

# PREFERENTIAL TRADE AGREEMENTS AS TRANSITIONAL JUSTICE

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## ABSTRACT

*Preferential trade agreements (PTAs) are deals between two or more trading partners. Unlike multilateral trade agreements, PTAs give states the latitude to pursue policy goals not traditionally part of trade infrastructure. This Note explores the possibility of PTAs as a form of transitional justice: the processes, mechanisms, and institutions that help post-conflict communities transition away from the legacies of human rights atrocities and toward more equitable, peaceful societal structures. This Note asks whether PTAs can speak to the needs of post-conflict communities in an era when scholars and practitioners are pushing the boundaries of trade and transitional justice alike.*

*Although PTAs are increasingly used to facilitate connections between trade and human rights, much of their potential remains untapped. Despite their popularity, PTAs are not incorporated into transitional justice efforts. However, the economic strengths and coercive elements in PTAs could fill gaps typically seen in traditional transitional justice efforts. Less certain is how to design and implement PTAs such that they benefit survivors of human rights atrocities.*

*Part II of this Note explores how PTAs may be “deepened” to address human rights issues and other non-trade objectives. Part III delineates the settings for and forms of transitional justice, noting where existing processes, mechanisms, and institutions fall short. Part IV fuses these elements, arguing that PTAs’ resource-rich and coercive qualities justify their introduction into transitional justice frameworks. It further argues that PTAs can be framed in two ways relevant to transitional justice: as a means of integrating human rights into trade, and as an alternative means of state power. Part IV then suggests facilitating a trade-transitional justice merger through three means: negotiations, policymaking, and economics. Finally, Part V considers case studies in Ukraine and Iraq to illustrate how PTAs could function as transitional justice.*

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## I. INTRODUCTION

The modern trade environment is a peace project.<sup>1</sup> The Agreement Establishing the World Trade Organization Agreement (WTO)<sup>2</sup> and its predecessor, the 1994 General Agreement on Tariffs and Trade (GATT),<sup>3</sup> were driven by the need to promote peace and cooperation following WWII.<sup>4</sup> These two premier multilateral trade deals had only a few goals: liberalize trade, avoid protectionism, and deal with negative externalities.<sup>5</sup>

In the ensuing decades, however, these objectives became less critical. As a result, preferential trade agreements (PTAs)—“any reciprocal trade agreement between two or more partners, not necessarily belonging to the same region”<sup>6</sup>—have “become a universal

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1. ABDESSALAM JALDI, THE CRISIS OF MULTILATERALISM VIEWED FROM THE GLOBAL SOUTH 5 (Policy Center for the New South, 2023).

2. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N. T.S. 154 [hereinafter WTO Agreement].

3. Marrakesh Agreement Establishing the World Trade Organization, General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Annex 1A, 1867 U.N.T.S. 187 [hereinafter GATT].

4. *The WTO Can . . . Contribute to Peace and Stability*, WTO, [https://www.wto.org/english/thewto\\_e/whatis\\_e/10thi\\_e/10thi09\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/10thi_e/10thi09_e.htm) (last visited Nov. 21, 2024).

5. *Id.*

6. *Regional Trade Agreements and the WTO*, WTO, [https://www.wto.org/english/tratop\\_e/region\\_e/scope\\_rta\\_e.htm](https://www.wto.org/english/tratop_e/region_e/scope_rta_e.htm) (last visited Dec. 15, 2023). The WTO distinguishes regional trade agreements—“any reciprocal trade agreement between two or more partners, not necessarily belonging to the same region”—from PTAs, but PTAs are in practice used to refer to both regional trade schemes and “unilateral trade privileges such as General System of Preferences

phenomenon.”<sup>7</sup> PTAs give states the latitude to pursue policy goals beyond what the WTO delineates, including objectives related to human rights.<sup>8</sup> PTAs are now worth trillions of dollars, with 373 such deals active in November 2024.<sup>9</sup> Given that states have all but abandoned negotiations to revitalize multilateralism, the popularity of PTAs is unlikely to decrease substantially in the near term.<sup>10</sup>

Although PTAs are increasingly used to facilitate connections between trade and human rights, much of their potential remains untapped. Despite their popularity, PTAs are not incorporated into the processes, mechanisms, and institutions that help post-conflict communities transition away from the legacies of human rights atrocities and toward more equitable, peaceful societal structures. These efforts, known as transitional justice, are frequently resource-strained and often do not include reliable enforcement provisions.<sup>11</sup> PTAs, on the other hand, can economically strengthen the implementing parties and typically contain coercive elements.<sup>12</sup> PTAs thus seem to fill the gaps associated with traditional transitional justice efforts. Less certain is how to design and implement PTAs such that they benefit survivors of human rights atrocities.

This Note explores the possibility of PTAs as transitional justice. It attempts to show how PTAs can speak to the needs of post-conflict communities in an era when scholars and practitioners are pushing the boundaries of trade and transitional justice alike. Part II explores how PTAs may be “deepened” to address human rights issues and other non-trade objectives. Part III delineates the settings for and forms of transitional justice, noting where existing processes, mechanisms, and institutions fall short. Part IV fuses these elements, arguing that PTAs’ resource-rich and coercive qualities justify their introduction into transitional justice frameworks. Part IV suggests three lenses for facilitating this merger: negotiations, policymaking, and economics. Finally, Part V considers case studies in Ukraine and Iraq to illustrate how PTAs could

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(GSP) schemes and non-reciprocal preferential programmes some WTO members implement for products from developing and least-developed countries.” *Id.*

7. Simon Wüthrich & Manfred Elsig, *Challenged in Geneva: WTO Litigation Experience and the Design of Preferential Trade Agreements*, 3 BUS. & POLS. 344, 345 (2021).

8. Emilie M. Hafner-Burton, *Trading Human Rights: How Preferential Trade Agreements Influence Government Repression*, 59 INT’L ORG. 593, 595 (2005).

9. *Regional Trade Agreements Database*, WTO, <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx> (last visited Feb. 23, 2024) [hereinafter *RTA Database*].

10. See KENT JONES, RECONSTRUCTING WORLD TRADE ORGANIZATION FOR THE 21ST CENTURY 1, 9 (2014).

11. U.N. OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS (OHCHR), TRANSITIONAL JUSTICE AND ECONOMIC, SOCIAL AND CULTURAL RIGHTS 6, 14, U.N. Doc. HR/PUB/13/5, U.N. Sales No. E.14.XIV.3 (2014).

12. Hafner-Burton, *supra* note 8, at 595.

function as transitional justice in existing conflict and post-conflict settings. The Ukraine and Iraq examples represent two distinct scenarios: the former is an active conflict setting where parties to the conflict are states, and the latter is a post-conflict setting where some parties to the prior conflict were non-state actors. These two case studies show that creativity could go a long way toward promoting stability and peace.

## II. PREFERENTIAL TRADE AGREEMENTS IN THE WTO ERA

PTAs are permitted derogations from GATT-WTO anti-discrimination requirements.<sup>13</sup> GATT Article 24 provides that “[t]he contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements . . . the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area.”<sup>14</sup>

All 164 WTO members as of spring 2024 are party to at least one PTA,<sup>15</sup> yielding a “spaghetti bowl” of agreements.<sup>16</sup> Some 100 PTAs were instituted in the past decade.<sup>17</sup> More than half of PTAs are free trade agreements (FTAs)—deals between two or more states reducing or eliminating tariffs and lowering other trade barriers.<sup>18</sup> Others are partial scope agreements, which involve tariff reductions on particular groups of goods, or customs unions, which are similar to FTAs but have common external tariffs.<sup>19</sup>

The early 2010s, by which time trade was comfortably non-discriminatory, saw the “paradoxical result that preferential bilateral and regional agreements continue to proliferate, even as the salience of preferences is diminishing, suggesting that countries have motives other than simply market access for entering into such arrangements.”<sup>20</sup> This part explores

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13. GATT, *supra* note 3, art. 20.

