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The Search for Post-Conflict Justice in Iraq: A Comparative Study of Transitional Justice Mechanisms and Their Applicability to Post-Saddam Iraq

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THE SEARCH FOR POST-CONFLICT JUSTICE IN IRAQ: A COMPARATIVE STUDY OF TRANSITIONAL JUSTICE MECHANISMS AND THEIR APPLICABILITY TO POST- SADDAM IRAQ

*Dana Michael Hollywood**

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INTRODUCTION

Few societies have suffered as has contemporary Iraq. Today, Iraq is a nation under foreign occupation¹ with a horrifying history of savage authoritarian rule.² Transitional justice mechanisms that address this legacy are critical to the stability and reconstruction of that troubled state.³ In particular, mechanisms aimed at national reconciliation could do much to allay sectarian divisions in Iraq, notably those created by the

1. A 2006 study published by the British medical journal *The Lancet* estimates that as many as 654,965 Iraqis may have died between March 2003 and July 2006 as a result of the American invasion. Gilbert Burnham et al., *Mortality After the 2003 Invasion of Iraq: A Cross-Sectional Cluster Sample Survey*, 368 *THE LANCET* 1421, 1421 (2006), available at <http://www.thelancet.com/journals/lancet/article/PIIS0140673606694919/fulltext>. Gen. David H. Petraeus, the senior American Commander in Iraq, presented figures to Congress on September 10, 2007 estimating that between July, 2006 and August 2007 there were over 30,000 Iraqi civilian deaths. See Multi-National Force–Iraq 3 (Sept. 10–11, 2007), available at <http://i.a.cnn.net/cnn/2007/images/09/10/petraeus.slides.pdf>.

2. The egregious and systematic human rights violations in Iraq under the Ba'ath regime have been well-documented and are beyond the scope of this paper. Arguably the best source on the monstrous inhumanity of the Ba'ath regime is Kanan Makiya's masterly study first published in 1989 and later updated in 1998. See KANAN MAKIYA, *REPUBLIC OF FEAR: THE POLITICS OF MODERN IRAQ* (updated ed. 1998). See also INT'L CTR. FOR TRANSITIONAL JUSTICE & HUMAN RIGHTS CTR., UNIV. OF CAL., BERKELEY, *IRAQI VOICES: ATTITUDES TOWARD TRANSITIONAL JUSTICE AND SOCIAL RECONSTRUCTION V* (2004), available at http://www.hrcberkeley.org/download/Iraqi_voices.pdf [hereinafter *IRAQI VOICES*] ("Hundreds of thousands killed or missing, hundreds of mass graves, crippled state institutions, and a political culture shaped by three decades of one-party rule and dictatorship are but four contemporary realities."); *Opening Statement by Pierre-Richard Prosper, Ambassador-at-Large for War Crimes Issues, U.S. Department of State: Before the Comm. on Gov't Affairs*, 108th Cong. 1–2 (2003) (statement by Pierre-Richard Prosper, Ambassador-at-Large for War Crimes) ("[T]he Iraqi regime has repeatedly committed atrocities and serious violations of the laws of war over a twenty-year period, including: [t]he gassing and killing of between 50,000 and 100,000 Kurds during the Anfal campaign in 1998; [t]he brutal oppression and torture of Kuwaitis in 1991, displacing 1.5 million people, killing more than 1,000 Kuwaitis and leaving over 600 persons missing; [t]he brutal suppression of Shi'a Muslim insurgencies in southern Iraq in 1991, with indiscriminate attacks that killed between 30,000 to 60,000 persons, the draining of the southern marshes, and the secret execution of thousands; [a]nd a series of violations during Iraq's war with Iran.").

3. See, e.g., JAMES A. BAKER, III & LEE H. HAMILTON, *THE IRAQ STUDY GROUP REPORT 19* (2006) ("The security situation cannot improve unless leaders act in support of national reconciliation.").

Sunni minority's persecution of the Shi'a majority⁴ and the Sunni Ba'ath regime's genocide of the Kurdish population.⁵

Consequently, while transitional justice is indispensable to Iraq in its transition from authoritarianism to democracy, it also faces unique challenges. The President of the Center for Strategic and International Studies and the President of the Association of the United States Army co-authored a perceptive article in 2002 entitled *Toward Postconflict Reconstruction*.⁶ The article delineates four "pillars" that all post-conflict societies must establish in their transition from war to peace or authoritarian rule to democracy: security; justice and reconciliation; social and economic well-being; and governance and participation.⁷ While the authors acknowledge that these four pillars are "inter-related," they also note that security is the "sine qua non of postconflict reconstruction."⁸ Today, the security pillar has yet to be erected in Iraq.⁹ Until it has been established,

4. See, e.g., SAÏD K. ABURISH, *SADDAM HUSSEIN: THE POLITICS OF REVENGE* 122–23, 183–85 (2000) [hereinafter ABURISH, *POLITICS OF REVENGE*].

5. On April 4, 2006 the Iraqi Special Tribunal ("IST") announced that it had charged Saddam Hussein with genocide of Iraqi Kurds. See Edward Wong, *Hussein Charged with Genocide in 50,000 Deaths*, N.Y. TIMES, Apr. 5, 2006, at A1. At least one Dutch court has already found that the attack on Iraqi Kurds in Halabja in March 1998 constituted genocide. See *Killing of Iraqi Kurds "Genocide"*, BBC News, Dec. 23, 2005, available at <http://news.bbc.co.uk/2/hi/europe/4555000.stm> (explaining that the ruling came in the "case of Dutch trader Frans van Anraat, who was given a 15-year sentence for selling chemicals to Saddam Hussein's regime").

6. John J. Hamre & Gordon R. Sullivan, *Toward Postconflict Reconstruction*, 25:4 WASH. Q. 85 (2002).

7. *Id.* at 91–92.

8. *Id.*

9. The February 22, 2006 explosion of the Askariya, or Golden, Mosque in Samarra, one of the Shi'ites' most revered shrines, has so inflamed sectarian tensions that scholars, journalists, and policymakers fear that Iraq is now in the midst of a civil war. For background on the attack on the Askariya Mosque see PETER W. GALBRAITH, *THE END OF IRAQ: HOW AMERICAN INCOMPETENCE CREATED A WAR WITHOUT END* 1–12 (2006).

The argument that Sunni-Shi'a tensions have so deteriorated in Iraq that the country is now in civil war is perhaps most forcefully made by former Ambassador Peter Galbraith. In a devastating critique of American policy, Galbraith comments: "Insurgency, civil war, Iranian strategic triumph, the breakup of Iraq, an independent Kurdistan, military quagmire. These are all consequences of the American invasion of Iraq that the Bush Administration failed to anticipate." *Id.* at 7. See also Sean D. Naylor, *Retired Generals Blast Rumsfeld*, ARMY TIMES, Apr. 24, 2006, at 10 ("[M]any observers now debate whether the country is on the brink of civil war."); Phil Rosenthal, *Journalists War Over "Civil War"*, CHI. TRIB., Apr. 14, 2006, at C1 ("Allawi has called it a civil war . . . and a growing number of Americans have decided that's exactly what it is. A *Los Angeles Times*/Bloomberg poll of 1,357 adults nationwide this week found 56 percent of respondents believed Iraq was 'currently engaged in a civil war' . . ."); *Civil War (Siv-el Wôr)*, n. 1 *A Violent Conflict Between Organized Groups Within a Country*, WASH. POST, Apr.

transitional justice mechanisms will fail to contribute their full potential and must be used sparingly. While acknowledging this reality, this paper looks cheerfully to a hopefully not-too-distant future when transitional justice mechanisms can be implemented to their full potential in a peaceful and stable Iraq.

Part I of this Article provides a conceptual analysis of transitional justice. Throughout this section, various transitional justice mechanisms will be considered as the author believes that a comparative study better assists one in more fairly evaluating a particular approach. Part II considers the 1991 Czech lustration law. Particular emphasis is placed on this law because *prima facie*, the need for de-Ba'athification may be analogized to the need for de-Communization. In both cases, strong arguments can be made that party leaders responsible for building a repressive totalitarian apparatus and committing systematic human rights violations should not be trusted to carry out democratic reforms and must therefore be estopped from serving in positions of power. Indeed, lustration in the

9, 2006, at B03 (“[T]he war in Iraq has been a civil war not simply since the escalation of internecine killings following the bombing of [the Golden Mosque] in February, but at least since the United States handed over formal control to an interim Iraqi government in June 2004.”); *Whether It’s Civil War or Not, Iraq Still Needs Military Help*, TAMPA TRIB., Mar. 21, 2006, Nation/World, at 14 (“The Iraqi occupation is entering its fourth year with violence escalating. Some people here and in Iraq are calling the situation civil war”); *Iraq ‘Now in the Grip of Civil War’*, THE HERALD (Glasgow), March 20, 2006, at 1 (“We are losing each day as an average 50 to 60 people throughout the country, if not more. If this is not civil war, then God knows what civil war is.”) (quoting former interim Prime Minister Iyad Allawi); Desiree Cooper, *Unholy Attacks Call Faithful Into Action*, DETROIT FREE PRESS, March 2, 2006, at 1 (“The death count is now in the hundreds as the region hurtles toward civil war.”); *Mosque Attack Arrests*, DAILY TELEGRAPH (Sydney), March 1, 2006, at 21 (“The attack on Samarra’s Golden Mosque led to widespread retaliatory attacks on the minority Sunni community, sparking fears of civil war.”); Editorial, *Nervous Days*, THE PRESS (Christchurch, New Zealand), Feb. 27, 2006, at 10 (“There can be no doubt that the attack on the Golden Mosque was designed to create even more intense religious hatred and even spark a religious civil war.”); Richard Sisk, *New Wave of Death and Hate: 100 Killed as Sunnis, Shiites Clash; U.S. Troops Don’t Take Sides as the Fear of Civil War Grows*, DAILY NEWS (N.Y.), Feb. 24, 2006, at 21 (“This is the first time that I have heard politicians say they are worried about the outbreak of civil war.”) (quoting a Kurdish elder statesman in an interview with the Associated Press); Editorial, *Iraq Is on the Brink; Destruction of the Golden Mosque Is a Major Test for Nation Rebuilding*, BUFFALO NEWS, Feb. 24, 2006, at A8 (“No moment in the aftermath of the U.S.-led invasion has led Iraq closer to civil war than Wednesday’s attack that shattered the iconic golden dome”); *The Golden Mosque*, FIN. TIMES (London), Feb. 23, 2006, First Section, at 1 (“Iraqi president Jalal Talabani pleaded with his countrymen to ‘work together’ against the danger of ‘civil war.’”); Louise Roug, *Iraqi Shiites Erupt Over Shrine Attack*, L.A. TIMES, Feb. 23, 2006, at A1 (“Almost three years after the April 2003 U.S.-led toppling of the Sunni regime of Saddam Hussein, more politicians and ordinary citizens began to utter the words ‘civil war’ openly.”).

form of de-Ba'athification, has had appeal in Iraq.¹⁰ Nevertheless, as Part II details, there are several concerns with lustration as a tool of transitional justice. Part III returns to post-Ba'ath Iraq and considers the transitional justice mechanisms heretofore implemented. The Article concludes with several recommendations to achieve transitional justice in Iraq.

I. TRANSITIONAL JUSTICE

A. Conceptual Overview

Professor Ruti Teitel, one of the preeminent students of transitional justice, has defined the approach as “the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.”¹¹ Transitional justice, therefore, is concerned with how “a state dedicated to the rule of law come[s] to terms with the lawlessness of a prior government, without in the process infringing on its own commitment to legality and impartiality.”¹² Thus, all models of transitional justice seek to answer how a state reconciles an evil past, or in the words of Václav Havel, a “monstrous heritage.”¹³ They are all concerned with what Samuel Huntington has referred to as the “torturer problem.”¹⁴

10. See, e.g., Peter Slevin & Rajiv Chandrasekaran, *Iraq's Baath Party is Abolished: Franks Declares End of Hussein's Apparatus as Some Members Retake Posts*, WASH. POST, May 12, 2003, at A10 (“U.S. authorities have made ‘de-Baathification’ a goal of the occupation period.”).

11. Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69, 69 (2003) (footnote omitted).

12. Stephen J. Schulhofer et al., *Dilemmas of Justice: A Forum on the Hungarian Constitutional Court Decision Overturning a Retroactivity Law*, 1 E. EUR. CONST. REV. Summer 1992, at 17.

13. Karel Bartošek, *Central and Southeastern Europe*, in THE BLACK BOOK OF COMMUNISM: CRIMES, TERROR, REPRESSION 394, 451 (Stéphane Courtois et al. eds., Jonathan Murphy & Mark Kramer trans., Harvard Univ. Press 1999).

14. SAMUEL P. HUNTINGTON, THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY 211 (1991). Huntington posits that whether a state will pursue transitional justice depends on how the non-democratic leaders exit. *Id.* at 228. That is, if, like Saddam Hussein, the leader was forced out, there will be a desire for retribution. *See id.* at 217–19. On the other hand, Huntington argues that if the non-democratic leaders voluntarily stepped down or “negotiated their way out,” often in the face of mass protests, the nation would be more likely to “forgive and forget.” *Id.* at 225–28. For criticism of Huntington’s hypothesis, see Kieran Williams et al., *Explaining Lustration in Eastern Europe: “A Post-Communist Politics Approach”* 8 (Sussex Eur. Inst., Working Paper No. 62, 2003), available at <http://www.sussex.ac.uk/sei/documents/wp62.pdf>.

Transitional justice has two key features. First, it includes restorative concepts of justice, such as the redressing of harms to a community,¹⁵ that extend well beyond prosecutions.¹⁶ Second, it “is transitional, which refers to a major political transformation, such as regime change from authoritarian or repressive rule to democratic or electoral rule or a transition from conflict to peace or stability.”¹⁷ This second feature distinguishes the much broader concept of transitional justice from restorative justice, considered below.¹⁸ Although “[t]he origins of modern transitional justice can be traced to World War I,”¹⁹ the field “gained coherence in the last two-and-a-half decades of the twentieth century, especially beginning with the trials of the former members of the military juntas in Greece (1975) and Argentina (1983)”²⁰

The instruments of transitional justice vary enormously.²¹ The International Center for Transitional Justice (“ICTJ”), for example, identifies

15. Restorative justice takes the victim and the community into account with respect to criminal law, in contrast to the perpetrator-centric approach emphasized in a retributive justice system. See Christa Obold-Eshleman, Note, *Victims’ Rights and the Danger of Domestication of the Restorative Justice Paradigm*, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y 571, 572–73 (2004). See also Susan Opatow, *Psychology of Impunity and Injustice: Implications for Social Reconciliation*, in POST-CONFLICT JUSTICE 201, 209 (M. Cherif Bassiouni ed., 2002) (“Restorative . . . justice also focuses on redress, but it does so by viewing transgressions primarily as harm inflicted on human relationships and secondarily, as violations of the law.”).

16. See, e.g., Neil J. Kritz, *The Dilemmas of Transitional Justice*, in 1 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES xxiv–xxvi (Neil J. Kritz ed., 1995) [hereinafter Kritz, *Dilemmas of Transitional Justice*] (surveying a number of non-criminal instruments falling under a transitional justice methodology).

17. 3 ENCYCLOPEDIA OF GENOCIDE AND CRIMES AGAINST HUMANITY 1045 (2004).

18. See *infra*, Part I.B.

19. Teitel, *Transitional Justice Genealogy*, *supra* note 11, at 70. Professor Teitel has proposed a “genealogy” of modern transitional justice “divide[d] along three phases.” *Id.* at 69. She explains:

[T]ransitional justice becomes understood as both extraordinary and international in the postwar period after 1945. The Cold War ends the internationalism of this first, or postwar, phase of transitional justice. The second, or post-Cold War, phase is associated with the wave of democratic transitions and modernization that began in 1989. . . . The third, or steady-state, phase of transitional justice is associated with contemporary conditions of persistent conflict which lay the foundation for a normalized law of violence.

Id. at 70.

20. 3 ENCYCLOPEDIA OF GENOCIDE AND CRIMES AGAINST HUMANITY, *supra* note 17, at 1046.

21. See, e.g., Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 761, 766 (2004) (“The tools of transitional justice include trials, truth commissions, reparations, apologies, and purges.”).

five key approaches: “prosecuting perpetrators, documenting and acknowledging violations through nonjudicial means such as truth commissions, reforming abusive institutions, providing reparations to victims, and facilitating reconciliation processes.”²² These tools are often further categorized in terms of what they hope to accomplish: peace (reconciliation as the primary goal) or justice (retribution and deterrence as the primary goals).²³ A holistic approach to transitional justice seeks to balance these two forces. Indeed, one of the most complicated dilemmas transitioning states face is drawing a line between a search for justice and a crusade for revenge or, as Václav Havel has explained, “manag[ing] to steer between Scylla and Charybdis.”²⁴

Because transitional justice has among its many aims the punishment of those who inflicted harms on society and the compensation of those who have suffered, some scholars have come to view it as “backward-

22. Int’l Ctr. for Transitional Justice, Mission and History, <http://www.ictj.org/en/about/mission> (last visited Aug. 15, 2007).

