

# *The Future of Transitional Justice*<sup>1</sup>

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## *I. Introduction*

The tenth anniversary of the 1994 Rwandan genocide—in which approximately one million Tutsi and moderate Hutu were massacred in about one hundred days—provides an appropriate opportunity to consider the future of ‘transitional justice.’<sup>2</sup> Transitional justice involves states and societies shifting from a situation of conflict to one of peace and, in the process, using judicial and/or non-judicial mechanisms to address past human rights violations. The number and diversity of transitional justice options have never been greater than they are today. In addition, the tense and shifting international landscape, especially since 9/11 and the subsequent United States (US)-led invasions of Afghanistan and Iraq, has both promoted and impaired international cooperation on these important issues. Recent efforts to bring to justice Osama bin Laden, Saddam Hussein, Slobodan Milošević, Radovan Karadžić, Ratko Mladić, Charles Taylor, Théoneste Bagasora, Augusto Pinochet, Hissène Habré, Luis Echeverría, and other suspected perpetrators of atrocities in the Balkans, Rwanda, Sudan, Sierra Leone, Liberia, the Democratic Republic of Congo, Uganda, Burundi, Chad, Chile, East Timor, Cambodia, Iraq, Mexico, and the US demonstrate how relevant and crucial issues of transitional justice are today and, unfortunately, will be for the foreseeable future.

There is a conspicuous gap between the analytical emphasis on states’ decision-making processes to initiate or intervene during a conflict, and whether and how states conduct themselves in the post-conflict period. While there is a great and growing literature on humanitarian intervention, there is little corresponding study of foreign policy in the immediate aftermath of conflicts involving widespread and systematic violations of human rights. The question of what foreign policy is and should be with respect to post-conflict reconstruction in general, and to transitional justice in particular, is a crucial and recurring one. Deciding whether and how to deal with suspected atrocity perpetrators is of critical importance to foreign policy-making and transitional justice, as the choices involved help determine the atmosphere of the post-conflict society. Such transitional justice issues are complicated and controversial because of the pitfalls of the chosen options, and the number, attractiveness, and precedence of alternative mechanisms. In the past, states have contemplated or employed a wide array of methods to deal with suspected atrocity perpetrators. As scholar Gary Bass notes, options considered for dealing with suspected war criminals have included:

prosecutions through an international criminal tribunal (ICT), executions on sight, executions *en masse* later, show trials and then executions, exile, concentration camps, amnesty, and, as Franklin Roosevelt and Winston Churchill suggested for suspected atrocity perpetrators in World War II, castration.<sup>3</sup> Further options will be discussed below.

Recent events have reinforced the salience of these issues. The International Criminal Court (ICC), which was established by the Rome Statute on 17 July 1998 and which entered into force on 1 July 2002, recently announced that its first two investigations will concern mass violence in the Democratic Republic of Congo (particularly the northeast) and Uganda (particularly the north), where tens of thousands of people have suffered atrocities, including murder, summary executions, torture, mutilation, sexual violence, forcible displacement, and cannibalism. For the past two decades, Sudan (particularly the western region of Darfur) has been consumed by a civil war that, in 2003, erupted into mass atrocities, leading to the deaths of tens of thousands of individuals and the displacement of 1.5 million more. The US Congress and US Secretary of State Colin Powell have recently categorised the 2003-04 events in Darfur as 'genocide.' A massacre of 164 Banyamulenge (Congolese Tutsi) in Burundi on 13 August 2004—who were apparently killed solely because they were Tutsi—created further disorder in the Great Lakes region. In each case, the international community is considering whether and, if so, how to address the perpetrators of these atrocities.

Furthermore, the US government has been considering how to address suspected terrorists, Iraqi Ba'ath Party leaders, and suspected atrocity perpetrators in its own military and civilian command. Former US Ambassador for War Crimes Issues David Scheffer theorises that there are at least nine judicial fora that the US government could use to prosecute suspected terrorists (many of whom are being held in a US military detention facility in Guantánamo Bay, Cuba), including Osama bin Laden. These options are: (1) US federal court, (2) US military court, (3) US military commission, (4) foreign national courts, (5) *ad hoc* ICT established by the UN Security Council, (6) *ad hoc* ICT established by the UN General Assembly, (7) a coalition treaty-based criminal tribunal, (8) a special Islamic court, and (9) UN-administered courts in Afghanistan.<sup>4</sup> Scheffer notes that these options need not be mutually exclusive: "There may well be occasion to prosecute different terrorist suspects in different courts in different jurisdictions simultaneously."<sup>5</sup> Among other issues, the debate about whether and how to deal with suspected terrorists has raised the controversy over military tribunals/commissions, with commentators debating whether they are legal and/or just and whether they are perceived to be legal and/or just, and, if not, what the consequences might be.

60 Furthermore, before settling on an Iraqi-led war crimes tribunal in December 2003, the US government considered various options for dealing with captured Iraqis (including Saddam Hussein), such as exile, assassination, a war crimes tribunal that was either unilateral or multilateral, and a domestic truth commission.<sup>6</sup> Finally, the US has become embroiled in a controversy over whether and how to handle cases involving Americans accused of war crimes and crimes against humanity, most recently related to the abuses committed at the Abu Ghraib prison in Iraq. That neither the US nor Iraq is a signatory to the Rome Statute on the ICC meant that the US could unilaterally decide what, if any, justice solution to implement, and what form it would take. Initial reports suggest that in these particular cases the US will favour immediate over delayed prosecution, military over civilian courts, unilateral over multilateral institutions, and trials in Iraq over trials in the US or a third-party state.<sup>7</sup> About two dozen US soldiers may also face criminal charges or other administrative punishment for their involvement in two prisoner-abuse cases that occurred in Afghanistan at Bagram Air Base.<sup>8</sup>

The aforementioned controversy over military tribunals reminds us that transitional justice options are sometimes chosen or judged based on two criteria: 1) what is just and 2) what is perceived to be just. The first criterion may be met if an option comports with international and/or domestic law.<sup>9</sup> The second criterion may be met if an option is considered legitimate, fair, and impartial. Even if the first criterion is met, a transitional justice option might not be selected or might be criticised if the second criterion is not met. Employing an option that, even if just, is not perceived as just, might undermine domestic and/or international support, including depleting diplomatic capital even among allies, and may inflame enmities. In that case, the credibility of the transitional justice option may be so damaged that the results it achieves (for example convictions, punishment) may be considered illegitimate. Criticisms against the authority responsible for administering transitional justice in such a situation might be strong enough to compel it to abandon the option it had originally considered or chosen.

This article is divided into three further sections. The next section will provide an overview of transitional justice options. The following section will discuss some recent developments in transitional justice and their implications. The final section will provide some concluding thoughts on the future of transitional justice. This article argues that despite the advent of the ICC, the future of transitional justice is likely to become more complex and no single transitional justice option will or even could be employed.