14. *Id.* art. 24(4)–(5).

15. Aaditya Mattoo et al., *Overview: The Evolution of Deep Trade Agreements*, in *HANDBOOK OF DEEP TRADE AGREEMENTS* 3, 3 (Aaditya Mattoo, Nadia Rocha & Michele Ruta eds., 2020).

16. Oli Brown, *The Impact of EU Trade Agreements on Conflict & Peace* 6 (Civ. Soc’y Dialogue Network, Discussion Paper No. 2, 2013).

17. *RTA Database*, *supra* note 9.

18. *Figures on Regional Trade Agreements Notified to the GATT/WTO and in Force*, WTO, <https://rtais.wto.org/UI/publicsummarytable.aspx> (last visited Nov. 21, 2024).

19. Rohini Acharya et al., *Landscape*, in *PREFERENTIAL TRADE AGREEMENT POLICIES FOR DEVELOPMENT: A HANDBOOK* 37, 38 (Jean-Pierre Chauffour & Jean-Christophe Maur eds., 2011).

20. WTO, *WORLD TRADE REPORT 2011: THE WTO AND PREFERENTIAL TRADE AGREEMENTS* 48 (2011). See, e.g., Leonardo Baccini, *The Economics and Politics of Preferential Trade Agreements*, 22 ANN. REV. POL. SCI. 75, 76 (2019) (describing how PTAs “not only reduce tariffs but also regulate . . . many other matters.”).

the evolution of those motives and goals in two sections. Section II.A discusses how PTAs have evolved in depth and breadth, giving them an increasingly distinct role in the global trade infrastructure. Section II.B discusses how human rights provisions have factored in that evolution, drawing distinctions with traditional human rights mechanisms.

### A. Deep Trade

As PTAs became more popular, they gradually began to incorporate standards unrelated to trade.<sup>21</sup> The average PTA now covers seventeen policy areas, up from only eight in the 1990s.<sup>22</sup> These policy areas increasingly address challenges that the WTO model does not mention and may not, to some observers, directly relate to trade.<sup>23</sup> Environmental protections are one such example. Studies show that increased trade liberalization may hasten the destruction of the natural environment, but World Bank researchers have suggested that environmental PTA provisions help limit deforestation.<sup>24</sup> This tendency to encompass non-trade policy objectives is known as “the progressive deepening of PTAs.”<sup>25</sup> In turn, the PTAs that promulgate these goals can be known as “deep trade agreements.”<sup>26</sup> Depending on how they are designed and enforced, the PTA rules corresponding to policy goals can have substantial social consequences.

The distinction between deep PTAs and their shallower counterparts lies both in the PTA provisions themselves as well as the institutions supporting them. As the economist Jean-Christophe Maur explains,

The former [shallow PTAs] contain only very limited provisions related to customs enforcement of preferences, whereas the latter [deep PTAs] tend to increasingly include extensive trade facilitation provisions. The big differences between them and ad hoc cooperation agreements are that in deep PTAs other sectors are liberalized in parallel and the institutions behind the PTA tend to be more complex—providing, for example, for dispute settlement—and to be closer to political decision centers.<sup>27</sup>

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21. Lisa Lechner, *The Domestic Battle Over the Design of Non-Trade Issues in Preferential Trade Agreements*, 23 REV. INT’L POL. ECON. 840, 841 (2016).

22. Mattoo et al., *supra* note 15, at 3.

23. *Id.* at 6.

24. Ryan Abman et al., *The Effectiveness of Environmental Provisions in Regional Trade Agreements* 3 (World Bank Group, Working Paper No. 9601, 2021).

25. Mattoo et al., *supra* note 15, at 3.

26. *See generally id.*

27. Jean-Christophe Maur, *Trade Facilitation*, in *PREFERENTIAL TRADE AGREEMENT POLICIES FOR DEVELOPMENT: A HANDBOOK* 327, 337 (Jean-Pierre Chauffour & Jean-Christophe Maur eds., 2011).

A list of policy areas covered in PTAs, compiled by the World Bank, is instructive. The most popular policy areas are unsurprising: manufacturing and agricultural tariffs, export taxes, customs, and competition policy, to name a few.<sup>28</sup> Other objectives commonly seen in trade deals follow closely: intellectual property protections, sanitary and phytosanitary measures, countervailing measures, and anti-dumping measures.<sup>29</sup> Perhaps more interesting are the non-trade objectives scattered toward the bottom half of the list: regional cooperation, political dialogue, and public administration appear, as do education, immigration, financial assistance, terrorism, health, human rights, nuclear safety, and civil protection.<sup>30</sup> Although these policy objectives constitute a tiny fraction of PTA provisions, their presence suggests a willingness on the part of WTO members to use PTAs not only for obvious trade purposes but also for broader societal good.<sup>31</sup>

Some of the most powerful trading states are especially willing to use PTAs for non-trade purposes. Canada, for instance, has incorporated provisions for labor rights, due process, political participation, and indigenous rights into its PTAs.<sup>32</sup> Thus far, the European Union (EU) and the United States are the primary users of non-trade issue provisions in PTAs.<sup>33</sup> The United States has required PTA partners to sign up for provisions on transparency, due process, and political participation;<sup>34</sup> it has also used the trade community's ongoing focus on intellectual property to justify PTA provisions that improve access to medicine.<sup>35</sup> Somewhat similarly, the EU entered PTA negotiations with Jordan, Egypt, Tunisia, and Morocco, implicitly to "encourage these post-revolutionary states to see benefits from participating in the international market and playing an active, positive role in the global community."<sup>36</sup> For developing countries in particular, PTAs are increasingly used to "lock in" non-trade policy provisions that promote economic improvement.<sup>37</sup>

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28. Mattoo et al., *supra* note 15, at 7–8.

29. *Id.*

30. *Id.*

31. *See id.*

32. Susan Ariel Aaronson, *Human Rights*, in 21 PREFERENTIAL TRADE AGREEMENT POLICIES FOR DEVELOPMENT: A HANDBOOK 443, 449–52 (Jean-Pierre Chauffour & Jean Christophe Maur eds., 2011).

33. Karolina Milewicz et al., *Beyond Trade: The Expanding Scope of the Nontrade Agenda in Trade Agreements*, 62 J. CONFLICT RESOL. 743, 752–54 (2016).

34. Aaronson, *supra* note 32, at 456.

35. *Id.* at 458.

36. Brown, *supra* note 16, at 17.

37. Acharya et al., *supra* note 19, at 1.

## B. PTAs and Human Rights

At least 131 states have acknowledged a link between trade and human rights.<sup>38</sup> By another measure, nearly three-quarters of the world's governments are or have been in PTAs with human rights elements.<sup>39</sup> Indeed, the appearance of human rights provisions in particular arguably helped signal the international interest in further trade liberalization.<sup>40</sup>

WTO members generally have common external human rights obligations based on the International Covenant on Civil and Political Rights (ICCPR),<sup>41</sup> the International Covenant on Economic, Social, and Cultural Rights (ICESCR),<sup>42</sup> and the non-binding Universal Declaration of Human Rights (UDHR).<sup>43</sup> All WTO member states are also members of the United Nations, binding them to the (relatively vague) human rights standards in the U.N. Charter.<sup>44</sup> The Charter expressly provides that “all bi-lateral and international treaties must conform with the Charter and its principles of equal rights and self-determination of peoples, respect for human rights and fundamental freedoms, sovereign equality of States . . . and of intervention in matters which are essentially within the domestic jurisdiction of States.”<sup>45</sup>

Some scholars have argued that the WTO implicitly references human rights.<sup>46</sup> Although the WTO “does not explicitly prohibit countries from protecting human rights at home or abroad . . . its rules do constrain the behavior of governments in providing that when member states seek to promote human rights, at home or abroad, they must not unnecessarily or unduly distort trade.”<sup>47</sup> As a result, “it is hard to use trade to promote human rights when nations can’t use trade to distinguish among those nations that may undermine the human rights of their citizens and those that strive to advance these rights.”<sup>48</sup>

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38. Aaronson, *supra* note 32, at 443.

