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## The global as local

### The limits and possibilities of integrating international and transitional justice

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#### Introduction

It has become increasingly popular in recent years to focus on the contributions of international criminal courts and tribunals (ICTs) to transitional or post-conflict justice and to assess the impact of ICTs in terms of their ability to promote justice locally in societies undergoing transition or emerging from conflict.<sup>1</sup> Yet this description only captures part of the story. These very same institutions have also been described as tools of international *realpolitik* or, in a more nuanced form, what Gerry Simpson calls ‘juridified diplomacy’, which largely serve political rather than legal aims and which generally operate globally rather than locally. In Simpson’s words, ‘juridified diplomacy’ is ‘[t]he phenomenon by which conflict about the purpose and shape of international political life (as well as specific disputes in this realm) is translated into legal doctrine or resolved in legal institutions’.<sup>2</sup>

This chapter elaborates these two competing paradigms of transitional justice and juridified diplomacy and examines the extent to which, and the reasons why, they have been reflected historically in different ICTs. This historical analysis leads to three observations. First, the origins of international criminal law lie firmly within the paradigm of juridified diplomacy and not in that of transitional justice. Second, despite these origins, ICTs have increasingly taken on characteristics that resemble the

<sup>1</sup> See, e.g., R. Shaw et al. (eds.), *Localizing Transitional Justice: Interventions and Priorities after Mass Violence* (Stanford, CA: Stanford University Press, 2010); Report on the Rule of Law and Transitional Justice in Conflict or Post-Conflict Societies, UN Doc. S/2004/616 (2004) (‘Rule of Law Report’).

<sup>2</sup> G. Simpson, *Law, War and Crime: War Crimes Trials and the Reinvention of International Law* (Cambridge: Polity Press, 2007), 1.

transitional justice paradigm. Third, and perhaps most surprising, this apparent turn towards transitional justice can to a large extent be explained by reasons grounded in the juridified diplomacy paradigm. On the basis of these conclusions, this chapter explores the possibility and desirability of ICTs becoming instruments of transitional justice in the future. Ultimately, it concludes that, while further moves towards a transitional justice mandate may be possible in the short-term, this could ultimately undermine the effectiveness of ICTs as instruments of both paradigms. In contrast, focusing on the juridified diplomacy mandates of ICTs may increase their beneficial impacts if appropriate caution is exercised.

### The two paradigms

ICTs are established through complex processes involving negotiations among a wide array of individuals and organisations with diverse interests. They do not reflect the working out of coherent conceptual frameworks defined *ex ante*. Rather, observers have constructed such frameworks or paradigms *ex post* in order to describe, to understand and to test assumptions about ICTs.<sup>3</sup> To date, two rival and ostensibly incompatible paradigms – transitional/post-conflict justice and international politics/juridified diplomacy – have emerged as the dominant frameworks for understanding ICTs. Neither paradigm in itself captures the complexity of ICTs or indeed of international diplomacy or transitional justice. Rather, they serve as rough conceptual frameworks for understanding these institutions and processes. This section describes these two paradigms and examines to what extent they are contradictory or complementary means of understanding ICTs.

#### *Transitional/post-conflict justice*

The UN Secretary-General's 2004 *Report on the Rule of Law and Transitional Justice in Conflict or Post-Conflict Societies* describes transitional justice generally as 'compris[ing] the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation'.<sup>4</sup> Ruti Teitel more precisely defines

<sup>3</sup> See D. Koller, 'The Faith of the International Criminal Lawyer', *New York University Journal of International Law and Politics*, 40 (2008), 1019, 1020–1021.

<sup>4</sup> Rule of Law Report, 8.

'transitional justice' as 'the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoing of repressive predecessor regimes'.<sup>5</sup> While these broad descriptions may encompass a wide variety of views as to what specifically transitional justice should entail and precisely how ICTs may contribute to its realisation,<sup>6</sup> two fundamental characteristics underlie the paradigm.

First, justice is an important goal to be pursued. Justice within this paradigm has a specific sense related to the rule of law and legal processes, and a claim to justice is one that must be phrased in legal terms.<sup>7</sup> In this sense, justice is opposed to politics as usual. Indeed, justice may not be the only or even the ultimate goal; it may exist alongside or as an intermediary to other goals such as peace or reconciliation.<sup>8</sup> However, justice is a significant and relevant good. As such, the manner in which institutions contribute to justice, the extent to which they do so and the particular conceptions of justice they serve become defining characteristics.

As a consequence, ICTs are perceived within this paradigm as mechanisms for the delivery of a highly formalised and individualised justice in the form of the criminal trial. They are, in this fundamental respect at least, indistinguishable from national criminal courts. Together, international and national or local criminal courts are thought to form a 'system' or 'community' of courts working to enforce accountability for international crimes for the benefit of societies undergoing transition or recovering from conflict.<sup>9</sup> They are thus distinguished from other justice-related mechanisms such as truth commissions or lustration mechanisms, all of which are contrasted with political (*i.e.* non-legal) processes.<sup>10</sup>

Second, transitional justice interventions tend to operate more locally, with their effects felt on the society undergoing a transition or recovering from conflict.<sup>11</sup> The precise borders of this society may vary; they can be

<sup>5</sup> R. Teitel, *Transitional Justice* (New York: Oxford University Press, 2000), 69 (citations omitted).

<sup>6</sup> Rule of Law Report, 5.

<sup>7</sup> See K. McEvoy, 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice', *Journal of Law and Society*, 4 (2007), 411.

<sup>8</sup> Rule of Law Report, 39.

<sup>9</sup> See, e.g., W. Burke-White, 'A Community of Courts: Toward a System of International Criminal Law Enforcement', *Michigan Journal of International Law*, 24 (2002–3), 1.

<sup>10</sup> See, e.g., Teitel, *Transitional Justice*.