23. Critics of the most visible truth commission, the South African Truth and Reconciliation Commission (“SATRC”), have argued that by granting limited amnesties in exchange for testimony, the SATRC “famously traded justice for truth—an exchange deeply resented by many of those who had been victimized by the state security forces or the families of those victims.” John Torpey, *Introduction: Politics and the Past*, in *POLITICS AND THE PAST: ON REPAIRING HISTORICAL INJUSTICES* 1, 9–10 (John Torpey ed., 2003). While volume one of the SATRC’s report acknowledges the criticism, it grounds the justification for the amnesty process in the desire to compile the most complete history possible:

The amnesty process was also a key to the achievement of another objective, namely eliciting as much truth as possible about past atrocities. The primary sources of information were the perpetrators themselves who, without the option of applying for amnesty, would probably not have told their side of the story.

For many victims, the granting of amnesty was a high price to pay for the public exposure of perpetrators. . . .

Yet, as many commentators noted, trials would probably have contributed far less than did the amnesty process towards revealing the truth about what had happened to many victims and their loved ones.

1 TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT ch. 5, paras. 64–66 (Susan de Villiers ed., 1998) [hereinafter SATRC Report].

24. Adam Michnik & Václav Havel, *Confronting the Past: Justice or Revenge?*, 4 J. DEMOCRACY 20, 21 (1993), reprinted in 2 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES 536, 537 (Neil J. Kritz ed., 1995).

looking.”²⁵ Nevertheless, in a compelling argument, Eric Posner and Adrian Vermeule assert the opposite:

[T]ransitional justice can also be understood in forward-looking terms: providing a method for the public to recapture lost traditions and institutions; depriving former officials of political and economic influence that they could use to frustrate reform; signaling a commitment to property rights, the market, and democratic institutions; and establishing constitutional precedents that may deter future leaders from repeating the abuses of the old regime.²⁶

To these arguments can be added that it is only by completely and openly acknowledging the past that a society can move forward and begin the process of reconciliation required to construct a peaceful and stable post-conflict society.²⁷

Two criticisms are often leveled at a transitional justice approach. First, it is often argued that transitional justice “draw[s] morally arbitrary distinctions in deciding which groups to benefit”²⁸ or “what types of harm to compensate.”²⁹ For example, Posner and Vermeule note that “Germany’s post-Holocaust restitution program . . . included Jews but excluded gypsies and homosexuals.”³⁰ For a more contemporary example, the South African Truth and Reconciliation Commission (“SATRC”) came under a great deal of criticism in its decision to limit “its investigation to gross violations of human rights defined as the ‘killing, abduction, torture or severe ill-treatment,’”³¹ thereby excluding millions of black Africans who suffered socially and economically under the system of apartheid.³² A second criticism is that transitional justice judgments can

25. The German political scientist Claus Offe, for example, has described transitional justice as comprising “problems of retroactive justice.” CLAUS OFFE, *VARIETIES OF TRANSITION: THE EAST EUROPEAN AND EAST GERMAN EUROPEAN EXPERIENCE* 82 (1996).

26. Posner & Vermeule, *supra* note 21, at 766.

27. *See, e.g.*, SATRC Report, *supra* note 23, ch. 1, para. 20 (“We could not make the journey from a past marked by conflict, injustice, oppression, and exploitation to a new and democratic dispensation characterised by a culture of respect for human rights without coming face to face with our recent history.”).

28. Posner & Vermeule, *supra* note 21, at 808.

29. *Id.* at 809.

30. *Id.* at 808 (citation omitted).

31. SATRC Report, *supra* note 23, ch. 2, para. 19.

32. *See id.* para. 20 (“The Commission’s focus was, therefore, a narrow or restricted one, representing what were perhaps some of the worst acts committed against the people of this country and region in the post-1960 period, but providing a picture that is by no means complete.”). *See also* Reed Brody, *Justice: The First Casualty of Truth? The Global Movement to End Impunity for Human Rights Abuses Faces a Daunting Question*, *THE NATION*, Apr. 30, 2001, at 25 (“The TRC process has been rightly challenged because it focused not on the apartheid system itself, including massive displacements and

not be fairly implemented because the past actions of former officials were often motivated by a plethora of reasons—not least of which is the argument that many collaborators participated in an unsavory regime because they were forced.³³ Despite these criticisms, there is no denying that “[t]he movement from repressive regimes to democratic societies has become a worldwide phenomenon”³⁴ and transitional justice approaches provide the greatest hope for shepherding broken states toward a stable and just peace.

B. Retributive v. Restorative Justice

Historically, criminal law in the United States has been based upon a retributive justice system.³⁵ Under such a system, “perpetrators commit crimes against the state, not against other people.”³⁶ Central to a retributive justice system is the concept of just deserts.³⁷ That is, the system’s primary focus is to make sure that “offenders get[] what they deserve.”³⁸ Until fairly recently, a retributive justice system was also the primary paradigm in international criminal law and some scholars believed that such a system served to support the rules of international law.³⁹ Nevertheless, with the end of the Cold War and an accompanying shift in the characterization of conflicts from inter- to intra-state,⁴⁰ two questions emerged regarding the applicability of a retributive international criminal justice system. First, how far removed is retributive justice from venge-

the pass system, but on ‘excesses’ that even apartheid considered criminal, like murder and torture.”).

33. Posner & Vermeule, *supra* note 21, at 811–12.

34. Richard H. Solomon, *Preface*, in 1 TRANSITIONAL JUSTICE, *supra* note 16, at xiii.

35. Mica Estrada-Hollenbeck, *The Attainment of Justice Through Restoration, Not Litigation*, in RECONCILIATION, JUSTICE, AND COEXISTENCE: THEORY AND PRACTICE 65, 66 (Mohammed Abu-Nimer ed., 2001).

36. *Id.*

37. See, e.g., Adil Ahmad Haque, *Group Violence and Group Vengeance: Toward a Retributivist Theory of International Criminal Law*, 9 BUFF. CRIM. L. REV. 273, 277–78 (2005) (“Retributivist theory has long been identified with its theory of individual desert, of the proper treatment of individuals in light of their individual acts.”).

38. HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE 21 (2002).

39. See, e.g., Michelle Maiese, *Retributive Justice* (May 2004), http://www.beyondintractability.org/essay/retributive_justice (“Retributive justice is a matter of giving those who violate human rights law and commit crimes against humanity their ‘just deserts.’ Punishment is thought to reinforce the rules of international law and to deny those who have violated those rules any unfair advantages.”).

40. See STOCKHOLM INT’L PEACE RESEARCH INST., SIPRI YEARBOOK 2005: ARMAMENTS, DISARMAMENT AND INTERNATIONAL SECURITY app. 2A, at 121 (2005) (noting that in 2004 there were nineteen major armed conflicts, and all the conflicts were intra-state (including Iraq), although in three conflicts external states contributed troops).

ance?⁴¹ Second, does a system premised on just deserts serve the interests of an international community in which member states are often attempting to emerge from protracted and savage civil wars?⁴²

Mica Estrada-Hollenbeck has argued that a retributive justice system has limited utility in resolving protracted ethnic and sectarian conflicts.⁴³ She explains that to “resolve [a conflict] is to leave the conflicted parties with institutions and attitudes that favor peaceful interactions. This sort of resolution . . . requires the establishment of *working trust*.”⁴⁴ Such trust, she concludes, is undermined in a retributive system, which “mak[es] [the] conflict resolution processes less stable and reconciliation less likely.”⁴⁵ Similarly, as victims’ rights are often subordinated in a retributive justice system,⁴⁶ Howard Zehr, the “grandfather of restorative justice,”⁴⁷ has identified four victims’ needs that a retributive justice system neglects: information,⁴⁸ truth-telling,⁴⁹ empowerment,⁵⁰ and restitution.⁵¹

In light of these and other criticisms of a retributive system of international criminal justice, there is an “increasing interest in the concept of restorative justice.”⁵² Zehr has defined restorative justice as “a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.”⁵³ Unlike retributive justice, restorative justice views crime not as “a violation of the

41. Thomas W. Porter, Jr., *The Spirit and the Law*, 26 *FORDHAM URB. L.J.* 1155, 1158 (1999).

42. See Estrada-Hollenbeck, *supra* note 35, at 69.

43. *Id.*

44. *Id.*

45. *Id.* at 71.

46. See, e.g., Obold-Eshleman, *supra* note 15, at 572 (“[A retributive] justice system defines crime as breaking the law, thus causing harm to the state as the representative of society in general. Accordingly, rather than the specific victims, the state is the primary party in dealing with the offense . . .”).

47. ZEHR, *supra* note 38, at 76.

48. *Id.* at 14 (“Victims need answers to questions they have about the offense—why it happened and what has happened since. . . . Securing real information usually requires direct or indirect access to offenders who hold this information.”).

49. *Id.* at 14–15 (“Often . . . it is important for victims to tell their stories to the ones who caused the harm and to have them understand the impact of their actions.”).

50. *Id.* at 15 (“Involvement in [victims’] own cases as they go through the justice process can be an important way to return a sense of empowerment to them.”).

51. *Id.* (“When an offender makes an effort to make right the harm, even if only partially, it is a way of saying ‘I am taking responsibility, and you are not to blame.’”).

52. Joseph V. Montville, *Justice and the Burden of History*, in *RECONCILIATION, JUSTICE, AND COEXISTENCE*, *supra* note 35, at 129.

53. ZEHR, *supra* note 38, at 37.

law and the state” but as “a violation of people and relationships.”⁵⁴ Moreover, whereas justice in a retributive system “requires the state to determine blame (guilt) and impose pain (punishment),” restorative justice “involves victims, offenders, and community members in an effort to put things right.”⁵⁵ Consequently, under a restorative justice system, the “aim of the judicial system . . . is to reconcile conflicting parties while repairing the injuries from the crimes.”⁵⁶ The inquiry does not end, however, with the determination that a transitional or retroactive⁵⁷ justice system will best serve the needs of a post-conflict society. Such systems contain a dizzying array of choices, some of which may, at times, seem mutually exclusive of others, as the section below considers.

C. *Truth v. Justice*

Juan E. Méndez, President of the ICTJ, has argued that post-conflict nations with a heritage of human rights violations owe their victims four distinct duties:

The first of these is an obligation to do justice, that is, to prosecute and punish the perpetrators of abuses when those abuses can be determined to have been criminal in nature. The second obligation is to grant victims the right to know the truth. . . . The third obligation is to grant reparations to victims in a manner that recognizes their worth and their dignity as human beings. . . . Finally, states are obliged to see . . . that those who have committed the crimes while serving in any capacity in the armed or security forces of the state should not be allowed to continue on the rolls of reconstituted, democratic law-enforcement or security-related bodies.⁵⁸

Regrettably, these four duties are often viewed as antagonistic rather than complementary and the debate is often framed in terms of “truth versus justice.”⁵⁹

54. *Id.* at 21.

55. *Id.* See also Estrada-Hollenbeck, *supra* note 35, at 74 (“Unlike the [retributivist] approach, the restorative justice approach identifies crime primarily as conflict between individuals that results in injuries ‘to victims, communities, and the offenders themselves, and only secondarily as a violation against the state.’”).

56. *Id.*

57. See *supra* note 25.

58. Juan E. Méndez, *In Defense of Transitional Justice*, in TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES 1, 12 (A. James McAdams ed., 1997).

59. See, e.g., *Dealing with the Past: Critical Issues, Lessons Learned, and Challenges for Future Swiss Policy* 33 (Swiss Peace Found., Working Paper No. 2/2004, 2005), available at http://www.swisspeace.ch/typo3/fileadmin/user_upload/pdf/KOFF/KOFF_DealingWithThePast.pdf [hereinafter *Dealing with the Past*].

1. Truth: A Right to Disclosure?

Professor Tim Kelsall, among others, has argued that “[d]emands for the truth, and for commissions to investigate it, are becoming the norm in societies emerging from periods of violent conflict or authoritarian rule.”⁶⁰ For example, in the 1970s and 1980s, six truth commissions were established.⁶¹ In the 1990s that number more than doubled to fourteen.⁶² As Kelsall concludes, “that number looks set to increase again in the current decade.”⁶³ Indeed, in its 2003–2004 annual report, the International Center for Transitional Justice noted that “[i]n recent months, others have decided to launch truth commissions: the Democratic Republic of the Congo, Liberia, Morocco [the first truth commission in the Arab world], [and] Paraguay.”⁶⁴ Moreover, in 2005, the first truth and reconciliation commission in the United States was convened in Greensboro, North Carolina.⁶⁵ One of the most thoughtful students of truth commis-

60. Tim Kelsall, *Truth, Lies, Ritual: Preliminary Reflections on the Truth and Reconciliation Commission in Sierra Leone*, 27 HUM. RTS. Q. 361, 362 (2005).

61. The six commissions included: Commission of Inquiry into the Disappearance of People in Uganda Since the 25th January, 1971 (1974); National Commission of Inquiry into Disappearances in Bolivia (1982–1984); National Commission on the Disappearance of Persons in Argentina (1983–1984); Investigative Commission on the Situation of Disappeared People and Its Causes in Uruguay (1985); Commission of Inquiry in Zimbabwe (1985); and Commission of Inquiry into Violations of Human Rights in Uganda (1986–1995). PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS 305–307 (2002).

62. The fourteen commissions included: Commission of Inquiry to Locate the Persons Disappeared During the Panchayet Period in Nepal (1990–1991); National Commission on Truth and Reconciliation in Chile (1990–1991); Commission of Inquiry on the Crimes and Misappropriations Committed by the Ex-President Habré, His Accomplices and/or Accessories in Chad (1991–1992); Commission of Enquiry into Complaints by Former African National Congress Prisoners and Detainees in South Africa (1992); Commission of Inquiry for the Assessment of History and Consequences of the SED Dictatorship in Germany (1992–1994); Commission on the Truth for El Salvador (1992–1993); Commission of Enquiry into Certain Allegations of Cruelty and Human Rights Abuse Against ANC Prisoners and Detainees by ANC Members in South Africa (1993); Commissions of Inquiry into the Involuntary Removal or Disappearance of Persons in Sri Lanka (1994–1997); National Commission for Truth and Justice in Haiti (1995–1996); International Commission of Inquiry in Burundi (1995–1996); Truth and Reconciliation Commission in South Africa (1995–2000); Truth and Justice Commission in Ecuador (1996–1997); Commission to Clarify Past Human Rights Violations and Acts of Violence That Have Caused the Guatemalan People to Suffer (1997–1999); and Commission of Inquiry for the Investigation of Human Rights Violations in Nigeria (1999–2000). *Id.* at 307–310.

63. Kelsall, *supra* note 60, at 362.

64. INT'L CTR. FOR TRANSITIONAL JUSTICE, ANNUAL REPORT 2003/2004, 10, 13 (2005), available at <http://www.ictj.org/images/content/1/7/176.pdf>.

65. See generally Greensboro Truth and Community Reconciliation Project, <http://www.gtcp.org> (last visited Oct. 3, 2007). The purpose of the Greensboro Truth and

sions, Priscilla Hayner, notes that they are “fast becoming a staple in the transitional justice menu of options.”⁶⁶

Mary Albon has written that there are three distinct benefits to telling the truth about the past: “1) [T]o seek justice for the victims and help restore their dignity; 2) to facilitate national reconciliation; and 3) to deter further violations and abuses.”⁶⁷ Contemporary truth commissions serve all of these functions and more. The most apparent purpose of truth commissions is what Hayner refers to as “sanctioned fact-finding: to establish an accurate record of a country’s past, clarify uncertain events, and lift the lid of silence and denial from a contentious and painful period of history.”⁶⁸ Some human rights activists argue, however, that truth commissions do not find the truth as much as raise “the veil of denial about widely known but unspoken truths.”⁶⁹

The Swiss Peace Foundation notes that truth commissions are particularly useful in two instances. The first instance occurs in nations where “the systems of abuse . . . [were] designed to hide the facts [and] [t]orture and related abuses were committed largely in secret.”⁷⁰ Second, in nations such as Bosnia, where the truth is not hidden, but “multiple ‘truths’” exist, truth commissions allow the real truth to be known and made part of the nation’s history by focusing “on the broad history and patterns of abuses.”⁷¹ As Michael Ignatieff, former director of the Carr Center for Human Rights Policy at Harvard University explains, “[t]he past is an argument and the function of truth commissions, like the function of honest historians, is simply to purify the argument, to narrow the range of permissible lies.”⁷²

Community Reconciliation Project is to “heal broken relations within [the] community by . . . distinguishing truth from falsehood and allowing for . . . public mourning and forgiveness.” Darryl Fears, *Seeking Closure on “Greensboro Massacre”; Reconciliation Panel Convened in N.C. to Address ‘79 Attack by Nazi Party, Klan*, WASH. POST, Mar. 6, 2005, at A3 (omissions in original) (quoting Commissioner Cynthia Brown). Specifically, the project will examine the causes and consequences of the 1979 Greensboro Massacre, in which members of the Ku Klux Klan and Neo-Nazis clashed with the anti-Klan Communist Workers Party (“CWP”), resulting in the death of five CWP members. *Id.* In criminal trials before all-white juries, no one was convicted. *Id.*

66. Brody, *supra* note 32.

67. Mary Albon, *Project on Justice in Times of Transition: Report of the Project’s Inaugural Meeting*, in 1 TRANSITIONAL JUSTICE, *supra* note 16, at 43.

68. PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY 24–25 (2001) [hereinafter HAYNER, CONFRONTING STATE TERROR].

69. *Id.* at 25.

70. *Dealing with the Past*, *supra* note 59, at 22.

71. *Id.*

72. HAYNER, CONFRONTING STATE TERROR, *supra* note 68, at 25.

Since their inception in the 1970s, the scope of truth commissions has steadily increased so that most present day commissions incorporate a broader focus on reconciliation.⁷³ As Robert Rotberg, President of the World Peace Foundation, has explained, "South Africa's [TRC] is the prime example of a commission with . . . a comprehensive vision of how such an effort can prevent future conflict and ensure that 'never again!' becomes a societal reality."⁷⁴ Rotberg concludes, "[t]he [South African] TRC, though flawed in many ways, has set a high standard for future commissions."⁷⁵ Indeed, some activists express concern that "because of South Africa, the international community has become blindly besotted with truth commissions, regardless of how they are established."⁷⁶

Truth commissions should not be seen as a panacea for every country emerging from protracted violence, and yet, all too often, commissions are established in post-conflict nations that prove to be poor candidates and fail to heed the lessons learned from past commissions.⁷⁷ Chief

73. See, e.g., *Dealing with the Past*, *supra* note 59 at 23 ("Beyond simply an accounting of victims and perpetrators, recent commissions focus more explicitly and expansively on reconciliation.").

74. Robert I. Rotberg, *Truth Commissions and the Provision of Truth, Justice, and Reconciliation*, in TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS 3, 4 (Robert I. Rotberg & Dennis Thompson eds., 2000).

75. *Id.* at 5.

76. Brody, *supra* note 32, at 25.

77. An example is the Truth and Reconciliation Commission established by the Sun City Accord for the Democratic Republic of the Congo. By most accounts, the Commission was improperly established and has proven entirely ineffective. The Commission's mandate is to "consider political, economic, and social crimes committed from 1960 until 2003 in order to establish truth and help bring individuals and communities to reconciliation." Human Rights Watch, *Democratic Republic of the Congo: Confronting Impunity* (Jan. 2004) <http://hrw.org/english/docs/2004/02/02/congo7230.htm>. In a perspicacious paper written for the International Center for Transitional Justice, Federico Borello expresses great concern with both the Commission's consultative process and its composition. See FEDERICO BORELLO, INT'L CTR. FOR TRANSITIONAL JUSTICE, *A FIRST FEW STEPS: THE LONG ROAD TO A JUST PEACE IN THE DEMOCRATIC REPUBLIC OF CONGO* 40-42 (2004), available at <http://www.ictj.org/images/content/1/1/115.pdf>. The paper makes the following conclusion:

It is unlikely that the current commission will be able to function effectively as an investigative body for the following reasons:

Lack of legitimacy because of its composition and insufficient consultation prior to its creation. . . .

Security concerns for staff, victims, and witnesses.

Lack of sufficient time for the commission to complete its investigations and submit a final report before the end of the transition.

among those lessons is the importance of a partnership with a vibrant civil society.⁷⁸ As the Swiss Peace Foundation explains in a government report entitled *Dealing with the Past*:

Without the active participation of civil society and without the resultant sense of public ownership of and investment in the process, a truth commission could produce a technically accurate history of the conflict and abuses, but the report might be relegated to an academic shelf

. . . As a consequence, a nation in which the institutions and organizations of civil society have been wholly decimated by civil war or by a long period of harsh repression will not, in general, be an appropriate candidate for a truth commission.⁷⁹

A 2001 article in *The Nation* delineates some of the other lessons learned: “[T]o be as effective as the [South African] TRC, truth commissions must be independent, well resourced and endowed with subpoena power; must hold public hearings when necessary; and must be able to name the accused publicly.”⁸⁰ The article concludes “[f]ew commissions today meet these criteria.”⁸¹ Moreover, in a world with finite resources in terms of funding and attention, a truth commission may divert such resources from justice efforts.⁸² Reed Brody, advocacy director of Human Rights Watch, relates a telling experience he had in Haiti:

Apparent lack of sufficient reflection on key provisions of the law, such as amnesty, reparations, and other matters.

Lack of necessary political will to support the commission’s work.

Id. at 46.

78. *Dealing with the Past*, *supra* note 59, at 23 (“In various countries, those sectors of civil society that have contributed to the truth commission process have included religious groups, representatives of the media, human rights and victims’ organizations, the business, medical and legal communities, historians, sociologists, psychologists, and political organizations.”).

79. *Id.* The Secretary-General makes a similar point in a 2004 report on transitional justice. See The Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 51, U.N. Doc. S/2004/616 (Aug. 23, 2004) [hereinafter *Secretary-General’s Report on Transitional Justice*] (“Factors that can limit [truth commissions’] potential benefits include a weak civil society . . .”).

80. Brody, *supra* note 32.

81. *Id.*

82. See, e.g., Neil J. Kritz, *Progress and Humility: The Ongoing Search for Post-Conflict Justice*, in POST-CONFLICT JUSTICE, *supra* note 15, at 55, 62 [hereinafter Kritz, *Progress and Humility*] (noting that the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) staff felt that a Bosnian truth and reconciliation commission would “be a source of competition for international resources and local attention”).

In Haiti, where I worked with President Aristide's minister of justice, we were explicitly told by international donors that they could not fund a special prosecutor's office—the government's priority—because they were supporting a truth commission (whose report, published years after its completion, only confirmed what people already knew about coup-era repression).⁸³

A terribly controversial element of truth commissions has been the granting of amnesty, tantamount to a prohibition on punishment of those guilty of human rights violations. As Charles O. Lerche III notes, "[o]n balance, it almost seems that some sort of amnesty has been a necessary prerequisite for a commission to contribute to national reconciliation."⁸⁴ The SATRC, for example, faced some of its most pointed criticism on this subject.⁸⁵ The argument in favor of limited amnesties is that they help create the most complete picture as perpetrators would likely not be

83. Brody, *supra* note 32.

84. Charles O. Lerche III, *Truth Commissions and National Reconciliation: Some Reflections on Theory and Practice*, 7 PEACE & CONFLICT STUD. 1, 5 (2000).

85. See, e.g., AMNESTY INT'L & HUM. RTS. WATCH, TRUTH AND JUSTICE: UNFINISHED BUSINESS IN SOUTH AFRICA 5 (2003), available at [http://web.amnesty.org/library/pdf/AFR530012003ENGLISH/\\$File/AFR5300103.pdf](http://web.amnesty.org/library/pdf/AFR530012003ENGLISH/$File/AFR5300103.pdf) [hereinafter UNFINISHED BUSINESS] ("Relatives of some prominent anti-apartheid victims of police brutality challenged the amnesty provisions in the Constitutional Court."). See also SATRC Report, *supra* note 23, ch. 1, para. 35 ("Those who have cared about the future of our country have been worried that the amnesty provision might, amongst other things, encourage impunity because it seemed to sacrifice justice.").

It should be noted, however, that the SATRC did not provide for a blanket amnesty. As Amnesty International and Human Rights Watch explain in a jointly authored report:

The new law did not provide for a general amnesty, but a circumscribed process of individual applications in which those seeking immunity from prosecution (or release from prison) had both to show that their crime was political in motive and to make full disclosure of the acts for which they were seeking amnesty. A successful applicant would be permanently protected from any criminal or civil liability in relation to the offence acknowledged.

UNFINISHED BUSINESS, *supra*, at 4.

It is important to note as well that "fewer than 10% of the over 7,500 persons who applied [for amnesty] were actually granted amnesty. This is partly attributable to the fact that a high percentage of applications were from common prisoners who tried to use the amnesty process to secure early release." Paula van Zyl, *Unfinished Business: The Truth and Reconciliation Commission's Contribution to Justice in Post-Apartheid South Africa*, in POST-CONFLICT JUSTICE, *supra* note 15, at 745, 753 (footnote omitted). See also Jon M. Van Dyke, *The Fundamental Human Right to Prosecution and Compensation*, 29 DENV. J. INT'L L. & POL'Y 77, 88 (2001) ("As of the end of 1999, 6,037 individuals had applied for political amnesty, with 568 receiving pardons . . .").

forthcoming in testifying without some promise of amnesty.⁸⁶ The argument against amnesties is that they encourage a culture of impunity.⁸⁷ In some instances, the granting of amnesties may also run counter to a state's obligations to punish human rights violations under international treaties.⁸⁸ The *Truth and Reconciliation Commission of South Africa Report*, however, responds eloquently to these criticisms:

We have been concerned, too, that many consider only one aspect of justice. Certainly, amnesty cannot be viewed as justice if we think of justice only as retributive and punitive in nature. We believe, however, that there is another kind of justice—a restorative justice which is concerned not so much with punishment as with correcting imbalances, restoring broken relationships—with healing, harmony and reconciliation. Such justice focuses on the experience of victims; hence the importance of reparation.⁸⁹

*a. Is Revealing Healing?*⁹⁰

While truth commissions vary considerably, they all share the same central tenet that “[s]unlight is said to be the best of disinfectants.”⁹¹ That is, unhealed wounds fester and it is only by bringing them to light that true societal reconciliation can be achieved.⁹² Along with goals of

86. See, e.g., SATRC Report, *supra* note 23, ch. 5, para. 64.

87. See, e.g., UNFINISHED BUSINESS, *supra* note 85, at 5.

88. See *infra* Part I.C.2.

89. SATRC Report, *supra* note 23, ch. 1, para. 36.

90. The SATRC catch phrase was “revealing is healing.” *War Crimes: Bringing the Wicked to the Dock*, THE ECONOMIST, Mar. 11, 2006; GILLIAN SLOVO, MAKING HISTORY: SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION (2002), <http://www.open-democracy.net/content/articles/PDF/818.pdf>.

91. See LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY, AND HOW THE BANKERS USE IT 92 (Thoemmes Press 2003) (1914) (quoting Supreme Court Justice Louis Brandeis).

92. The analogy of a society's wounds to a wounded body requiring healing is a powerful metaphor often invoked by proponents of truth commissions. The Chairperson of the SATRC, the Reverend Desmond M. Tutu, explained in the first of the Commission's six volumes:

The other reason amnesia simply will not do is that the past refuses to lie down quietly. It has an uncanny habit of returning to haunt one. “Those who forget the past are doomed to repeat it” are the words emblazoned at the entrance to the museum in the former concentration camp of Dachau. They are words we would do well to keep ever in mind. However painful the experience, the wounds of the past must not be allowed to fester. They must be opened. They must be cleansed. And balm must be poured on them so they can heal. This is not to be obsessed with the past. It is to take care that the past is properly dealt with for the sake of the future.

broader societal reconciliation, truth commission proponents also point to psychological benefits accruing on a more individualized level.⁹³ Indeed, the 1995 Act establishing the SATRC set the restoration of “human and civil dignity of such victims by granting them an opportunity to relate their own accounts of the violations of which they are the victims” as one of the SATRC’s primary goals.⁹⁴

There are, however, two problems associated with relying on truth commissions to facilitate individualized healing of trauma resulting from state sanctioned violence. First, and quite peculiarly, it is difficult to find the truth in truth commissions.⁹⁵ Oscar Wilde, the great Irish wit, once noted that “[t]he truth is seldom pure and rarely simple.”⁹⁶ Though he

SATRC Report, *supra* note 23, ch. 1, para. 27. *See also* HAYNER, CONFRONTING STATE TERROR, *supra* note 68, at 133 (“Why reopen wounds that have closed? . . . Because they were badly closed. First you have to cure the infection, or they will reopen themselves.”) (quoting an Argentine journalist); ROSALIND SHAW, U.S. INST. OF PEACE, RETHINKING TRUTH AND RECONCILIATION COMMISSIONS 8 (2005), *available at* <http://www.usip.org/pubs/specialreports/sr130.pdf> (“Why do we come and open the wounds again? . . . We have to reopen the wounds because they have not healed. Superficial healing will allow the wounds to explode again. We have to revisit the events so that we can heal properly.”) (quoting Bishop Joseph Humper, the Chairman of the Sierra Leone Truth and Reconciliation Commission).

Such analogies are used not only to justify truth commissions but other forms of transitional justice as well. In support of lustration, Václav Havel noted in an interview:

The history of our country shows that every time we took the approach of thinking that we should not be interested in whatever happened in the past—that it was not important—the consequences were always severe. It meant that we did not remove an ulcer that was poisoning the whole system. The ulcer kept festering and producing new toxins. I think that the need to cut out this ulcer, to administer justice, is clearly justified and natural.

Michnik & Havel, *supra*, note 24, at 537.

93. *See, e.g.*, Brandon Hamber, Do Sleeping Dogs Lie?: The Psychological Implications of the Truth and Reconciliation Commission in South Africa, Seminar Paper Presented at the Centre for the Study of Violence and Reconciliation, Seminar No. 5, Johannesburg, South Africa (July 26, 1995), *available at* <http://www.csvr.org.za/papers/papsldog.htm> (“Repressed pain and trauma generally block emotional life, have psychologically adverse consequences and can even lead to physical symptoms.”).

94. Promotion of National Unity and Reconciliation Act ch. 2, para. 3(1)(c), No. 34 of 1995, *available at* <http://www.doj.gov.za/trc/legal/act9534.htm>. *See also* SATRC Report, *supra* note 23, ch. 5, para. 89.

95. *See, e.g.*, Kelsall, *supra* note 60, at 363, 380 (noting that in the proceedings of the Sierra Leone Truth and Reconciliation Commission that the author visited, “in spite of its injunction to victims to express the truth, the whole truth, and nothing but the truth, [the Commission] was rarely able to get beyond detached, factual statements on the part of victims and half-truths, evasions, and outright lies on the part of perpetrators”).

96. OSCAR WILDE, THE IMPORTANCE OF BEING EARNEST Act 1 (1895).

penned those words close to a century before the first truth commissions, commissioners would do well to recall the aphorism. In her brilliant book on truth commissions, Priscilla Hayner recounts a conversation she had with S.K. Mbande, a South African minister. Mbande explained that in giving their narrative of events, some people

stand somewhere between truth and dishonesty, because coming up with the whole truth is still not safe. Some give their statements because they've been told to do so by the government But some people are traumatized and fearful, and they feel it's not safe to talk about it. . . . Some people have forgotten what happened, or due to trauma, they may tell different stories, or keep changing their story, because they can't remember clearly.⁹⁷

A second problem is that while truth commissions may lead to national healing,⁹⁸ individual wounds are opened and often left untreated in the process.⁹⁹ South African psychologist Dr. Brandon Hamber explains, "Psychological restoration and healing can only occur through providing the space for survivors to feel heard and for every detail of the traumatic event to be re-experienced in a safe environment."¹⁰⁰ Unlike traditional psychotherapy, truth commissions "do not offer long-term therapy; they offer survivors a one-time opportunity to tell their story."¹⁰¹ It is ques-

97. HAYNER, *CONFRONTING STATE TERROR*, *supra* note 68, at 137–38. Similarly, in an interview with the editor of the journal *African Affairs*, Bishop Humber, the chairperson of the Sierra Leone Truth and Reconciliation Commission (SLTRC) explained:

Perpetrators will tell you truth from their own perspective . . . he will say what he saw . . . but he is dissociating himself . . . it may be the truth, but what is truth? What is partial truth? . . . In most of the cases there is some partial truth. The person is saying something that affects another person . . . he reserves within himself some of those elements that he needed to say the whole truth. . . . It's truth on the surface, it's not a deep truth.

Kelsall, *supra* note 60, at 377.

98. Even this is debatable. *See* Brody, *supra* note 32 ("A respected poll showed that two-thirds of South Africans believed that the TRC investigations led to a deterioration of race relations.").

99. Lerche, *supra* note 84, at 6 ("There is a popular assumption that the TRC provides the space for a cathartic release of emotions that can form the basis for psychological healing—for individual deponents and for society as a whole. But this is questionable.").