39. *Id.*

40. *Id.*

41. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

42. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

43. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

44. U.N. Charter. arts. 1, 13, 55, 76.

45. Press Release, U.N. OHCHR, Secret Negotiations on Trade Treaties, A Threat to Human Rights – UN Expert (Apr. 23, 2015), <https://www.ohchr.org/en/press-releases/2015/04/secret-negotiations-trade-treaties-threat-human-rights-un-expert> [hereinafter U.N. Press Release].

46. Aaronson, *supra* note 32, at 446–47.

47. *Id.*

48. *Id.* at 447.



Distinct from the WTO's deficiencies and unlike human rights agreements themselves, PTAs can "harden" human rights obligations<sup>49</sup> and situate the language of human rights agreements "in an enforceable incentive structure designed to provide members with the economic and political benefits of various forms of market access."<sup>50</sup> As a result, beyond their notable use of non-trade objectives in PTAs, the EU and the United States both have long used trade agreements specifically in the interest of human rights.<sup>51</sup>

PTAs are inherently coercive, though to varying degrees.<sup>52</sup> They create voluntary commitments, derogation from which comes with economically disruptive consequences.<sup>53</sup> Many scholars point to extensive evidence of instances where PTAs have directly coerced repressive states into complying with human rights standards.<sup>54</sup> But this is not to say that the benefits of human rights provisions in PTAs are undisputed. In 2011, Susan Ariel Aaronson noted that "policy makers, scholars, and activists still know very little about the effects of including human rights provisions in trade agreements."<sup>55</sup> Since then, international relations scholars Gabriele Spilker and Tobias Böhmelt have argued that states are forward-looking when they sign PTAs—that is, they have already decided that they meet the human rights obligations they include in the PTA.<sup>56</sup> As a result, they argue, the PTA provision itself does not actually impact the level of political repression.<sup>57</sup> This, in turn, "implies that we should not observe any impact of hard human rights standards in PTAs on states' degree of human rights compliance, once we control for the selection effect of including hard human rights clauses in a PTA."<sup>58</sup>

But even if these arguments prove true, they hardly foreclose the possibility of using PTAs for transitional justice. As the next part will show, transitional justice is less about influencing government repression

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49. See Hafner-Burton, *supra* note 8, at 595.

50. *Id.* at 606.

51. See Aaronson, *supra* note 32, at 453, 455–58.

52. Hafner-Burton, *supra* note 8, at 605.

53. *Id.* Although power disparities make it more likely that one state will enforce provisions against the other party or parties, all signatories will still need to account for the possibility of enforcement and what it would cost. See Gabriele Spilker & Tobias Böhmelt, *The Impact of Preferential Trade Agreements on Government Repression Revisited*, 8 REV. INT'L ORG. 343, 349 (2013).

54. Hafner-Burton, *supra* note 8, at 609.

55. Aaronson, *supra* note 32, at 443.

56. Spilker & Böhmelt, *supra* note 53, at 358.

57. See *id.* at 348.

58. *Id.* at 349.



than it is improving political, social, and economic stability at all levels of a state.

### III. THE NEW TRANSITIONAL JUSTICE

Transitional justice refers to processes, mechanisms, and institutions that help societies move forward from mass atrocities.<sup>59</sup> It includes “the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.”<sup>60</sup> It is also the means through which “societies respond to the legacies of massive and serious human rights violations.”<sup>61</sup> Those violations are typically human rights catastrophes like war crimes, crimes against humanity, and genocide. Transitional justice tools are sometimes used *amid* conflict as well, such as in Ukraine, where domestic war crimes prosecutions have already begun.<sup>62</sup> Traditionally, transitional justice is less multifaceted than PTAs; it functions *ex-ante* in the sense that its primary actors are setting objectives for the future based on atrocities of the past.<sup>63</sup>

Transitional justice “asks some of the most difficult questions in law, politics, and the social sciences and grapples with innumerable dilemmas.”<sup>64</sup> Its institutions traditionally include at least five possibilities: criminal justice and prosecutions, truth and memory mechanisms, reparations, institutional reform, and non-recurrence measures.<sup>65</sup> These practices aim, in their own ways, to advance societal and political transformation while developing elements of stability and order<sup>66</sup>—not unlike the WTO, which aims to “raise living standards, create jobs, and improve people’s lives.”<sup>67</sup> In effect, they bridge past and present by focusing on needs unique to post-conflict communities: establishing a

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59. *What is Transitional Justice?*, INT’L CTR. FOR TRANSITIONAL JUST., <https://www.ictj.org/what-transitional-justice> (last visited Nov. 29, 2023) [hereinafter *Transitional Justice*].

60. U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 8, U.N. Doc. S/2004/616 (Aug. 23, 2004).

61. *Transitional Justice*, *supra* note 59.

62. See generally Tomasz Lachowski, *Transitional Justice in Ongoing Conflicts and Post-War Reconstruction: Reintegrating Donbas into Ukraine*, 46 POLISH POL. SCI. Y.B. 36 (2017) (describing potential uses of transitional justice during the ongoing conflict in Ukraine).

63. Eman M. Rashwan, *The Price of Transitional Justice: A Cost-Benefit Analysis of Its Mechanisms in Post-Revolution Phase*, 6 UNIV. BOLOGNA L. REV. 95, 99 (2021).

64. *Transitional Justice*, *supra* note 60.

65. See *id.*

66. See Bronwyn Anne Leebaw, *The Irreconcilable Goals of Transitional Justice*, 30 HUM. RTS. Q. 95, 97 (2008).

67. *WTO in Brief*, WTO, [https://www.wto.org/english/thewto\\_e/whatis\\_e/inbrief\\_e/inbr\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.htm) (last visited Nov. 29, 2023).

narrative about what happened, compensating individuals who experienced the worst harm, and ensuring a future free from similar atrocities. If implemented well, they ultimately facilitate at least some redistribution of wealth and power.<sup>68</sup>

Each form of transitional justice comes with costs and benefits.<sup>69</sup> The challenges associated with transitional justice force it to evolve continuously, and no two transitional justice strategies are the same. Taking these challenges into consideration, Section III.A of this part walks through existing settings for transitional justice and explores ways in which the possibilities for these settings have changed. Section III.B argues that trade fits squarely in the transitional justice equation by combining traditional goals and evolving frames for transitional justice.

### A. *Settings for Transitional Justice*

Although the aforementioned five transitional justice tools have been used repeatedly around the world, their manifestations are not necessarily consistent. To understand the scope and scale of potential transitional justice settings, it is helpful to look back at the first significant expression of transitional justice in modern times: the International Military Tribunal at Nuremberg (IMT).<sup>70</sup> The IMT falls squarely within the concept of transitional justice via prosecutions. Launched by the Allied powers in 1943, the IMT indicted twenty-four Nazi officials with crimes against peace, war crimes, crimes against humanity, and conspiracy to commit all three.<sup>71</sup>

The trial, which began in November 1945, ultimately fell short of its ambition to be the “Trial to End All Wars.”<sup>72</sup> However, the IMT saw hundreds of visitors and journalists in attendance.<sup>73</sup> While it did not wholly accomplish its professed criminal justice goals, it may have served an even more important function: public reckoning.<sup>74</sup> The IMT

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68. But see Dustin N. Sharp, *What Would Satisfy Us? Taking Stock of Critical Approaches to Transitional Justice*, 13 INT’L J. TRANSITIONAL JUST. 570, 571 (2019).