<sup>11</sup> R. Teitel, 'Preface', in Shaw et al., *Localizing Transitional Justice*, viii; M. Osiel, *Mass Atrocity, Collective Memory, and the Law* (New Brunswick, NJ: Transaction Publishers, 2000), 1.

conceived in a more communitarian or more individualistic manner, and the views of the society's members may be given more or less weight in the design of particular justice mechanisms. However, the key point is that all justice mechanisms, including ICTs, should be evaluated in terms of the benefits they bring to particular defined societies in transition or post-conflict. The paradigm is inapplicable, however, to societies that have not yet entered into transition or that remain in the midst of conflict.<sup>12</sup> Furthermore, the international audience, which transcends the borders of particular societies, is given at most secondary consideration after the concerns of local populations.<sup>13</sup>

### *Juridified diplomacy*

Counterpoised to the transitional justice paradigm, critical scholars have put forth an alternative vision that largely conceives of ICTs as instruments of international politics.<sup>14</sup> This paradigm – building on Simpson's notion of 'juridified diplomacy' – is constructed upon premises that at least appear fundamentally opposed to those that underlie the transitional justice paradigm.

First, within this paradigm, ICTs are not primarily instruments of law and of justice but of diplomacy and of politics.<sup>15</sup> They are set up by states to achieve their political purposes rather than for the pursuit of an idealised notion of justice. These purposes may reflect self-interest in a narrow, cynical sense or more broadly conceived, such as a general interest in maintaining international peace and security. As instruments of politics, they fulfil these purposes primarily through influencing the calculus or perceptions (short or long term) of political actors,<sup>16</sup> although interaction with ICTs may also have a normative effect on the

<sup>12</sup> See Teitel, *Transitional Justice*, 5.

<sup>13</sup> See N. Kritz, 'Progress and Humility: The Ongoing Search for Post-Conflict Justice', in M. Bassiouni (ed.), *Post-Conflict Justice* (Ardsey, NY: Transnational Publishers, 2001), 59.

<sup>14</sup> Simpson, *Law, War and Crime*; See also P. Hazan, *Judging War, Judging History: Behind Truth and Reconciliation* (Stanford, CA: Stanford University Press, 2010), 145; F. Mégret, 'The Politics of International Criminal Justice', *European Journal of International Law*, 13 (2002), 1261; M. Koskenniemi, 'Between Impunity and Show Trials', *Max Planck Yearbook of United Nations Law*, 6 (2000), 1.

<sup>15</sup> See G. Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton, NJ: Princeton University Press, 2002).

<sup>16</sup> See Hazan, *Judging War, Judging History*, 137; J. Maogoto, *War Crimes and Realpolitik: International Justice from World War I to the 21st Century* (Boulder, CO: Lynne Rienner Publishers, 2004), 8–9.

interests of states in the long term.<sup>17</sup> The key point is that the fact that ICTs conduct criminal trials is considered at most an accidental or secondary characteristic of such institutions. ICTs have much more in common with other mechanisms of international diplomacy, such as the threat or imposition of sanctions or military intervention, than they do with national courts.<sup>18</sup>

Second, defining ICTs as mechanisms of diplomacy also situates them within a particular community of practice, namely the international diplomatic community. This community may be defined narrowly to include only states or more broadly to account for a wide range of non-state actors. Local actors may even have a role within this community. The defining aspect of this community, however, is that it transcends particular societal borders; by contrast, borders provide the context for the transitional justice paradigm. Moreover, as instruments for effecting political change, international criminal courts and tribunals are not limited to operating within post-conflict or transitional situations. Rather, they are explicitly intended to bring about such changes and potentially bridge conflict and post-conflict societies.<sup>19</sup>

### *Competing or complementary paradigms?*

As described before, the two paradigms reflect premises defined in opposition to each other and that superficially appear to be irreconcilable. One considers transitional justice as the triumph of law and legal processes over politics. The other regards judicial mechanisms as co-opted for political purposes and rendered subservient to political aims. One defines itself as operating within particular national or societal borders, and the other as operating only across such borders.

On closer look, however, these paradigms depend on each other for their respective existences and cannot be easily separated. Indeed, they are mutually constitutive: the decision to pursue justice through legal mechanisms is itself a political decision, whilst this decision is justified

<sup>17</sup> See Koller, 'The Faith of the International Criminal Lawyer'.

<sup>18</sup> See T. Farer, 'Restraining the Barbarians: Can International Criminal Law Help?' *Human Rights Quarterly*, 22 (2000), 90; D. Scheffer, 'International Judicial Intervention', *Foreign Policy*, 102 (1996), 34.

<sup>19</sup> Madoka Futamura describes such institutions as existing at the 'critical juncture' between 'how war ends' and 'how peace starts'. M. Futamura, *War Crimes Tribunals and Transitional Justice: The Tokyo Trial and the Nuremberg Legacy* (Abingdon: Routledge, 2008), 6.

through appealing to legal norms and implemented through legal mechanisms. And while the focus of transitional justice is on one particular society, that society's claims to justice are often articulated in presumptively universal norms that reject its past practices. Yet as Ruti Teitel notes, despite the appeal to the universal, what constitutes justice 'is determined not from an idealized archimedean point but from the transitional position itself'.<sup>20</sup> Thus, it is impossible to separate one paradigm entirely from the other. As Frédéric Mégret observes, 'all attempts at prioritizing one over the other seem destined to fail, as the excluded paradigm comes back to haunt the dominant account'.<sup>21</sup>

These two paradigms of transitional justice and juridified diplomacy constitute ideal types, each representing a distinct set of contradictory but also mutually constitutive values in dialogue with each other: the local and judicial contrasted with the international and political. International criminal law is a contested field in which states and other policy-makers are constantly articulating and mediating between values such as law and politics, realism and idealism, individual and collective, local and international and so forth.<sup>22</sup> As the debate between the competing values represented by each paradigm plays out over time, support for one or the other set of values ebbs and flows among those in a position to influence the development of ICTs and manifests in differences within and between these institutions over time. The next section of this chapter looks at why and to what extent the values represented by one or the other paradigm have come to dominate in different ICTs.

### Historical development of international courts and tribunals

This section traces the historical evolution of international criminal law (ICL) through the five ICTs established to date: the International Military Tribunal ('Nuremberg Tribunal'), the International Military Tribunal for the Far East Tribunal ('Tokyo Tribunal'), the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court (ICC). It excludes hybrid mechanisms and purely domestic institutions (criminal and otherwise) dealing with international crimes. The same contestation between contradictory but mutually constitutive paradigms

<sup>20</sup> Teitel, *Transitional Justice*, 224.

