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Global Transitional Justice

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This working paper series is based on an international symposium, "Human Rights Tribunals in Latin America: The Fujimori Trial in Comparative Perspective." Select panelists have prepared incisive analyses of new trends in transitional justice in the region. The conference was organized by the Center for Global Studies at George Mason University, the Washington Office on Latin America, and the Instituto de Defensa Legal on October 2, 2008 in Washington, D.C., and funded with the generous support of the Open Society Institute.

The Center for Global Studies at George Mason University was founded to promote multidisciplinary research on globalization. The Center comprises more than 100 associated faculty members whose collective expertise spans the full range of disciplines. The Center sponsors CGS Working Groups, publishes the Global Studies Review, and conducts research on a broad range of themes.

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FOREWORD

Over the course of the past year, former Peruvian president Alberto Fujimori has sat, three days a week, in front of a panel of three Supreme Court justices tasked with determining his responsibility in a series of grave human rights violations committed during his ten-year administration (1990-2000).

Few Peruvians imagined such a trial was ever possible. Fujimori fled Peru in November 2000, amidst explosive corruption scandals. Upon his arrival in Japan, the birthplace of his parents, he was provided protection by top political authorities and was quickly granted Japanese citizenship, effectively shielding him from the risk of extradition to Peru.

But events took a new turn in November 2005, when Fujimori left his safe haven in Japan for Chile. In what international law scholar Naomi Roht-Arriaza has referred to as "the age of human rights," this was a critical miscalculation. Instead of launching a bid for the presidency in Peru's 2006 elections, Fujimori instead found himself under arrest in Chile. The Peruvian state prepared an extradition request, and in September 2007, after a long and complex process, the Chilean Supreme Court approved Fujimori's extradition. Within days the former president was returned to Peru, and on December 10, 2007, his trial for human rights violations began.

Domestic prosecutions of heads of state for human rights crimes are extremely rare in any country. And Peru may seem an especially unlikely place for such a high-profile trial to unfold. Fujimori remains quite popular among certain segments of the Peruvian public. The judiciary historically has been held in low esteem by Peruvian citizens. Key figures in the present-day political establishment, including the current president, vice-president, and key opposition figures, have their own reasons for being wary of possible prosecutions for human rights violations in the future. Yet, in a striking display of impartiality and professionalism, the tribunal overseeing the prosecution of the former president has been a model of fairness, fully protecting the due process rights of the accused. Regardless of the outcome, the trial of Fujimori demonstrates that with sufficient political will, domestic tribunals can prosecute high-level public officials who commit or order the commission of grave human rights violations.

Impunity has long characterized Latin American societies emerging from years of authoritarian rule and/or internal conflict, but today numerous Latin American countries are making great strides in bringing to justice those who committed or ordered the commission of grave violations of human rights. To highlight and analyze this welcome development, the Center for Global Studies at George Mason University, the Washington Office on Latin America (WOLA) and the Instituto de Defensa Legal (IDL) joined forces to draw attention to the Fujimori trial, as well as the other human rights tribunals underway in parts of Latin America today.

Mason, WOLA and IDL organized a conference series to examine human rights trials in Latin America. The first conference, entitled Los culpables por violación de derechos

humanos, took place in Lima, Peru, June 25-26, 2008. It convened key experts in international human rights law, as well as judges, lawyers, scholars and human rights activists from across the region, to analyze the Fujimori trial in comparative perspective. (A rapporteur's report for this conference is available online at: <www.justiciaviva.org.pe/nuevos/2008/agosto/07/seminario_culpables.pdf >.)

A second conference took place in Washington, D.C., on October 2, 2008, at the Carnegie Endowment for International Peace. Several participants from the Lima conference were joined by human rights activists, lawyers, judges and scholars from across the region to examine the Fujimori trial as well as other human rights tribunals underway in Argentina, Chile, Uruguay, and Guatemala. The result is a rich multidisciplinary look at a new moment in Latin America's history, in which impunity and forgetting is giving way to processes of accounting for crimes of the past through domestic tribunals, one piece of a broader process of coping with the difficult legacies of the authoritarian and violent past. (A rapporteur's report for this conference is available online at: <http://cgs.gmu.edu/publications/hjd/OSI2009RappReport.pdf>.)

***T**his working paper series is based on the Washington conference on human rights tribunals in Latin America. Select panelists have prepared incisive analyses of this new trend in transitional justice in the region. Several of the papers analyze the Fujimori trial, offering legal, activist, and scholarly perspectives on the trial of Peru's former head of state. Others examine trends in other countries, including Argentina, Chile, and Guatemala, that have also sought to promote prosecutions for human rights violations. Collectively the papers reveal the strides Latin America has made in its efforts to combat impunity and promote the rule of law and democratic governance. Though obstacles remain, as several conference participants indicated, these efforts represent a key departure from the past, and merit careful scrutiny by policymakers, scholars, and the human rights community.*

We would like to especially thank the Latin American Program at Open Society Institute, in particular Victoria Wigodsky, which made this conference series as well as the publication of this paper series possible. We also thank Arnaud Kurze at CGS/Mason for his capable assistance during all stages of this project and in particular of the preparation of this working paper series.

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Center for Global Studies, George Mason University
March 2009

Global Transitional Justice*

By
Ruti G. Teitel

GENEALOGIES

I coined the term "transitional justice" [1] to account for the self-conscious construction of a distinctive conception of justice associated with periods of radical political change on the heels of past oppressive rule. Such political change was strongly associated with state-building post-conflict, although as Hannah Arendt and others have noted even at Nuremberg a sense of reckoning with humanity itself was present. But that more global aspiration of accountability became submerged with the focus on regime change and constitutional (re-) construction. Today, global accountability is present front and center, and transitional justice manifests itself frequently if not predominately in situations other than post-conflict regime transformation and constitutional (re)-construction. We are in what might be called the global phase of transitional justice. This is a complex phenomenon, with a number of different facets. First, there is the normalization of transitional justice, i.e., the move away from thinking of this set of response as forms of justice for exceptional times. There is a turn to law in the regulation of violence not merely ex post, but also ex ante where societies are facing a threat of pervasive use of violence and a rise in the number of ethnic and civil strife, which has lead to shifting and adapting the research on the relationship between violence and law. The next dimension pertains to the change from seeing in terms of traditional state-centric obligations to a broader array of interests and non-state actors whether in the role of perpetrators or victims. This dimension evidently associated with globalization and the rise of the private sector as well as the weak state phenomenon—a result of post cold war fragmentation and the unfoldings of decolonization over the past two decades. In light of these two changes, there is an added transformation