100. Hamber, *supra* note 93.

101. HAYNER, *CONFRONTING STATE TERROR*, *supra* note 68, at 135. Similarly, Dr. Brandon Hamber notes, "the long-term ability of a once-off statement or public testimony to address the full psychological impact of the past is questionable." Brandon Hamber, *Does the Truth Heal?: A Psychological Perspective on the Political Strategies for Dealing with the Legacy of Political Violence*, in *BURYING THE PAST: MAKING PEACE AND*

tionable whether a single retelling in a public setting can truly bring about the psychological restoration sought.¹⁰² Indeed, as Hayner notes, “psychologists question the idea of a one-time catharsis resulting in real psychological healing. . . . [I]n fact, most therapists would avoid pushing someone to address the worst of their pain too quickly, especially if it is rooted in events of extreme trauma.”¹⁰³ While truth commissions undeniably give *some* victims a sense of closure,¹⁰⁴ they serve to severely traumatize others.¹⁰⁵ As the assistant director of the Trauma Center for Victims of Violence and Torture, a non-governmental organization (“NGO”) in Cape Town, South Africa, has explained, the commission “opens the patient up and then walks away. In some ways, they feel they are just being used as a public spectacle.”¹⁰⁶

The fact that testifying before a truth commission may grant some victims the closure for which they have long been searching, while a similar experience only serves to retraumatize others should come as little surprise, for individuals reconcile pain in profoundly personal ways. Indeed, as volume one of the *Truth and Reconciliation Commission of South Africa Report* acknowledges, “the reconciliation of victims with their own pain is a deeply personal, complex and unpredictable process. . . . Truth may, in fact, cause further alienation.”¹⁰⁷

While the fact that not all victims would be served by a truth commission is hardly surprising, what is surprising is that concerns exist that truth commissions (especially those that fail to implement a social ser-

DOING JUSTICE AFTER CIVIL CONFLICT 155, 160 (Nigel Biggar ed., expanded and updated ed. 2003).

102. See, e.g., HAYNER, *CONFRONTING STATE TERROR*, *supra* note 68, at 140 (“Given the great number of victims that come forward and the short period of time that a commission has to complete its work, truth commissions to date have not been able to offer any serious psychological support services, nor generally to respond well to the occasional follow-up phone calls of distress . . .”).

103. *Id.* at 139.

104. See, e.g., *id.* (“Emotionally it helped a great deal. It helped me to come to terms with it. But physically it hasn’t helped. I still have bullets in my chest, I’m still in pain. But emotionally it has helped a great deal.”) (quoting one South African survivor who had been shot during a political march).

105. See, e.g., Suzanne Daley, *In Apartheid Inquiry, Agony Is Relived but Not Put to Rest*, N.Y. TIMES, July 17, 1997, at A1 (“It was very traumatic to relive it . . . Now, I can actually see it in my mind. Before the hearing I never cried. But now, I cry all the time” and “It was like—speak to the Truth Commission and you will be reconciled. . . . But it’s not that way. That did not happen. I just cry all the time now. How do you reconcile? How?”) (quoting one victim of the apartheid regime who testified before the SATRC).

106. *Id.*

107. SATRC Report, *supra* note 23, ch. 5, para. 14.

vices justice component)¹⁰⁸ may actually do more harm than good. While no comprehensive study on the psychological impact of truth commissions on victims has yet been undertaken,¹⁰⁹ “officials of the Trauma Center for Victims of Violence and Torture . . . say 50 to 60 percent of the dozens of victims they have talked to in the last year have said they suffered difficulties after testifying or expressed regret.”¹¹⁰ As Hayner concludes, “[t]here has been no study to date . . . but the evidence that is available is enough to raise some serious questions.”¹¹¹

2. Justice: A Duty to Prosecute?

In contrast to truth commissions, prosecution through criminal trials holds perpetrators directly accountable for their actions. Criminal trials serve distinct functions relative to non-judicial mechanisms,¹¹² and many

108. Social services justice focuses on the social, economic, and medical components of providing justice to victims. *See, e.g.*, Naomi Cahn, *Beyond Retribution and Impunity: Responding to War Crimes of Sexual Violence*, 1 *STAN. J. C.R. & C.L.* 217, 247–49 (2005).

109. HAYNER, *CONFRONTING STATE TERROR*, *supra* note 68, at 135.

110. Daley, *supra* note 105. *See also* HAYNER, *CONFRONTING STATE TERROR*, *supra* note 68, at 138 (“It’s true that the truth commission is a healing process—if not 100 percent, then 60 percent.”) (quoting Reverend S.K. Mbande). When Hayner asked the Reverend whether the sixty percent referred to the percentage of people who were healed or the percentage to which each person was healed, he replied: “Both. Perhaps 60 percent feel better, but those people are only healed 60 percent.” *Id.*

111. HAYNER, *CONFRONTING STATE TERROR*, *supra* note 68, at 135.

112. The Swiss Peace Foundation explains:

Trials communicate that a culture of impunity which permitted abuses is being replaced by a culture of accountability, giving a sense of security to victims and a warning to those who might contemplate future abuses. They provide some redress for the suffering of victims and help to curtail the inclination towards vigilante justice. . . . [I]n the context of recent intra-societal conflicts, criminal trials make the important statement that specific individuals have committed the crimes in question and are therefore to be held accountable, not entire ethnic or religious groups—thereby repudiating notions of collective blame and guilt that can otherwise be used to foment the next round of violence.

Dealing with the Past, *supra* note 59, at 18.

The Secretary General’s 2004 report on transitional justice explains:

Criminal trials can play an important role in transitional contexts. They express public denunciation of criminal behaviour. They can provide a direct form of accountability for perpetrators and ensure a measure of justice for victims by giving them a chance to see their former tormentors made to answer for their crimes. Insofar as relevant procedural rules enable them to present their views and concerns at trial, they can also help victims to reclaim their dignity.

Secretary-General’s Report on Transitional Justice, *supra* note 79, ¶ 39.

scholars believe that they are the best mechanism for developing the rule of law in post-conflict societies.¹¹³ The view also exists that punishment for gross human rights violations is not only preferable to non-judicial mechanisms but may be mandatory under international treaties to which a state is a signatory.¹¹⁴

113. See, e.g., M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 LAW & CONTEMP. PROBS. 9, 18 (1996) (“The relevance of prosecution and other accountability measures to the pursuit of peace is that through their effective application they serve as deterrence, and thus prevent future victimization.”); Jamal Benomar, *Justice After Transitions*, in 1 TRANSITIONAL JUSTICE, *supra* note 16, at 33 (“Punishing perpetrators of past abuses can thus serve not only as a symbolic break with the ugly legacy of authoritarian rule, but also as an affirmation of adherence to new democratic values.”); Richard J. Goldstone, *Ethnic Reconciliation Needs the Help of a Truth Commission*, INT’L HERALD TRIB., Oct. 24, 1998, at 6 (“For without justice and the rule of law, it is far too easy for mankind to fall into a self-destructive Hobbesian state of anarchical survival of the fittest. Through a robust tribunal process, the international community can demonstrate to those who would contemplate committing such horrific crimes—whether in Bosnia or elsewhere—that they will pay a price.”); Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, in 1 TRANSITIONAL JUSTICE, *supra* note 16, at 68 (“Prosecution is necessary to assert the supremacy of democratic values and norms and to encourage the public to believe in them.”); MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS 25 (1998) (“To respond to mass atrocity with legal prosecutions is to embrace the rule of law.”); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L. J. 2537, 2542 (1991) (“Trials may, as well, inspire societies that are reexamining their basic values to affirm the fundamental principles of respect for the rule of law and for the inherent dignity of individuals.”); Mary Margaret Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT’L L. REV. 321, 393 (1999) (“Law must come first and enforcement of law is a prerequisite to respect for the law.”).

114. This argument is made forcefully by Diane F. Orentlicher, who served as General Counsel to the International League for Human Rights. Orentlicher argues that “explicit obligations to punish human rights crimes . . . are established by the Convention on the Prevention and Punishment of the Crime of Genocide . . . and the Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment” Orentlicher, *supra* note 113, at 2562.

For example, the Convention on the Prevention and Punishment of the Crime of Genocide states:

Persons charged with genocide or any of the other acts enumerated in article III [(a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide] shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

Convention on the Prevention and Punishment of the Crime of Genocide art. VI, *adopted* Dec. 9, 1948, G.A. Res. 260 A (III), 78 U.N.T.S 227.

On the other hand, there are severe limitations with a post-conflict system of justice that only employs prosecutions. First and foremost, systematic human rights violations are never carried out by a single group of individuals. Rather, thousands of individuals were responsible for transforming Iraq into a republic of fear,¹¹⁵ just as thousands were responsible for committing genocide in Rwanda¹¹⁶ and thousands were responsible

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Convention Against Torture”) states:

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 4, *adopted* Dec. 10, 1984, G.A. Res. 39/46, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture].

Iraq ratified the Genocide Convention on Jan. 20, 1959. Office of the United Nations High Comm’r for Human Rights, Ratifications and Reservations, <http://www.ohchr.org/english/bodies/ratification/1.htm> (last visited Oct. 23, 2007). As of Oct. 23, 2007, Iraq has not ratified the Convention Against Torture. *See* Office of the United Nations High Comm’r for Human Rights, Ratifications and Reservations, <http://www.ohchr.org/english/bodies/ratification/9.htm> (last visited Oct. 23, 2007). Despite Iraq’s failure to ratify the Convention Against Torture, several human rights scholars have argued that the prohibition of torture is a *jus cogens* principle, a nonderogable duty. *See, e.g.*, M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63, 68 (1996) (“The legal literature discloses that the following international crimes are *jus cogens*: aggression, genocide, crimes against humanity, war crimes, piracy, slavery and slave-related practices, and torture.”). The Ninth Circuit has also held that the prohibition of torture is a *jus cogens* principle. *See* Pamela J. Stephens, *A Categorical Approach to Human Rights Claims: Jus Cogens as a Limitation on Enforcement?*, 22 WIS. INT’L L.J. 245, 255 (2004) (“[T]he [N]inth [C]ircuit held that the ‘prohibition against official torture ‘carries with it the force of a *jus cogens* norm,’ which ‘enjoys the highest status within international law.’”).

Similarly, Article 8 of the Universal Declaration of Human Rights states that “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.” Universal Declaration of Human Rights, G.A. Res. 217A, at 73, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

115. *See* MAKIYA, *supra* note 2, at xi (“The Ba’th developed the politics of fear into an art form, one that ultimately served the purpose of legitimizing their rule by making large numbers of people complicit in the violence of the regime.”).

116. As Neil Kritz writes:

In Rwanda, after ousting a regime that organized genocidal killings of at least half a million people, if the new government were to undertake prosecution of every person who participated in this heinous butchery, some 30,000–100,000

for carrying out the Holocaust—a fact made clear in Hannah Arendt's brilliant *Eichmann in Jerusalem: A Report on the Banality of Evil*,¹¹⁷ covering Nazi Adolph Eichmann's trial in Jerusalem. As one writer explains:

Arendt concluded that far from exhibiting a malevolent hatred of Jews which could have accounted psychologically for his participation in the Holocaust, Eichmann was an utterly innocuous individual. He operated unthinkingly, following orders, efficiently carrying them out, with no consideration of their effects upon those he targeted. The human dimension of these activities were not entertained, so the extermination of the Jews became indistinguishable from any other bureaucratically assigned and discharged responsibility for Eichmann and his cohorts.¹¹⁸

Nonetheless, due to limited resources, prosecutions are “[in]capable of touching more than the tip of this iceberg; they have the capacity to prosecute only a tiny percentage of potential defendants.”¹¹⁹ This in turn

Rwandan citizens could be placed in the dock—a situation that would be wholly unmanageable and extremely destabilizing to the transition.

Kritz, *Dilemmas of Transitional Justice*, *supra* note 16, at xxiii.

117. See generally HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (rev. & enlarged ed. 1965).

118. The Internet Encyclopedia of Philosophy, Hannah Arendt (1906–1975), <http://www.iep.utm.edu/a/arendt.htm#H6> (last visited Oct. 22, 2007).

119. *Dealing with the Past*, *supra* note 59, at 21. Indeed, the Special Court for Sierra Leone (“SCSL”) was expected to prosecute less than twenty individuals over four years. Kritz, *Progress and Humility*, *supra* note 82, at 68.

In an innovative attempt at transitional justice, Rwanda instituted the *gacaca* courts in June 2002. Maya Goldstein Bolocan, *Rwandan Gacaca: An Experiment in Transitional Justice*, 2004 J. DISP. RESOL. 355, 355 (2004). *Gacaca* literally means “the lawn or grass where communities assemble to resolve community disputes.” *Id.* at n.1. As Bolocan writes, *gacaca* “blend[s] retributive and restorative [justice] approaches in an innovative way . . . [by] seek[ing] justice in an open, accessible, and participatory fashion.” *Id.* at 356. Under *gacaca*, over 250,000 community elected “judges” are expected to hear 115,000 cases of prison detainees accused of crimes in the 1994 genocide. See, e.g., Marc Sommers & Elizabeth McClintock, *On Hidden Ground: One Coexistence Strategy in Central Africa*, in *IMAGINE COEXISTENCE: RESTORING HUMANITY AFTER VIOLENT ETHNIC CONFLICT* 35, 44–45 (Antonia Chayes & Martha Minow eds., 2003). The accused will return to the scene of the crime and local residents may offer evidence in the hopes of disclosing the truth of what occurred. *Id.* at 45. Punishments for those found guilty by a *gacaca* court range from imprisonment to community service to paying restitution to a victim’s family. See, e.g., Craig Timberg, *In Rwanda, Suicides Haunt Search for Justice and Closure*, WASH. POST, Feb. 17, 2006, at A1.

While Rwanda should be applauded for taking an important step toward national reconciliation, *gacaca* has come under criticism. Amnesty International has expressed concern about the judges’ competency, claiming “[t]he abbreviated training they have received is grossly inadequate to the task at hand, given the complex nature and context

may foster impunity and serve to undermine reconciliation.¹²⁰ A second concern with prosecutions is that a nation emerging from a protracted conflict is too “fragile . . . to survive the destabilizing effects of politically charged trials.”¹²¹

If a nation chooses to prosecute perpetrators, it must take caution not to run counter to principles implicit in a democratic legal order. One such principle is that of *nulla poena sine lege*. This concept is defined as “[n]o punishment without a law authorizing it.”¹²² As Professor Teitel explains, “[t]his principle against retroactivity in the operation of criminal justice requires that as a matter of fairness persons ought not to be held accountable for offenses not known to be unlawful at the time they were com-

of the crimes committed during the genocide.” Amnesty Int’l, *Rwanda: Gacaca – Gambling with Justice*, AI Index AFR 47/003/2002 (June 19, 2002), available at <http://web.amnesty.org/library/index/engAFR470032002!Open>. The same report also notes that “[p]re-gacaca trial sessions observed by Amnesty International delegates in 2001 were marked by intimidation and haranguing by officials of defendants, defence witnesses and local populations.” *Id.* Finally, critics have expressed procedural concerns. See, e.g., Sarah L. Wells, *Gender, Sexual Violence and Prospects for Justice at the Gacaca Courts in Rwanda*, 14 S. CAL. REV. L. & WOMEN’S STUD. 167, 169 (2005) (“[A] lack of regard for the due process rights of the accused will inhibit *gacaca*’s contribution to post-conflict justice . . .”).

Gacaca has been the subject of much scholarship. See generally Christina M. Carroll, *An Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing with the Mass Atrocities of 1994*, 18 B.U. INT’L L.J. 163 (2000); Mark A. Drumbl, *Law and Atrocity: Settling Accounts in Rwanda*, 31 OHIO N.U. L. REV. 41 (2005); Jessica Raper, *The Gacaca Experiment: Rwanda’s Restorative Dispute Resolution Response to the 1994 Genocide*, 5 PEPP. DISP. RESOL. L.J. 1 (2005); L. Danielle Tully, Note, *Human Rights Compliance and the Gacaca Jurisdictions in Rwanda*, 26 B.C. INT’L & COMP. L. REV. 385 (2003); Lars Waldorf, *Views from the Field*, XIX PRAXIS: THE FLETCHER J. OF INT’L DEV. 137 (2004).

120. *Contra* BORELLO, *supra* note 77, at 16 (“International law and international jurisprudence have been evolving toward the principle that ‘those bearing the greatest degree of responsibility’ . . . should be prosecuted.”). The concept of prosecuting those “who bear the greatest responsibility” is also enshrined in Article 1 of the Statute of the Special Court for Sierra Leone. Statute of the Special Court for Sierra Leone art. 1(1) (2000), available at <http://www.sc-sl.org/scsl-statute.html>.

121. Orentlicher, *supra* note 113, at 2544 (“Many countries emerging from dictatorship are polarized and unstable, and may be further fractured by prosecutions of the prior regime’s depredations.”) (footnote omitted).

122. BLACK’S LAW DICTIONARY 1095 (Bryan A. Garner ed., 7th ed. 1999). *Nulla poena sine lege* is also enshrined in Article XXIII of the International Criminal Court. See Rome Statute of the International Criminal Court art. 23, July 17, 1998, 2187 U.N.T.S. 90, 37 I.L.M. 1002.

mitted.”¹²³ While genocide and torture were clearly unlawful under the Ba’ath regime in Iraq, merely being a member of the Ba’ath party was not. Lustration laws (considered in Part II) that seek to impose legal disabilities on former members generally run counter to this important principle.

D. From Competition to Compatibility: A Holistic Approach to Transitional Justice

During the 1990s, disputes over “truth versus justice” were familiar and arose from the belief that the two mechanisms were in competition for finite resources and incompatible with one another. The contest over the creation of a truth and reconciliation commission in Bosnia is one such example. Although the idea of a Bosnian truth and reconciliation commission enjoyed wide support from local NGOs, senior International Criminal Tribunal for the Former Yugoslavia (“ICTY”) officials disapproved of the enterprise and, in the words of Neil J. Kritz, “aggressively blocked the project, and did so in ways that arguably exceeded the Tribunal’s mandate and displayed a disdain for local players and concerns that international institutions of justice must avoid in the future.”¹²⁴ Notably, the ICTY’s former chief prosecutor Richard Goldstone argued in 1998 that “the two processes serve distinct functions and can be complementary,”¹²⁵ but such thoughtful views were few and far between in the 1990s.