Because of space constraints, this article will focus on only the foreign policy considerations of transitional justice issues. Domestic considerations, which are also crucial and intertwined with foreign policy issues,

are largely outside the scope of this article. Furthermore, the article will focus on only a few case studies and examples, drawing often on activities of the United States, since it is one of the states most actively involved in making and leading decisions relating to and either supporting or opposing the establishment and maintenance of transitional justice options and institutions. The case studies are chosen to reflect the breadth of problems and controversies involved in these issues. The aforementioned atrocities currently being committed in Sudan and the Democratic Republic of Congo are also some of the most important issues in contemporary transitional justice issues, but the pace of developments in those states and space constraints prevent a thorough analysis of those cases in this article. Also because of space constraints, this article will focus on mapping the transitional justice terrain, which highlights—but does not resolve—the normative issues that must eventually be faced. Finally, compared to the high drama associated with trials of infamous atrocity perpetrators, such as Adolf Eichmann and Slobodan Milošević, the analysis presented in this article may seem to be comparatively tedious, as it often involves lists and considerable attention to institutional detail. Nonetheless, such a thorough investigation of transitional justice options and the issues surrounding them is crucial for the process of evaluating responses to past atrocities and for developing appropriate and effective policy to address suspected atrocity perpetrators in the future.

## *II. Transitional Justice Options*

This section will enumerate and describe all possible transitional justice options—including unconsidered, unprecedented, and unselected ones—for dealing with any past, current, or future suspected atrocity perpetrators, and will also provide some examples. These options, which are visually displayed in Figure 1: Transitional Justice Options Tree for Suspected Atrocity Perpetrators, are sometimes mutually supportive and sometimes conflicting. While it is true that not all of the options are mutually exclusive, some of them are necessarily or practically mutually exclusive. For example, assassination necessarily excludes all other options for dealing with an individual. Additionally, from a practical standpoint, choosing one option may exclude others because of limited resources or time. The options are listed in no particular order.

To confront suspected atrocity perpetrators, the first decision is whether to do anything at all. There are several, either discrete or mutually reinforcing, reasons why, at the first decision point, a state may want to ‘do something’ about suspected atrocity perpetrators. These reasons may be genuinely humanitarian, narrowly self-interested, or some combination of the two. One possible motivation is guilt: leaders may want to take proactive and public steps to compensate for failures to prevent or mitigate the

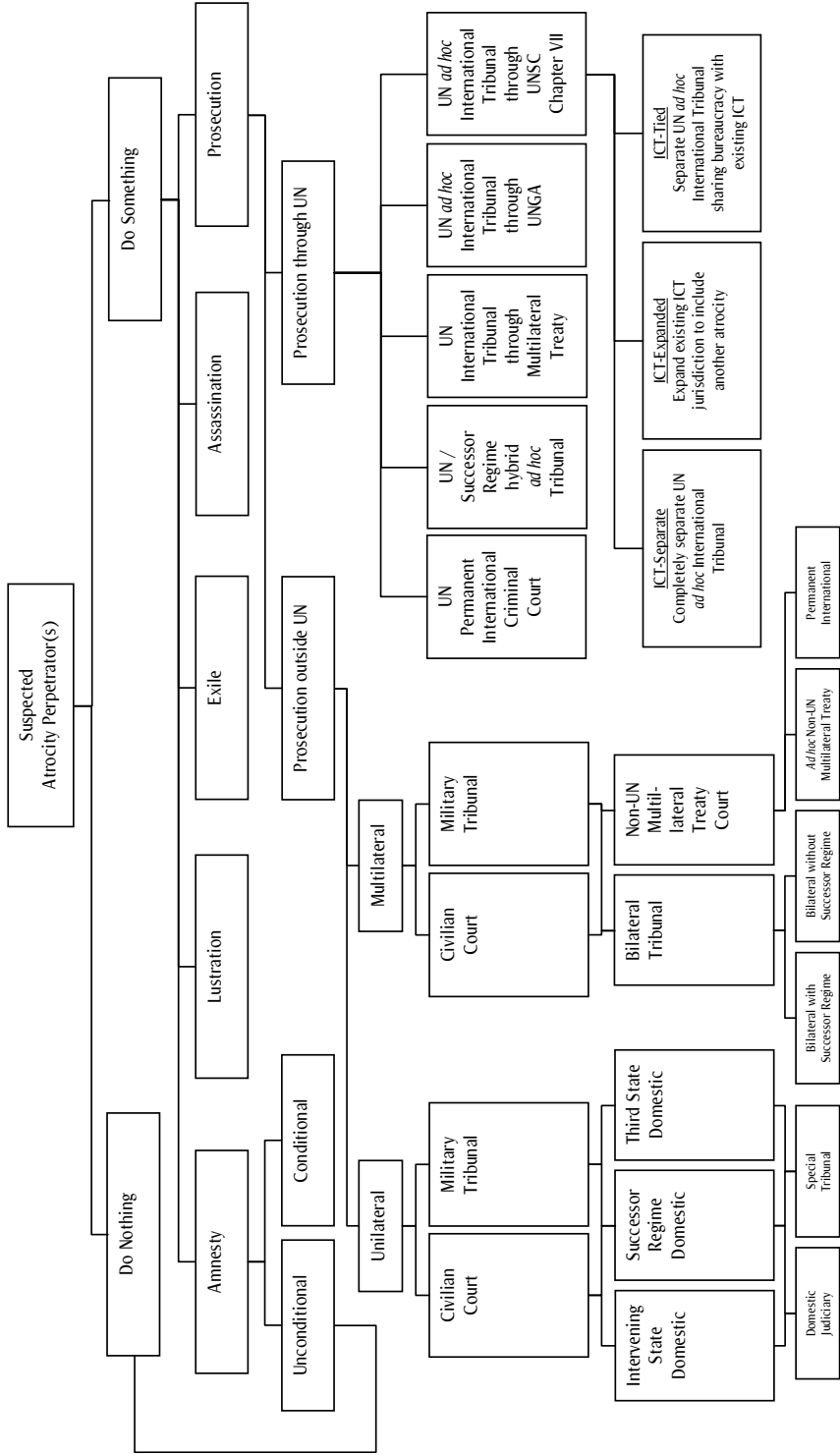
62 atrocity. A second possible reason is that a realisation of the particularly egregious nature and scope of crimes compel a state to become involved as a logical, appropriate, and necessary response. A third possible reason is that a foreign policy success in the site of the atrocity by bringing its perpetrators to justice could compensate for the intervening state's recent failures in the region and thus demonstrate that the intervening state can operate successfully in that region, thus building or re-building its credibility. A fourth possible explanation is that an intervening state wants to become involved in the transitional justice solution out of a concern for the future. Especially if the intervening state views the creation of the transitional justice solution as inevitable and not necessarily against its own interests, the intervening state may become involved in the establishment of the transitional justice option because it wants to ensure the best possible and most favourable design of that institution and because that institution could potentially serve as a precedent and model for subsequent transitional justice institutions that are also in the intervening state's interests to help design. Finally, the intervening state may become involved out of concern for consistency in applying transitional justice solutions: a state's concern that it needed to be seen as acting in the same way for one victimised community as it had for another. Doing nothing might be considered tantamount to racism and regionalism in prioritising the tragedy of, for example, a European country and its white inhabitants over that of an African country and its black inhabitants who had arguably suffered even more. If a state chooses not to 'do something' to bring to justice suspected atrocity perpetrators, especially after the precedent of doing something about other suspected atrocity perpetrators, that state may assume the burden of justifying its inaction.

On the other hand, some pragmatists argue that a deliberate or *de facto* strategy of doing nothing, either because there was little demand for justice and accountability or efforts to pursue these goals were effectively deterred, need not be considered a failed policy. For example, these scholars argue, doing nothing about suspected atrocity perpetrators has been a strategy in Namibia and Afghanistan, which may have contributed to peace-building and post-conflict reconstruction in both cases.<sup>10</sup>

If the decision to do something is made, there are then five general options: (1) amnesty, (2) lustration, (3) exile, (4) assassination, or (5) prosecution.