* This paper is based on a talk the author gave at the conference "Accountability After Mass Atrocity: Latin American and African Examples in Comparative Perspective," in Washington, D.C., May 6, 2009. This symposium was part of the Human Rights, Global Justice & Democracy Project.
[1] See Ruti Teitel, "Transitional Justice: a Bridge between Regimes" (Grant Application to the United States Institute of Peace) (1991 *available at* http://www.usip.org/ (last visited Aug. 10, 2009).

which goes to the role of the law in transformation. The purposes of transitional justice become more complex—not solely aimed at the state building nor liberalization in general, but in many places go to another set of issues relating to conflict: including issues of human peace and human security. These changes, as we will see, hardly work in a linear way, but rather, result potentially in clashes, and multiple rule of laws—as well as other values involved in the protection of a variety of interests of state, persons, and peoples.

Almost two decades later, at a time of ongoing political transitions in Africa, the Middle East as well as instances of delayed transitional justice, decades after the cold war transitions, e.g., in Latin America, Central Europe, Cambodia, etc., we still have not fully explored, as of yet, the relations between the center and the periphery.

Recent years have witnessed a return to the expansion of transitional justice throughout Latin America, involving a revival of accountability efforts and including trials and other mechanisms. Not only in Peru, falling the end of the Fujimori regime, but also the domino effects that have occasioned a revival of postponed justice-seeking efforts in a number of countries from Brazil to Argentina; one can see some added normative impact in the belated prosecutions policies from Morocco to Cambodia. [2] As will be discussed farther on, these debates, deliberations different from those earlier that operated within the assumed framework of "the state" now appear porous and more open to influence by international norms and by regional tribunals, such as the Inter American Court of Human Rights, the European Court of Human Rights, as well as influenced by other processes, e.g., in the European Union.[3] And, while there continue to be debates regarding issues of accountability and impunity; there is also a trend towards the dedication of institutions to truth-seeking and the restoration of the rule of law. In various parts of the world emerging from fractious conflict, there is a resort to non-criminal non-individualized processes and institutions e.g., such as truth commissions, to deal with long-standing conflict, from Timor-Leste to Liberia.[4]

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[2] *Case of Guek Eav Kaing,* Case No. 001/18-07-2007/ECCC-TC (Trial Chamber, Extraordinary Chambers in the Courts of Cambodia) (Trial commenced 17 Feb. 2009); *Case of Chea Nuon,* Case No. 002/19-09-2007/ECCC-PTC (Trial Chamber, Extraordinary Chambers in the Courts of Cambodia) (Trial has not yet commenced); Corte Suprema de Justicia, 14/6/2005, Simon Julio Hector y otros, La Ley (2005-2-2056) (Arg.), Part VIII.B.

[3] Indeed, the post authoritarian Argentine constitution explicitly invokes international human rights law. *See* Martin Bohmer, "Hybrid Legal Cultures, Borrowings and Impositions: The Use of Foreign Law as a Strategy to Build Constitution and Democratic Authority," *University of Puerto Rico Law Review* 77 (2008): 411.

[4] U.N. Security Council Resolution 1757, Security Council Authorizes Establishment of Special Tribunal to Try Suspects in Assassination of Rafiq Hariri, S/RES/1757 (2007).

There continues to be interest in institutions of judgment. In twentieth-century liberal political theory, such tribunals were generally thought to be associated with state-building (while some philosophers in other intellectual traditions, such as Arendt, discerned a dimension of accountability at a broader level. Now the transnational dimension becomes manifest through the activity of the regional and international tribunals. The Extraordinary Chambers in the Courts of Cambodia was convened to deal with the Pol Pot regime leaders responsible for the atrocities in the Khmer Rouge's killing fields, the special United Nations tribunals convened for Sierra Leone, as well the UN tribunal to explore the Hariri assassination in Lebanon. Or, consider the trial of Charles Taylor, prosecuted not within Liberia, but as part of the "Sierra Leone" Tribunal, the International Criminal Tribunal for Rwanda, or the indictment of sitting leader of Sudan, Omar Bashir, in the International Criminal Court.[5]

To what extent and in what ways have the central questions and debates changed since the early post-Cold War period? In the late 1980's and early l990's, the context that gave rise to the modern day understanding of 'transitional justice' was characterized by a vital question which appeared to dominate the debate, across multiple political transformations and regions, as Aryeh Neier put it in an early piece following the post-communist transitions, "what is to be done?" My own work concluded that what is employed would vary depending upon the particular character of repression in that country, a process whose legitimacy depended upon the importance of dealing fairly with those accused; as well as the needs of victims – all consonant with the rule of law.[6] Whether to punish predecessor regimes, particularly, in light of the aims of democratization and state-building, this debate was often framed in terms of relatively narrow justice.

At that time, I advocated a more expansive discussion of what was at stake in the in so called "punishment/impunity" dilemmas arguing that, wherever the criminal justice response was compromised, that there were other ways to respond to predecessor repressive rule.[7] And, moreover, that the pursuit of such alternatives to criminal justice—even where not individualized and lacking the rigor of criminal process—might too develop capacities for advancing the rule of law, in addition to the aims of democracy and state building. As we now understand, in the particular context of the collapse of Communism and

[5] U.N. Security Council Resolution 1688, S/RES/1688 (2006) (authorizing the Special Court for Sierra Leone to transfer the trial of Charles Taylor to the Hague); *In the Case of the Prosecutor v Omar Hassan Al Bashir,* Case No. ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Ahmad Al Bashir (International Criminal Court, 4 March 2009).

[6] Aryeh Neier, "Do Trials Work?" *The New York Review of Books* 42 (1995): 16. Aryeh Neier, "Putting Saddam Hussein on Trial", *The New York Review of Books* 40 (1993): 15.

[7] Ruti G. Teitel, *Transitional Justice* (New York: Oxford University Press, 2000).

subsequent East European transitions, what became demonstrably evident was that the transitional response was informed by the circumstances of the associated political conditions. In such periods, it became clear that the law operates differently than in ordinary times, and that justice-seeking would hardly conform to an ideal fitting for a steady-state legitimate regime. In many contexts it is illusory to think that one could vindicate fully all of the traditional values associated with the rule of law, such as general applicability, procedural due process, as well as more substantive values of fairness or analogous sources of legitimacy.