123. Schulhofer et al., *supra* note 12, at 20. See also Kritz, *Dilemmas of Transitional Justice*, *supra* note 16, at xxii (“[T]he reality is that many of the acts that [countries emerging from repressive regimes] desire to punish today were not crimes when they were committed under the former regime; they were often laudable and encouraged under the old system.”).

124. Kritz, *Progress and Humility*, *supra* note 82, at 62. Kritz notes that ICTY concerns included:

- (1) The TRC would get in the way of the work of the ICTY
- (2) Multiple statements by the same individual to the two bodies might contain inconsistencies that could be used by a defense attorney to impugn the ICTY testimony of the witness.
- (3) The TRC could be a source of competition for international resources and local attention.
- (4) The combination of the ICTY and the TRC would be confusing to those who are obliged to live with the legacy of the past on a day-to-day basis in the region.

Id. See also *Dealing with the Past*, *supra* note 59, at 29 (“[T]he idea . . . was initially blocked by senior officials at the International Criminal Tribunal for the former Yugoslavia, who effectively mobilized the international community to stop the domestic effort in its tracks.”).

125. Goldstone, *supra* note 113.

Quite fortunately, as the Swiss Peace Foundation notes, “attitudes on this issue have evolved”¹²⁶ and “experience has shown that the question is not which takes priority, but how to combine and sequence a ‘package’ of measures that allow the maximum possible of justice, truth-telling, reparations to victims and structural reforms.”¹²⁷ Two nations in particular, East Timor and Sierra Leone, have taken holistic approaches to transitional justice by combining “peace” and “justice.”¹²⁸

In the summer of 2001, the United Nations Transitional Administration in East Timor (“UNTAET”) created the Commission for Reception, Truth, and Reconciliation (“CRTR”).¹²⁹ The CRTR was designed to complement the larger prosecution plan and has largely succeeded in this regard. As one scholar notes, “the CRTR is part and parcel of a broader justice and reconciliation model working on the basis of interdependent and complementary prosecution.”¹³⁰ Also in 2001, the war-ravaged nation of Sierra Leone¹³¹ became the first country to launch a Truth and

126. *Dealing with the Past*, *supra* note 59, at 29 (“[T]he current leadership of the ICTY [has endorsed] the TRC proposal as an important, complementary mechanism to help Bosnia to deal with its recent past in a healthy way.”).

127. *Id.* at 33.

128. See, e.g., Carsten Stahn, *Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission in East Timor*, 95 A.J.I.L. 952, 954 (2001) (considering the establishment of a truth commission in East Timor and concluding “truth commissions have gradually developed into a justice-supportive machinery, designed to complement rather than replace national or international prosecution”).

129. See United Nations Transitional Administration in East Timor, UNTAET/REG/2001/10, Part II, 13 July 2001.

130. Stahn, *supra* note 128, at 953.

131. Contemporary intra-state conflicts are often marked by egregious human rights violations and tend to more deleteriously impact civilians (particularly women and children) than inter-state conflicts. See, e.g., Abiodun Alao, *The Role of African Regional and Sub-Regional Organizations in Conflict Prevention and Resolution* (Office of the United Nations High Comm’r for Refugees, Working Paper No. 23, 2000), <http://www.unhcr.org/research/RESEARCH/3ae6a0c88.pdf>. One explanation for this is that many rebel forces, particularly those in African conflicts, are unable to rely upon tactical skills and therefore must rely on terror. See, e.g., Tony Clayton, *African Military Capabilities in Insurrection, Intervention and Peace Support Operations*, in *AFRICAN INTERVENTIONIST STATES* 51, 54–55 (Oliver Furley & Roy May eds., 2001). Sierra Leone’s vicious decade-long civil war was a study in terror. During the war, 50,000–200,000 people were killed. *War Crimes: Bringing the Wicked to the Dock*, *supra* note 90. Moreover, in a war waged by attacks on the civilian population, one scholar explains, “thousands more were defenseless victims of ‘terror tactics,’ including, abduction, rape, carving of messages into chests and backs of victims, and amputation of hands and feet, leaving victims physically disfigured and psychologically scarred.” Jennifer L. Poole, *Post-Conflict Justice in Sierra Leone*, in *POST-CONFLICT JUSTICE*, *supra* note 15, at 563, 564–65 (footnote omitted).

The war began on March 23, 1991 when a guerrilla organization, the Revolutionary United Front ("RUF"), armed by Liberia's Charles Taylor, invaded Sierra Leone from Liberia with the goal of overthrowing the government. *See, e.g.*, Human Rights Watch, *Getting Away with Murder: Mutilation, Rape, New Testimony from Sierra Leone* 8 (Working Paper, Vol. 11, No. 3(A), July 1999). While the RUF initially "set forth a vaguely populist agenda of fighting against government officials and their business associates in Freetown who had plundered the country's resources," such revolutionary zeal quickly dissipated and spiraled into a campaign of terror. JOHN L. HIRSCH, *SIERRA LEONE: DIAMONDS AND THE STRUGGLE FOR DEMOCRACY* 31 (2001). Although all sides in the conflict committed egregious human rights violations, the RUF became known for monstrous acts committed against civilians, particularly amputating limbs, the RUF's signature. As a 1998 Human Rights Watch paper reports, "gross violations of human rights committed by the AFRC/RUF . . . included amputations by machete of one or both hands, arms, feet, legs, ears and buttocks and one or more fingers; lacerations to the head, neck, arms, legs, feet and torso; the gouging out of one or both eyes." Human Rights Watch, *Sowing Terror: Atrocities Against Civilians in Sierra Leone* 1 (Working Paper, Vol. 10, No. 3(A), July 1998). Children suffered enormously during the war, perhaps more than in any other contemporary armed conflict. A 2004 child friendly version of the Sierra Leone Truth and Reconciliation Report produced with the support of the United Nations Children's Fund ("UNICEF") notes:

Children of this country were forced to fight for a cause we could not understand. We were drugged and made to kill and destroy our brothers and sisters and our mothers and fathers. We were beaten, amputated and used as sex slaves. This was a wretched display of inhuman and immoral actions by those who were supposed to be protecting us. Our hands, which were meant to be used freely for play and schoolwork, were used instead, by force, to burn, kill and destroy.

UNICEF, *Truth and Reconciliation Commission Report for the Children of Sierra Leone*, at 3 (2004), <http://www.unicef.org/infobycountry/files/TRCCF9SeptFINAL.pdf>.

A military stalemate gave way to the 1996 Abidjan Peace Agreement, but as John L. Hirsch writes in his masterly study of Sierra Leone, "[n]o sooner was the Abidjan Agreement signed than the nascent peace process began to break down." HIRSCH, *supra*, at 54. The RUF refused to disarm as required by the Agreement and within two years the rebels were on the brink of taking the capital of Freetown. *Id.* at 71. Ultimately, the Economic Community of West African States Monitoring Group ("ECOMOG") succeeded in pushing the rebels out of Freetown, thereby paving the way once again for renewed peace talks. *Id.* at 63. On July 7, 1999, in the city of Lomé, Togo, the Lomé Peace Agreement was signed by the government of Sierra Leone and the RUF. *See* Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, July 7, 1999, *available at* <http://www.sierra-leone.org/lomeaccord.html> [hereinafter Lomé Agreement]. Despite its intention to observe a "total and permanent cessation of hostilities" by signing the agreement, the RUF refused to abide by the terms and in May 2000, seized some 500 United Nations Mission in Sierra Leone ("UNAMSIL") peacekeepers, who had replaced the ECOMOG troops. HIRSCH, *supra*, at 87. The British government reacted with an ambitious military offensive that served to strengthen the resolve of the peacekeepers and within a year, the RUF had resumed the disarmament process detailed in the Lomé Agreement. Poole, *supra*, at 572-73.

Reconciliation Commission¹³² and a Special Court¹³³ concurrently,¹³⁴

The Lomé Agreement contained a detailed plan for disarmament, demobilization, and reintegration (“DDR”), the establishment of a Truth and Reconciliation Commission (“SLTRC”), and a timetable for national elections. *See* Lomé Agreement, *supra*, arts. XVI, XXVI(1), XII. The Lomé Agreement was not without controversy, however. Article III of the Agreement allowed the RUF to become an accepted political party. *Id.* art. III. Article IX traded justice for peace by granting a blanket amnesty for all crimes committed by parties, including the RUF, during the war “[t]o consolidate the peace and promote the cause of national reconciliation.” *Id.* art. IX(3). Critically, at the last minute, the Secretary-General’s Special Representative to Sierra Leone, Ambassador Francis Okelo, added a disclaimer to the agreement stating that “[t]he United Nations interprets that the amnesty and pardon in article nine of this agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes, and other serious violations of international humanitarian law.” Human Rights Watch, *The Sierra Leone Amnesty Under International Law* (Aug. 3, 1999), <http://www.hrw.org/campaigns/sierra/int-law2.htm>. Although this disclaimer had the effect of dismantling the legal impact of the amnesty provision, international human rights organizations, who did not have to deal with the consequences of the war, decried the amnesty. Sierra Leoneans, on the other hand, recognized the painful reality that without the amnesty provision the war would continue. As such, they were willing to sacrifice justice for peace. *See, e.g.*, Karen Gallagher, *No Justice, No Peace: The Legalities and Realities of Amnesty in Sierra Leone*, 23 T. JEFFERSON L. REV. 149, 165 (2000). *See also* Corinna Schuler, *Sierra Leone’s ‘See No Evil’ Pact*, CHRISTIAN SCIENCE MONITOR, Sept. 15, 1999, at 1 (“Some 200 representatives of civil society—groups of women, church leaders, students—agreed to the amnesty provisions at a national conference.”).

132. Per Article XXVI of the Lomé Agreement, the SLTRC was established with the following mandate:

[T]o create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone, from the beginning of the Conflict in 1991 to the signing of the Lome Peace Agreement; to address impunity, to respond to the needs of the victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered.

The Truth and Reconciliation Commission Act § 6(1) (2000), *available at* <http://www.sierra-leone.org/trcact2000.html>.

The SLTRC was composed of seven individuals, four Sierra Leoneans and three non-citizens. *Id.* at § 3(1). Operationally, the work of the Commission was conducted in three phases: a deployment phase; a hearings phase; and a report-writing phase. Sixth Weekly Briefing of the Truth and Reconciliation Commission (Aug. 28, 2002), <http://www.sierra-leone.org/trcbriefing082802.html>. The SLTRC “worked tirelessly” for two years, taking the statements of over 7,000 people. Press Release, U.N. Econ. & Soc. Council [ECOSOC], *Final Report on Ten-Year Sierra Leone Conflict Published; Seeks to Set Out Historical Record, Offer Guidance for Future*, U.N. Doc. ECOSOC/6140 (Oct. 27, 2004) [hereinafter ECOSOC Press Release], *available at* <http://www.un.org/News/Press/docs/2004/ecosoc6140.doc.htm>. As children were disproportionately impacted by the conflict, the Commission made particular efforts to include the views of children. *See id.* The SLTRC was funded primarily by international donors. William A.

Schabas, *The Relationship Between Truth Commissions and International Courts: The Case of Sierra Leone*, 25 HUM. RTS. Q. 1035, 1039 (2003). Although initially budgeted at \$10 million, the SLTRC had to make do with less than half that amount. *Id.*

The SLTRC released its final report in October 2004. The report consists of 1,500 pages and a 3,500 page annex. ECOSOC Press Release, *supra*. As the International Center for Transitional Justice notes, the report “provides an account of the abuses committed during the civil war, sets out the Commission’s findings, and makes recommendations on how the country can address its past and move forward.” Press Release, Int’l Ctr. for Transitional Justice, Sierra Leone Truth Commission Final Report Released (Oct. 5, 2004), available at <http://www.ictj.org/en/news/press/release/465.html>. The SLTRC also recommended “address [ing] the needs of the victims” through a reparations program. See 2 THE FINAL REPORT OF THE TRUTH AND RECONCILIATION COMMISSION OF SIERRA LEONE chap. 4 (2004).

For criticism of the SLTRC, see SHAW, *supra* note 92, at 4 (“[T]here was little popular support for bringing the Commission to Sierra Leone, since most people favored instead a ‘forgive and forget’ approach. . . . But there was a very strong vocal minority that thought that people needed to talk about what happened.”).

133. Unlike the International Criminal Tribunal for the Former Yugoslavia (“ICTY”), created by Security Council Resolution 827 (May 25, 1993), and the International Criminal Tribunal for Rwanda, created by Security Council Resolution 955 (Nov. 8, 1994), the Special Court for Sierra Leone (“SCSL”) is a “treaty-based *sui generis* court.” See, e.g., Poole, *supra* note 131, at 583. As a member of the International Criminal Court Preparatory Commission notes, it is “the first ad hoc criminal tribunal based upon an agreement between the United Nations and the government of a member state.” Micaela Frulli, *The Special Court for Sierra Leone: Some Preliminary Comments*, 11 E.J.I.L. 833, 833 (2000). The SCSL has its antecedent in a letter the President of Sierra Leone sent to the Secretary-General. As Annan notes in his Fifth Report on UNAMSIL, “[i]n a letter addressed to me dated 12 June, President Kabbah requested United Nations assistance to establish a special court to try Foday Sankoh and other senior members of RUF ‘for crimes against the people of Sierra Leone and for the taking of United Nations peacekeepers as hostages.’” The Secretary-General, *Fifth Report of the Secretary-General on the United Nations Mission in Sierra Leone*, ¶ 9, delivered to the Security Council, U.N. Doc. S/2000/751 (July 13, 2000). In his letter, President Kabbah indicated that the crimes were so serious as to be “of concern to all persons in the world.” Richard S. Williamson, *Transitional Justice: The UN and the Sierra Leone Special Court*, 2 CARDOZO PUBL. L. POL’Y & ETHICS J. 1, 5 (2003) (quoting President Alhaji Ahmed Tejan Kabbah to Kofi Annan (June 12, 2000)). Two weeks later, the Security Council responded with Resolution 1315, which requested that the Secretary-General “negotiate an agreement with the Government of Sierra Leone to create an independent special court consistent with th[e] resolution.” S.C. Res. 1315, ¶ 1, U.N. Doc. S/RES/1315 (Aug. 14, 2000). With regard to the legality of the amnesty granted in Article IX of the Lomé Agreement, the United Nations specifically addressed this matter with the following:

While recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict, the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law.

The Secretary-General, *Report of the Secretary General on the Establishment of a Special Court for Sierra Leone*, ¶ 22, delivered to the Security Council, U.N. Doc. S/2000/915 (Oct. 4, 2000).

Three aspects of the SCSL are particularly noteworthy. First, the court is a “hybrid” in that it is composed of both international and domestic judges, prosecutors, and defense counsels, and sits in Sierra Leone. See Statute of the Special Court for Sierra Leone art. 12. The judges are appointed by both the Government of Sierra Leone and by the United Nations. *Id.* art. 12(1)(a). The prosecutor is appointed for a three-year term by the United Nations while the deputy prosecutor is appointed by the Government of Sierra Leone. *Id.* art. 15(3). For the benefits that a “hybrid” court may offer international criminal law, see Laura A. Dickinson, Note, *The Promise of Hybrid Courts*, 97 AM. J. INT’L L. 295, 303 (2003) (“Purely domestic and purely international institutions may also fail to promote local capacity-building, which is often an urgent priority in postconflict situations.”). See also Michael Lieberman, *Salvaging the Remains: The Khmer Rouge Tribunal on Trial*, 186 MIL. L. R. 164, 165 (2006) (citing possible benefits of hybrid courts, including “combining the expertise and integrity of international personnel” with local ownership, “reduced expenses, easier access to witnesses and evidence, and the potential for local capacity building”). See also Frulli, *supra*, at 835 (arguing that hybrid courts involve the members state to a greater extent in the “establishment, composition, and functioning” of the court).

Second, the SCSL has jurisdiction over both international and domestic crimes. Articles 2–4 confer jurisdiction to the SCSL over crimes against humanity, violations of Article 3 of the Geneva Conventions, and “[o]ther serious violations of international humanitarian law.” Statute of the Special Court for Sierra Leone arts. 2–4. Article 5 confers jurisdiction to the SCSL over crimes under Sierra Leonean law. *Id.* art. 5. The SCSL’s jurisdiction extends to noncitizens as well as citizens, and to persons who were fifteen years of age at the time of the crime’s commission. *Id.* art. 7(1). While extension of the SCSL’s jurisdiction to children of this age initially garnered international opprobrium, the SCSL Statute emphasizes rehabilitation over retribution when dealing with juveniles. For example, Article 7(2) states then when trying a case against a juvenile, any of the following would be a proper disposition: “care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies.” *Id.* at 7(2).