69. See generally Rashwan, *supra* note 63.

70. Lachowski, *supra* note 62, at 39–40.

71. *International Military Tribunal: The Defendants*, HOLOCAUST ENCYCLOPEDIA, <https://encyclopedia.ushmm.org/content/en/article/international-military-tribunal-the-defendants> (last visited July 24, 2024).

72. DAVID LUBAN, *LEGAL MODERNISM* 336 (1994).

73. Edna Friedberg, *How the Nuremberg Trial Bore Witness to the Nazis’ Worst Crimes*, SLATE (Nov. 20, 2015), <https://slate.com/news-and-politics/2015/11/nuremberg-trials-70th-anniversary-the-prosecutors-built-an-unimpeachable-historical-record-of-nazi-crimes.html>.

74. See *id.*

allowed victims of Nazi crimes to be heard in court,<sup>75</sup> and it helped establish a narrative about the Holocaust in the chaotic aftermath of WWII.<sup>76</sup>

The IMT's ability to serve multiple—and perhaps competing—purposes is reflected in transitional justice efforts that have taken place since, even those that appear to stand in a single traditional category of transitional justice. Consider, for instance, the Truth and Reconciliation Commission (TRC) in South Africa, a quasi-judicial body established to help the country transition out of apartheid.<sup>77</sup> Now considered one of the most successful transitional justice mechanisms in history, the TRC, across seven years, heard testimony from some 21,000 apartheid victims, granted (or denied) amnesty to perpetrators who confessed, and developed substantive recommendations for reparations, institutional reforms, prosecution, and truth preservation.<sup>78</sup>

Transitional justice is about delivering justice,<sup>79</sup> but “delivering justice” does not always mean going to courts—particularly in communities that have experienced major human rights atrocities, where tribunals may be financially and geographically inaccessible. Outside of courts or court-like bodies, reparations are increasingly popular means of transitional justice. In Iraq, for instance, the Yazidi [Female] Survivor's Law provided monthly payments, created employment and education opportunities, authorized the establishment of health care facilities, and guaranteed housing for survivors of the Islamic State genocide.<sup>80</sup>

While no transitional justice process is perfect, the traditional tools often open the door to participation by survivors and victims. This participatory element is particularly crucial given that transitional justice tools necessarily do not exist in a community before they are needed, and thus historically have seen their credibility challenged. As political science scholar Bronwyn Anne Leebaw notes, “transitional justice institutions aim to challenge the legitimacy of prior political practices by confronting denial and transforming the terms of debate on past abuses, yet they also

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75. See *id.* (Robert Storey, an American prosecutor at the IMT, later noted that, “[t]he purpose of the Nuremberg trial was not merely, or even principally, to convict the leaders of Nazi Germany . . . Of far greater importance, it seemed to me from the outset, was the making of a record of the Hitler regime which would withstand the test of history.”)

76. *Id.* See also Robert H. Jackson, *Foreword: The Nuremberg Trial Becomes an Historic Precedent*, 20 TEMPLE L. Q. 167, 167 (1947).

77. See Promotion of National Unity and Reconciliation Act 34 of 1995, §3 (S. Afr.).

78. *Truth Commission: South Africa*, U.S. INST. OF PEACE, <https://www.usip.org/publications/1995/12/truth-commission-south-africa> (last visited Nov. 29, 2023).

79. Lachowski, *supra* note 62, at 42.

80. Yazidi [Female] Survivors Law No. 8 of 2021, arts. 5–6 (Iraq).

seek to establish their own legitimacy by minimizing the challenge that they post to dominant frameworks for interpreting the past.”<sup>81</sup> Securing political and social buy-in is thus crucial for implementing transitional justice in any setting.

### B. *Evolving Possibilities for Transitional Justice*

The myriad forms of transitional justice since the IMT suggest that there are no firm boundaries for how and when transitional justice can be implemented. Indeed, transitional justice increasingly includes unexpected forms of “justice.”<sup>82</sup> As a result, it has the potential to be the most survivor- and victim-centric form of justice available.<sup>83</sup> But reaching that potential demands a certain degree of creativity from those tasked with implementation. This could mean assembling resources from institutions that do not count transitional justice as one of their primary goals. Trade is one such example.

PTAs could be one way to combine transitional justice and trade. A transitional justice effort built on multilateralism is practically impossible, because the WTO provides no extra space to pursue policy goals; it cannot involve even the objectives most intimately tied up in trade. This is also one reason why it has become popular to say that “multilateralism is in crisis”: despite its myriad benefits, multilateralism has been unable to adapt to the most pressing challenges of our time.<sup>84</sup>

Although advocates have successfully begun pushing the boundaries of what transitional justice can include, opportunities to tie transitional justice to economic activities are largely untapped. The case for combining transitional justice and trade turns on three key points: PTAs

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81. Leebaw, *supra* note 66, at 95.

82. See, e.g. *Achieving Justice One Beat at a Time: An ICTJ-Led Hip Hop Initiative Takes Center Stage*, INT’L CTR. TRANSITIONAL J. (May 18, 2023), <https://www.ictj.org/latest-news/achieving-justice-one-beat-time-ictj-led-hip-hop-initiative-takes-center-stage> (describing hip-hop music as means of transitional justice).

83. Some scholars argue that the concept of transitional justice is an “inherently legalistic and elite-driven sphere,” while the desired participatory, survivor- and victim-centric elements are something different: *transformative* justice. But these distinctions between “transitional” and “transformative” justice are disputed. The discussion here might be better described as a “transformative approach to transitional justice.” Trade could be considered a “transformative” aspect of transitional justice in that it shifts from the traditional focus on civil and political rights to concern about economic challenges. See Matthew Evans, *Structural Violence, Socioeconomic Rights and Transformative Justice*, in TRANSFORMATIVE JUSTICE: REMEDYING HUMAN RIGHTS VIOLATIONS BEYOND TRANSITION 32, 37–38, 40 (Kieran McEvoy ed., 2018).

84. Teresa Nogueira Pinto, *The Failures of Multilateralism*, GEOPOLITICAL INTEL. SERV. (Mar. 30, 2022), <https://www.gisreportonline.com/r/multilateralism-crisis/>.

have the benefits of enforceability along with the flexibility to implement new policy goals; they have a proven ability to ease hostilities; and their economic potential can channel resources toward cash-strapped advocacy efforts.<sup>85</sup>

These potential benefits are not merely theoretical. According to the “trade-peace theory,” which evolved amid a rise in intra-state conflict and a decrease in inter-state conflict,<sup>86</sup> “the more two countries trade with each other the less likely they are to fight each other.”<sup>87</sup> Increasingly, there is an argument that trade may also generate a “spillover” effect, unintentionally decreasing the likelihood of intra-state conflict as well.<sup>88</sup>

Resources are crucial to transformative outcomes,<sup>89</sup> and traditional models of transitional justice are insufficient for dealing with socioeconomic rights.<sup>90</sup> Financial limitations are among the most pernicious for transitional justice efforts, making the lack of convergence between transitional justice and economic activities especially disappointing.<sup>91</sup> Special tribunals for criminal justice and truth and reconciliation cost money to establish and more money to maintain. Reparations also require investment, regardless of whether they take the form of cash payments or other services and opportunities.<sup>92</sup> Political institutional reforms generally require states to reallocate parts of their budgets—a particularly big ask for countries that might have many critical but competing priorities in the wake of conflict.<sup>93</sup> A transitional justice mechanism that turns on PTAs will capture the stability benefits associated with economic growth, while the possibility for economic growth will be attractive to states otherwise unlikely to pursue transitional justice measures. This may be particularly so when the primary intended beneficiaries of transitional justice are minority communities that have little or no influence on state power structures—and are thus unlikely to see any sort of transitional justice unless it will expressly benefit the powerful majority as well.

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85. Brown, *supra* note 16, at 12–13.

86. *Id.*

87. *Id.* at 13.

