly associated with the debates of the practical modalities of the Latin American transitions, but he had argued in the wake of the Argentine transition in the mid-1980s that “*there was ‘no role for us’ after the fall of a dictatorship, since the country had ‘turned a new leaf’*”⁹⁶, in other words, that transitions were political processes that could only be effected in the shadow of courts, so as to further stabilization. But this success was also illustrated in the promotion of the *International Center for Transitional Justice* not only as a springboard – to UN positions – but also as part of trajectories from the legal field, as illustrated by the profile, recounted above, of the current president of the organization, but also in that of its current president David Tolbert, also a lawyer, who had served as Registrar for the United Nations’ Special Tribunal for Lebanon, where he served from August 2009 to March 2010, after holding the position of deputy chief prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY) from 2004 to 2008.

⁹⁶ P. Arthur, “How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice”, *Human Rights Quarterly*, vol. 31 (2), 2009, p. 335.

Conclusion

This paper has explored the genesis of the *International Center for Transitional Justice*. It has recounted the story of this organization as an offspring of laboratories of investments, led prominently by a US Foundation, the *Ford Foundation*, in the Latin American Cone and in South Africa from the 1970s and 1980s. These investments were first focused in Latin America and aimed at furthering alternative forms of “governance”, by forming alternative elites, and a combination of research and legal clinics and public interest law – a model which was later replicated in South Africa. These investments – which in effect accompanied the growth of the international field of human rights were focused on building a “bottom-up” State that was both in the shadow of the State and in the shadow of the Court.

The reorientation of the *Ford Foundation* in the wake of the transitions in Latin America and South Africa was instrumental in the setting-up of the *International Center for Transitional Justice* in 2001, as an umbrella organization, charged with rationalizing and centralizing earlier investments, including by supporting grantee organizations in the Southern laboratories into making the transition from the transition, i.e. into shifting from a position of critique of the State to that of technical advisors of the State.

This conscious strategy of reorientation is one that was translated as a displacement by the founders of the *International Center for Transitional Justice*: the trajectories of Paul van Zyl or Graeme Simpson were ones of an earlier displacement from politics to law as a space of opposition to Apartheid in South Africa. The strategy devised by Paul van Zyl in particular at the *International Center for Transitional Justice* was one of a further displacement: from the politics of transition to a juridification of transition.