Third, the SCSL placed a great emphasis on local outreach, conducted through town hall meetings, transparent communication with media, and consistent sharing of information with civil society organizations. UNITED STATES INST. OF PEACE, BUILDING THE IRAQI SPECIAL TRIBUNAL: LESSONS FROM EXPERIENCES IN INTERNATIONAL CRIMINAL JUSTICE 3 (2004), available at <http://www.usip.org/pubs/specialreports/sr122.pdf> [hereinafter BUILDING THE IST]. As the United States Institute of Peace (“USIP”) notes, “the strong emphasis on outreach . . . is considered to have contributed significantly to its credibility among the local population” and should be a model for other tribunals. *Id.*

As of this writing, eleven individuals representing the three warring factions have been indicted by the SCSL. Three trials of nine accused have progressed simultaneously. On February 28, 2004, the trial court ordered the joint trials of three members of the Civil Defense Force (“CDF”). CDF Trial, Special Court for Sierra Leone, <http://www.scs-sl.org/CDF.html> (last visited Sept. 26, 2007). On August 2, 2007, two of the defendants were found guilty on several counts each (the third defendant died during the trial). *Id.* The joint trial against three former RUF members began on July 5, 2004. RUF Trial,

thus providing, in the words of Professor William Schabas, “the evolving discipline of transitional justice with a laboratory in which to examine how the two bodies . . . relate to each other.”¹³⁵ Despite initial concerns that the existence of the Special Court for Sierra Leone (“SCSL”) would prevent individuals from testifying to the Sierra Leone Truth and Reconciliation Commission for fear that their testimony would be used against them at the SCSL, such fears have generally proved unfounded.¹³⁶ Sierra

Special Court for Sierra Leone, <http://www.sc-sl.org/RUF.html> (last visited Sept. 26, 2007). Indictments against two other RUF members (including the notorious Foday Saybana Sankoh) were withdrawn on December 8, 2003 due to the two individuals’ deaths. *Id.* The joint trial of three former Armed Forces Revolutionary Council (“AFRC”) members began on Mar. 7, 2005. AFRC Trial, Special Court for Sierra Leone, <http://www.sc-sl.org/AFRC.html> (last visited Sept. 26, 2007). One other AFRC member, Johnny Paul Koroma, remains at large. See OFFICE OF PRESS AND PUB. AFFAIRS, SPECIAL COURT FOR SIERRA LEONE, PAMPHLET, BASIC FACTS, available at <http://www.sc-sl.org/basicfactspamphlet.pdf>. In what was a momentous coup for transitional justice, the infamous former President of Liberia, Charles Taylor, was captured on March 29, 2006 following a request by Liberian President Ellen Johnson-Sirleaf that Nigerian authorities apprehend Taylor. See Craig Timberg, *Liberian President Backs Bid To Move Taylor Trial to Hague*, WASH. POST, Mar. 31, 2006, at A15. In his first appearance before the SCSL, Taylor defiantly pleaded not guilty. See, e.g., Hans Nichols & Lydia Polgreen, *Liberia Ex-Leader Faces War-Crimes Court*, N.Y. TIMES, Apr. 4, 2006, at A3 (“I think this is an attempt to divide and rule the people of Liberia and Sierra Leone, and so most definitely I am not guilty.”) (quoting Charles Taylor). Whether Taylor will remain at the SCSL is anyone’s guess. Fearing concerns that a Taylor trial may further destabilize a fragile nation, the SCSL has requested that Taylor be moved to a courtroom in the Hague. Taylor, on the other hand, has vowed to fight any move, claiming that he can only receive a fair hearing in Sierra Leone. *Id.*

134. For an examination of the collaboration and coordination between the SLTRC and the SCSL, see Abdul Tejan-Cole, *The Complementary and Conflicting Relationship between the Special Court for Sierra Leone and the Truth and Reconciliation Commission*, 6 YALE HUM. RTS. & DEV. L.J. 139 (2003); Elizabeth M. Evenson, Note, *Truth and Justice in Sierra Leone: Coordination Between Commission and Court*, 104 COLUM. L. REV. 730 (2004).

135. Schabas, *supra* note 132, at 1065.

136. Beth K. Dougherty, for example, examined a study undertaken by a Sierra Leonean NGO on ex-combatants’ views toward the SLTRC. Dougherty found:

Concern about the SCSL and fears for their security . . . initially kept ex-combatant participation low. But as the hearings went on, and the SCSL did not pursue those who testified, more and more ex-combatants came forward. Many ex-combatants wanted to return to their communities but were afraid of their reception; participating in the TRC was a means of easing the path of reintegration. In at least four districts, perpetrators (mostly RUF) came forward and publicly asked forgiveness. By the end, an unprecedented 13% of individual statements came from perpetrators, and “approximately a third of those who appeared in hearings admitted to their own wrongs, often in great detail.”

Leone has learned that “mass atrocities . . . generally expose and/or produce complex problems and rifts in society which are resistant to simple, one-step solutions; they typically require sophisticated, multi-faceted and well-integrated responses.”¹³⁷ Hopefully, Sierra Leone is not the last nation to learn this lesson. In the words of a 2006 article in *The Economist*, “the wounded little country’s bold experiment could set a trend.”¹³⁸

E. The Need for Reparations

An important component of transitional justice is the awarding of reparations to victims of state-sponsored human rights violations.¹³⁹ Generally, reparations “refers to compensation, usually of a material kind and often specifically monetary, for some past wrong.”¹⁴⁰ Reparations may, however, take several forms,¹⁴¹ including non-monetary awards.¹⁴² Prin-

Beth K. Dougherty, *Searching for Answers: Sierra Leone’s Truth & Reconciliation Commission*, 8 AFR. STUD. Q. 39, 48 (2004). See also Schabas, *supra* note 132, at 1051 (“As the TRC hearings progressed . . . many perpetrators came forward to tell their stories to the Commission . . . They did not appear at all concerned about the threat of prosecution by the Special Court. Perhaps [sic] they had already understood that the Special Court was only concerned with ‘big fish’ . . .”). But see SHAW, *supra* note 92, at 4 (“Ex-combatant fears about the passage of information from the TRC to the Special Court in fact appear to have been partly justified. This is not because of any deliberate intent, but because of leakages that may be inevitable when two forms of transitional justice operate concurrently.”).

137. *Dealing with the Past*, *supra* note 59, at 29.

138. *War Crimes: Bringing the Wicked to the Dock*, *supra* note 90.

139. See, e.g., HAYNER, CONFRONTING STATE TERROR, *supra* note 68, at 170–82.

140. Torpey, *supra* note 23, at 3.

141. The *Revised Set of Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law*, by the United Nations Economic and Social Council, notes that reparations generally take one of four forms: restitution (“to re-establish the situation that existed prior to the violations of human rights and humanitarian law”); compensation (which “provide[s] for any economically assessable damage resulting from violations of human rights and humanitarian law”); rehabilitation (which “provide[s] and will include medical and psychological care as well as legal and social services”); and “[s]atisfaction and guarantees of non-repetition.” ECOSOC, Sub-Comm. On Prevention of Discrimination & Prot. of Minorities, *Revised Set of Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law*, ¶¶ 12–15, U.N. Doc. E/CN.4/Sub.2/1996/17 (May 24, 1996) (*prepared by* Theo van Boven).

Generally, a combination of these types is necessary to adequately remunerate victims. See, e.g., *Secretary General’s Report on Transitional Justice*, *supra* note 79, ¶ 55 (“No single form of reparation is likely to be satisfactory to victims. Instead, appropriately conceived combinations of reparation measures will usually be required . . .”).

142. See, e.g., UNFINISHED BUSINESS, *supra* note 85, at 8 (“[T]he TRC made extensive recommendations for . . . various forms of ‘symbolic’ reparations, ranging from the

principles guiding reparations for breaches of international obligations date back to at least 1928¹⁴³ and today states have an unambiguous duty to grant reparations to victims of gross human rights violations.¹⁴⁴

Reparations serve two primary functions. First, on the most basic level, victims of human rights violations “often suffer a range of physical and psychological injuries and sometimes live under extreme economic conditions as a result of the loss of the breadwinner in the family, the destruction of property, or their physical inability to work.”¹⁴⁵ Reparations therefore help victims “manage the material aspect of their loss.”¹⁴⁶ Reparations also serve to “deter the state from future abuses.”¹⁴⁷

Three difficulties can be identified in the administration of reparations. First, few transitioning states have the funds to compensate all the victims deserving of assistance. In South Africa, the President’s Fund for overseas donations was established but was poorly funded.¹⁴⁸ Other

building of monuments and renaming streets and community facilities, to expunging criminal records for acts committed with political motives.”)

143. In the 1928 Chorzów Factory case, involving a claim by Germany against Poland concerning the expropriation of a factory, the Permanent Court of International Justice held:

The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.

The Factory at Chorzów (Germany v. Poland), 1928 P.C.I.J. (ser. A) No. 17, at 29 (Sept. 13).

144. See, e.g., International Covenant on Civil and Political Rights art. 2(3)(a), Mar. 23, 1976, 999 U.N.T.S. 171 (“Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity . . .”).

The Convention Against Torture has a similar provision. Article 14 states:

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.

Convention Against Torture, *supra* note 114, art. 14.

145. HAYNER, *CONFRONTING STATE TERROR*, *supra* note 68, at 170.

146. Krütz, *Dilemmas of Transitional Justice*, *supra* note 16, at xxvii.

147. *Id.*

148. See UNFINISHED BUSINESS, *supra* note 85, at 9; HAYNER, *CONFRONTING STATE TERROR*, *supra* note 68, at 178–79.

states have considered a reparations tax, but as Hayner notes, “the vast majority of reparations policies to date . . . have not relied on any special tax to cover the expense.”¹⁴⁹ Second, in the event that the state is capable of paying reparations, they may “unsettle property rights and interfere with economic reform by creating new claims against existing property holders.”¹⁵⁰ Last, identifying those individuals deserving of reparations can pose difficult and complex logistical questions for a poor nation emerging from war. Hayner notes that while truth commissions “produce a list of victims” and are “an obvious source on which to build a reparations program,” they “usually document[] only a small portion of the total number of victims, and rarely ha[ve] the resources to corroborate all of the victim statements that [they] receive[].”¹⁵¹ Consequently, she concludes that “in most circumstances a truth commission is not in a good position to provide a final list of recommended recipients.”¹⁵²

149. HAYNER, *CONFRONTING STATE TERROR*, *supra* note 68, at 171.

150. Posner & Vermeule, *supra* note 21, at 766.

151. HAYNER, *CONFRONTING STATE TERROR*, *supra* note 68, at 171.

152. *Id.* Nevertheless, in determining who should receive reparations, both Chile and Argentina have depended upon information compiled by the nations’ truth commissions. *Id.* at 172.

Since 1997, close to 5,000 Chileans have received a monthly pension from the government as part of its “‘pension plan’ for family members of those killed or disappeared under the military dictatorship.” *Id.* Survivors of torture are not included in the program. *Id.* at 173. The checks vary from approximately \$345 to \$482, depending on how many survivors there are in a family. *Id.* at 172–73. Children of those killed or disappeared are entitled to extensive educational benefits and may waive mandatory military service. *Id.* at 173; Law Creating the National Corporation for Reparation and Reconciliation, Law No. 19, 123, arts. 29–32 (Jan. 31, 1992), *reprinted in* 3 *TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES* 694 (Neil J. Kritz, ed., 1995).

In Argentina, where close to 9,000 people disappeared under the military dictatorship, family members of the disappeared “receive[d] a lump sum of \$220,000, paid in government bonds.” HAYNER, *CONFRONTING STATE TERROR*, *supra* note 68, at 175.

II. THE URGE TO PURGE: LUSTRATION LAW IN THE CZECH REPUBLIC

Several Central European nations have used lustration¹⁵³ to deal with the legacy of totalitarian Communism.¹⁵⁴ The Czech Republic was the

153. See, e.g., Roman Boed, *An Evaluation of the Legality and Efficacy of Lustration as a Tool of Transitional Justice*, 37 COLUM. J. TRANSNAT'L L. 357, 358–59 (1999); Vojtech Cepl, *Lustration in the CSFR: Ritual Sacrifices*, 1 E. EUR. CONST. REV. 24, 24 (1992); Mark S. Ellis, *Purging the Past: The Current State of Lustration Laws in the Former Communist Bloc*, 59 LAW & CONTEMP. PROBS. 181 (1996); Williams et al., *supra* note 14, at 3; Jiri Pehe, *Parliament Passes Controversial Law on Vetting Officials*, REP. ON E. EUR., Oct. 25, 1991, at 4, reprinted in 2 TRANSITIONAL JUSTICE, *supra* note 24, at 547. The word lustration derives from the Latin *lustratio*, meaning “purification by sacrifice.” Boed, *supra*, at 358.

154. In Czechoslovakia, the Communist Party seized power in February 1948. See JOHN F.N. BRADLEY, *POLITICS IN CZECHOSLOVAKIA, 1945–1990*, at 27–28 (1991). Stalinist purges followed, culminating in the notorious Slansky trial, in which major Czech Communist figures were tried on charges of treason. See HEDA MARGOLIUS KOVALY, *UNDER A CRUEL STAR: A LIFE IN PRAGUE, 1948–1968* (Franci Epstein & Helen Epstein trans., 1986) (detailing the show trial and execution of Ms. Kovaly’s husband, who had served as foreign minister). Following Stalin’s death in 1953, token reforms were allowed in Czechoslovakia, culminating with the 1968 Prague Spring, during which democratization flourished. As the State Department has explained, “[a]fter January 1968, the Dubcek leadership took practical steps toward political, social, and economic reforms. In addition, it called for politico-military changes in the Soviet-dominated Warsaw Pact” U.S. State Dep’t, Bureau of European and Eurasian Affairs, Background Note: Czech Republic (Sept. 2007), <http://www.state.gov/r/pa/ei/bgn/3237.htm> [hereinafter State Dep’t Note: Czech Rep.]. The Prague Spring came to a violent demise on August 21, 1968. On that day, troops from the Soviet Union, Hungary, Bulgaria, East Germany, and Poland invaded Czechoslovakia. The justification for the invasion appeared in *Pravda* on September 26. ALVIN Z. RUBINSTEIN, *SOVIET FOREIGN POLICY SINCE WORLD WAR II: IMPERIAL AND GLOBAL 95* (2d ed. 1985). The article, soon dubbed the Brezhnev Doctrine, explained:

It should be stressed that even if a socialist country seeks to take an ‘extrabloc’ position, it in fact retains its national independence thanks precisely to the power of the socialist commonwealth—and primarily to . . . the Soviet Union—and the might of its armed forces. The weakening of any link in the world socialist system has a direct effect on all the socialist countries Thus, the anti-socialist forces in Czechoslovakia were in essence using talk about the right to self-determination to cover up demands for so-called neutrality and [Czechoslovakia’s] withdrawal from the socialist commonwealth.

Id. As two scholars have written, “[t]he Soviet invasion . . . ended the optimum chance for a fundamental reform of a socialist regime and started the long process of the decay of communism that was to culminate in the Velvet Revolution just over two decades later.” BERNARD WHEATON & ZDENĚK KAVAN, *THE VELVET REVOLUTION: CZECHOSLOVAKIA, 1988–1991*, at 3 (1992). The Velvet Revolution (referred to as such for its peaceful nature) had its antecedents in police brutality. On November 17, 1989, police violently broke up a peaceful pro-democracy student march. State Dep’t Note: Czech Rep., *supra*. The violence inspired the Czech people and led to the creation of the Civic Forum, an

first Central European nation to pursue such a policy¹⁵⁵ and the Czech lustration law has served as a model throughout the region.¹⁵⁶ This section considers lustration as a tool of transitional justice. It begins with a general overview of lustration law and concludes with an analysis and assessment of the Czech¹⁵⁷ lustration law.

A. Lustration Law in General

Lustration includes “screening, disqualifying, and purging” former officials from elected and appointed state positions.¹⁵⁸ Lustration laws typically draw on secret police files¹⁵⁹—a fact that critics argue is an inherent

umbrella pro-democracy organization led by the taciturn playwright Václav Havel. *See id.* By the end of December 1989 the Czech Communist Party had collapsed, leading to the appointment of Havel as President. *Id.* David Remnick beautifully explains Havel’s quixotic rise to power:

A bourgeois boy becomes a bohemian playwright; he then becomes a dissident, who, for the crime of writing subversive essays and helping to organize a subversive movement called Charter 77, is encouraged by the regime to master the art of welding in a reeking Czech prison; finally, in late November, 1989, everything implodes and he is leading demonstrations in Wenceslas Square, and hundreds of thousands of people are shouting “*Havel na hrad!*” (“Havel to the Castle!”); within days, he is the head of state, working in the same hilltop redoubt that served as a seat of power for dynasts of the Bohemian kingdom and the Hapsburg monarchy, for the emissaries of Berlin and the satraps of the Kremlin.

David Remnick, *Exit Havel: The King Leaves the Castle*, THE NEW YORKER, Feb. 17, 2003, at 90.

155. Hungary instituted a lustration law in 1994 as did Poland in 1997. Williams et al., *supra* note 14, at 16.

156. *See, e.g.*, Boed, *supra* note 153, at 359.