88. *Id.*

89. Matthew Evans, *Transformative Justice Processes, Policies and Practice*, in TRANSFORMATIVE JUSTICE: REMEDYING HUMAN RIGHTS VIOLATIONS BEYOND TRANSITION 121, 131 (Kieran McEvoy ed., 2018).

90. Evans, *supra* note 83, at 33.

91. U.N. OHCHR, *supra* note 11, at 53.

92. See Alexander Segovia, *Financing Reparations Programs: Reflections from International Experience*, in THE HANDBOOK OF REPARATIONS 650, 655–59 (Pablo de Greiff ed., 2006).

93. See *Institutional Reform*, INT’L CTR. FOR TRANSITIONAL JUST., <https://www.ictj.org/institutional-reform> (last visited Feb. 25, 2024).

IV. TRADE AS TRANSITIONAL JUSTICE

This Note has thus far argued that human rights-linked PTAs and transitional justice for post-conflict communities are valid and helpful legal efforts, their respective limitations notwithstanding. But whether and how they should be combined is arguably a trickier question.

As an initial matter, it is important to recognize that PTAs for transitional justice will not simply follow the existing playbook for PTAs as applied in least-developed countries (LDCs). PTAs are of particular importance to developing countries,<sup>94</sup> but the notions of post-conflict communities and communities in LDCs are different. Both can experience human rights atrocities, but not all post-conflict communities that have been subjected to those horrors are in LDCs, and not all LDCs have suffered the most flagrant human rights abuses.<sup>95</sup>

One of the greatest strengths of PTAs is their power to speak to multiple types of goals at once. For transitional justice, PTAs can be framed in two ways: as a means of *integrating* human rights into trade, discussed *supra*, and as an alternative means of *state power*. Political science scholar Olga Chyzh argues that governments may use three strategies to stay in power: economic distribution, policy concessions, and repression, with the latter being the costliest and least certain.<sup>96</sup> A state that relies on repression as the primary form of power risks “being caught in a ‘vicious cycle’ of not being able to give it up. In order to give up repression, it must shift to another tool of maintaining its hold on power.”<sup>97</sup>

With this in mind, there are at least three possible ways for PTAs to have purchase as part of transitional justice objectives, each of which is implicated in both integration and state power views: negotiations, policymaking, and economic control. This part discusses each in turn.

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94. Gabriele Spilker et al., *What Kinds of Trade Liberalization Agreements Do People in Developing Countries Want?*, 44 INT’L INTERACTIONS 510, 511 (2018).

95. Ukraine, for instance, is not an LDC but is currently suffering one of the worst human rights atrocities of our generation. See U.N. *List of Least Developed Countries*, U.N. CONF. ON TRADE AND DEV., <https://unctad.org/topic/least-developed-countries/list> (last visited Feb. 25, 2024); see generally U.N. OHCHR, *40th Periodic Report on the Human Rights Situation in Ukraine* (Oct. 1, 2024), <https://www.ohchr.org/en/documents/country-reports/40th-periodic-report-human-rights-situation-ukraine-treatment-prisoners>.

96. Olga Chyzh, *Dangerous Liaisons: An Endogenous Model of International Trade and Human Rights*, 53 J. PEACE RSCH. 409, 411 (2016).

97. *Id.*

A. Negotiations

Power disparities are crucial to PTAs, especially for trading partners such as the United States and the EU.<sup>98</sup> Non-trade policy objectives can arise in PTAs as a way to protect from future backsliding and prevent a race to the bottom.<sup>99</sup> They require all states involved to promote and publicly commit to shared non-trade values.<sup>100</sup> In essence, “states exercise their (trade) power when they are able to compel other (weaker) partners to accept [provisions for non-trade issues] that they would not otherwise accept.”<sup>101</sup> Critics of the use of PTAs for human rights enforcement tend to discount or ignore the benefits associated with negotiating these provisions, particularly where major power disparities are concerned.<sup>102</sup>

In a similar vein, one argument *against* transitional justice is the “tendency for change to occur through elite bargains and the transfer of power at the top.”<sup>103</sup> Some scholars construe this as antithetical to the goals of “transformative” justice, which include socioeconomic objectives.<sup>104</sup> But in the trade context, so-called “elite” bargaining<sup>105</sup> might instead be a vehicle for human rights progress (integration) and economic stability (state power). States negotiating a PTA will come across both. As Susan Ariel Aaronson notes,

The “how” can also relate to whether the demandeur and the target government adopt monitoring or enforcement strategies in concert with the agreement; whether the link the agreement to capacity building designed to build governance expertise and will; and whether one signatory can challenge human rights violations of the trade agreement or suspend it.<sup>106</sup>

Recall that transitional justice is aimed at improving stability and peace while dealing with the legacies of human rights atrocities. PTA

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98. Milewicz et al., *supra* note 33, at 747; Sophie Meunier & Kalypso Nicolaïdis, *The European Union as a Conflicted Trade Power*, 13 J. EURO. PUB. POL’Y 906, 912 (2006).

99. Milewicz et al., *supra* note 33, at 744, 747; U.N. Press Release, *supra* note 45.

100. Milewicz et al., *supra* note 33, at 747.

101. *Id.*

102. See generally Meredith K. Lewis, *Human Rights Provisions in Free Trade Agreements: Do the Ends Justify the Means?*, 12 Loy. U. Chi. Int’l L. Rev. 1 (2015) (discussing the outcomes of negotiations but not the processes themselves).

103. Evans, *supra* note 83, at 46.

104. See *id.*

105. *Id.* at 46–47.

106. Aaronson, *supra* note 32, at 444.



negotiations may be helpful toward these ends. Proactive disclosure of negotiations, as well as the inclusion of NGOs and other community stakeholders in those negotiations, can strengthen human rights and promote democratic norms.<sup>107</sup> Moreover, “PTAs act as trust-building mechanisms, promoting interactions between officials and exchange of information . . . PTAs have a good track record in enabling trust building across partner countries’ administrations.”<sup>108</sup> Studies show that public opinion matters for non-trade issues within PTAs,<sup>109</sup> creating an opportunity for states to solicit input from survivor and victim communities that have been silenced.

### B. Policymaking

The inclusion of non-trade policy goals in a PTA may serve as a public demonstration of the state’s commitment to that goal.<sup>110</sup> PTAs can help improve policy credibility.<sup>111</sup> Specifically, the joint monitoring that comes with PTAs promotes transparency and efficiency in pursuing policy goals.<sup>112</sup>

The design of non-trade objectives can vary significantly.<sup>113</sup> For human rights generally, PTA provisions might include “condition[ing] the agreement on the partner’s changing its laws to meet international standards,” such as those outlined in the ICCPR and ICESCR. These provisions could also secure government commitments to maintain existing high standards with the expectation that those standards will promote trade and investment.<sup>114</sup>

For example, consider negotiations between a powerful state that values human rights and a weaker state where major human rights atrocities have occurred, at the hands of either state *or* non-state actors. Negotiators might consider whether there is an opportunity to reference *specific* rights violated during past atrocities, such as due process, free expression, and freedom from torture (integration). If the weaker state is responsible for the violations, the more powerful state may be able to secure an incremental human rights commitment (state power).

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107. See U.N. Press Release, *supra* note 45.

108. Maur, *supra* note 27, at 341.

109. Spilker et al., *supra* note 94, at 533.

110. Lechner, *supra* note 21, at 846.

111. Bernard Hoekman, *North-South Preferential Trade Agreements*, in *PREFERENTIAL TRADE AGREEMENT POLICIES FOR DEVELOPMENT: A HANDBOOK* 95, 97 (Jean-Pierre Chauffour & Jean Christophe Maur eds., 2011).

112. *Id.* at 103.