Since these early debates, the field has developed precisely in the directions foreseen, to include a broader array of institutions, actors and purposes, beyond the state, and its purposes, as seen with the exercise of punitive power. Yet, as one might expect, once other actors recognized their aims and alternative sources of legitimacy, this inevitably, too shifted the terms of the evolving debates as well as the potential bases for legitimacy.

THE NEW JUDICIALIZATION

There is a dynamic relationship between tribunalization, the normative substance of the law, and the politics on the ground. Given notable changes in the processes of lawmaking; i.e., a shift from legislation to judicialization, and a related shift from the state to private actors, the law today is enmeshed in various ways, through the new international and regional tribunals[8], which have become the most evident sites of the new global politics of contestation between multiple actors, beyond states, e.g., NGOs, individuals, corporations, and peoples. Indeed, this shift in who are the relevant actors in transitional justice can be seen clearly in instances of delayed transitional justice, among others, where we see a normative impact that goes beyond matter of state compliance. With regional tribunals shaping policies and claims-making on the ground, there seems to be a demand for complex forms of accountability—-associated with the rise of private actors implicated in violent conflict both as perpetrators e.g., paramilitaries, warlords and military contractors, and as civilian victims, who bear an increasingly greater toll in contemporary conflict.[9] In addition to a myriad of local responses, we can also see a growing insertion of transitional justice mechanisms in situations of international conflict. Leading the way and still operative are the United Nations special tribunals – the so-called ad hocs, which were set up pursuant to the UN Security Council's 'Chapter 7'

[8] These judicial institutions include, e.g. the ad hoc or exceptional tribunals, the ICTY and the ICTR and in a more permanent way, the International Criminal Court.
[9] Civilian casualties, by some accounts, have tripled in the last decades: see Security Council, "Security Council Cross-Cutting Report: Protection of Civilians," 14 Oct. 2008.

"peacemaking" power in the midst of ethnic cleansing in Bosnia, and in response to the genocide in Rwanda,[10] and, which, by their own terms reflect the Security Council's aims of peace and security. Moreover, these intra-conflict tribunals illustrate the newer uses of justice seeking in the midst of conflict, i.e. ex ante- as illustrated in the Uganda referrals and possibly Sudan too, with even more likely implications for political effects, i.e., where the indictment of a sitting leader by some has backfired in international terms, in fostering sub-solidarities-bonding within the African Union. An exercise, which suggests an expansive judicialization with political impact—especially when its uses pose a more threshold question that is, to what extent can justice bring on not only democracy, but also, assure peace and security?

So far, these experiments have had mixed results in terms of their politics in the region: in the former Yugoslavia, the 'untimely' death of Slobodan Milosevic just days from his trial's close left a sense of unfinished business as the aborted proceeding appeared to cheat international society of the satisfaction of a final judgment.[11] Moreover, a broader anxiety long surrounded the evident limits of the ICTY, with the recognition that, for more than a decade, those most responsible – General Radko Mladic and Radovan Karadzic– eluded the court, (although finally, after much outside pressure, Karadzic ultimately was turned over in 2008). Other troubling conclusions have been made about the ICTR, in part due to its inception on "primacy" terms seen as exclusive vis-à-vis accountability in the region.[12]

Indeed, these experiences suggest that the mere concern for accountability measured in terms of numbers of defendants in custody may well reflect an outdated state-centric approach, at best, a limited assessment of the impact of these courts. From the global perspective, the relevant effect transcends state compliance, to witnessing extraterritorial forms of adjudication often initiated by non-state actors, whether multilateral parts of civil society, e.g., communal actors, NGOs, and private parties.[13] One of the tribunal's apparent successes is its orbit of normativity beyond the immediate jurisdiction; hence one can plausibly

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[10] See U.N. Charter, Ch. VII; Security Council Resolution 808, U.N. Doc. S/RES/808 (22 Feb. 1993).
[11] Carla Del Ponte, *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity* (Feltrinelli Editore, 2008).
[12] José Alvarez, "Crimes of State/Crimes of Hate: Lessons from Rwanda', *Yale Journal of International Law* 24 (1999): 365–483.
[13] Iavor Rangelov and Marika Theros, "Transitional Justice in Bosnia and Herzegovina: Coherence and Complementarity of EU Institutions and Civil Society," in *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development,* eds. Kai Ambos, Judith Large and Marieke Wierda (Berlin: Springer Verlag, 2009): 357.

see an ad hoc effect on the local courts in Serbia, and even beyond to other areas, as a "beyond compliance" phenomenon.[14]

Beyond the ad hoc international criminal tribunals, another symbol of the ostensible regularization of law as mechanism in politics is the permanent International Criminal Court, a new institution which despite its intended universal ambitions, has so far, been deployed largely against one region, namely the ongoing conflicts and abuses in Africa. A product of UN lawmaking, this time coming out of the General Assembly, the UN commitment in situations of conflict, requires access to a tribunal—- even if one of last resort. As pursuant to its chartered "complementarity" jurisdiction, the normativity exercised via judgment processes are, in the first instance, to be pursued by the state itself, and, only where it is " unable or unwilling," to be jumpstarted by the international institutions.

In addition to the permanent International Criminal Court, there have surfaced numerous other forms of transnational courts dealing in transitional justice, such as the "hybrids" in Sierra Leone, East Timor, Kosovo and Lebanon.[15] These have had a very mixed impact highlighting the important predicates for accountability.[16] Last, but not least, are the "mixed tribunals," i.e., the domestic courts, which, in some way, whether via special wing or personnel, integrate diverse elements of the international. Finally, the norm incorporated in domestic law: These one can see instantiate paradigmatic elements of globality in that they explicitly synthesize dimensions of the local and the international. Put this way, the state-centric paradigm also seems still appreciated in terms of the prior perspective.