Amnesty is a mechanism whereby an authority grants a pardon for past offences.<sup>11</sup> There are two amnesty options. One is a conditional amnesty in which amnesty is granted in exchange for truthful testimony, including the option of prosecution if that testimony were judged incomplete or untruthful. This option could have the benefit of holding accountable uncooperative suspected atrocity perpetrators or enhancing cooperation by threatening to do

**Figure 1:  
Transitional Justice Options Tree for Suspected Atrocity Perpetrator(s)**



64 so. Such a system was most famously established in South Africa in 1995 as the Truth and Reconciliation Commission. The alternative is unconditional amnesty, a general amnesty granted to suspected atrocity perpetrators not based on the breadth or accuracy of testimony or any other condition. Doing nothing to address suspected atrocity perpetrators might also be considered an unconditional amnesty, or, as Jack Snyder and Leslie Vinjamuri call it, a 'de facto amnesty.'<sup>12</sup> This option could have the benefit of encouraging combatants to stop fighting, surrender themselves, or testify without fearing prosecution and punishment. El Salvador established such a system with its 1991 Commission on the Truth. Another example of unconditional amnesty occurred after World War I, when the Allied Powers signed the 1923 Treaty of Lausanne with Turkey, which included a 'Declaration of Amnesty' for crimes committed from 1914 to 1922, including the Turkish massacre of Armenians. Recently, there has even been a proposal to create a permanent international truth commission to supplement the ICC.<sup>13</sup>

A second option at this decision point is lustration. Scholar Neil Kritz defines lustration, or *épuration*, as the non-criminal sanction of 'purging from the public sector those who served the repressive regime.'<sup>14</sup> Essentially a collective, extra-judicial punishment through presumed guilt by political association, lustration is often seen as a quick and relatively easy method of dealing with a large number of suspected atrocity perpetrators and their accomplices. Some argue that this process violates laws concerning discrimination based on political association, specifically international law, such as the Fourth Geneva Convention and the International Covenant on Civil and Political Rights, or domestic law, such as the First Amendment to the US Constitution. In the past, lustration has been implemented in instances including post-WWII France and Germany, and, after the fall of the Soviet Union, in Germany, the Czech Republic, Bulgaria, Latvia, and Estonia.<sup>15</sup> More recently, the US implemented lustration to purge members and associates of the Ba'ath Party from the Iraqi government and other domestic institutions.<sup>16</sup>

A third option at this decision node is exile, a mechanism that sometimes is used to facilitate a transition to peace by removing former leaders and that has the potential benefit of satisfying those individuals so that they do not cause further conflict in the state. Political scientists Edward Mansfield and Jack Snyder argue that former autocratic leaders should be exiled and given a 'golden parachute' in order to lessen their incentive to attempt to retain or regain power.<sup>17</sup> Twice the president of Haiti went into exile, first in 1986 (Jean-Claude 'Baby Doc' Duvalier, who fled to France, where he allegedly remains) and again in 2004 (Jean-Bertrand Aristide, who either voluntarily fled to or was kidnapped by the US and taken to the Central African Republic, after which he fled to Jamaica and then to South Africa,

where he allegedly remains).<sup>18</sup> Other famous cases of exile include Idi Amin, the former dictator of Uganda who in 1979 went into exile in Libya, then Iraq, and finally Saudi Arabia, where he died on 16 August 2003; Mengistu Haile Mariam, the former dictator of Ethiopia who in 1991 went into exile in Zimbabwe, where he allegedly remains; and Charles Taylor, the former president of Liberia who in 2003 went into exile in Nigeria, where he allegedly remains.<sup>19</sup>

A fourth alternative is assassination, an act of state-sponsored premeditated, extra-judicial, targeted killing. This option is arguably the most extreme, retributive, and morally dubious of all alternatives because it does not provide for due process, it exacts the death penalty without appeal, and it violates the principle of respect for human life.<sup>20</sup> For transitional justice as well as other purposes, governments have pursued assassinations throughout history because they are seen as relatively quick, inexpensive, and simple solutions for dealing with enemies, including individuals suspected of heinous crimes. Furthermore, murdered individuals cannot use an amnesty hearing, trial, or other public forum as a bully pulpit from which to further their cause, perhaps inciting even more atrocities. For example, the US government has attempted or accomplished assassinations (or has acquiesced to or supported assassinations attempted or accomplished by its allies, such as Israel) in which transitional justice may have been a motivating factor. As revealed by a 1975 US Congressional report, the US government has tried to or succeeded in assassinating several foreign leaders (who may or may not have been involved in atrocities), including: Cambodian Prince Norodom Sihanouk in 1959, Congolese Prime Minister Patrice Lumumba in 1961, Dominican President Rafael Trujillo in 1961, six attempts on Cuban President Fidel Castro from 1961-63, South Vietnamese President Ngo Dinh Diem in 1963, Chilean Commander-in-Chief of the Army General Rene Schneider in 1970, and Chilean President Salvador Allende in 1970-73. Others suggest that the US government was involved in even more assassinations, including that of Ernesto 'Che' Guevara in 1967.<sup>21</sup> Even after President Gerald Ford signed a 1976 Executive Order prohibiting political assassinations,<sup>22</sup> which was refined by President Jimmy Carter in 1978,<sup>23</sup> the US government has allegedly or admittedly continued to plan assassinations, including on Guyana opposition leader Walter Rodney in 1980.<sup>24</sup> Furthermore, even after President Ronald Reagan's 1981 Executive Order,<sup>25</sup> which expanded the prohibition on political assassination to include all types, the US government, without issuing any superseding executive orders on the topic, has attempted several assassinations since 9/11, including on Al-Qaeda leader Osama bin Laden<sup>26</sup> and former Iraqi President Saddam Hussein.<sup>27</sup>

The final option is prosecution, which arguably promotes stability, the rule of law, democracy, and deterrence of the commission of atrocities; en-

66 sures accountability; and appropriately punishes atrocity perpetrators. This option may, however, prove to be expensive and slow, and may also perpetuate a cycle of vengeance. Prosecution, which has the most variations of all transitional justice options, can be conducted either by or outside the UN. Prosecution not under the aegis of the UN can be pursued either unilaterally or multilaterally. In either case, such prosecution can be conducted through the controversial assertion of 'universal jurisdiction,' in which it is claimed that some crimes are so heinous that they fall within the jurisdiction of any state or institution and, as such, their suspected perpetrators can be prosecuted at any time anywhere in the world.<sup>28</sup>

If prosecutions are unilateral, they can be administered either by a civilian court or a military tribunal, under the auspices of an intervening state, the successor regime, or a third-party state through either the domestic judiciary or a special tribunal. To date, the US government has chosen to prosecute suspected terrorists either in US federal courts or military tribunals. In fact, the first case before a US military tribunal since the end of World War II commenced on 24 August 2004 against a Yemeni, Salim Ahmed Hamdan, who was accused of conspiring to commit acts of terrorism.<sup>29</sup> On 10 December 2003, the Iraqi Coalition Provisional Authority (ICPA) established the Iraqi Special Tribunal (IST). This is an Iraqi-led domestic court dedicated to trying any Iraqi national or resident accused of committing genocide, crimes against humanity, or war crimes, or of violating certain stipulated Iraqi laws, including those that proscribe attempts to 'manipulate the judiciary,' 'the wastage of national resources,' 'the squandering of public assets and funds,' 'the abuse of position,' and 'the pursuit of policies that may lead to the threat of war or the use of the armed forces against an Arab country.'<sup>30</sup> The temporal jurisdiction of the IST is from 17 July 1968, when Saddam Hussein seized power through a coup, to 1 May 2003, when the war against Iraq officially ended.<sup>31</sup> The IST, which will try Saddam and other members of his Ba'ath Party regime, is therefore a purely domestic criminal tribunal (albeit with significant international involvement and assistance). Civil proceedings in the US are a final example of unilateral prosecution. The Alien Tort Claims Act (ATCA) of 1789 states that '[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.'<sup>32</sup> The Torture Victim Protection Act (TVPA) of 1991 permits US courts to hold liable '[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation subjects an individual to torture or extra-judicial killing.'<sup>33</sup> Perhaps the most famous and precedent-setting case brought under the ATCA or TVPA against a suspected atrocity perpetrator concerned crimes alleged to have been committed by the Bosnian-Serb leader Radovan Karadžić in the former Yugoslavia.