<sup>21</sup> Mégret, 'The Politics of International Criminal Justice', 1281.

<sup>22</sup> See, e.g., D. Robinson, 'The Identity Crisis of International Criminal Law', *Leiden Journal of International Law*, 21 (2008), 925.

takes place at all levels of the transitional justice/international criminal law debate. Similar observations could be made at national or local levels or among other transitional justice mechanisms, although the different actors and different interests will lead the processes to play out differently. This chapter limits itself to exploring how this process of contestation has played out at the sites of construction of ICTs.

### *Nuremberg and Tokyo tribunals*

The establishment of the Nuremberg and Tokyo tribunals emerged not out of a commitment to deliver justice to affected communities but rather as part of broader efforts to achieve the overarching political aims of ending the war and establishing peace. The founding documents of the Nuremberg and Tokyo tribunals rooted these institutions, respectively, in the 1943 Moscow and 1945 Potsdam Declarations, sweeping political documents setting out the Allies' aims and intentions with respect to the conduct and termination of hostilities and the establishment and maintenance of peace and security after the war.<sup>23</sup> The Moscow Declaration situated a call for punishment alongside such broad political aims as continuing the war, disarming the Axis powers, establishing what was to become the United Nations and regulating armaments in the post-war period.<sup>24</sup> The Potsdam Declaration, occurring nearer to the end of the war, listed the need to mete out 'stern justice' among the comprehensive terms for Japanese surrender.<sup>25</sup>

The threat of punishment contained in the Moscow and Potsdam Declarations did not, however, necessarily reflect any commitment to criminal justice as understood within the transitional justice paradigm. The Moscow Declaration reserved the question of how major war criminals would be punished for a future decision of the Allies,<sup>26</sup> and it was equally contemplated that they could be summarily executed without trial or following only the most cursory 'show trial', as opposed to following a full trial.<sup>27</sup> The decision to punish these individuals – already denoted as 'war criminals' – through the mechanism of a criminal trial

<sup>23</sup> Joint Four-Nation Declaration ('Moscow Declaration'), Moscow, 30 October 1943, The Avalon Project; Proclamation by the Heads of Governments, United States, China and the United Kingdom, Terms for Japanese Surrender ('Potsdam Declaration'), Berlin, 26 July 1945, 3 Bevans 1204.

<sup>24</sup> Moscow Declaration. <sup>25</sup> Potsdam Declaration. <sup>26</sup> Moscow Declaration.

<sup>27</sup> See A. Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment* (Chapel Hill: University of North Carolina Press, 1998), 63–79.

came much later, long after the decision to inflict individual punishment on the authors of atrocities had been taken.<sup>28</sup> The Tokyo Tribunal largely followed its influential predecessor. Thus, while the Nuremberg prosecutor Robert Jackson referred to the decision to subject those responsible for Nazi atrocities to criminal trials as 'stay[ing] the hand of vengeance',<sup>29</sup> at their roots, these tribunals represented the threat of individual violence to be inflicted directly on the Allies' political opponents. The decision to opt for criminal trials instead of summary executions merely channelled and did not substitute for such threats of individualised violence.

The nature of the crimes the tribunals were to address further reflected the primary concern of their creators with matters of international politics and not transitional justice. The main focus of the creators and proponents of the tribunals was the launching of an aggressive war, a crime that affected primarily the interests of states.<sup>30</sup> War crimes, which also implicated primarily the interests of states and their militaries, were of lesser but significant concern.<sup>31</sup> Far less significance was attached to crimes against humanity, the one category of crimes that most reflects the concerns motivating the more recent transitional justice paradigm.<sup>32</sup>

Over time, the Nuremberg and Tokyo tribunals increasingly took on apparent characteristics of the transitional justice paradigm. As mentioned earlier, criminal trials triumphed over the prospect of summary executions, crimes against humanity were eventually included in the tribunals' charters, and trials were carried out even after the Allies' war aims had been achieved. However, the extent of these developments should not be exaggerated. The legality of trials was sharply contested.<sup>33</sup> Prosecutions were highly selective. The tribunals not only focused exclusively on German and Japanese defendants, but also spared those German and Japanese officials who could serve useful political purposes.<sup>34</sup> The tribunals' jurisdiction over crimes against humanity was restricted to crimes committed in execution of or in connection with the

<sup>28</sup> See Report of Robert H. Jackson, US representative to the International Conference on Military Trials (1945), The Avalon Project; Kochavi, *Prelude to Nuremberg*; B. Smith, *The Road to Nuremberg* (New York, NY: Basic Books 1981).

<sup>29</sup> R. Jackson, 'Opening Address at the Nuremberg Tribunal', reprinted in *U.S. Chief of Counsel For Prosecution of Axis Criminality, Nazi Conspiracy and Aggression* (Washington, DC: United States Government Printing Office, 1946), vol. I, 98–99.

<sup>30</sup> *Ibid.* (referring to the launching of an aggressive war as the 'supreme crime').

<sup>31</sup> Koller, 'The Faith of the International Criminal Lawyer', 1035–1036. <sup>32</sup> *Ibid.*

<sup>33</sup> See Judge R. Pal, 'Dissenting Opinion to the Tokyo Judgment', in B. Röling and C. Ruter (eds.), *The Tokyo Judgment* (Amsterdam: University Press Amsterdam, 1977), 541–551.

<sup>34</sup> Maogoto, *War Crimes and Realpolitik*, 100–104.



war.<sup>35</sup> Though the war may have ended, trials were seen as serving the broader purpose of delegitimising Nazism and Japanese imperialism and establishing the ideological foundations of the post-war order.