For some, this suggests an attempt to move away from politics, as the view held by Koskennimi that somehow the mere legal proliferation aimed at neutralizing conflict. Nevertheless, what the phenomena reflect so far is that judicialization does not simply mean depoliticization. Indeed, what can be seen is that a new

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[14] Theodor Meron, "The Geneva Conventions as Customary Law," *American Journal of International Law* 81 (1987); Theodor Meron, *Human Rights and Humanitarian Norms as Customary International Law* (Oxford University Press, 1989). See Open Society News, *Working to Break the Chains of Injustice* (Winter 2006-07). See Robert Howse and Ruti Teitel, *Beyond Compliance: Rethinking Why Law Really Matters* (Mar. 6, 2008) (draft presented at Institute for International Law and Justice Colloquium March), *available at* http://iilj.org/courses/documents/2008Colloquium.Session7.Howse.pdf..

[15] See Project on International Courts and Tribunals, "Hybrid Courts," *available at* http://www.pict-pcti.org/courts/hybrid.html (last visited August 5, 2009). For discussion of these experiments, see Chandra Sriram, Revolutions in Accountability: New Approaches to Past Abuses, Amer Univ Intl Law Rev 19 (2003): 400-426.

[16] David Cohen. Indifference and Accountability: the United Nations and the Politics of International Justice in East Timor, East West Center Special Reports No 9 (June 2006). Re Sierra Leone, see supra at 421.

politics is being played out in the shadow of the law and its institutions. That is, these institutions cast a normative orbit that goes beyond the narrow terms of their charters.

BEYOND THE TRANSITION: RETHINKING THE PLACE AND ROLE OF JUSTICE?

The aims of the new tribunals, as reflected in their jurisdiction-granting instruments, now routinely include "political" aims such as peacemaking, reconciliation, and security. [17] Not unsurprisingly then questions are now being posed as to whether the intervention of tribunals necessarily advances the goals set out of advancing peace and security, such as challenged by politics scholars Jack Snyder and Leslie Vinjamuri.[18] Here we can see a number of relevant examples of transitional justice being called upon to "deliver" peace—most demonstrably in the Balkans conflict, where the tribunal was convened out of UN "Chapter 7" power. Former ICTY Chief Prosecutor Richard Goldstone's opening statement in 1995, the "public record will assist in attributing guilt to individuals and be an important tool in avoiding the attribution of collective guilt to any nation or ethnic group."[19]

On the one hand, we can also see that judicialization's impact on politics is hardly simple, and that some observers argue that a sanction or its threat may well in some fashion advance some political processes, as arguably occurred vis-à-vis negotiations in the Balkans, or, in Africa, e.g., towards restoring stability in Uganda, and in Darfur (Sudan).[20] On the other hand, there are situations where one might see the delicate entwining of transitional justice aims, state building,

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[17] Rome Statute of the International Criminal Court, Preamble, U.N. doc. A/Conf.183/9, (17 July 1998); Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, Preamble, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993).

[18] See infra note 25. See also William Burke-White, "The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina," *Columbia Journal of Transnational Law* 46 (2008): 279. William Burke-White, "War Crimes Indictments and Conflict Strategies" *Paper presented at the annual meeting of the ISA's 49th Annual Convention, Bridging Multiple Divides* (San Francisco, CA, Mar 26, 2008).

[19] *Prosecutor v. Nikolic*, Case No. IT-94-2-I, Rule 61 Hearing: Opening Statement by Justice Richard Goldstone, (Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, 9 October 1995).

[20] See Human Rights Watch Report, Selling Justice Short: Why Accountability Matters for Peace (July 7, 2009) (noting that national enforcement efforts have been spurred in countries where the ICC prosecutor has undertaken preliminary analysis, such as in Kenya and Colombia).

peace and security, such as now at stake in places like Afghanistan, [21] and Iraq, where justice-seeking often appears to be in clear tension with security on the ground. Sometimes the debate has been framed in terms of peace v. justice debates. Some scholars have suggested the "irreconciliability" in the aims of transitional justice.[22] But the multiplicity of goals and the possibility of tensions and trade-offs between them in specific contexts hardly justify a conceptualization of the problem as a "tragic choice" in this manner. While in stark contrast, there is a burgeoning community of consultants that suppresses these difficulties through an attempted synthesis of modalities in a formulaic plan for transitional justice.[23] At this juncture, there are numerous experiments in the realignment of the national-international balance and in new hybridizations, as well as transnational judicialization, one might see as associated with global rule of law. These developments in international criminal law and its reception pose challenges even within the state.

In Iraq, where law and justice entered in the presence of ongoing conflict, the question emerged of the relation of transitional justice to the management of the conflict itself, in contrast to the traditional focus of jus post bellum – a context that, due to the rapid rise in numbers of weak and failed states, may well be gaining in salience, as, for instance, in Afghanistan. The association of justice processes with the perception of U.S. occupation,[24] raised questions as to the extent to which, seen in this context, the uses of the law, of judicial processes and trials could really advance the asserted transitional purposes of state building, and even more importantly, of rule of law and security.

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[21] Ruti Teitel, "Introduction," *New York Law School Law Review* 51(3) (2006): 456; Ulrich K. Preuss, "Perspectives on Post-Conflict Constitutionalism: Reflections on Regime Change Through External Constitutionalization," *New York Law School Law Review* 51(3) (2006): 466; Jean L. Cohen, "The Role of International Law in Post-Conflict Constitution-Making: Toward a *Jus Post Bellum* for 'Interim Occupations,'" *New York Law School Law Review* 51(3) (2006): 496; Andrew Arato, "Post-Sovereign Constitution-Making and Its Pathology in Iraq," *New York Law School Law Review* 51(3) (2006): 534; J. Alexander Thier, "The Making of a Constitution in Afghanistan," *New York Law School Law Review* 51(3) (2006): 556.

[22] Jack Snyder and Leslie Vinjamuri, "Trials and Errors: Principles and Pragmatism in Strategies of International Justice," *International Security* 28 (Winter 2003/04): 5; For commentary on this perspective, see Bronwyn Anne Leebaw, "The Irreconciliable Goals of Transitional Justice," *Human Rights Quarterly* 30 (2008): 95.

[23] Indeed this has been the approach of the international center. See Paige Arthur, "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice," *Human Rights Quarterly* 31(2) (2009).

[24] Note that as a formal matter, under the Security Council resolutions, post June 30, 2004, the situation in Iraq would not be so considered. Cf. e.g. U.N. Security Council Resolution 1564, U.N. Doc. S/RES/1564 (8 June 2004); U.N. Security Council Press Release, "Security Council Endorses Formation of Sovereign Interim Government in Iraq; Welcomes End of Occupation by 30 June, Democratic Elections by January 2005, Resolution 1564 (2004) Adopted Unanimously, SC/8117. Ruti G. Teitel, "Introduction," *New York Law School Law* Review 51 (2006): 456.