If non-UN prosecutions are multilateral, they can again be administered either by a civilian court or military tribunal. Permutations of either of these options are a bilateral tribunal with or without the successor regime and a multilateral court that is either *ad hoc* or permanent. Two examples of *ad hoc* multilateral military tribunals are the International Military Tribunal for Germany at Nuremberg (the so-called Nuremberg Tribunal) and the International Military Tribunal for the Far East at Tokyo (the so-called Tokyo Tribunal). The ICC is the first multilateral court established outside the UN through a treaty.

If prosecutions are conducted through the UN, there are at least five options: (1) a permanent international criminal court, (2) a hybrid UN/successor regime *ad hoc* tribunal, (3) an *ad hoc* ICT established through multilateral treaty, (4) an *ad hoc* ICT established through the UN General Assembly, and (5) an *ad hoc* ICT established through the Chapter VII powers of the UN Security Council. Only options two and five have been employed. Three existing examples of the second option are the Serious Crimes Panels of the District Court of Dili in East Timor, the 'Regulation 64' Panels in the Courts of Kosovo, and the Special Court for Sierra Leone (SCSL). The Extraordinary Chambers in the Courts of Cambodia, a fourth example of the second option<sup>34</sup>, has recently been negotiated between the UN and the Cambodian government, and was unanimously ratified by the Cambodian National Assembly on 4 October 2004.<sup>35</sup> The UN International Criminal Tribunal for the former Yugoslavia (ICTY) and the UN International Criminal Tribunal for Rwanda (ICTR) are examples of option five. This fifth option has three variations. It could be: (1) a UN *ad hoc* ICT completely separate from any existing UN *ad hoc* ICT (as in the case of the ICTY when it was established), (2) an existing UN *ad hoc* ICT that could be expanded to include jurisdiction over another atrocity, or (3) a UN *ad hoc* ICT that shares some bureaucracy, such as an appeals chamber and/or chief prosecutor, with an existing UN *ad hoc* ICT (as in the cases of the ICTR<sup>36</sup> and the ICTY after the ICTR was established)

This section will discuss some recent developments in transitional justice and their implications for the future.

*Lustration: A wreck in Iraq?*

As part of the transitional justice and post-conflict reconstruction process in Iraq, the US-led coalition instituted lustration. This policy, announced on 16 May 2003 and popularly known as 'de-Baathification,' banned Ba'athists, most of whom are minority Sunnis, from positions of authority in order to purge from the Iraqi administration any remaining influence by Saddam's supporters. Approximately ten per cent of the Iraqi population, or 2.5 million people, belonged to the Ba'ath Party, and this decree, which targeted the top three levels of the Ba'ath party membership, stripped more than 120,000 people of their jobs and disbanded Iraq's 350,000-member military.<sup>37</sup> However, less than a year later, on 23 April 2004, the US government announced that some of these individuals, including some of Saddam's former generals, may be re-hired, in a process that has come to be termed 'reverse Baathification,' 're-Baathification,' or even 'de-de-Baathification.'

The change in US policy was grounded in the events of May 2003-April 2004 and in a growing acceptance that the initial policy was ill-conceived. De-Baathification was not narrowly tailored enough to target effectively those individuals who were truly loyal to Saddam and who remained a threat to the US-led coalition and the process of building a peaceful, just, democratic, and stable Iraq. Instead, the US-led coalition was grossly indiscriminate in its purging of Iraqis from positions of authority, leaving jobless many well-trained and experienced professionals, such as teachers (including university professors), engineers, doctors, police officers, soldiers, and bureaucrats. Essentially, these individuals were criminalised because of their political affiliation, even if they were not suspected of committing any crimes during Saddam's rule or participating in any hostile acts against the US-led coalition invasion and occupation of Iraq. De-Baathification thus contributed to creating a security vacuum that enabled insurgency and crime in Iraq to continue and, in some cases, worsen.<sup>38</sup> Because they were left unemployed and feeling that they had been unfairly treated and discriminated against, the policy also generated resentment among many Iraqis towards the US-led coalition. In essence, de-Baathification converted many potential allies who could have been crucial to effecting a peaceful, efficient postwar transitional period into fervent enemies of the US-led coalition who were dedicated to violently thwarting all US-led efforts.

Part of the problem was that the US-led coalition did not adequately screen all the Ba'athists it initially purged and simply assumed that by virtue

of their political affiliation they must have been supportive of Saddam and would thus be impediments to the postwar transition. The truth is that many individuals joined the Ba'ath Party not for ideological but for instrumental reasons: they wanted to get or keep a job, to receive the benefits of Ba'ath party membership, or simply to survive. As Dr. Ayad Allawi, the prime minister of the interim Iraqi government, observed, "Their only crime was a desire to feed their families."<sup>39</sup> The US-led coalition eventually changed its policy to help address the security vacuum that had been created, to re-hire and re-integrate professionals it needed for their manpower and skills to institute the postwar transition, to rectify the hardships disproportionately shouldered by Sunnis, and to attempt to appease large segments of the Iraqi population who opposed de-Baathification. Without stating that the principle of lustration was flawed, the US Administrator in Iraq, L. Paul Bremer III, belatedly acknowledged this reality: 'Many Iraqis have complained to me that the de-Baathification policy has been applied unevenly and unjustly,' he said, calling the complaints 'legitimate.' 'The de-Baathification was and is sound. [...] It is the right policy for Iraq, but it has been poorly implemented.'<sup>40</sup>

The lesson learned from the de-Baathification experience seems to be that in the process of lustration, it is critical to purge only those former members of a regime who were true loyalists and remain a threat but not so many that the successor regime cannot be established and function effectively. In practice, of course, the additional review process involved would require more resources and time, but the potential dividends warrant this heightened scrutiny. Re-training—another costly process (both in terms of resources and time)—may also be required to ensure that former members of a regime can be valuable contributors to a post-conflict society.