Thus, to the extent that the Nuremberg and Tokyo tribunals took on apparent characteristics of transitional justice, they did so primarily for reasons of international politics, not out of concern among policy-makers as to their domestic effects on transitional societies. The decision to reject summary executions in favour of criminal trials had little to do with the impact of these trials on Germany or Japan. Rather, to impose punishment on individuals without trial was considered by international decision-makers to be an affront to shared international values.<sup>36</sup> Similarly, the incorporation of crimes against humanity came only after pressure from non-governmental organisations who appealed not to a particular society's need for justice but to a common sense of humanity perceived to be shattered by these crimes.<sup>37</sup> In short, the tribunals were tools of diplomacy: in Simpson's words, they 'pursue[d] political ends through jurisprudential means'.<sup>38</sup>

### ICTY/ICTR

Like their Nuremberg and Tokyo predecessors, the ICTY and ICTR bear many of the hallmarks of juridified diplomacy. They were established by an overtly political body – the UN Security Council – in the exercise of a political mandate – Chapter 7 of the UN Charter – with a view to achieving an overtly political aim: the restoration and maintenance of international peace and security.<sup>39</sup>

In both cases, the establishment of the tribunals followed an escalating series of Security Council resolutions and presidential statements, beginning with expressions of general concern about or condemnation of the ongoing violence and continuing through the imposition of arms embargoes, calls to respect humanitarian law, the deployment of peacekeepers and, penultimately, the establishment of commissions to investigate allegations of international crimes.<sup>40</sup> Only after the failure of these actions to

<sup>35</sup> Article 6 of the Charter of the International Military Tribunal.

<sup>36</sup> See the discussion in Koller, 'The Faith of the International Criminal Lawyer', 1040–1046.

<sup>37</sup> *Ibid.*, 1038–1039 <sup>38</sup> Simpson, *Law, War and Crime*, 24.

<sup>39</sup> UN Doc. S/RES/827 (1993) (establishing the ICTY); UN Doc. S/RES/955 (1994) (establishing the ICTR).

<sup>40</sup> In relation to the ICTY, see UN Docs S/RES/713 (1991); S/RES/721 (1991); S/RES/724 (1991); S/RES/727 (1992); S/RES/740 (1992); S/RES/743 (1992); S/RES/749 (1992);

achieve their intended aims of restoring peace and security did the Security Council turn to the establishment of tribunals. In these circumstances, threatening individualised violence against perpetrators of crimes was seen as a more forceful action that could be taken either without going so far as to intervene militarily in the case of the former Yugoslavia<sup>41</sup> or to make up for having failed to intervene adequately in the case of Rwanda.<sup>42</sup>

The primary political function of the ICTY and ICTR was further reflected in the debate, or more properly the lack of debate, concerning their features. Echoing the relationship between the Moscow Declaration and the establishment of the Nuremberg Tribunal, the decision to establish the ICTY preceded any consideration of the means by which it would operate.<sup>43</sup> Meanwhile, as with the Tokyo Tribunal, the ICTR's Statute largely replicated that of its sister institution.

As was the case with the Nuremberg and Tokyo tribunals, states targeted and labelled as 'criminals' those individuals whom they intended the ad hoc tribunals to prosecute long before they had been established, let alone having begun any investigations or trials.<sup>44</sup> To the extent that states expressed views on the possible features of the ICTY, at least some influential states advocated features inimical to the concept of fair and independent justice, such as placing it under the control of the Security Council.<sup>45</sup> Once established, the ICTY and ICTR also found their ability to carry out their mandates frustrated by a lack of support by states, suggesting that the interest of states in using the political threat of punishment outweighed their support for adjudicating crimes committed in the regions.<sup>46</sup>

S/RES/752 (1992); S/RES/757 (1992); S/RES/758 (1992); S/RES/760 (1992); S/RES/761 (1992); S/RES/762 (1992); S/RES/764 (1992); S/RES/771 (1992); S/RES/780 (1992). In relation to the ICTR, see UN Docs S/RES/912 (1994); S/PRST/1994/21 (1994); S/RES/918 (1994); S/RES/935 (1994).

<sup>41</sup> See K. Anderson, 'The Rise of International Criminal Law: Intended and Unintended Consequences', *European Journal of International Law*, 20 (2009), 331, 334; R. Kerr, *The Internal Criminal Tribunal for the Former Yugoslavia: An Exercise in Law, Politics and Diplomacy* (Oxford/New York: Oxford University Press, 2004), 38.

<sup>42</sup> See Maogoto, *War Crimes and Realpolitik*, 185; M. Mutua, 'Never Again: Questioning the Yugoslav and Rwanda Tribunals', *Temple International & Comparative Law Journal*, 11 (1997), 167, 176.

<sup>43</sup> UN Doc. S/RES/808 (1993), 2.

<sup>44</sup> See 'U.S. Names Figures it Wants Charged with War Crimes', *The New York Times*, 17 December 1992; Letter dated 28 September 1994 from the Permanent Representative of Rwanda to the United Nations Addressed to the President of the Security Council, UN Doc. S/1994/1115 (1994).

<sup>45</sup> Mégret, 'The Politics of International Criminal Justice', 1275.

<sup>46</sup> Bass, *Stay the Hand of Vengeance*, 215–216; D. Hirsh, *Law against Genocide: Cosmopolitan Trials* (London: The Glass House Press, 2003), 75–76.

Notwithstanding their firm roots in international political concerns, the ICTY and ICTR showed increasing affinity with the transitional justice paradigm. Both tribunals were established, at least formally, not only to restore peace and security, but also to hold accountable those responsible for serious violations of international humanitarian law<sup>47</sup> and, in the case of the ICTR, to contribute to national reconciliation and the strengthening of national courts.<sup>48</sup> Their jurisdictions were extended from the Nuremberg and Tokyo tribunals to include genocide, war crimes committed in non-international armed conflict and crimes against humanity when committed in non-international armed conflict (ICTY) or even independent of any nexus to armed conflict (ICTR),<sup>49</sup> and they were given broad jurisdiction over all sides to the conflicts. Suggestions to subordinate the judicial process to political supervision were rejected,<sup>50</sup> the independence of the tribunals was guaranteed<sup>51</sup> and cooperation and support was eventually forthcoming with the overwhelming majority of suspects surrendered to the tribunals.