Here, we can see the significance of reframing the problem beyond 20th-century terms, which long dominated the justice debates—particularly in terms of the choice over the exercise of jurisdiction ought be local or international. The traditional juxtaposition between local and international justice appears to have run its course, giving way instead to what appears to be more of a continuum or "complementarity"" approach to global rule of law.

While some of the jurisdictional questions and dilemmas over modalities may well appear to become all too common to pre-transitional periods, the Iraqi prosecutions were also singular in some respects, notably given their peculiar context of acute absence of security-situation of justice in conflict. The expectations of justice in this context, of course, reflect the normalization dimension of the changing paradigm. Indeed, one might conclude that to some extent, even the fraught issues of security could be seen to relate to other issues of transitional justice going awry, such as the evident failure of debaathification. This, arguably, offered lessons, which we can see, spurred a turn away from sweeping bureaucratic responses, instead, to the more contemporary individualized punishment. The shift, in turn, gave way to a vigorous debate over exactly what the appropriate body of sovereign authority and judgment ought be exercised over Saddam Hussein? Whether national or international, or, some other hybrid compromise of jurisdictions, whether either procedural or substantive? While the choice reflected competing rule of law values—regardless of one might say of the values of fairness understood as neutral applicability of the law deemed affordable by distant tribunals versus fairness understood as local accountability. As understood in its time, it also reflected a transitional justice characterized by globalization. In asking what works and what is at stake it goes beyond one homogenous community, and therefore, also generates palpable tensions associated with the attempt to use punishment to draw the contours of a relevant international society.

In the post-Cold War context, we can see that there is an evident transformation in the significance of an expanded role for international criminal justice. Clearly, international criminal justice aims and contributions are complex and in transformed political circumstances inevitably imply diverse understandings of rule-of-law values. Consider, for instance, the extent to which international law at The Hague affords the rule-of-law values of fairness and neutrality, often perceived as fragile or non-existent in domestic processes. Yet, this, too, comes at a cost: local accountability has its own contribution to make to the development of the rule-of-law in a transitional context.

In ordinary times, there is generally little tension of this sort in that established domestic courts are presumed independent and neutral In transitional times, these diverse forms of jurisdiction are thought to advance diverse dimensions of

rule of law, including fairness and general applicability of the law, and local accountability. Yet, this breakdown in the respect for rule-of-law values hardly exists in a vacuum, but rather reflects various historical and political resonances. In part, a function of its political traditions, but also, in light of the goals of its campaign in the region, the United States (and most Iraqis) favored a nation-building model. Transitional justice was intended to serve popular sovereignty, local accountability and related purposes,[25] therefore, favoring national over international law and its processes. For the U.S., the situation, as seen previously in the Balkans with the ICTY, exemplified its general preference for ad hoc tribunals. While, by contrast, Europeans and the human rights community tended to prefer multilateralism and U.N.-affiliated trials, such as those convened at The Hague, to adjudicate atrocities in the Balkans and Rwanda. These trials were largely rationalized in terms of other rule-of-law values, such as neutrality between parties to the conflict. Multiple rule-of-law values serve the varying aims of transitional societies in global politics in different ways, while transitional conditions often exacerbate tension in adherence to these diverse rule-of-law values. This balance of values would plausibly be accommodated—given other contexts.[26]

From the beginning, transitional justice in Iraq raised dilemmas: to what extent could the trial of Saddam offer the sought-for rule of law? An even more threshold question, what body, if any, had the legitimacy to sit in judgment? And what of a domestic prosecution in occupied Iraq; an international adjudication presided over by a foreign judiciary e.g., as in the cases of Nuremberg, the ICTY, and Rwanda; [27]or, alternatively, a "mixed" or "hybrid" tribunal, such as those convened in Sierra Leone and East Timor?[28]

What we know now is that the choices are hardly clear-cut, as each jurisdictional scenario is tied to a nexus which arguably fulfills diverse and distinct rule-of-law values. While the mechanisms of national justice afford local accountability, the international approach, as advocated by a number of non-state actors, e.g., the European Union, Human Rights Watch and others, appears to have afforded a modicum of legal continuity through the International Criminal Court (ICC) and its charter, an apparent international penal code. This alternative legal system appeals to values of fairness and neutrality via universality. Accordingly, each

[25] John P. Cerone, "Dynamic Equilibrium: The Evolution of US Attitudes Toward International Criminal Courts and Tribunals," *The European Journal of International Law* 18 (2007): 277.
[26] See Frederic Megret, "Epilogue to an Endless Debate: The International Criminal Court's Third Party Jurisdiction and the Looming Revolution of International Law," *European Journal of International Law* 12(2) (2001): 247.
[27] Anne-Marie Slaughter, Op-Ed., "Iraq Needs More Backers on Board," *Financial Times*, June 29, 2004.
[28] Laura Dickinson, "The Promise of Hybrid Tribunals," *American Journal of International Law* 97 (2003): 295. But see Cohen, n.16 infra (re UN and East Timor).

jurisdiction advances important but often competing rule-of-law values. What was also clear was that, whatever the Baghdad tribunal's ultimate form, it would be distinguishable from the posture of the Hague tribunal or, the historical postwar Nuremberg trials and their context of the Allies' "total" sovereignty, in the law's relationship to conflict.

OFFENDING HUMANITY: PREFIGURING GLOBAL SOCIETY?