157. In 1990, Czechoslovakia changed its name to the Czech and Slovak Federal Republic (“CSFR”). On January 1, 1993, the CSFR ceased to exist and divided into the Czech Republic and Slovakia with remarkably little violence. IRRECONCILABLE DIFFERENCES?: EXPLAINING CZECHOSLOVAKIA’S DISSOLUTION (Michael Kraus & Allison Stanger eds. and trans., 2000).

Following the split, the Czech Republic proceeded with lustration. The Slovakian President, Vladimir Mečiar, opposed lustration and beseeched the Constitutional Court to abrogate the law in 1994. Although the Court refused, the law was never invoked and ceased to exist in 1996. *See, e.g.*, Ellis, *supra* note 153, at 183. For an attempted explanation of the divergent responses to transitional justice in the Czech Republic and Slovakia, see Nadya Nedelsky, *Divergent Responses to a Common Past: Transitional Justice in the Czech Republic and Slovakia*, 33 THEORY & SOC’Y 65 (2004).

158. Herman Schwartz, *Lustration in Eastern Europe*, 1 PARKER SCH. J. E. EUR. L. 141, 143 (1994).

159. Ellis, *supra* note 153, at 181.

weakness.¹⁶⁰ As Mark Ellis, the former Executive Director of the Central and East European Law Initiative (“CEELI”) explains, this information is then “used to determine whether suspected individuals collaborated with the former state security service.”¹⁶¹

Professor Herman Schwartz has explained that lustration law generally falls into one of two camps, “(1) those that ban a relatively large number of former functionaries from a wide range of . . . positions; and (2) those that apply to just a particular activity.”¹⁶² Act No. 451/1991 (the Czech lustration law) is an example of the former. As lustration only seeks to sanction those individuals in positions to undermine the democratic process, lustration as a tool of transitional justice could be thought of as a midpoint in terms of severity between retributive justice and restorative justice. Indeed, Roman David has referred to the Czech lustration law as “semi-retributive” in nature.¹⁶³ Similarly, as a working paper for the Sussex European Institute (“SEI”) explains, “[a]s sanctions go, those imposed by lustration are restrained.”¹⁶⁴

Lustration is often justified on a state security theory. It is argued that lustration can allow a fragile democracy to take root by preventing those who would harm it from serving in positions of power and undermining the process.¹⁶⁵ In addition to this security argument, Professor Maria Łoś argues that lustration also achieves “historical truth”¹⁶⁶ and “minimal

160. See *infra* note 180 and accompanying text.

161. Ellis, *supra* note 153, at 181.

162. Schwartz, *supra* note 158, at 149.

163. Roman David, *Lustration Laws in Action: The Motives and Evaluation of Lustration Policy in the Czech Republic and Poland (1989-2001)*, 28 LAW & SOC. INQUIRY 387, 425 (2003) (“The Czech lustration law does not sanction every member of the past repressive apparatus. Instead, it is primarily forward looking since it concerns only access to senior public posts in state institutions. Thus, the law . . . can be called ‘semi-retributive.’”) (citation omitted).

164. Williams et al., *supra* note 14, at 18 (“Unlike the states of Europe liberated from German occupation in 1944–45, post-Communist democracies did not resort to the mass internment or summary execution of suspected collaborators, suspend their civil and political rights, or seize their property.”).

165. See, e.g., David, *supra* note 163, at 420 (“In the Czech Republic, the threat to democracy is reduced by removing some members of the totalitarian machinery from leading positions.”). See also Maria Łoś, *Lustration and Truth Claims: Unfinished Revolutions in Central Europe*, 20 LAW & SOC. INQUIRY 117, 149 (The Vice-Minister of the Interior in the Czech-Slovak cabinet explained: “Is it so difficult to understand that people want to know who the former agents and informers are? This is not an issue of vengeance, nor of passing judgments. This is simply a question of trusting our fellow citizens who write in newspapers, enact laws and govern our country.”).

166. Łoś, *supra* note 165, at 145 (“[L]ustration brings a clarification of values and a frank evaluation of the past, as well as a clear warning for the future. In its absence, one can expect a continuation of the lie and a dangerous, moral ambivalence.”).

justice.”¹⁶⁷ One more affirmative purpose can be added to those proposed by Łoś. The SEI working paper argues that lustration generally serves to prevent blackmail and thus contributes to national reconciliation.¹⁶⁸ Although the example the authors use is from the Czech law, the argument has applicability to lustration law in general. They explain:

Advocates of lustration warned that individuals with past associations with the security services who now held important public offices were open to blackmail. Conceivably, these people could be forced . . . to act against the public interest and subvert democracy; if they did not cooperate, their histories would . . . be divulged . . . and their lives ruined. Lustration was thereby presented as a necessary means to protect public safety and democracy by ensuring that occupants of prominent and sensitive positions were not vulnerable to such duress.¹⁶⁹

One of the principle criticisms of Act No. 451/1991 is that it assigned collective guilt.¹⁷⁰ It should be noted, however, that lustration laws may avoid such criticism by being narrowly tailored and by making individualized assessments. Nevertheless, the following criticisms can be leveled at lustration regardless of how narrowly drawn the law may be.

The first problem can be described as a personnel dilemma. That is, lustration often “exact[s] a heavy price from the society by denying it scarce human resources.”¹⁷¹ Countries which purge large segments of managerial and administrative expertise will find political and economic reconstruction extraordinarily arduous, for revolutionaries rarely have the

167. *Id.* at 146–47 (“Even if the justice discourse does not necessarily call for punishment, and lustration measures are not penal in character, the underlying notion is one of retribution. Evil must be met with (at least some) evil. The wrongdoer must not be allowed to profit from his misdeeds.”).

168. The argument is also made by the Czechoslovak Parliamentary Investigative Commission for the Clarification of the Events of November 17, 1989 (“Parliamentary Investigative Commission”), which was established prior to passage of Act No. 451/1991. The Commission’s spokesman explains, “[t]he only way to prevent blackmail . . . and a series of political scandals that could surface at crucial moments is to clear the government and legislative bodies of these collaborators.” Petr Toman, Spokesman, Parliamentary Investigative Commission, Report on StB Collaborators to the Czechoslovak Federal Assembly (Mar. 22, 1991), *reprinted in* 3 TRANSITIONAL JUSTICE, *supra* note 152, at 308 [hereinafter Report on StB Collaborators].

169. Williams et al., *supra* note 14, at 9.

170. See, e.g., Boed, *supra* note 153, at 359 (“The foremost legal criticism of the practice has been that lustration risks the miscarriage of justice by assigning collective guilt without a determination of an individual’s responsibility for any harm caused.”).

171. Schwartz, *supra* note 158, at 146.

skills necessary to run a modern administrative state.¹⁷² In his brilliant chronicle of the Soviet empire's demise, David Remnick recounts a remark a Russian official made to a *Washington Post* reporter. The official explained, "[w]hen we were forming the new structures, we had to hire people from the old structures. Our supporters—the people who came to rallies and street demonstrations—didn't know anything about how to run a country."¹⁷³ Within the Russian official's comments may lie a partial solution—lustration law must take into account the wealth of talent available without members connected to the *ancien regime* and be willing to compromise if there are too few of those individuals to effectively run the state. As Eric Posner and Adrian Vermeule note, "[w]ell-designed schemes can finesse the dilemma, maintaining a critical mass of useful old-regime personnel while excising the officials who present the greatest threat to the new regime or whose presence would create the greatest public offense."¹⁷⁴

A second problem with lustration is the source of information on which it relies. Secret police files in the Czech Republic and Soviet Union have proven to be both incomplete and inaccurate.¹⁷⁵ With regard to incompleteness, neither the files of the Czech secret police, the Státní bezpečnost ("StB"), nor the Soviet Komitet Gosudarstvennoy Bezopasnosti ("KGB") contained the identities of those in the "top echelons of the system,"¹⁷⁶ a fact that has led to Havel decrying the Czech law as only affecting the "small fry."¹⁷⁷ With regard to inaccuracies, both sources of files have proven to be unreliable, with many files being "falsified and deliberately distorted by agents seeking to exaggerate their achievements."¹⁷⁸ In one list of "alleged former 'collaborators,'" President Havel's name even appeared.¹⁷⁹ Finally, in the unlikely event that secret police files could be certified as being complete and accurate, it is

172. See, e.g., Posner & Vermeule, *supra* note 21, at 778–79 ("Former resisters or revolutionaries are often the very people who have been denied technical education or political office . . .").

173. DAVID REMNICK, *LENIN'S TOMB: THE LAST DAYS OF THE SOVIET EMPIRE* 505 (Vintage Books 1994) (1993).

174. Posner & Vermeule, *supra* note 21, at 779.

175. See, e.g., Schwartz, *supra* note 158, at 151.

176. Cepl, *supra* note 153, at 25. See also Stephan Engelberg, *The Velvet Revolution Gets Rough*, N.Y. TIMES, May 31, 1992, § 6 (Magazine), at 31 ("We know that at least 16,000 top-level agents were not listed in any registers. . . . We are chasing little fish.") (quoting a Czech parliamentary deputy).

177. Mark Gibney, *Decommunization: Human Rights Lessons from the Past and Present, and Prospects for the Future*, 23 DENV. J. INT'L L. & POL'Y 87, 126 (1994).

178. Schwartz, *supra* note 158, at 145.

179. *Id.* at 152.

debatable whether a state transitioning from totalitarian rule to democracy would want to use them. As President Havel explained in a 1991 interview, “[i]t is absurd that the absolute and ultimate criterion for a person’s suitability for performing certain functions in a democratic state should come from the internal files of the secret police.”¹⁸⁰

Finally, because lustration laws may implicate behavior that took place decades earlier, lustration raises the issue of procedural fairness.¹⁸¹ As time passes, exculpatory evidence may be lost or destroyed, witnesses may die, and memories may fade. Indeed, this is the purpose behind statutes of limitations.¹⁸² As lustration laws are not criminal statutes, the principle of *nulla poena sine lege* does not generally apply. Nevertheless, in an amicus brief on the applicability of international agreements to the Czech law before the Constitutional Court of the Czech & Slovak Federal Republic (“CSFR”), a number of human rights organizations argued that the rationalization for the principle continues to apply. The brief notes, “[i]t is unfair to sanction someone today by today’s standards for what was legitimate and even considered laudatory in the past.”¹⁸³

B. The CSFR’s Screening (Lustration) Law

1. Antecedents

The Parliament of the CSFR passed Act No. 451/1991, the Czech Screening (“Lustration”) Law, on October 4, 1991.¹⁸⁴ The act was originally scheduled to expire on December 31, 1996.¹⁸⁵ Since that time, the law has been extended twice by the Czech Republic, first on September 27, 1995 for five additional years, and indefinitely on October 25, 2000.¹⁸⁶ In each case, President Havel unsuccessfully attempted to veto

180. Michnik & Havel, *supra* note 24, at 538.

181. See, e.g., Schwartz, *supra* note 158, at 147.

182. See, e.g., Marc A. Massey, Comment, *The Problem of Court Enforced Morality*, 82 DENV. U. L. REV. 461, 469 (2004) (“Statutes of limitations have been upheld on the basis that it is contrary to the notion of justice to fail to put one’s opponent on notice that he will need to defend himself within a reasonable amount of time and that ‘the right to be free from stale claims in time comes to prevail over the right to prosecute them.’”).

183. Brief for Helsinki Watch (U.S.A.) et al. in the Matter of the Constitutionality of Act No. 451/1991 (1992), *reprinted in* 3 TRANSITIONAL JUSTICE, *supra* note 152, at 343.

184. Screening (“Lustration”) Law, Act. No. 451/1991 (Oct. 4, 1991), *reprinted in* 3 TRANSITIONAL JUSTICE, *supra* note 152, at 312.

185. *Id.* art. 23, at 321.

186. See, e.g., David, *supra* note 163, at 409. See also Williams et al., *supra* note 14, at 12 (“[R]ight-wing defenders of the legislation relocated the perceived threat from ex-Communists in the mainstream leftist party, the Social Democrats, to justify the permanent renewal of the law in 2000.”).

the extension.¹⁸⁷ As of November 2002, over 400,000 individuals had been lustrated (screened) and approximately 12,000 individuals had tested positive, i.e. found to have collaborated with the StB.¹⁸⁸

Screening of individuals began with the run-up to the federal elections held in June 1990.¹⁸⁹ With the exception of the Communists, all the political parties requested that their candidates be screened for past association with the StB.¹⁹⁰ A similar request came that fall in the run-up to local elections, although this time it was not the parties that made the request, but the Czech National Council, which sought an order from the Czech Electoral Commission requiring that all parties screen their candidates.¹⁹¹ While the Electoral Commission did not mandate screening, it did recommend that parties screen their candidates.¹⁹² As a result, some parties complied while others did not. This lack of uniformity allowed McCarthyite allegations to be made that collaborators were running the federal government. As a result, in January 1991, parliament passed Resolution 94, tasking the Parliamentary Investigative Commission for the Clarification of the Events of November 17, 1989 ("Parliamentary Investigative Commission")¹⁹³ with determining whether any members of parliament were registered as StB collaborators.¹⁹⁴ On May 22, 1991, the Parliamentary Investigative Commission reported to the parliament that "fourteen members of the federal government and sixty other officials were declared to have been collaborators."¹⁹⁵

With the Parliamentary Investigative Commission's findings, calls for a more thorough lustration law became increasingly assertive. The final gasp of the Communists in the Soviet Union, taking shape in an attempted coup against Gorbachev¹⁹⁶ less than three months later, intensi-

187. David, *supra* note 163, at 409.

188. Williams et al., *supra* note 14, at 6.

189. Pehe, *supra* note 153, at 545.

190. See, e.g., TINA ROSENBERG, *THE HAUNTED LAND: FACING EUROPE'S GHOSTS AFTER COMMUNISM* 70 (1995).

191. Pehe, *supra* note 153, at 545.

192. *Id.*

193. The Parliamentary Investigative Commission was composed of members of all the political parties in parliament. See Report on StB Collaborators, *supra* note 168, at 307.

194. Lawrence Weschler, *The Velvet Purge: The Trials of Jan Kavan*, *THE NEW YORKER*, Oct. 19, 1992, at 66, 68.

195. Report on StB Collaborators, *supra* note 168, at 307.

196. See generally David Remnick, *Three Days of Drama, Terror Will Shape the Future*, *WASH. POST*, Aug. 22, 1991, at A25.

fied the crusade.¹⁹⁷ The next month, the government presented the parliament with a draft lustration law. Prior to presenting the draft, the government consulted with the International Labour Organization (“ILO”), which recognized the need “to remove from public institutions persons who took part in suppressing human rights.”¹⁹⁸ Nonetheless, this draft version hardly resembled the law that was eventually passed and diverged from what would become Act No. 451/1991 in several important respects. First, the original draft was narrowly tailored in that it sought to identify individuals who had harmed others or committed human rights violations.¹⁹⁹ Act No. 451/1991’s scope is much broader and implicates an individual if he is merely listed in StB files, regardless of the circumstances.²⁰⁰ The law’s inability to consider a host of mitigating circumstances²⁰¹ and thereby allow for an individualized assessment is a troublesome aspect of Act No. 451/1991. Closely related, the draft version operated on individual guilt, whereas Act No. 451/1991 “espouses the principle of collective guilt” as it “bar[s] entire categories of people . . . from holding certain positions.”²⁰² Finally, the original draft placed the burden of proof on the government to show that the accused had suppressed human rights whereas Act No. 451/1991 placed the burden on the accused to prove that he was not a collaborator.²⁰³

197. See, e.g., Williams et al., *supra* note 14, at 11 (“[T]he coup . . . sparked (vague) claims that Communist-era networks had been stirring during the brief time when it looked like Moscow might revert to a hard line.”).

198. International Labour Organization [ILO], *Report of the Committee Set up to Examine the Representations Made by the Trade Union Association of Bohemia, Moravia and Slovakia and the Czech and Slovak Confederation of Trade Unions Under Article 24 of the ILO Constitution Alleging Non-Observance by the Czech and Slovak Federal Republic of the Discrimination (Employment and Occupation) Convention, 1958 (No.111)*, ILO Official Bulletin Supp. 1, Vol. LXXV, Series B, 1992, ¶ 44(1), GB.252/16/19 (Feb. 28, 1992), reprinted in 3 TRANSITIONAL JUSTICE, *supra* note 152, at 322, 322–23 [hereinafter ILO Decision].

199. See, e.g., Boed, *supra* note 153, at 369.

200. *Id.* at 378.

201. One can readily imagine a number of reasons (duress and necessity to name just two) why an individual living in a totalitarian regime would assist the security services. See, e.g., Posner & Vermeule, *supra* note 21, at 820. See also Weschler, *supra* note 194, at 81 (“The law makes no provision for any such mitigating circumstances [as joining the dissident movement]. If you ever signed—if you’re listed in the registry . . . that’s it: You’re StB positive, and there’s no appeal. You’re lustrated.”) (quoting Jaroslav Basta, a Czech dissident).