As they grew, the tribunals began to develop and to articulate their own conceptions of their roles as instruments of transitional justice and of reconciliation, and to move themselves in these directions.<sup>52</sup> Outreach to local populations was accepted, if belatedly, to be an important component of the tribunals' practices, and the tribunals gradually began to work more closely with national courts and other organisations engaged in transitional justice.<sup>53</sup>

As with Nuremberg and Tokyo, the ICTY and ICTR's transitional justice mandates were not universally accepted,<sup>54</sup> and the extent to which they have contributed to local justice remains limited. They have been accused of impartiality for not prosecuting all sides to the conflicts

<sup>47</sup> See UN Doc. S/Res/827 (1993); UN Doc. S/Res/955 (1994).

<sup>48</sup> UN Doc. S/Res/955 (1994).

<sup>49</sup> Articles 3–5 ICTY Statute, Annex to UN Doc. S/25704 (1993); Articles 2–4 ICTR Statute, Annex to UN Doc. S/RES/955 (1994).

<sup>50</sup> Mégret, 'The Politics of International Criminal Justice', 1275.

<sup>51</sup> See Articles 12 and 16 ICTY Statute, Annex to UN Doc. S/25704 (1993); Articles 11 and 15 ICTR Statute, Annex to UN Doc. S/RES/955 (1994).

<sup>52</sup> See, e.g., Report of the ICTY, UN Doc. A/49/342-S/1994/1007 (1994), at 15–16.

<sup>53</sup> See, e.g., Seventeenth Annual Report of the ICTY, UN Doc. A/65/205-S/2010-413 (2010), at 8, 80–84 and 87; Fifteenth annual report of the ICTR, UN Doc. A/65/188-S/2010/418 (2010), at 53–55, 60–65.

<sup>54</sup> See statements of Mr Kovanda (Czech Republic) and Mr Keating (New Zealand) in UN Doc. S/PV.3453 (1994).

despite having the jurisdiction to do so.<sup>55</sup> More importantly, an immense gulf (or ‘impunity gap’) persisted between the activities of the ad hoc tribunals and demands for punishment of those responsible for atrocities. Ten years after the establishment of the ICTR, thousands remained in Rwandan jails awaiting trial<sup>56</sup> and it was not until 2011 that the tribunal approved the transfer of suspects for trial in Rwanda on the basis of ‘international standards’ (namely, opposition to capital punishment), which was prioritised over calls for more local accountability.<sup>57</sup>

While the tribunals themselves and their staff may have developed and acted on their own conceptions of the ICTY and ICTR as instruments of transitional justice, support among states for the apparent turn towards this paradigm can be explained to a large extent in light of international political concerns. More specifically, two sorts of international influences – normative and instrumental – led to states supporting efforts by the ICTY and ICTR to take on apparent characteristics of transitional justice.

First, as with Nuremberg and Tokyo, international values shaped both the structure and the operations of the ad hoc tribunals. Suggestions to subject them to the political control of the Security Council were rejected as inconsistent with international values,<sup>58</sup> and it was considered ‘axiomatic’ that the tribunals’ procedures should be consistent with internationally recognised human rights.<sup>59</sup> The international nature of the tribunals, including in particular the composition of their judiciaries and their location outside situation countries, was seen as means to safeguard their international legitimacy.<sup>60</sup> When international and national values clashed, such as over the location of the tribunals, the primacy of the tribunals over national courts or the prohibition of the

<sup>55</sup> See, e.g., A.-S. Massa, ‘NATO’s Intervention in Kosovo and the Decision of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia Not to Investigate: An Abusive Exercise of Prosecutorial Discretion?’ *Berkeley Journal of International Law*, 24 (2006), 610; P. Erlinder, ‘The UN Security Council Ad Hoc Rwanda Tribunal: International Justice or Juridically-Constructed “Victor’s Impunity”?’ *DePaul Journal for Social Justice*, 4 (2010), 131.

<sup>56</sup> See K. Moghalu, ‘Reconciling Fractured Societies: An African Perspective on the Role of Judicial Prosecutions’, in R. Thakur and P. Malcontent (eds.), *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* (Tokyo: United Nations University Press, 2004), 197.

<sup>57</sup> See J. Mujuzi, ‘Steps Taken in Rwanda’s Efforts to Qualify for the Transfer of Accused from the ICTR’, *Journal of International Criminal Justice*, 8 (2010), 237.

<sup>58</sup> Mégret, ‘The Politics of International Criminal Justice’, 1275.

<sup>59</sup> UN Doc. S/25704 (1993), at 106.

<sup>60</sup> See UN Doc. S/25704 (1993), at 131. See also T. Franck, *Fairness in International Law and Institutions* (Oxford: Oxford University Press, 2002), 280.

death penalty before the ICTR, it was the international that won out, even though encouraging national values could arguably contribute more to transitional justice.

Second, states came to support the transitional justice mandate of these tribunals for more instrumental reasons. As international public opinion paid increasing attention to the unfolding atrocities and support for accountability measures grew, it became in the interests of states to be seen as defenders of the international rule of law and to provide the ICTY and ICTR with necessary cooperation and support.<sup>61</sup> The same states also quickly realised that the international legitimacy bestowed by fair and independent judicial processes could further their own political aims. The issuance of arrest warrants for Radovan Karadžić and Ratko Mladić provided an objective basis for excluding them from negotiations on the future of Bosnia-Herzegovina, thereby enabling diplomats to deal with their preferred interlocutor, Slobodan Milošević.<sup>62</sup> Later, the perception of Milošević as a war criminal, even before an indictment was issued, eased the acceptance for the ongoing bombing of Kosovo by NATO forces.<sup>63</sup> This recognition of the possible convergence between states' political interests and the legitimacy bestowed by independent judicial bodies constituted a significant development in the practice of ICTs and was to be of relevance for the ongoing negotiations on the establishment of the ICC.

### *International Criminal Court*

To some extent, the adoption of the Rome Statute of the International Criminal Court in 1998 can be seen as continuing the trend of increasing recognition of the transitional justice paradigm. It may even be described as, to that point, a high-water mark in the development of ICTs *qua* transitional justice mechanisms. The ICC has broad jurisdiction over crimes against humanity outside of situations of armed conflict as well as war crimes committed in non-international armed conflict.<sup>64</sup> The

<sup>61</sup> Mégret, 'The Politics of International Criminal Justice', 1273. See also G. McDonald, 'Problems, Obstacles and Achievements of the ICTY', *Journal of International Criminal Justice*, 2 (2004), 558, 560–567.