The most prominent trials punish the attempt to destroy groups of civilians. The offense is couched not in local, penal terms, but rather, in global terms of the crime against humanity,[29] and, especially, in terms where the relevant wronged community lies beyond the particular state. [30] Consider the significance of the universalizing dimension in the globalized transitional justice: first, in that crimes against humanity express the core rule-of-law norm that is at once procedural and substantive. In theory, where there is accompanying universal jurisdiction, there is no escaping humanitarian law's protective force -- even within the expanded globalizing community. Therefore, we can see the core legality values of equality and general applicability of the law expressed in various dimensions of the norm. As the norm is leveled beyond the state-citizen nexus to condemn the persecution of "any" citizen group, it becomes therefore equally applicable to any citizen—regardless of nationality, ethnicity or religion. Moreover, the explicit transcendence of traditional political sovereignty—"state" sovereignty—is evident wherever these charges may involve abuse of power by political leaders: in that no one, not even sitting leaders, are automatically immunized from judgment.[31]

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[29] See *Statute of the Iraqi Special Tribunal*, *International Legal Materials* 43 (2003): 231, *available at* http://iraq-ist.org/en/about/statute.htm [hereinafter *IST Statute*]

[30] For the first positive definition of crimes against humanity, see Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, Article 6 (c), 82 U.N.T.S. 279, 288 (1945) [hereinafter Nuremberg Charter]; *Statute of the International Criminal Tribunal for the Former Yugoslavia,* U.N. Security Council Resolution 827, Article 5, UN. Doc. S/R.ES/827 (1993) [hereinafter ICTY Statute]; *Rome Statute of the International Criminal Court,* Article 7, U.N. Doc. A/Conf. 183/9, 2187 U.N.T.S. 90 (17 July 1998) [hereinafter ICC Statute]. See David Luban, "A Theory of Crimes Against Humanity," *Yale Journal of International Law* 29 (2004), 85, 124-131, (contending for the nexus between the offense against humanity and universal jurisdiction); see also Stafaan Smis & Kim Van der Borght, "Belgium: Act Concerning the Punishment of Grave Breaches of International Humanitarian Law, *International Legal Materials* 38 (1999); Article 23(4) of the Spanish Organic Law of the Judicial Branch.

[31] See David Luban, "A Theory of Crimes Against Humanity," *Yale Journal of International Law 29* (2004): 86-167, abridged as "Crimes Against Humanity: What's in a Name?," in *Crimes Against Humanity,* (ed. Charles Jones, Montreal/Ithaca, N.Y.: McGill University Press/Cornell University Press forthcoming).

The distinctive rule-of-law message is also seen in the extent to which current human rights law emphasizes the universality of crimes against humanity. Prosecution of "crimes against humanity" appears to instantiate a universal norm because, by definition, such crimes are deemed to offend the entire community of "humanity." [32] Moreover, because by definition such offenses may be committed anywhere under any circumstances, whether during war or in peacetime, they may be subject to transnational adjudications and prosecution by any state as a matter of universal concern. Yet, despite this idealistic view, the uses of punishment have always implied political considerations.

One might consider the extent to which it is the gravamen of crimes against humanity that lays the basis for the legitimacy of the trials in the first place, whether in The Hague or, Baghdad. One of contemporary transitional justice goals is nation building, and trials are commonly thought to assist in defining a community in the state consolidation process. Yet, in transitional situations where the crime adjudicated is defined as one against "humanity," what exactly is the relevant community of judgment? To what extent do such trials assist in state-building? Or, perhaps, even more in building a community of judgment?

These questions have arisen before in history: for example, in the postwar successor trials where the allied coalition sat in judgment. Yet another example was the politics of subsequent trials that was ensuing generations organizing over trials and constituting new communities of judgment. By prosecuting leaders for acts explicitly committed against their own citizens—even if implemented by outsiders—trials, which deploy universal norms, also resort to the traditional understandings of legitimacy of state sovereignty and the nexus of citizenship, which was specifically not included in Balkans- wars aggression. In the Balkans, every attempt was made to adjudge across ethnic communities, [33] One might add here the trial of Charles Taylor, currently prosecuted in the Sierra Leone Tribunal[34] Or consider in this light, the indictment of Omar al-Bashir in

[32] So far, these have been largely deployed in Europe, Spain: Article 23(4) of the Organic Law: Provides universal jurisdiction over several crimes, including genocide, terrorism, offenses related to prostitution, crimes related to the corruption of minors and handicapped, and other crimes that Spain has a duty to prosecute under international treaties. A broad interpretation of Spain's universal jurisdiction statute was upheld in the recent Guatemala Genocide Case where in September 2005, Spain's Constitutional Tribunal (Spain's highest court) reversed the decisions of the Audiencia Nacional and the Supreme Court by issuing "a ringing endorsement of broad universal jurisdiction." M. Cherif Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice," *Virginia Jounal of International Law* 42 (2001).
[33] *Prosecutor v. Nikolic*, Case No. IT-94-2-I, Rule 61 Hearing: Opening Statement by Justice Richard Goldstone, (Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, 9 October 1995).
[34] Special court for Sierra Leone, *Prosecutor v. Taylor*, Case No. SCSL-03-01-PT, 29 May 2007, Prosecution's Indictment.

Sudan, where the international community is conflicted about whether at an impasse in trying to resolve the situation politically. [35] Milosevic and Hussein's offenses were those of political leaders and were part and parcel of the promulgation of the ideological policies involving aggressive nationalism and ethnic persecution. Therefore, the trials involved a mix of objectives. Insofar as the contemporary charges go beyond crimes against humanity to include war crimes, the trials have been critiqued for posing the risks of politicization. As we saw with the Milosevic trial, prosecuting war crimes raises broader questions concerning the legality of the NATO intervention at the time of the indictment—a lesson avoided in the trial of Saddam.

Given the mix of aims served by transitional justice in this context, one might question—whether and to what extent—conducing crimes against humanity prosecutions in international fora really aimed at the advancement of state-building? In some ways, one might suppose such a trial raises the converse of the national successor trials convened over recent decades. Put differently, the normativity adjudicated expressed aimed at defining the relevant community beyond the state, particularly in terms of humanity.[36] In turn, the adjudication of the crime against humanity underscores state failure, and in so doing, lays the basis for judicial and other intervention and for transnational solidarity. This necessitates a rethinking of the politics of transitional justice- towards bolstering impetus to intervention, and to a prefigured global society.

THE CONTEMPORARY POLITICS OF GLOBAL TRANSITIONAL JUSTICE

As the remainder of this Essay observes, the changes laid out above do not necessarily work together in a linear or harmonious direction, but, instead, may often be difficult to reconcile, and may well affect politics in different ways, that are not necessarily liberalizing, but this has everything to do with the diverse actors, and their interests, and the related potential for clashes in the multiple rule of law values involved in the protection of the interests of states, persons and peoples.

The discussion above of the global paradigm illustrated by the 1990's conflict tribunals, among others convened in similar or analogous circumstances, the trend towards and expansion of transnational judicialization reflects the transformation in the stated telos of transitional justice. One can see that, from the start, the exceptional tribunals' unusual beginnings chartered via the UN

[35] See Ginger Thompson, "Obama Drops Plan to Isolate Sudan Leaders, *New York Times* (Oct. 16, 2009), A1.
[36] E.g, Judith Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge: Harvard University Press, 1986).