### *Exile: Nigeria's Nullification?*

The Special Court for Sierra Leone was jointly established by the UN and the Sierra Leone government on 16 January 2002 pursuant to UN Security Council resolution 1315 of 14 August 2000. On 4 June 2003, this court unsealed its 7 March 2003 indictment of former Liberian president Charles Ghankay Taylor, charging him with 17 counts of crimes against humanity, violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, and other serious violations of international humanitarian law.<sup>41</sup> This indictment was supported by a 31 May 2004 decision by the appeals chamber of the Special Court that ruled that 'the official position of... [Taylor] as an incumbent Head of State at the time when these criminal proceedings were initiated against him is not a bar to his prosecution by this court.'<sup>42</sup>

Instead of being arrested and handed over to the SCSL, on 11 August 2003, Taylor submitted to international and domestic pressure to resign, after which he fled to Calaba, in southeastern Nigeria, where he allegedly remains. The Nigerian government granted him amnesty in exchange for his voluntary resignation and exile.

There have been calls, particularly from international and domestic West African human rights groups, for Nigeria to arrest Taylor and extradite him to the SCSL. In November 2003, the US government also began offering a US\$2 million bounty for Taylor's capture. In response, Nigeria has reportedly increased security around Taylor.<sup>43</sup> However, Nigerian president Olusegun Obasanjo has also stated that if Liberia (but not the SCSL) requests it, he may return Taylor to his home state.<sup>44</sup>

Taylor's exile in and amnesty granted by Nigeria raise important questions regarding transitional justice: Is exile a transitional justice option that should have been used in this case, or ever? Should Nigeria arrest and extradite Taylor to Liberia or the SCSL?

Some argue that Taylor's exile to Nigeria was a reasonable option for West Africa, at least in the short-term. If Nigeria had not granted Taylor asylum, Taylor might have remained in power, causing further bloodshed and chaos in Liberia and Sierra Leone and continuing to pilfer from Liberia's treasury. However, the long-term effects of Taylor's exile may be disastrous and far outweigh the short-term benefits. First, if Taylor is not arrested and prosecuted, the SCSL and international law are likely to be viewed as ineffective. Second, the reconciliation process for the victims of Taylor's alleged atrocities is likely to suffer without his prosecution and likely conviction and punishment. If Taylor were not held accountable, victims might continue to feel unsafe, be psychologically unable to lead productive lives, and may also feel that the truth of what occurred under Taylor's leadership would not be established, thus perhaps making it more difficult for them to establish or re-establish relationships with those with whom they have been in conflict in the past. Third, Taylor might continue to foment conflict in West Africa through his loyalists in Liberia and Sierra Leone, causing further violence and hampering post-conflict reconstruction. Fourth, Nigeria will continue to demonstrate its non-compliance with international law by ignoring Taylor's indictment and arrest warrant, raising doubts about its reliability in the international system. Finally and perhaps most crucially, other potential war criminals may feel emboldened by Taylor's impunity, and thus feel undeterred from continuing or commencing their perpetration of atrocities.

On the other hand, if Nigeria were to arrest and extradite Taylor to Liberia or the SCSL, this would seriously undermine the legitimacy and utility of exile as a transitional justice option. Nigeria's action would not necessar-

ily suggest that other states would be less likely to offer suspected atrocity perpetrators asylum on their territory, but those individuals might be less likely to accept it, as the credibility of this arrangement would have been significantly weakened by Nigeria's broken promise effectively to extend amnesty to and to provide a secure exile for Taylor. In that case, other suspected atrocity perpetrators may be less willing to resign and leave a state voluntarily. The international community would then have to pursue alternative methods to facilitate a transfer of power, such as by forcibly violating a state's territorial integrity to apprehend an individual, such as a sitting Head of State, who has been indicted and for whom an arrest warrant has been issued. This process would likely cause more conflict, at least in the short-term, as a suspected atrocity perpetrator fought to retain his power and freedom, but, if successful, in the long-term, it would combat impunity, support reconciliation efforts, bolster efforts to deter atrocity perpetrators, stem regional conflict, and uphold international law.

### *The ICC: Do All Roads Lead to Rome?*

Contrary to what some may think, the advent of the ICC does not signify that no other transitional justice options will be pursued. In fact, there are at least five reasons to believe that alternative transitional justice options will continue to be utilised.

First, the ICC will be limited by its own resources in the number of cases it can try. If more atrocities are committed than the ICC can investigate and prosecute, then those cases will have to be dealt with through alternative transitional justice options.

Second, the ICC's own jurisdiction limits the number of cases it can try. The subject-matter jurisdiction of the ICC is limited to genocide, war crimes, crimes against humanity, and the still undefined crime of aggression.<sup>45</sup> The temporal jurisdiction is limited to crimes committed after the ICC came into force on 1 July 2002.<sup>46</sup> The personal and territorial jurisdiction is limited to crimes committed on the territory or by a national of a State Party to the Rome Statute.<sup>47</sup> Finally, the ICC may exercise jurisdiction through any of three ways: (1) a situation is referred to the ICC Chief Prosecutor by a State Party, (2) a situation is referred to the ICC Chief Prosecutor by the UN Security Council, or (3) the Chief Prosecutor himself initiates an investigation through his controversial *proprio motu* powers.<sup>48</sup> For crimes that fall outside the jurisdiction of the ICC, alternative transitional justice options may be used. Two examples are the IST and the Extraordinary Chambers in the Courts of Cambodia. As neither the US nor Iraq is a State Party to the Rome Statute, these two states used their prerogative on 10 December 2003 to cooperate in the establishment of a separate transitional justice option in the form of the IST, which is described above. As mentioned above, the UN and

72 the Cambodian government have recently concluded a treaty to establish the Extraordinary Chambers in the Courts of Cambodia, a hybrid war crimes tribunal to prosecute senior leaders of Democratic Kampuchea and those most responsible for the atrocities committed in Cambodia in the mid- to late-1970s, which fall outside the temporal jurisdiction of the ICC.

Third, the number of cases the ICC tries will be limited by its own discretion. It is the prerogative of a combination of the ICC's chief prosecutor and judges to decide which cases within its jurisdiction it will try.<sup>49</sup> If the ICC decides not try a case within its jurisdiction, other transitional justice options may be pursued.

Fourth, the number of perpetrators the ICC tries within the cases it does choose will also be limited by its own discretion. As the first Chief Prosecutor of the ICC, Luis Moreno Ocampo, has stated, the ICC will only try a dozen or so of the 'big fish' of an atrocity, such as in the Democratic Republic of Congo, a policy consistent with other war crimes tribunals.<sup>50</sup> This will leave all other suspected perpetrators of those atrocities to be dealt with through alternative means, if at all. In a situation like the Rwandan genocide, where more than 120,000 suspects<sup>51</sup> were put in pre-trial detention after the genocide<sup>52</sup> and will be processed through either local (*gacaca*<sup>53</sup>) or national judicial systems, if something is to be done about those individuals, the transitional justice solution implemented will have to be outside the ICC.