<sup>62</sup> See Kerr, *An Exercise in Law, Politics and Diplomacy*, 156 (citing R. Holbrooke, *To End a War* (New York, NY: Random House, 1999), 315–316, 338).

<sup>63</sup> P. Williams and M. Scharf, *Peace with Justice? War Crimes and Accountability in the Former Yugoslavia* (Lanham, MD: Rowman and Littlefield, 2002), 207–208.

<sup>64</sup> Articles 7–8, Rome Statute.

exercise of this jurisdiction is subject to the principle of complementarity,<sup>65</sup> suggesting a preference for domestic proceedings that are closer to affected populations. Victims have unprecedented rights to participate in proceedings and to obtain reparations, rights that make sense only within the transitional justice paradigm.<sup>66</sup> Most importantly, its jurisdictional regime puts fundamental determinations of where and when the ICC will act in the hands of an independent prosecutor and judges guided by objective criteria set out in the Statute.<sup>67</sup>

One should not be too hasty, however, in celebrating the ICC as an unqualified victory for the premises of transitional justice. As noted by Judge Philippe Kirsch, the first president of the ICC and former chairman of the committee that elaborated the ICC's Statute,

The ICC did not create itself. It was created by states for the fulfilment of certain objectives stated by them and as provided in the ICC statute: to put an end to impunity for the perpetrators of the most serious crimes that threaten the peace, security and well-being of the world; to contribute to the prevention of such crimes, and to guarantee lasting respect for the enforcement of international justice.<sup>68</sup>

Originally conceived as 'a "facility" for states – something of which they might avail themselves if they thought it useful or expedient to do so',<sup>69</sup> the ICC may be triggered by states referring situations (individually or via the Security Council), and the Statute accords privileged status to these referrals. Not only may the prosecutor investigate such situations without first awaiting judicial approval as he must in the case of investigations *proprio motu*,<sup>70</sup> but the referring state or Security Council may also challenge a decision of the prosecutor not to investigate or prosecute.<sup>71</sup>

The early years of the ICC have seen states seize it in circumstances that recall the establishment of previous ICTs. Uganda and the Central African Republic referred situations on their own territory, specifically targeting individuals opposed to the governing regime in their referrals.<sup>72</sup>

<sup>65</sup> Preamble and Article 17, Rome Statute.   <sup>66</sup> Articles 68(3) and 75, Rome Statute.

<sup>67</sup> Articles 15 and 73, Rome Statute.

<sup>68</sup> Statement of President Kirsch, 11th Diplomatic Briefing, 10 October 2007, 4.

<sup>69</sup> C. Warbrick, 'The United Nations System: A Place for Criminal Courts?' *Transnational Law and Contemporary Problems*, 5 (1995), 237, 243.

<sup>70</sup> See Articles 13–15, Rome Statute.   <sup>71</sup> Article 53(3)(a), Rome Statute.

<sup>72</sup> See Letter from Prosecutor Moreno-Ocampo to President Kirsch on 17 June 2004, Annex to Decision Assigning the Situation in Uganda to Pre-Trial Chamber II, *Situation in Uganda*, ICC-02/04, Presidency, ICC, 5 July 2004; Letter referring the situation in the Central African Republic to the ICC Prosecutor, reproduced in annex 19 to Communication par la Défense des copies de documents référenciés dans les notes de

Much as it did in establishing the ICTY and ICTR, the Security Council referred the situation in Darfur, Sudan, only following the failure of a series of increasingly stringent measures, including the establishment of a commission of inquiry, to achieve peace and security.<sup>73</sup> In an action that recalls the earlier origins of ICTs in the 1943 Moscow Declaration, the Security Council referred the situation in Libya in the context of a broader resolution aimed at stemming a conflict.<sup>74</sup> In each of these cases, the threat of punishment was seen as a tool for achieving a political end – the resolution of conflict – and this threat could be withdrawn through legal processes or promises of non-cooperation if withdrawal would further those ends.<sup>75</sup> In these circumstances, the principle of complementarity represents not so much a preference for national or local trials but rather deference to states that may choose to relinquish the exercise of jurisdiction to the ICC.<sup>76</sup>

Even the *proprio motu* powers of the prosecutor and his or her discretion in deciding to investigate situations or cases can be fully explained within the juridified diplomacy paradigm. States undoubtedly realised, from the experience of the ICTY, that the ability of the ICC to influence political developments would depend on its perceived legitimacy. By creating an independent prosecutor, states have ‘outsourced’ difficult decisions as to when and where to intervene judicially with two potential benefits.

bas de pages de sa requête en contestation de la recevabilité, *The Prosecutor v. Jean-Pierre Bemba Gombo* (‘Bemba’), ICC-01/05-01/08, 15 March 2010. Even the referral of the situation in the Democratic Republic of the Congo can be seen as an expression of self-interest. See W. Burke-White, ‘Complementarity in Practice: the International Criminal Court as Part of a System of Multi-Level Global Governance in the Democratic Republic of the Congo’, *Leiden Journal of International Law*, 18 (2005), 557, 565.

<sup>73</sup> UN Doc. S/RES/1593 (2005). For a brief overview of the steps leading to the referral, see R. Cryer, ‘Sudan, Resolution 1593, and International Criminal Justice’, *Leiden Journal of International Law*, 19 (2006), 195, 198–203.

<sup>74</sup> UN Doc. S/RES/1970 (2011).

<sup>75</sup> See Cable from US Embassy, London to US Secretary of State: ‘Sudan/ICC: UK Prepared to remain Initially Flexible in the Face of New Indictments’, 11 July 2008; Cable from US Embassy, London to US Secretary of State: ‘Sudan/ICC: UK Strategy with Potential Bashir ICC Indictment’, 15 July 2008; ‘Deal Could See Gaddafi Escape Prosecution’, *Belfast Telegraph*, 29 March 2011; David Bosco, ‘The Libya Resolution: Prosecution as Bargaining Chip?’, *Foreign Policy*, 27 February 2011.