113. Lechner, *supra* note 21, at 864.

114. Aaronson, *supra* note 32, at 444.

But this might not be sufficient to constitute transitional justice. Although a non-trade provision specifically labeled “human rights” might support transitional justice goals, a more likely scenario involves provisions tied to other issues that may add up to stabler communities and favorable human rights situations. Indeed, an explicit human rights provision is unlikely to be helpful unless the state is striking a deal with the state that committed the atrocities.

For example, if the atrocities in the weaker state were committed by non-state actors, the weaker state may be more motivated to improve national security outside the universe of trade deals (state power). The labor and environmental non-trade objectives that are increasingly common in PTAs—perhaps even more so than human rights provisions—can also take on transitional justice qualities. For instance, a transitional justice-oriented PTA provision might draw attention to poor working conditions or employment discrimination that contributed to unrest, or an environmental disaster or contamination that worsened displacement.

Enforcement of PTA provisions will also factor in how human rights are implemented and how the states exercise their power. Aaronson argues that “sanctions or fines can do little to build demand for human rights or to train governments . . . in how to respect human rights. Isolating a government or punishing it will do little to increase the targeted country’s commitment to human rights over time.”<sup>115</sup> Instead, parties might turn to a dispute settlement mechanism that makes the provision justiciable; a public complaint procedure; or NGO involvement beyond the negotiations phase.<sup>116</sup>

### C. Economics

One economic element of PTAs is simple: where protectionism incentivizes hostility, trade creates an economic incentive to avoid conflict.<sup>117</sup> While this is useful to keep in mind when attempting to establish stability among states with a propensity to attack one another, the majority of the economic benefits for survivors will lie elsewhere. This is especially true where not all parties to a conflict are states.

Trade liberalization generally creates employment opportunities,<sup>118</sup> and employment is a key goal of some transitional justice efforts,

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115. *Id.* at 460.

116. See Lechner, *supra* note 21, at 851.

117. Julian Adorney, *Want Peace? Promote Free Trade*, HINRICH FOUND. (Sept. 10, 2020), <https://www.hinrichfoundation.com/research/tradevistas/sustainable/trade-and-peace/>.

118. See *Trade and Jobs: Getting the Policy Mix Right to Better Support Employment with Open Markets*, OECD, <https://www.oecd.org/trade/topics/trade-and-jobs/> [<https://web.archive.org/web/20240414175359/https://www.oecd.org/trade/topics/trade-and-jobs/>] (last visited Feb. 25, 2024).

particularly reparations.<sup>119</sup> Thus, by reducing tariff barriers, a state might improve job accessibility (integration). Moreover, when mass atrocities take place in agrarian communities, the elimination of barriers for goods produced in those communities could improve economic stability there.<sup>120</sup> In situations where communities are displaced from their land, this strategy could provide the support needed for survivors and victims to return home.

One facet of the economic equation that merits caution is the survival of micro, small, and medium-sized enterprises (MSMEs). MSMEs are a “critical source of employment and livelihood in developing countries, especially for women.”<sup>121</sup> Development scholar Tessa Khan argues that MSMEs stand to lose the most when new PTAs are enacted because they lack the resources to compete with imported products and are often unable to comply with non-tariff trade barriers such as technical and procedural requirements.<sup>122</sup> Moreover, “the measures that are necessary to redress these imbalances, including preferential terms of credit, technical support and export subsidies, are precisely the kinds of measures that are in danger of running afoul of the ‘fair and equitable treatment’ provisions of PTAs.”<sup>123</sup> However, this concern may be less critical in post-conflict regions than in developing countries, which, as discussed *supra*, face disparate challenges.

## V. CASE STUDIES

Ultimately, like any transitional justice pathway, PTAs as transitional justice will look different depending on the circumstances to which they are applied. Some considerations might include whether the conflict is ongoing or ended; whether the state has existing PTAs; and what goods or services the state is willing and able to trade. To consider how PTAs might be used as transitional justice in the real world, this part explores scenarios in two states, Ukraine and Iraq, that have faced

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119. See, e.g., *Preliminary Reparations Plan*, NAT’L AFR.-AM. REPARATIONS COMM’N 8–9, <https://reparationscomm.org/reparations-plan/> (last visited Feb. 25, 2024) (suggesting job and employment training as part of a reparations package for people of African descent in the U.S.); Yazidi [Female] Survivors Law No. 8 of 2021, art. 5(5) (Iraq) (guaranteeing job and employment opportunities for individuals eligible for reparations).

120. See, e.g., *Agricultural Trade: Monitoring the Changing Landscape of Agricultural Markets and Trade*, OECD, <https://www.oecd.org/agriculture/topics/agricultural-trade/> (last visited Feb. 25, 2024) (noting that “trade plays a crucial role in providing livelihoods for farmers”).

121. Tessa Khan, *Unfair Trade? Preferential Trade Agreements Human Rights & Inequalities*, 57 DEV. 423, 424 (2014).

122. *Id.*

123. *Id.* at 427.

devastating and destabilizing conflicts during the past few years. Conflict in one country hurts its neighbors too,<sup>124</sup> so efforts in these and similar situations could have positive impacts far beyond their borders.

### A. *Ukraine: Interstate Conflict*

Three years after the full-scale Russian invasion, Ukraine is still fighting for its life.<sup>125</sup> Though it initially defended itself far more successfully than anticipated,<sup>126</sup> its future is anything but certain.<sup>127</sup> Assuming Ukraine retains even a portion of its independence, it will face a new challenge in rebuilding its economy. PTAs could prove beneficial in this process.

Ukraine joined the WTO in 2008.<sup>128</sup> As of spring 2025, it is a party to nineteen PTAs, including agreements with Canada,<sup>129</sup> the EU,<sup>130</sup> the European Free Trade Association (EFTA),<sup>131</sup> and the United Kingdom,<sup>132</sup> which include several non-trade policy goals. As part of their existing agreement, Ukraine and the EU entered into the Deep and Comprehensive Free Trade Agreement (DCFTA) in 2016, eliminating 99.1% and 98.1% of tariffs for Ukraine and the EU, respectively.<sup>133</sup> The EU-Ukraine

124. Mahvash Saeed Qureshi, *Trade and Thy Neighbor's War* 9, 23–24 (Int'l Monetary Fund Working Paper No. WP/09/283, 2009).

125. See Mykola Bielieskov, *The State of Russia's War on Ukraine As It Nears 2024*, ATL. COUNCIL EURASIA CTR. (Oct. 16, 2023), <https://www.atlanticcouncil.org/blogs/ukrainealert/the-russia-ukraine-war-in-2024/>; see also Simon Shuster, 'Nobody Believes in Our Victory Like I Do.' Inside Volodymyr Zelensky's Struggle to Keep Ukraine in the Fight, TIME (Nov. 1, 2023), <https://time.com/6329188/ukraine-volodymyr-zelensky-interview/>.

126. Mykhailo Minakov et al., *Assessing the Outcomes of Russia's War on Ukraine*, WILSON CTR. (Jan. 23, 2023), <https://www.wilsoncenter.org/blog-post/assessing-outcomes-russias-war-ukraine>.

127. See *Global Perspectives on Ending the Russia-Ukraine War*, COUNCIL ON FOREIGN REL. (Feb. 21, 2024), <https://www.cfr.org/councilofcouncils/global-memos/global-perspectives-ending-russia-ukraine-war>.

128. *Ukraine and the WTO*, WTO, [https://www.wto.org/english/thewto\\_e/countries\\_e/ukraine\\_e.htm](https://www.wto.org/english/thewto_e/countries_e/ukraine_e.htm) (last visited Nov. 29, 2023).

129. Canada-Ukraine Free Trade Agreement, Can.-Ukr., Sep. 22, 2023, 2024 Can. T.S. No. 16.

130. Association Agreement Between the European Union and its Member States, of the One Part, and Ukraine, of the Other Part, Mar. 21–June 27, 2014, 2014 O.J. (L 161).