Finally, some states may decide to pursue alternative transitional justice options for crimes that fall within the ICC's jurisdiction. This need not be viewed as an attempt to thwart the ICC, although, of course, it could be, especially by state governments that oppose the ICC. In fact, according to ICC Chief Prosecutor Ocampo, 'the number of cases that reach the Court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.'<sup>54</sup> The goal of the ICC, then, appears to be not to have any cases—and, instead, to help prevent atrocities or, where it cannot, to encourage and assist states themselves to be genuinely willing and able to carry out investigations and prosecutions of suspected atrocity perpetrators. This relationship between the ICC and states in which the ICC supplements, but does not claim primacy over, domestic proceedings is built into the institutional framework of the ICC itself in Article 17 of the Rome Statute, known as the 'complementarity' provision.<sup>55</sup>

There currently exist several war crimes tribunals, including the ICTY, ICTR, SCSL, ICC, IST, and Extraordinary Chambers in the Courts of Cambodia, and, as mentioned before, it is possible that despite the advent of the ICC, more will be established. The simultaneous operation of multiple, unconnected international, hybrid, and domestic war crimes tribunals may lead to the development of conflicting international criminal law. Without a common appeals chamber, as between the ICTR and ICTY and as found in most domestic judiciaries, there is nothing to prevent separate war crimes tribunals from reaching decisions that directly contradict one another. For example, in the *Akayesu* case, the ICTR defined rape and sexual violence in international law and held that they could constitute genocide.<sup>56</sup> This ruling was upheld by the joint ICTY/ICTR appeals chamber. But what if another war crimes tribunal, such as the SCSL, reaches a different view—that rape and sexual violence could not constitute genocide? Which precedent takes precedence in other cases? Without a common appeals chamber among war crimes tribunals, international criminal law may develop in confusing and contradictory ways.

The advent of the ICC, with a single appeals chamber, will ensure that its own cases do not create conflicting international jurisprudence. However, the existence of several unlinked war crimes tribunals and the possibility that others will be created that will not share an appeals chamber with each other or the ICC suggest that the ICC's appeals chamber, alone, is not sufficient to ensure the development of consistent international jurisprudence. There are at least three theoretical institutional solutions to establishing consistent international criminal law, although the first two would not prevent the development of inconsistent international criminal law among existing war crimes tribunals. First, the international community could refrain from creating any new war crimes tribunals and thus defer to the ICC, with its sole appeals chamber, to investigate and prosecute all atrocities. This solution, however, is highly unlikely for a host of reasons, as discussed above. Second, if it chooses to create new war crimes tribunals in the future, the international community could tie all of them together through a shared appeals chamber, which, in addition to helping ensure the consistent development of international criminal law would also promote burden-sharing by minimising duplicate staff and resources. Third, the international community could expand the jurisdiction of the International Court of Justice or establish a new world court with the authority to pass judgments binding on all other courts. These latter two solutions, though, presume that the international community would not have equally or more compelling reasons beyond unified legal development and increased bureaucratic efficiency to

74 establish and maintain separate and autonomous tribunals. For example, some states may (1) oppose a UN role, (2) desire use of the death penalty (which is not permitted in UN-established ICTs), (3) wish to establish hybrid tribunals to involve the successor government of an atrocity, (4) want to try to help kick-start a post-conflict domestic judiciary, (5) be motivated to support differing transitional justice solutions depending on whether and how the international community intervened in a particular atrocity, (6) desire multiple tribunals to experiment with differing transitional justice solutions, or (7) want to impose compulsory/primary jurisdiction over the parties to the specialised tribunal where no such jurisdiction existed. Consequently, it seems unlikely that there is any realistic institutional solution to prevent the development of inconsistent international criminal law. There may, however, be a solution outside the formal structure of tribunals. The development of consistent international criminal law may be ensured if the tribunal judges—particularly in the appellate chambers—voluntarily decide not to render judgments that conflict with the judgments of other tribunals. As there is often a collegial atmosphere and exchange among international criminal law jurists that has created a sort of informal network or transnational community,<sup>57</sup> such a scenario of judicial ‘cross-fertilisation’ is possible.

### *Tribunals: Global Greater, Local Lesser?*

Many advocates of ICTs, including the ICC, argue that ICTs are superior to domestic courts. Their argument is not only that ICTs can and should function where and when domestic courts are unwilling or unable to do so, but also that ICTs are more legitimate, fair, and do not impose punishments which many states consider invalid, such as the death penalty.

This superiority argument has received new attention in the wake of the US-led coalition’s invasion of Iraq. The desire to hold Saddam accountable for atrocities he allegedly committed against Iran, Kuwait, and his own Iraqi people has provoked much debate about the proper forum for trying him and other suspected atrocity perpetrators who are members of the Ba’ath party. Many advocates of trying Saddam in an ICT have emphasised all the reasons noted above for why such a forum would be better than a domestic one. These arguments are especially interesting and timely as the ICC is considering its first cases, and may reveal the true attitudes and plans of those who support the ICC.

To be sure, the ICC could not have jurisdiction over Saddam’s crimes since, *inter alia*, it cannot try crimes committed before it came into force on 1 July 2002, which is after Saddam allegedly perpetrated most of his crimes. However, even before it has begun to function, the IST has been severely criticised, and by many of the same individuals, organisations, and govern-

ments that support the ICC. Their objections can be divided into two categories. First, many challenge the ability of the Iraqi judicial system (through the IST) to investigate and prosecute Saddam. They argue that, as compared to an ICT, the IST (1) will have lower standards of due process, (2) will be slow, (3) will not have UN Security Council Chapter VII powers to compel the necessary cooperation of other states, and, (4) in any case, the Iraqi judicial system is incapable of trying Saddam as its jurists lack the necessary training and experience. Second, many challenge the appropriateness of the IST, claiming that (1) the IST will be considered illegitimate, in part because it may be seen as victor's justice; (2) only an international forum is appropriate to try Saddam, as his alleged crimes offend international sensibilities and claimed many victims beyond Iraqis; and (3) that it will wrongly be able to impose the death penalty.

It is important to square these arguments with the so-called 'complementarity' provision of the ICC Statute, which provides that the ICC will have jurisdiction *only if* 'the State is unwilling or unable genuinely to carry out the investigation or prosecution.'<sup>58</sup> The first question, then, is whether Iraq is willing and able genuinely to carry out the investigation and prosecution of Saddam and others. While it is clear and undisputed that the Iraqi interim government, which is led by interim prime minister Dr. Ayad Al-lawi, interim president Ghazi al-Yawer, and interim vice presidents Ibrahim al-Jafari and Rowsch Shaways, and which was transferred sovereignty by the ICPA on 28 June 2004, is willing to investigate and prosecute Saddam, some argue that it is unable, for the reasons listed above. The ICC Statute's test for ability depends on whether 'due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.'<sup>59</sup> Although a measure of ability is inherently somewhat subjective, a strong argument can be made that the Iraqi interim government meets or at least will soon meet this test.<sup>60</sup> Furthermore, there are valid reasons to presume that Iraqis are, in fact, capable in an even broader sense, especially given (1) the number of qualified jurists who have or will return from exile to their home state of Iraq; (2) that Iraqi jurists are receiving training from Western governments, including the US; (3) that the IST Statute requires international judges, monitors, and advisors to staff the IST; (4) that UN Security Council Chapter VII powers are probably unnecessary, as the Iraqi interim government already controls many of the suspects and much of the evidence; and (5) that there is no reason to believe that the IST would be as slow or slower than ICTs, as it took two years to make the ICTY operational and after a decade of functioning and almost \$1 billion spent, the ICTR has tried only about two dozen *génocidaires*, with the first conviction delivered only four years after it was established.

76        Therefore, even if the case against Saddam could meet the jurisdictional requirements of the ICC, it is unlikely that it could be tried in that forum, as Article 17 would probably require that the ICC defer to the domestic judicial authority—in this case, the IST. And yet there are still arguments (for example legitimacy, fairness, anti-death penalty) that suggest that even if this complementarity test compelled the ICC to defer jurisdiction, advocates of the ICC would still prefer that an ICT (whether the ICC or another one) assume the authority to try the case.