<sup>76</sup> See Corrigendum to Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled ‘Decision on the Admissibility and Abuse of Process Challenges’, *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Appeals Chamber, ICC, 19 October 2010; Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Appeals Chamber, 25 September 2009.

First, it increases the legitimacy of international action if judicial intervention is triggered or led by an independent prosecutor, rather than a handful of possibly self-interested states. Second, there may be situations where states wish international action to be taken but would not be willing to incur the political costs of referring a situation to the Court. By feeding information to the prosecutor, they may anonymously contribute to the opening of an investigation. In exchange for these benefits, states had to accept the risk of an independent prosecutor and judges who may act against their interests. However, it should be recalled that such independence, as a practical matter, is not unlimited. The whole ICC system is, at its core, entirely dependent on the support and cooperation of states.<sup>77</sup> In particular, without the arrest of suspects, the ICC may be prevented from carrying out trials. As such, states retain significant control over the effectiveness of the ICC.

That the ICC can be largely explained within the juridified diplomacy paradigm – as a means of routing political interests through legal forms – does not necessarily negate its role as an instrument of transitional justice. The two could be complementary. It could also be that the two paradigms have converged in the recognition that justice and peace must, in the words of UN secretary-general Ban Ki-Moon, go ‘hand in hand’.<sup>78</sup> In 2010, states parties to the ICC Statute held a conference to review the Statute, during which they devoted a significant portion of time to a ‘stocktaking’ of international criminal justice as it currently stands.<sup>79</sup> While they emphasised that justice is ‘a fundamental building block of sustainable peace’,<sup>80</sup> their discussions reflected a limited commitment to a view of the ICC as an instrument of transitional justice. Its ultimate impact was considered primarily in terms of its contribution to peace;<sup>81</sup> its impact on victims and affected communities was treated as a secondary or incidental effect.<sup>82</sup>

<sup>77</sup> See Parts IX–XII, Rome Statute.

<sup>78</sup> Ban Ki-Moon, ‘Op-Ed: We Must Get Justice’, *New Vision Online*, 28 May 2010.

<sup>79</sup> Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Part I, at 22–30.

<sup>80</sup> Kampala Declaration, 1 June 2010, RC/Decl.1, Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Part II, 23, at 3.

<sup>81</sup> See Stocktaking of International Criminal Justice (Peace and Justice): Moderator’s Summary, Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Annex V(b), at 2a, 8–26, 32.

<sup>82</sup> Stocktaking of International Criminal Justice (The impact of the Rome Statute System on Victims and Affected Communities): Final Report by the Focal Points (Chile and Finland), Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Annex V(a), at 8.



Furthermore, when it came to closing the so-called impunity gap between national jurisdictions and the ICC, states made clear that the ICC had a very limited role in strengthening national jurisdictions. In their view, it should rather focus on its 'core mandate and function', whilst '[a]ctivities aimed at strengthening national jurisdictions . . . should be carried forward by States themselves, together with international and regional organizations'.<sup>83</sup>

### **Towards the integration of transitional justice and international politics**

In light of the arguably increasing acceptance by states of ICTs as instruments of transitional justice, the question is whether and to what extent ICTs may play such a role in the future. This section considers the extent to which it is practical and desirable for ICTs to engage more directly with the objectives of transitional justice.

#### *Integrating transitional justice and juridified diplomacy in practice*

The history of ICTs, as depicted earlier, demonstrates that it is possible to render these institutions more responsive to transitional justice concerns. States have increasingly recognised that the legitimacy provided by independent judicial bodies can contribute to the advancement of their own political interests. They have accordingly accepted and even supported the independence and judicial nature of ICTs and provided them with necessary support. This interest of states has also opened the opportunity for ICTs to develop their own identities and for 'outsiders', most notably non-governmental organisations, to also influence their direction.<sup>84</sup>

By arguing that the legitimacy of ICTs depends on such factors as the fairness of trials and the effectiveness of cooperation or outreach, advocates of transitional justice have sought to move ICTs in this direction. To date, states have shown greater receptivity to arguments concerning the

<sup>83</sup> Assembly of States Parties, Report of the Bureau on stock-taking: complementarity, ICC-ASP/8/51 at 4.

<sup>84</sup> The growing role of civil society has had the added consequence that the ICC must justify its legitimacy not only to states but also to civil society. M. Glasius, 'What Is Global Justice and Who Decides? Civil Society and Victim Responses to the International Criminal Court's First Investigations', *Human Rights Quarterly*, 31 (2009), 496, 497.

'justice' aspect of the transitional justice paradigm, that is, to ensuring the fairness of judicial proceedings, than to its 'transitional' component, that is, its benefit to societies undergoing transition.

Any effort to render ICTs more responsive to transitional justice concerns will encounter two significant challenges. First, as reflected earlier, support of states for the transitional justice mandate of ICTs remains limited. A considerable increase in state support would be needed to effect a significant shift in the role of ICTs towards transitional justice. Second, turning ICTs into comprehensive instruments of transitional justice would require incredible investments. In the case of Rwanda, for example, the ICTR issued indictments against eighty individuals, yet approximately 120,000 persons remained in jail as of 2004.<sup>85</sup>

The complementarity challenges in the situations before the ICC are similarly daunting.<sup>86</sup> Promoting effective and comprehensive transitional justice will require longer-term involvement in societies and a broader approach to criminality than that currently employed by any ICT. Even only moving international courts and tribunals partially towards closing the 'impunity gap' would significantly change the functioning of these institutions. In this context, the questions remain whether, to what extent and in what form further expanding the transitional justice role of ICTs would be desirable.

*The desirability of integrating transitional justice and juridified  
diplomacy*

Given the limited support of states and the significant investments likely to be required, prudence is merited in any effort to enhance the contributions of ICTs to transitional justice. Demanding too much too quickly risks creating unrealistic expectations that courts and tribunals will be unable to fulfil. Such failures in the short term could significantly impair enthusiasm for broader transitional justice initiatives in the long term. Moreover, a backlash may emerge if states see the mandates of these institutions being stretched too far beyond what they are willing to

<sup>85</sup> Moghalu, 'Reconciling Fractured Societies', 203.