131. Free Trade Agreement Between the EFTA States and Ukraine, June 24, 2010, <https://www.efta.int/sites/default/files/documents/legal-texts/free-trade-relations/ukraine/EFTA-Ukraine%20Free%20Trade%20Agreement.pdf>.

132. Political, Free Trade and Strategic Partnership Agreement Between the United Kingdom of Great Britain and Northern Ireland and Ukraine, U.K.-Ukr., Oct. 8, 2020, GR. BRIT. TS No. CP 312.

133. EU-Ukraine Deep and Comprehensive Free Trade Area, EURO. COMM'N (Jan. 1, 2016), <https://trade.ec.europa.eu/access-to-markets/en/content/eu-ukraine-deep-and-comprehensive-free-trade-area>.

relationship is not without controversy. In 2013, scholar Oli Brown argued—perhaps presciently—that “the EU’s pursuit of deeper trade relations with nations formerly firmly in the Soviet/Russian sphere is an issue that could cause considerable regional friction in the future.”<sup>134</sup>

None of Ukraine’s PTAs include explicit human rights provisions. Nevertheless, Ukraine is unlikely to enter a bilateral trade deal with Russia anytime soon, so Ukraine should consider not how to hold Russia accountable via human rights provisions in a PTA, but rather how to support its citizens in the wake of Russian aggression. This could take the form of a new PTA or an amendment to an existing PTA.

Ukraine has gained international standing as it improves its democratic commitments.<sup>135</sup> This legitimacy could make other states even more amenable to trading with it. Moreover, other countries might want to be seen as supporting Ukraine to further their own aspirations of international legitimization. Add to this Ukraine’s outsized role in the world grain supply,<sup>136</sup> and Ukraine may be able to negotiate from a place of relative strength. As such, Ukraine is well-positioned to push for deals that contain significant non-trade measures. Moreover, by exercising its state power by participating in PTAs, Ukraine will set itself on a path to greater economic stability after the war. Ukraine’s agriculture sector (based primarily on grain production) accounts for a significant percentage of employment,<sup>137</sup> so negotiations related to agriculture in particular will create an opportunity for the state to solicit feedback from certain communities, allowing individuals’ voices to be heard in the recovering economy.<sup>138</sup>

Amid Russia’s illegal war, Ukraine faces another problem: systemic corruption. Ukraine’s President, Volodymyr Zelenskyy, has stated that he is committed to rooting out corruption, but the results have proven

134. Brown, *supra* note 16, at 18.

135. See *Freedom in the World 2024: Ukraine*, FREEDOM HOUSE, <https://freedomhouse.org/country/ukraine/freedom-world/2024> (last visited Nov. 21, 2024); Iulian Romanyshyn, *Ukraine’s Total Democratic Resilience in the Shadow of Russia’s War*, CARNEGIE EUROPE (Apr. 4, 2023), <https://carnegieendowment.org/research/2023/04/ukraines-total-democratic-resilience-in-the-shadow-of-russias-war?lang=en&center=europe>; Joanna Szostek & Lisa Toremark, *Democracy in Ukraine*, CHATHAM HOUSE (Nov. 14, 2023), <https://www.chathamhouse.org/2023/11/democracy-ukraine>.

136. For instance, some forty percent of the World Food Programme’s wheat stores come from Ukraine. See Mark A. Green, *Forty Percent of the World Food Program’s Wheat Supplies Come from Ukraine*, WILSON CTR. (June 2, 2022), <https://www.wilsoncenter.org/blog-post/forty-percent-world-food-programs-wheat-supplies-come-ukraine>.

137. See STATE STATISTICS SERVICE OF UKRAINE, LABOUR FORCE OF UKRAINE 2019, tbl. 2.15 (Inna Osypova ed., 2020).

138. See generally Marije Schaafsma et al., *A Framework to Understand the Social Impacts of Agricultural Trade*, 31 SUSTAINABLE DEV. 138 (2022).

controversial.<sup>139</sup> Here, PTAs provide a unique opportunity for Ukraine to make early investments in post-war stability by publicly affirming its commitment to reducing corruption through non-trade objectives. If Ukraine can swallow opening itself up to slightly more accountability, its willingness to integrate anti-corruption more thoroughly as a policy matter will help ensure that profits trickle down to the communities that need them most.

Finally, Ukraine and its regional partners should reconsider the Black Sea Grain Initiative—but in the form of a PTA. The original agreement between Russia, Türkiye, Ukraine and the U.N., which lasted roughly a year, ensured that both Russia and Ukraine could export foodstuffs and fertilizer through a humanitarian corridor to Türkiye.<sup>140</sup> The U.N. set up a monitoring body to set the humanitarian route and oversee shipping vessel movements.<sup>141</sup> The deal facilitated exports of thirty-two million metric tons of grain and food, including 725,000 metric tons of wheat that the World Food Programme shipped to locations at risk of famine.<sup>142</sup> It was, by every measure, crucial for avoiding starvation around the world.<sup>143</sup>

The original Black Sea Grain Initiative could be a model for state parties to institutionalize these efforts further. Understandably, a full-on FTA among Russia, Türkiye, and Ukraine is unlikely to be on the table. But negotiating a partial scope agreement limited to food and fertilizer could help sustain economic flows into war-torn areas, which eventually will need tremendous funding for redevelopment.<sup>144</sup> At the same time, these exports might support transitional justice measures for other impoverished communities around the world by promoting consistent availability and affordability of key goods.

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139. Tara Law, *What to Know About the Corruption Scandals Sweeping Ukraine's Government*, TIME (Feb. 1, 2023), <https://time.com/6249941/ukraine-corruption-resignation-zelensky-russia/>; see also Mykhailo Minakov, *Fighting Corruption in Wartime Ukraine*, WILSON CTR. (Feb. 13, 2023), <https://www.wilsoncenter.org/blog-post/fighting-corruption-wartime-ukraine>; see also Steven Pifer, *Ukraine's Zelenskyy Ran on a Reform Platform—Is He Delivering?* BROOKINGS INST. (July 22, 2020), <https://www.brookings.edu/articles/ukraines-zelenskyy-ran-on-a-reform-platform-is-he-delivering/>.

140. Black Sea Grain Initiative Joint Coordination Centre, *Beacon on the Black Sea*, U.N., <https://www.un.org/en/black-sea-grain-initiative> (last visited Dec. 13, 2023).

141. *Id.*

142. Black Sea Grain Initiative Joint Coordination Centre, *Data: Black Sea Grain Initiative*, U.N. (October 17, 2023), <https://www.un.org/en/black-sea-grain-initiative/data>.

143. See U.N. News, *One Year of the Black Sea Initiative: Key Facts and Figures*, U.N. (July 10, 2023), <https://news.un.org/en/story/2023/07/1138532>.

144. Partial scope agreements, though less common than FTAs, are valid forms of PTAs. See *supra* Part I.

B. *Iraq: Non-State Actor Conflict*

Iraq is more than six years removed from the Islamic State's genocide of ethnoreligious minorities, especially the Yazidis, a traditionally agrarian community native to northern Iraq.<sup>145</sup> Despite valiant efforts by NGOs and aid workers, few justice measures have come to fruition. One transitional justice mechanism that *was* successfully established is the Yazidi [Female] Survivors Law, which provides employment, education, housing, and reparative funding to those most affected by the genocide.<sup>146</sup> However, hundreds of thousands of Yazidis remain displaced from their home region, Sinjar,<sup>147</sup> and the Iraqi economy remains deeply unstable.<sup>148</sup>

Iraq has observer status in the WTO and has concluded FTAs with Algeria, Egypt, Jordan, Oman, Qatar, Syria, Sudan, Tunisia, and the United Arab Emirates.<sup>149</sup> It first requested to join the WTO in September 2004<sup>150</sup> and renewed its bid in 2020, an effort that has drawn notable support from the EU.<sup>151</sup> Iraq is an especially complex setting for trade. It regulates imports heavily<sup>152</sup> and has two customs regimes: one for most of Iraq, or “federal Iraq,” and one for the semi-autonomous Kurdistan Region of Iraq,<sup>153</sup> a subsection of northern Iraq projected to represent more than fifteen percent of the Iraqi population by 2020.<sup>154</sup>

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145. See Raya Jalabi, *Who Are the Yazidis and Why is ISIS Hunting Them?* THE GUARDIAN (Aug. 11, 2014), <https://www.theguardian.com/world/2014/aug/07/who-yazidi-isis-iraq-religion-ethnicity-mountains>; see also Press Release, Amnesty International, *Iraq: Islamic State's Destructive Legacy Decimates Yazidi Farming* (Dec. 13, 2018), <https://www.amnesty.org/en/latest/press-release/2018/12/iraq-islamic-states-destructive-legacy-decimates-yezidi-farming/>.