By making arguments against the IST that are unrelated to the willingness and ability of the Iraqis to investigate and prosecute Saddam and others, some ICC supporters reveal that they do not necessarily subscribe to the complementarity provision of the ICC Statute. By suggesting that only an international court would be an appropriate forum for trying Saddam and others, they contravene this fundamental principle of the ICC. Furthermore, they feed the fears of critics of the ICC, especially the US government, who believe that the ICC will not function even as it is designed: that it would try cases even when domestic courts that have jurisdiction are able and willing. Instead, these arguments suggest that the ICC and/or other ICTs are and should be supranational courts that have primary jurisdiction over domestic judiciaries, which is not a position to which signatories to the Rome Statute agreed and is a position that critics of the ICC and champions of state sovereignty vehemently oppose.

On this basis, either supporters of the ICC need to reform the Rome Statute so that it will have primary jurisdiction (and thus risk losing signatories and deepening hostility from ICC opponents) or they need to accept that as the ICC is currently designed, it must and will defer to domestic judiciaries that will employ staff, use procedures, and impose punishments ICC supporters may not desire but do not signify unwillingness or inability to investigate and prosecute.

#### *IV. Conclusion*

Recent developments in Iraq and West Africa give us serious reason to doubt the wisdom and effectiveness of two transitional justice options: lustration and exile. In fact, in addition to being politically, legally, and morally problematic, these mechanisms may backfire, ironically resulting in the commission of even more atrocities.

Given that there are at least five reasons to believe that alternative transitional justice options to the ICC can and will be pursued, war crimes tribunals and other transitional justice solutions may proliferate. This phenomenon may allow for the possibility of pursuing transitional justice options that are more appropriate to address the particular nature or context of certain

atrocities. Without definite collective action, such as through ICTs, which are sometimes problematically viewed by their advocates as necessarily superior to domestic transitional justice solutions in terms of their perceived fairness, legitimacy, and appropriateness, the likelihood that atrocities will be prevented or addressed in a predictable, coherent, and effective manner is dubious and may lead to the development of inconsistent international criminal jurisprudence, although the flexibility to employ alternative transitional justice options is not necessarily undesirable.

These concerns raise the further issue of whether ‘transitional justice’ is, perhaps, a misnomer.<sup>61</sup> As demonstrated in this article, transitional justice is a broad term that attempts to unify under a single topic a vast array of activities (including inaction) that pursue different objectives and employ varying procedures. As some of the goals and processes of transitional justice are arguably unrelated to either post-conflict transitions or notions of justice (but rather, for example, to domestic, regional, and global order and stability), it may be that the current international relations sub-field of ‘transitional justice’ should be re-conceptualized under a different rubric, which would include another sub-field of international relations, security studies.

The hope is that genocide, which has been called the ‘crime of crimes,’<sup>62</sup> and other atrocities will cease to occur in the future. Sadly, we have little reason to believe that this will be the case. There remain high levels of ethnic strife, discrimination, and hatred in the world, and improved technologies, which are no longer exclusively under the control of a limited number of state governments, enable even individuals acting alone to kill on a massive scale. Furthermore, if the international community continues to be a bystander, its choice not to try to prevent or intervene in such atrocities will ensure their continuation.

As long as such crimes persist, then, the international community will be forced to make choices regarding whether and how to deal with the perpetrators. This article has been an attempt to outline transitional justice options and to analyse some recent developments in the field and their implications for the future. Without an increased willingness and ability to consider and respond to these and other developments, our demands for—and promises of—‘Never Again!’ will have failed, yet again.

## Notes

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78 Prosser, Peter Schuck, Katherine Southwick, Wilburn Williams, and Lindsey Worth. All statements and any errors are, of course, the responsibility of the author.

<sup>2</sup> This paper will not attempt to describe or analyze the 1994 Rwandan genocide. There are many thorough and insightful accounts of it.

<sup>3</sup> Gary Jonathan Bass, *Stay the Hand of Vengeance: the Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2000), 7.

<sup>4</sup> David J. Scheffer, 'Options for Prosecuting International Terrorists,' United States Institute of Peace, Special Report 78, Nov. 14, 2001, <http://www.usip.org/pubs/specialreports/sr78.html> (accessed Jan. 31, 2005).

<sup>5</sup> Scheffer, 1.

<sup>6</sup> Thom Shanker and David Johnston, 'US Intelligence Categorizes Iraqis to Punish, or to Deal With,' *New York Times*, sec. A1, Feb. 26, 2003, final edition.

<sup>7</sup> For example, see Dexter Filkins, 'The Struggle for Iraq: Prosecution; First Trial Set to Begin May 19 in Abuse in Iraq,' *New York Times*, sec. A1, May 10, 2004, final edition; and Dexter Filkins, 'G.I. Pleads Guilty in Court-Martial for Iraqis' Abuse,' *New York Times*, sec. A1, May 20, 2004, final edition.

<sup>8</sup> Eric Schmitt and David Rohde, 'About 2 Dozen G.I.'s to Face Trial or Other Punishment in Deaths of 2 Afghan Prisoners,' *New York Times*, sec. A10, Sept. 2, 2004, final edition.

<sup>9</sup> Although, of course, there may be situations in which international and/or domestic law is considered to be unjust, even if it is technically legal.

<sup>10</sup> Jack Snyder and Leslie Vinjamuri, 'Trials and Errors: Principle and Pragmatism in Strategies of International Justice,' *International Security* 28, no. 3 (2003): 5-44.

<sup>11</sup> For more information on amnesty, see Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (New York: Routledge, 2000).

<sup>12</sup> Snyder and Vinjamuri, 18.

<sup>13</sup> Michael P. Scharf, 'The Case for a Permanent International Truth Commission,' *Duke Journal of Comparative and International Law* 7, no. 2 (1997): 375-410.

<sup>14</sup> Neil J. Kritz, ed., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes, Volume I: General Considerations* (Washington D.C.: United States Institute of Peace Press, 1995), xxiv.

<sup>15</sup> See Constantine Fitzgibbon, *Denazification* (London: Norton, 1969).

<sup>16</sup> Amy Waldman, 'In Search of Baath Loyalists, US Finds Itself in Gray Area,' *New York Times*, sec. A1, July 22, 2003, final edition.

<sup>17</sup> Edward Mansfield and Jack Snyder, 'Democratization and the Danger of War,' *International Security* 20, no. 1 (1995): 5-38, cited at 36.