<sup>86</sup> See E. Witte, *Putting Complementarity into Practice: Domestic Justice for International Crimes in DRC, Uganda and Kenya* (New York, NY: Open Society Foundations, 2011); G. Mattioli and A. van Woudenberg, 'Global Catalyst for National Prosecutions? The ICC in the Democratic Republic of Congo', in N. Waddell and P. Clark (eds.), *Courting Conflict? Justice, Peace and the ICC in Africa* (London: Royal African Society, 2008), 55.

support.<sup>87</sup> Emphasising the contributions of ICTs to transitional justice goals may also lead to a diminution of support and cooperation, to the extent that states do not see these goals as being in their interests. In contrast, stressing the contributions of ICTs to international peace and security increases the likelihood that states will see their interests reflected and provide the support and cooperation necessary for ICTs to function as instruments of both transitional justice and juridified diplomacy.<sup>88</sup>

In addition, there is a potentially significant loss incurred in transforming ICTs into more effective instruments of transitional justice. ICTs are beginning to emerge as potentially powerful tools of specific deterrence and conflict resolution.<sup>89</sup> Burdening ICTs with the responsibility to deliver comprehensive transitional justice could significantly curtail the flexibility and freedom of action that, arguably, enables them to make these contributions. To the extent that it is desirable to pursue transitional justice, it may be preferable to heed the lessons of the 2010 ICC Review Conference stocktaking exercise and to focus on developing national capacities to promote transitional justice while preserving the more selective, targeted role of international courts and tribunals as instruments of juridified diplomacy – bearing in mind that many of the same challenges of contestation of values will be replicated at national and local levels.

Focusing on the juridified diplomacy role of ICTs is not without its own dangers. Leaving ICTs as instruments of international politics risks opening them to the cynical manipulation of states, thereby undermining not only their limited contributions to transitional justice but also their legitimacy, which provides their added value within the juridified

<sup>87</sup> Suggestions that international criminal law will radically evolve on its own against the interests of states are largely overstated. See A. Kapur, 'Conceptual Distinctions Between the ICJ Project and Its Constituent Processes: A Reply to Brad Roth and Ken Anderson', *EJIL Talk!*, 11 May 2010.

<sup>88</sup> See, T. Franck and S. Yuan, 'The United States and the International Criminal Court: Unilateralism Rampant', *New York University Journal of International Law and Politics*, 35 (2003), 519, 555–558.

<sup>89</sup> See, e.g., N. Grono and A. O'Brien, 'Justice in Conflict: The ICC and Peace Processes', in Waddell and Clark (eds.), *Courting Conflict? Justice, Peace and the ICC in Africa*, 15–16; see also International Crisis Group, 'Northern Uganda Peace Process: The Need to Maintain Momentum', Africa Briefing No. 26, 14 September 2007; Mattioli and van Woudenberg, 'Global Catalyst for National Prosecutions?'; M. Glasius, 'Global Justice Meets Local Civil Society: The International Criminal Court's Investigation in the Central African Republic', *Alternatives: Global, Local, Political*, 33 (2008), 413, 428; B. Cooper, 'The Limits of International Justice', *World Policy Journal*, 91 (2009), 98.

diplomacy paradigm. It is crucially important – even within this paradigm – that states are aware of the substantial damage that can result from undermining the legitimacy, independence or effectiveness of ICTs, or of failing to provide them with the necessary support and cooperation.

Even minor instances of non-cooperation or infringement on the perceived independence or legitimacy of ICTs can have significant effects because, as Thomas Franck has observed with respect to international law more broadly, '[i]n a community whose rules are so largely derived from the persistent patterns of its members' conduct, each action is judged by all states in terms of its projected effect it all were to act similarly'.<sup>90</sup> It is therefore vital that states make every effort to refrain from interfering with, and provide full support to the conduct of, independent judicial processes before ICTs. In those limited cases where states may consider it absolutely necessary to withhold support or otherwise to interrupt the judicial process, every effort should nevertheless be made to preserve the integrity of ICTs.

### Conclusion

As much as signifying acceptance of the promise of transitional justice, the evolution of ICTs can be understood as reflecting growing recognition of states of the importance of legitimacy in international politics. By creating and supporting independent criminal courts and tribunals guided by neutral, objective criteria, states have been able to draw on these institutions' legitimacy for their own purposes. This independence has, at the same time, enabled these institutions, with the support of civil society and others, to develop their own identities as instruments of transitional justice within the limits of the tolerance of states and other policy-makers.

Nevertheless, the support of states for ICTs playing a transitional justice role remains limited. While the integration of transitional justice and international politics may be desirable and achievable in the long-term, the hesitation of states to fully embrace the transitional justice paradigm, at least insofar as ICTs are concerned, suggests that caution is due in the short-term. To expect ICTs to perform the functions or to fulfil the purposes ascribed to them within the transitional justice paradigm is to ask these institutions to play many roles, perhaps more than

<sup>90</sup> T. Franck, *The Power of Legitimacy Among Nations* (New York: Oxford University Press, 1990), 152.

any one institution can bear. The ICC's own struggle as a court of both retribution and reparations is instructive in this regard.<sup>91</sup>

The extent to which ICTs contribute to the realisation of the aims of transitional justice should not be taken as measures of their overall effectiveness, and the failure to 'achieve' transitional justice, broadly construed, should not be laid at the feet of these institutions. The evaluation of ICTs should be done on the basis of the political context and constraints in which they operate, not on the basis of what one might wish them to do under ideal circumstances. Thus, with respect to the ICC – whose future development is at the centre of this evolution – it may be preferable to continue to explore and to focus on its contributions as an instrument of a legitimised international politics, mindful of the potential for its political manipulation by states. At a minimum, efforts to render the ICC more responsive to the concerns motivating the transitional justice paradigm must acknowledge the risks and challenges of doing so.

<sup>91</sup> See Chapters 12–14 by Fletcher, Dixon and Kendall in this volume.