146. Yazidi [Female] Survivors Law No. 8 of 2021, arts. 5–6 (Iraq).

147. See *About the Genocide*, NADIA'S INITIATIVE, <https://www.nadiasinitiative.org/the-genocide> (last visited Feb. 25, 2024).

148. See generally MAJID KAZEMI ET AL., WORLD BANK, *IRAQ ECONOMIC MONITOR — REEMERGING PRESSURES: IRAQ'S RECOVERY AT RISK* (2023), <https://documents1.worldbank.org/curated/en/099453507282342287/pdf/IDU0b9f5dc440cf047f9098e202d3dab0861c7.pdf>.

149. *Iraq Country Commercial Guide*, INT'L TRADE ADMIN., <https://www.trade.gov/country-commercial-guides/iraq-market-overview?section-nav=17236> (last visited Nov. 29, 2023).

150. Directorate-General for Trade, *Iraq*, EURO. COMM'N, [https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/iraq\\_en](https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/iraq_en) (last visited Sept. 24, 2023).

151. See Michael Ferrantino et al., *Trading Out of Fragility – Lessons from Iraq*, WORLD BANK BLOGS: ARAB VOICES (Nov. 17, 2020), <https://blogs.worldbank.org/arabvoices/trading-out-fragility-lessons-iraq>.

152. *Id.*

153. *Id.*

154. MAGUED OSMAN, KURDISTAN REGION STATISTICS OFFICE, MINISTRY OF PLANNING, KURDISTAN REGION OF IRAQ - POPULATION ANALYSIS REPORT 11 (2021), <https://krso.gov.krd/content/upload/1/root/kurdistan-population-analysis-report-6-english-final-corrected-29052022.pdf>.



To make matters more challenging, Iraq is among the world's least diversified exporters,<sup>155</sup> as crude oil accounts for more than ninety-five percent of its exports.<sup>156</sup> One illustration: Iraq in 2020 exported EUR 7.25 billion in fuel and mining products to the EU,<sup>157</sup> while the EU's exports to Iraq were worth less than half of that during the same time.<sup>158</sup> Overspecialized, resource-dependent states like Iraq can find it challenging to improve economic diversity. World Bank experts say this is not from lack of possibilities: "rice, dried fruit, electric lamps, distillates of coal tar, crushed stone, wool, skins and hides, copper products . . . . Some of these products will likely re-emerge as a consequence of improved security and government transparency."<sup>159</sup>

In a multilateralism context, the trade of petroleum products functionally operates outside the bounds of the system.<sup>160</sup> This could explain Iraq's prior reticence to join the WTO: Iraq and similarly situated states might perceive "that in joining they will be giving up control of their economic relations with the rest of the international community."<sup>161</sup> However, because crude oil exports are the main source of Iraq's income, this concern is likely overblown.<sup>162</sup> Even so, engaging in PTAs would allow Iraq to reap the economic benefits of increased trade while assuaging any fears it has about losing its power.

Any improvements PTAs might contribute to the Iraqi economy are largely untapped. Iraq suspended its nine PTAs in 2015—during the height of the Islamic State occupation—purportedly to review whether they were beneficial.<sup>163</sup> Bilateral trade takes three to five years, on average, to recover after conflicts end,<sup>164</sup> but the status of these deals is not clear. As of December 2023, Iraq's only PTA documented with the WTO was the Pan-Arab Free Trade Area (PAFTA), an FTA among nineteen Arab states.<sup>165</sup> Regardless of whether it continues to push for WTO

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155. Ferrantino et al., *supra* note 151.

156. *Id.*

157. Directorate-General for Trade, *supra* note 150.

158. *Id.*

159. Ferrantino et al., *supra* note 151.

160. IRAQ LEGAL EDUC. INITIATIVE & AM. UNIV. OF IRAQ, SULAIMANI, INTRODUCTION TO THE LAWS OF KURDISTAN, IRAQ WORKING PAPER SERIES: INTERNATIONAL TRADE LAW 23–24 (2016).

161. *Id.* at 24.

162. *Id.*

163. *Iraq - Trade Agreements*, INT'L TRADE ADMIN. (Nov. 2, 2021), <https://www.trade.gov/country-commercial-guides/iraq-trade-agreements>.

164. Qureshi, *supra* note 124, at 20.

165. See The Economic and Social Council of the Arab League, *The Agreement of Pan-Arab Free Trade Area*, Resolution No. 13-O.S. 59 (Feb. 19, 1997), [https://rtais.wto.org/rtadocs/16/TOA/English/Pan-Arab%20Free%20Trade%20Area%20Agreement%20\(1997\).pdf](https://rtais.wto.org/rtadocs/16/TOA/English/Pan-Arab%20Free%20Trade%20Area%20Agreement%20(1997).pdf).

membership, Iraq has an opportunity to transition its governance away from repression by reinstating or renegotiating PTAs.

The mere act of negotiating could also open channels through which its negotiating partners could insist on stronger human rights protections, potentially even striking justiciable provisions relevant to human rights concerns.<sup>166</sup> A regionalized complaints procedure or dispute settlement mechanism for a PTA—one that just so happens to apply to human rights provisions—is likely to be more efficient and more trusted than international bureaucratic processes. By including human rights as a sliver of a much larger economic whole, Iraq is less likely to feel singled out for human rights abuses that originated from a non-state group.

Diversifying exports could be another way for Iraq to use PTAs in this setting. The ethnoreligious minority communities targeted in the Islamic State's genocide are primarily agrarian societies with fewer ties to crude energy materials.<sup>167</sup> As such, the products that comprise the overwhelming majority of Iraq's exports have little potential to produce socioeconomic benefits for those communities. By contrast, many of the non-energy materials within the realms of possibility for Iraq would necessarily come from agrarian areas, suggesting that increased demand for those products could create jobs—and financial opportunity—for rural communities.<sup>168</sup>

## VI. CONCLUSION

As the situations in Ukraine and Iraq make evident, the world has no shortage of need for initiatives promoting peace and sustainability. With PTAs increasingly amenable to non-trade policy goals, and transitional justice more open than ever to expansion, states should explore a combination of the two as they explore options for moving forward from human rights atrocities.

PTAs may be primed to provide resources and enforcement options sometimes missing from transitional justice initiatives, while transitional justice initiatives can ensure that the most vulnerable communities benefit from trade deals. Through negotiations, policymaking, and economic considerations, the construction of PTAs as transitional justice can promote the integration of human rights in trade and support non-repressive forms of state power.

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166. See, e.g., Milewicz et al., *supra* note 33, at 747, n.7.

167. See generally AMNESTY INT'L, DEAD LAND: ISLAMIC STATE'S DELIBERATE DESTRUCTION OF IRAQ'S FARMLAND (2018).

168. *Id.*

This is not to say the possibility is an easy one. It will require creativity as well as commitments from experts whose paths often do not cross. But as multilateralism continues to struggle and states increasingly take trade matters into their own hands, it seems certain that they must consider ways for their economies to support stability and peace in our fractured world.