Chapter VII powers reflected a complex set of goals ranging from bringing and maintaining peace and security, to getting beyond the state and its responsibility, to engineering social change through the uses of the law to transform the nexus and relation of the individual and the ethnic and other collectives in the pursuit of liberal society.

A yet broader lens through which to appreciate the impact of the global justice is the expansive panoply of aims pursued by the mix of tribunals, which are neither simply retributive or deterrent in their aim or effect, but rather, are now aiming beyond traditional criminal justice purposes to advance asserted goals of public interest, peace and rule of law. And here, while purportedly committed to positivism in the law[37], in their adjudications jurisprudence, the tribunals have increasingly reflected goals not ordinarily associated with criminal justice such as peace in the region, as well as security that is centered on the human. In a number of landmark cases in the tribunals, the judiciary in operating has been described as having a near "legislative" role.[38] Going beyond a textualist approach to its charter, the ICTY appellate chamber declared that the law applied 'must serve broader normative purposes in light of its social, political and economic role.'[39]

One can see the broader normative impact in a number of dimensions that reflect the global ambit—local, regional and transnational. The substantial developments in local justice and the reestablishment of the rule of law in the impact of the international tribunal on the evolution of the work of the domestic judiciary in the Balkan region serve as a case in point. Ever since the launching of the ICTY, remarkably, there are now scores of war crimes cases in the region including hundreds indicted by the special court in Serbia, as well as national courts in Croatia and Kosovo's internationalized courts.[40] Judicialization's diverse directions reflect the degree to which one might understand the effects as "beyond compliance," setting in motion a normativity among diverse actors and processes.

Another site of effects is regional, where it is evident that the trend in judicialization and the justice- or accountability-seeking normativity more

[37] Positivism to the law refers to the notion that application of their process implies only mere application of pre-existing law according to established criminal justice principles and concepts, as set out in the ICTY's landmark *Tadic* decision.
[38] Theodor Meron, "Humanization of Humanitarian Law," *American Journal of International Law* 94 (2000): 239.
[39] *Prosecutor v Tadic*, Case No. IT-94-T, Jurisdiction, (International Criminal Tribunal for the Former Yugoslavia, 2 Oct. 1995).
[40] See Diane Orentlicher, "International Justice Marks Its Fifteenth Anniversary: A Preliminary Assessment of the ICTY's Impact in Serbia," *Human Rights Brief* 16 (2009): 19. Open Society News, *Working to Break the Chains of Injustice* (Winter 2006-07).

broadly is affecting the political discourse and civil society in the region. In domestic politics, and regional issues such as accession to Europe, particularly in the case of the Balkans, compliance with the United Nations' tribunal has—in and of itself—now become a benchmark of greater European cooperation. Here, transitional justice appears to constitute a path towards legitimacy in the region. Similar instances in other previously conflict ridden areas such as Latin America to the Middle East and Africa reflect that, at this point in time, transitional justice is seen a broader signifier of the establishment or restoration of the rule of law. [41] This is occurring as these mechanisms are often deployed in concert with outside actors and in the context of conflict zones.[42] Others looking to the African trials argue that they demonstrably affect politics on the ground, although the jury is split on whether this is necessarily for the better, such as more recently in Uganda, where the effects of the pending indictments of the Lords Resistance on negotiations were under scrutiny when that country chose to first refer its own regime leaders and then withdraw the indictments suggesting politics was inextricably intermingled. [43] Meanwhile, other impetus in the region, for instance vis-à-vis al-Bashir have led to greater polarization within the African Union.

Whether these ambitious justice-seeking processes to advance security and rule of law work or not, recognizing the changing claims being made rationalizing transitional justice at this time may well help to explain the proliferation over the last decade of transitional justice phenomena. Thinking about these developments explicitly in terms of their association with contemporary politics may well illuminate transitional justice's connection and apparent correlation (in its proliferation) to globalizing politics.

Hence, transitional justice as we can see, has now become a critical element of the post-conflict security framework; its normative effects are now seen as having the potential of fostering the rule of law and security on the ground.[44] At a time of a growing number of weak and failed states, from Eastern Europe, to the Middle East, and to Africa, it is the particular mix of assuring a modicum of security and the rule of law that, with or without other political consensus, has become a route to contemporary legitimacy.

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[41] "135 African Civil Society Groups Call for Cooperation With ICC," *New Liberian* 31 July 2009 (African civil society and human rights groups called upon African states that are party to the International Criminal Court to reaffirm their commitment following a statement by the African Union at its summit on July 1-3, 2009 that its member states "shall not cooperate" with the ICC in the arrest of Bashir).

[42] See Report of the Secretary-General: *The rule of law and transitional justice in conflict and post-conflict societies*, U.N. Doc. S/2004/616, 23 August 2004.

[43] See Sarah Nouen, draft, Doing Justice to the Political: The International Criminal Court in Uganda and Sudan

[44] See ibid.

Understanding the transformation of the categories associated with the prevailing legal regimes of war and peace illuminates the new century's trend of growing entrenchment and institutionalization of the norms and mechanisms of transitional justice. The most significant symbol of this trend is the establishment of the first freestanding, permanent International Criminal Court, which has been vested to apply a prevailing international consensus on the obligation to prosecute the 'most serious' crimes, namely, war crimes, crimes against humanity and genocide.

In contemporary international affairs, moreover, the pervasiveness of conflict, particularly civil wars and ethnic violence in many places gives rise to a related generation of post conflict responses, raising questions about the relationship between transitional justice and post conflict justice. While there is some overlap, obviously not all conflict situations involve the aims and goals of political transition. Although various actors in the area, such as the international center for transitional justice have staked out the broadest definition, apparently to rationalize their involvement in a growing number of post conflict zones, e.g., Lebanon, Cyprus, Gaza ,etc. The question has become more and more pertinent and controversial, particularly with the rise of terrorism and a related counter-terror campaign, hence, affecting generalized expectations regarding the proliferation of violence, rise in number of occupied regions, and general sense of pervasive conflict. Here, we can discern the apparent aim to entrench and normalize a number of limited legal responses and judicialized discourses, chiefly humanitarian norms which until now, have been associated with transitional and exceptional times.