- <sup>18</sup> Tim Weiner and Lydia Polgreen, 'Under Pressure, Aristide Leaves Haiti,' *New York Times*, sec. A1, Feb. 29, 2004, final edition.
- <sup>19</sup> Somini Sengupta, 'Sierra Leone War Crimes Trial Opens Without Chief Suspect,' *New York Times*, sec. A4, June 4, 2004, final edition.
- <sup>20</sup> See the extensive literature on assassinations.
- <sup>21</sup> Jonathan Fanton and Kenneth Roth, 'US Policy on Assassinations, CIA; Human Rights Watch Letter to United States President George W. Bush,' Human Rights Watch, Sept. 20, 2001, <http://www.hrw.org/press/2001/09/bushlet0920.htm> (accessed Jan. 31, 2005).
- <sup>22</sup> The White House, 'President Gerald R. Ford's Executive Order 11905: United States Foreign Intelligence Activities,' Feb. 18, 1976, in *Weekly Compilation of Presidential Documents* 12, no. 8, Feb. 23, 1976. Available at: <http://www.ford.utexas.edu/library/speeches/760110e.htm> (accessed Jan. 31, 2005).
- <sup>23</sup> The White House, 'Executive Order 12036; United States Foreign Intelligence Activities,' Jan. 24, 1978. Available at: <http://www.fas.org/irp/offdocs/eo/eo-12036.htm> (accessed Jan. 31, 2005).
- <sup>24</sup> United States Senate Select Committee on Intelligence (1984).
- <sup>25</sup> The White House, 'Executive Order 12333; United States Foreign Intelligence Activities,' Dec. 4, 1981. Available at: <http://www.reagan.utexas.edu/resource/speeches/1981/120481d.htm> (accessed Jan. 31, 2005).
- <sup>26</sup> *Chicago Tribune*, 'Bush Gives CIA License to Kill Terrorist Leaders,' sec. A19, Dec. 15, 2002.
- <sup>27</sup> Bob Woodward, 'President Broadens Anti-Hussein Order; CIA Gets More Tools to Oust Iraqi Leader,' *Washington Post*, sec. A1, June 16, 2002, final edition.
- <sup>28</sup> For more information on universal jurisdiction, see Christopher C. Joyner, 'Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability,' *Law and Contemporary Problems* 59, no. 4 (1996): 153-172.
- <sup>29</sup> Neil A. Lewis, 'First War-Crimes Case Opens at Guantánamo Base,' *New York Times*, sec. A14, Aug. 25, 2004, final edition.
- <sup>30</sup> The Statute of the Iraqi Special Tribunal, Section 3: Jurisdiction and Crimes. Available at: <http://www.cpa-iraq.org/human—rights/Statute.htm#> (accessed Jan. 31, 2005).
- <sup>31</sup> *Ibid*, Article 1, Paragraph a.
- <sup>32</sup> United States Code, Title 28, Part IV, Chapter 85, Section 1350.
- <sup>33</sup> United States House Resolution 2092 (1992), 102nd Congress of the United States.
- <sup>34</sup> For more information on hybrid tribunals, see Laura A. Dickinson, 'The Promise of Hybrid Courts,' *American Journal of International Law* 97, no. 2 (2003): 295-310.

- 80 <sup>35</sup> *Economist.com*, 'Bringing the Khmer Rouges to Justice,' Oct. 7, 2004, <http://www.economist.com/World/asia/displayStory.cfm?story—id=3272569> (accessed Jan. 31, 2005).
- <sup>36</sup> On August 28, 2003, the UN Security Council unanimously voted to divide the ICTY/ICTR chief prosecutor into two separate positions. See Aryeh Neier, 'Rwanda's War Crimes Tribunal: Effort to Oust Prosecutor is Misguided,' *International Herald Tribune*, Aug. 8, 2003, final edition.
- <sup>37</sup> Eric Schmitt, 'US Generals Fault Ban on Hussein's Party,' *New York Times*, sec. A11, April 20, 2004, final edition.
- <sup>38</sup> For example, see Jon Lee Anderson, 'Out on the Street,' *New Yorker*, Nov. 15, 2004, 72-9.
- <sup>39</sup> Ayad Allawi, 'In Search of Justice, Not Vengeance,' *Washington Post*, sec. B7, Dec. 28, 2003, final edition.
- <sup>40</sup> Jim Krane, 'Bremer Softens Baath Party Ban in Iraq,' *Guardian*, April 23, 2004, final edition.
- <sup>41</sup> The Special Court for Sierra Leone, 'Prosecutor against Charles Ghankay Taylor,' Indictment, Case No. SCSL-03-I, March 3, 2003. Available at: <http://www.sc-sl.org/taylorindictment.html> (accessed Jan. 31, 2005).
- <sup>42</sup> The Special Court for Sierra Leone, 'Prosecutor against Charles Chankay Taylor,' Appeals Chamber, Decision on Immunity from Jurisdiction, Case No. SCSL-2003-01-I, May 31, 2004, Paragraph 53. Available at: <http://www.sc-sl.org/SCSL-03-01-I-059.pdf> (accessed Jan. 31, 2005).
- <sup>43</sup> *New York Times*, 'In \$87.5 Billion Bill, \$2 Million Bounty for Exiled Liberian,' sec. A11, Nov. 10, 2003, final edition.
- <sup>44</sup> Somini Sengupta, 'Nigerian Says He May Return Liberia's Ex-Leader for Trial if Liberia Asks,' *New York Times*, sec. A10, Nov. 26, 2003, final edition.
- <sup>45</sup> Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, Articles 5-8, entered into force July 1, 2002. Available at: <http://www.un.org/law/icc/statute/romefra.htm>.
- <sup>46</sup> *Ibid*, Article 11.
- <sup>47</sup> *Ibid*, Article 12.
- <sup>48</sup> *Ibid*, Article 13.
- <sup>49</sup> *Ibid*, Part 5: Investigation and Prosecution.
- <sup>50</sup> Luis Moreno-Ocampo, 'Remembering Rwanda: Justice for War Criminals and the Role of the International Criminal Court,' Paper at University of Oxford, UK, June 27, 2004.
- <sup>51</sup> It is estimated by some Rwandan government officials that a total number of people several times that figure participated in the genocide.

<sup>52</sup> *CNN.com*, 'Rwandan Prisoners Endure Long, Cramped Wait in Jail for Trial,' Sept. 15, 1999, <http://www.cnn.com/WORLD/africa/9909/15/rwanda.prison/> (accessed Jan. 31, 2005).

<sup>53</sup> *Gacaca*, which literally means 'in the grass' in Kinyarwanda, is the name of the traditional Rwandan communal justice and reconciliation process that is being used to deal with the majority of suspected participants in the 1994 Rwandan genocide.

<sup>54</sup> Luis Moreno-Ocampo, 'Statement by Mr. Luis Moreno-Ocampo, Ceremony for the Solemn Undertaking of the Chief Prosecutor,' International Criminal Court, The Hague, The Netherlands, June 16, 2003.

<sup>55</sup> Rome Statute, Article 17. This 'complementarity' provision is one of the major differences between the ICC and the *ad hoc* international criminal tribunals for Rwanda and the former Yugoslavia, both of which do claim primacy over national legal systems.

<sup>56</sup> International Criminal Tribunal for Rwanda, 'Prosecutor v. Jean-Paul Akayesu,' Trial Chamber, Judgment, Case No. ICTR-96-4-T, Sept. 2, 1998, Paragraph 731. Available at: <http://www.ictr.org/default.htm> (accessed Jan. 31, 2005).

<sup>57</sup> Anne-Marie Slaughter has conducted pioneering work on transnational communities, especially among international jurists. See Laurence R. Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication,' *Yale Law Journal* 107, no. 2 (1997): 273-391.

<sup>58</sup> Rome Statute, Article 17: Issue of Admissibility, Paragraph 1(a).

<sup>59</sup> Rome Statute, Article 17: Issue of Admissibility, Paragraph 3.

<sup>60</sup> Michael Newton, 'Iraq's New Court Finds Itself on Trial,' *New York Times*, sec. A23, Nov. 24, 2001, final edition.

<sup>61</sup> The author wishes to thank David Fidler for this point.

<sup>62</sup> International Criminal Tribunal for Rwanda, 'Prosecutor v. Jean Kamukanda,' Trial Chamber, Judgment and Sentence, Case No. ICTR-97-23-S, Sept. 4, 1998, Paragraph 731. Available at: <http://www.ictr.org/default.htm> (accessed Jan. 31, 2005).