From the inception, these processes already reflecting the paradigm change argued for here, were intended somehow simultaneously to serve multiple values in the name of justice, including the traditional nation building, but also truth, reconciliation, rule of law and security.[45] By now, it is expected that this is part of the necessary response to repressive prior rule. Indeed, given the many conflict-ridden areas in the world, now one can see that transitional justice is no longer primarily considered to be about the normative questions regarding a state's dealing with its troubled past, but, instead, the relevant questions are now considered part of a broader international commitment to human security. From the ICTY on, where, according to its founders, establishing the truth about the conflict was seen as 'essential' to reconciliation, similar goals have been set out in the International Criminal Court statute. Beyond, in the United Nations tool box for dealing with post-conflict security issues, transitional justice is now deemed to be an important component, so that the UN Department of Peacekeeping has

[45] As set out in the ICTY charter, but as evaluated by some IR scholars, e.g. Snyder and Vinjamuri may well prove to be a conflict., n 22 supra.

reconstituted a Security Sector Reform and Transitional Justice Unit.[46] "The United Nations must…help fill the rule of law vacuum evident in so many post-conflict societies…Justice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives." Here, we can see that justice seeking purposes are no longer said to be primarily about retribution nor even deterrence. Rather, these aspirations may actually give way to the demand for a kind of accountability suited to fostering peace and security on the ground. One can see a rise in the international humanitarian legal regime as associated with and responding to globalization, to its uncertain weak and failed states, and the often-related political fragmentation. This has led to the entrenchment of certain rights claims. Claims which have been seen as involving transitional rights claims, now recast as overlapping or amalgamated in the regime associated with conflict, such as international humanitarian law, often involving tensions and contradictions regarding what protections avail in and around conflict.[47]

With the normalization or entrenchment of transitional justice, justice-seeking mechanisms are not always aligned in a straightforward way that is it is not linear in its association with a progressive movement of a political regime in a liberalizing direction. By now, there has been a significant normalization and entrenchment of transitional justice within existing legal regimes such as the human rights and humanitarian law systems. By this point, one can see that many transitional justice responses have become ratified and entrenched in human rights law. Sometimes this process occurred via standing human rights conventions where they have given rise to enduring and universally invoked human rights, such as the so-called right to truth that includes investigations, and, often related, prosecutions, adjudication and reparation.[48] Other times, this phenomenon happened via litigation, as to enforce transitional justice in regional tribunals. In these instances, we can see that these rights depend for their vindication on the responses of civil society, such as NGOs devoted to the representation of human rights and its abuses. Likewise, these actors' legitimacy also draws from the emerging normativity of global transitional justice. Indeed, as we have seen wherever these issues have been kept alive, or revived, it has been as a result of the significant impetus of non-governmental actors, as occurred for instance with civil society in Argentina and Armenia, where despite state action, victims groups kept the causes alive. In Argentina, thirty years after

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[46] See ibid.

[47] *Juan Carlos Abella v Argentina*, Case 11.137, Report Nº 55/97, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 271 (1997). See *Isayeva v Russia*, Application no. 57950/00, Judgment of 24 February 2005 ("In the light of the importance of the protection afforded by Article 2, the Court must subject deprivations of life to the most careful scrutiny …").

[48] See *Velásquez Rodríguez*, Case 7920, Ser. C., No. 4, Inter-Am. Ct. H.R. 35, OEA/ser. L/V/III.19 doc. 13 (1988), *reprinted in International Legal Materials* 28 (1989): 291.

junta rule, there is a revival of human rights-related prosecutions. Much of the impetus for this is an outgrowth of the interaction between the state and non-state actors in the evolution of the normativity as well as the significance of civil society in the form of the relevant organizations, such as of the mothers of the disappeared, the 'Mothers of the Plaza de Mayo,' as well as other interest groups and the media. This underscores the ongoing repercussions of the passage of time that relates to the long ago involvement of the state in these wrongdoings, and the sense that it is often a long time before the effectuation of transitional justice.

Indeed, it is this dynamic interaction of state and non-state actors that enables a context where transitional justice can promote a culture of rule of law. This reflects a dimension of the global move away from state to non-state actor centricity in the politics and law of transitional justice. Indeed, the shift again reflects the interaction of politics and law; here, whether in diplomacy or in customary lawmaking, it is a globalizing dynamic.

The involvement of transnational NGOs and global civil society more broadly illustrates the wider politics of transitional justice associated with the present moment. Reflecting on the current global politics of transitional justice may well illuminate areas of foreign affairs controversy where claims to transitional justice change the structure of the terms of the discourse. There are numerous illustrations. For example, one may reflect on the ongoing role of punishment regarding Serbia and its accession to Europe and why exactly was the question so postponed? And, one might also see this in the struggle over the arrest of General Mladic between Serbia and the European Union, where the negotiation status suggests that the enforcement of transitional justice may well end up as a chip in the bargain around the status of Kosovo—an interesting tradeoff in legal and political sovereignties. Reflecting in this way on the politics of transitional justice, may well explain some puzzling revivals such as the persistence of the Turkish Armenian genocide question. Here, the elision of transitional justice remains critically important to the implicated peoples with extraterritorial dimensions; yet the timing of the demand indubitably helps to shape and guide the structure of other questions of interstate relations, such as European accession. Similarly, recurring questions in other regions also give some sense of how the law and politics of transitional justice interact. For example, one might see that the absence of Japanese disavowal or accountability for past war crimes may well affect the extent to which that country can be seen as an Asian great power with a rival human rights alternative to China. Similar dynamics seem evident internally in Europe, where the concern has been with member states struggling with other communities for control over self determination and

identity politics in the region, as reflected in the engagement with the politics of transitional justice. [49]

Today, one can see that transitional justice indubitably has a global normative reach, with effects far and wide on the discourse and structure of international affairs. The language is shaping a number of other legal fields, with claims making of both individual and collective nature in these terms. The paradigm shift has clear implications for how transitional justice affects politics.

[49] Sarkozy's proposal provides that every French child should be "entrusted with the memory of a French child of the Holocaust." Sarkozy noted that "Nothing is more moving, for a child, than the story of a child his own age, who has the same games, the same joys and the same hopes as he, but who, in the dawn of the 1940s, had the bad fortune to be defined as a Jew." Elaine Sciolino, "By Making Holocaust Personal to Pupils, Sarkozy Stirs Anger," *New York Times* (16 Feb. 2008).