202. Pehe, *supra* note 153, at 555.

203. *Id.* (“The chief flaw of the new legislation is that it is partially based on a presumption of guilt rather than of innocence: that is, the burden is on people in certain government positions to prove they did *not* work for the secret police . . .”).

To come into law, Act No. 451/1991 had to be signed by the President, the philosopher-king Václav Havel.²⁰⁴ On the one hand, Havel considered the bill “very harsh and unjust,”²⁰⁵ yet he also appreciated the need “not [to] try to escape from the past.”²⁰⁶ In a remarkable interview, he explained:

[A]s President, I must bear in mind that society needs some public action in this regard because otherwise it would feel that the revolution remains unfinished. There are people whose own lives . . . have been destroyed by the regime

. . . Our society has a great need to face that past, to get rid of the people who had terrorized the nation and conspicuously violated human rights, to remove them from the positions that they are still holding.²⁰⁷

As the law could be revised once it had been passed, Havel chose to ratify Act No. 451/1991, but proposed several amendments. Among Havel’s recommendations were that those found to have been collaborators be allowed to appeal the decision in court and that the law make an individualized determination of guilt, which would include consideration of mitigating factors. As he explained:

The amendment that I proposed . . . provides for the right of appeal to an independent court, which would have the right to pronounce people capable of holding certain positions according to the specific circumstances of the individual case. For example, if a person later fought for human rights, the court would have the power to declare that this contribution was greater than the guilt of having belonged to something sometime in the past. This would also cover persons who were forced to cooperate with the regime²⁰⁸

Despite such remonstrations, parliament refused to implement any of the President’s proposals.

2. Act No. 451/1991

The lustration law that passed in 1991 required that individuals serving in delineated positions²⁰⁹ present their employer with a certificate from the Ministry of Interior that the individual did not fall into one of three

204. For references to Havel as such, see Paul Berman, *Havel’s Burden; The Philosopher-King is Mortal*, N.Y. TIMES, May 11, 1991, § 6 (Magazine).

205. Michnik & Havel, *supra*, note 24, at 538.

206. *Id.* at 537.

207. *Id.* at 539–40.

208. *Id.* at 538.

209. The positions are listed in Article 1 of the Lustration law. See Act No. 451/1991 art. 1(1).

delineated categories²¹⁰ during the period from February 25, 1948 to November 17, 1989.²¹¹ The duty is on the employee to obtain the certificate.

210. The categories listed in Article 2 include:

- (a) a member of the National Security Corps detailed to any State Security section;
- (b) listed on the files of the State Security as a resident, an agent, a holder of a lent-out apartment, a holder of a conspiratorial apartment, an informer or an ideological collaborator of the State Security;
- (c) a conscious collaborator of the State Security;

....

Id. art. 2(1).

The law defines a “conscious collaborator” in the following manner:

[T]he citizen concerned has been listed on the files of the State Security as a confidant, a candidate of secret collaboration or as a secret collaborator of confidential contacts and knowledge, and he knew he was in contact with a member of the National Security Corps and was giving him information through the form of clandestine contacts, or was implementing tasks set by him.

Id. art. 2(2).

In an action brought by ninety-nine members of the Federal Assembly, the Constitutional Court of the CSFR found the Article 2(c) category unconstitutional. Decision on Act No. 451/1991, Constitutional Court of the Czech and Slovak Federal Republic, Pl. US 1/92 (Nov. 26, 1992), *available at* http://test.concourt.cz/angl_verze/doc/p-1-92.html. The Court held that having a certificate indicating such collaboration could “merely express[] the intention of the State Security to recruit the recorded persons for conscious collaboration in the future.” *Id.*

In upholding the rest of the law, the Court noted:

In a democratic society, it is necessary for employees of state and public bodies . . . to meet certain criteria of a civic nature, which we can characterize as loyalty to the democratic principles upon which the state is built. . . .

....

. . . Even . . . Act No. 451/1991 was based on [democratic values and criteria]. It cannot be understood as revenge against particular persons or groups of persons, nor as discrimination against persons who, . . . alone or in cooperation with or through a repressive body, had violated fundamental human rights and basic freedoms

The statute . . . does not even discriminate against such persons (neither in employment nor in their profession), it merely provides . . . certain additional preconditions for those positions designated as crucial by law, or for engaging in a licensed trade

Id.

211. Act No. 451/1991 art 2(1).

Should he fail to do so, his employment will terminate within fifteen days from the date the organization received notice.²¹²

3. Assessment

The Czech lustration law has been the subject of much criticism, including a 1992 decision by the ILO that Act No. 451/1991 violated Convention No. 111.²¹³ Nevertheless, to adequately assess Act No. 451/1991 one must consider whether the act, and more generally lustration, meet the stated goals of transitional justice. The typology suggested by Professor Łoś, that lustration achieves “historical truth” and “minimal justice,”²¹⁴ and the additional goal of national reconciliation, offer a useful starting point.

In terms of state security and safeguarding democracy, Act No. 451/1991 clearly achieved this goal. As Timothy Garton Ash, Professor of European Studies at Oxford and a Senior Fellow at the Hoover Institution, notes, “there is no doubt that the [lustration] law did keep a number of highly compromised persons out of public life in Czech lands, while such persons remained to do much damage in Slovakia.”²¹⁵

With regard to exposing historical truth, the Czech law did not fare as well. Under Act No. 451/1991, a lustrated person could choose not to reveal his status to the public once his status was revealed to his employer. As Roman David explains,

The entire lustration process is kept secret; the lustration certificate is delivered to the person concerned and cannot be published without her consent. Thus, a positively lustrated person has to leave her position without any public knowledge of her collaboration. The dilemma of the truth versus the protection of the personality of former informers has been solved for the benefit of the latter.²¹⁶

As a result, lustration was unable to serve the very important transitional justice function of reckoning with the past. Nevertheless, this is a specific weakness of Act No. 451/1991 rather than a general weakness of lustration. It would not be burdensome to devise a lustration process in which results of a positive lustration could be made public provided that an appeals process had first been exhausted.

212. *Id.* art. 14(1).

213. See ILO Decision, *supra* note 198, ¶¶ 81, 105. See also ILO Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation, June 25, 1958, 362 U.N.T.S. 31, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C111>.

214. See *supra* notes 166–167 and accompanying text.

215. Posner & Vermeule, *supra* note 21, at 807 (alteration in original). See also *supra* note 165 and accompanying text.

216. David, *supra* note 163, at 424.

There are clearly more efficacious mechanisms of achieving “justice” than lustration. Lustration is “semi-retributive” and forward-looking in nature, as it does not seek to punish all former members of a repressive regime, but only those who held positions in public life.²¹⁷ Nonetheless, as the example of Sierra Leone indicates, nations are free to choose among a variety of transitional justice mechanisms, and no single mechanism itself is sufficient to achieve all the goals of transitional justice. Provided that they do not violate the principle of *nulla poena sine lege*, selective prosecutions should be implemented along with a lustration process, thus achieving justice.

With regard to achieving national reconciliation, there is no doubt that today the Czech Republic is a vibrant democracy and stable economy.²¹⁸ Whether these remarkable achievements are the result of lustration is hotly disputed. As noted, the SEI argues that by curtailing the possibility of blackmail, lustration helps achieve national reconciliation to some degree.²¹⁹ Roman David also argues that Act No. 451/1991 has “substantially helped reduce political tensions.”²²⁰ On the other hand, Roman Boed has argued that “[l]ustration has had divisive effects on the societies that have experienced it [and] [i]t thus seems that the effect of lustration would be to move society away from national reconciliation rather than towards it.”²²¹ Neil Kritz has also admonished that “if extended too broadly, purges can have the destabilizing effect of creating a large, ostracized, and unemployed element within society.”²²²

III. THE SEARCH FOR TRANSITIONAL JUSTICE IN IRAQ

One may argue that with the death of Saddam Hussein on December 30, 2006, no further efforts need be made toward national reconciliation. The fact is, however, that while Hussein had a capacity for evil not likely rivaled since Hitler or Stalin, acting alone, he would have been incapable of transforming Iraq into the state of horrors it had become at the time of the American invasion on March 20, 2003. As the International Center for Transitional Justice and the Human Rights Center at Berkeley ex-

217. See *supra* note 163 and accompanying text.

218. A 2007 background note by the State Department notes that “[o]f the former communist countries in central and eastern Europe, [it] has one of the most developed and industrialized economies.” State Dep’t Note: Czech Rep., *supra* note 154.

219. See *supra* notes 168–169 and accompanying text.

220. David, *supra* note 163, at 419.

221. Boed, *supra* note 153, at 401.

222. Neil J. Kritz, *Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, 59 LAW & CONTEMP. PROBS. 127, 140 (1996).

plain, “[t]he [Ba’ath] party as a social institution was clearly identified as an instrument of oppression and control that was the means by which Saddam Hussein entrenched his grip over all aspects of Iraqi life.”²²³ Similarly, as an Iraqi scholar posited:

The Ba’th regime differs from all its predecessors in Iraq not only in the sanctification of violence in its ideology and its idiom but also in having made it into a pivotal tool in running the country. It has built up security services that are among the best endowed and most skillful in the world and that have penetrated every sector of Iraqi society, including economic life. They have turned themselves into a vast apparatus of terror and violence.²²⁴

For thirty-five years, or “more than a third of modern Iraq’s existence,”²²⁵ thousands of Ba’ath party members inflicted countless acts of unimaginable cruelty and savagery upon the Iraqi people. Indeed, the Sunni-Shi’a sectarian violence that now threatens to destroy Iraq has its roots in the Ba’ath party apparatus that allowed the Sunni minority to systematically persecute the Shi’a majority.²²⁶ Consequently, there is much work to be done from a transitional justice perspective in Iraq, but not until the security pillar has been firmly erected.

This section first presents a brief history of the Arab Socialist Ba’ath Party. It then looks to the dizzying spate of post-Ba’ath developments, beginning with the American invasion in 2003. Next it considers the two transitional justice mechanisms heretofore implemented in post-Saddam Iraq; the Iraqi Special Tribunal and efforts at de-Ba’athification.

A. The Arab Socialist Ba’ath Party

When one considers what was, until 2003, the centrality of the Ba’ath to the ordinary Iraqi’s life, it is quite remarkable that the party was not “homegrown,” but rather had established itself in Syria for a decade before being transported to Baghdad from Damascus.²²⁷ The party initially developed out of what the Ba’ath claim was a “struggle” against French colonial rule and it attracted young urban intelligentsia.²²⁸ Although Saddam Hussein would not join the party until 1959, the party

223. IRAQI VOICES, *supra* note 2, at 36.

224. OFRA BENGIO, SADDAM’S WORLD: POLITICAL DISCOURSE IN IRAQ 53 (1998).

225. *Id.* at 33.

226. *See, e.g.*, PHEBE MARR, THE MODERN HISTORY OF IRAQ 310 (2d ed. 2004) (noting that the top eighteen positions in the Ba’ath apparatus in 1998 broke down along the following lines: sixty-one percent to Sunnis, twenty-eight percent to Shi’a, six percent to Kurds, and another six percent to others).

227. *See* BENGIO, *supra* note 224, at 33.

228. MAKIYA, *supra* note 2, at 184–85.

retained this membership profile when he joined—a fact which clearly distinguished the poor and uneducated Saddam from other party members.²²⁹

The Arabic word Ba'ath means “resurrection.”²³⁰ Indeed, central to Ba'ath ideology is a longing to return to past greatness—a concept returned to time and again by Ba'ath leadership.²³¹ For example, Saddam Hussein invoked this concept before his disastrous invasion of Kuwait. Hussein explained, “[t]he opportunity we speak of is a [sic] historic opportunity; the Arab nation will either . . . move to regain its . . . universal task, or else it will remain in the state its enemies wish to see it in.”²³² Similarly, Kanan Makiya has explained that “[p]arochialism and mythmaking, the twin pillars of Ba'thist ideology, . . . both emanate from the unifying idea of a permanently hostile outside always directing its attention to Ba'thism.”²³³

The party's motto is “Unity, freedom, socialism.”²³⁴ All three terms can be seen as foreign, not only to Iraq, but in a larger sense, to Arab society²³⁵—a fact that makes the ideology's unparalleled success all the more remarkable. The term “unity,” which refers to Arab unity, does not appear a single time in the Qur'an.²³⁶ The term “freedom,” which refers to freedom from foreign control, appears to have been borrowed from the French Revolution's idea of *liberté*.²³⁷ The term “socialism” refers to Arab socialism.²³⁸

The Ba'ath Party came to power in Syria in March 1963 and has had a monopoly on power there ever since.²³⁹ A month before its ascendancy to power in Syria, the Ba'ath Party attempted a coup in Iraq, but it lasted

229. See, e.g., ABURISH, *POLITICS OF REVENGE*, *supra* note 4, at 34–35.

230. Edward Wong, *The Struggle for Iraq: Expanding Safeguards; In Effort to Secure Borders, Iraqis are Patrolling a River for Smugglers and Pirates*, N.Y. TIMES, July 9, 2005, at A5 (“Al Baath [is] the name of Mr. Hussein's tyrannical party. It means resurrection in Arabic.”).

231. See BENGIO, *supra* note 224, at 37 (Saddam Hussein claimed that the Ba'ath party was the “renewal of the nation's mission.”).

232. *Id.*

233. MAKIYA, *supra* note 2, at 75.

234. See, e.g., BENGIO, *supra* note 224, at 37.

235. *Id.* at 38.

236. *Id.*

237. See *id.*

238. Arab socialism distinguished itself from European socialism in discounting the latter's rejection of nationalism. *Id.* Indeed, Michel Aflaq, one of the principal founders of Ba'athism, once noted, “Communism is Western, and alien to everything Arab.” MAKIYA, *supra* note 2, at 226.

239. U.S. State Dep't, Bureau of Near Eastern Affairs, Background Note: Syria (May 2007), <http://www.state.gov/r/pa/ei/bgn/3580.htm>.

less than a year.²⁴⁰ Splits in the party were primarily to blame for its failure, but, as Phebe Marr notes, it was significant for three lessons, which would be internalized by a young but already influential Saddam Hussein:

The first is that ideological divisions . . . are to be avoided at the top at all costs. Second, that potential military opponents must be moved out of power as soon as possible. Third, it is easier to gain power than to maintain it. In any future government, gaining control over the instruments of state would be paramount. For this purpose, a security apparatus would prove far more effective than a party or the military.²⁴¹

The Ba'ath would not make the same mistakes again, and five years later the party undertook another, albeit successful, coup, plummeting Iraq into a whirlwind of terror that would last thirty-five years. The Arab world's stunning defeat in the 1967 Six-Day War no doubt played a role in the downfall of the Kassem military regime,²⁴² but credit must be given to the Ba'ath. As Marr notes, "the leadership that emerged in 1968 was a more practical and seasoned group than that of 1963; it was also more ruthless, more conspiratorial, and above all, more determined to seize power and this time to hold it."²⁴³ Despite Saddam Hussein's later embellishments that he "learned how to fire the gun of a tank" during the coup, it was a "totally bloodless coup."²⁴⁴

Ahmad Hassan al-Bakr and Saddam Hussein became, respectively, President and Vice Chairman of the Revolutionary Command Council ("RCC").²⁴⁵ In this capacity, Hussein was in charge of the state intelligence and security apparatuses.²⁴⁶ That year, a new constitution was also promulgated.²⁴⁷ As the United States Institute of Peace ("USIP") notes, "the new Baathist constitution marginalized the judiciary by ending the separation of powers, making civilian courts subservient to

240. MARR, *supra* note 226, at 116, 119.

241. *Id.* at 123.

242. See Hazem Saghieh, openDemocracy, *The Six-Day War, Forty Years On* (May 18, 2007), http://www.opendemocracy.net/conflict-middle_east_politics/sixdaywar_4629.jsp ("For the Arabs, their decisive defeat in June 1967 . . . was laden with significance—political, cultural, economic and of course military.").

243. *Id.* at 136.

244. ABURISH, *POLITICS OF REVENGE*, *supra* note 4, at 75–76, 80.

245. *Id.* at 125.

246. See, e.g., Frontline, *The Survival of Saddam: Secrets of His Life and Leadership*, <http://www.pbs.org/wgbh/pages/frontline/shows/saddam/interviews/aburish.html> (last visited Sept. 26, 2007).

247. UNITED STATES INST. OF PEACE, *ESTABLISHING THE RULE OF LAW IN IRAQ 5* (2003), available at <http://www.usip.org/pubs/specialreports/sr104.pdf> [hereinafter *ESTABLISHING THE RULE OF LAW*].

the military court system, and creating special courts outside the regular judicial system.”²⁴⁸ In another development with far-reaching consequences for the courts, James Dobbins explains that the regime made

the deliberate decision . . . to encourage a return to tribal justice as part of its policy of retribalizing Iraq to fragment political opposition. This policy has meant that significant portions of the population have effectively been distanced from the state’s criminal justice system, resorting instead to tribal elders and a range of traditional, sometimes summary, forms of justice.²⁴⁹

In one indicative example of the ever-widening grip of the various security apparatuses over Iraqi society, in 1969 the Iraqi Penal Code was amended to include an entire chapter on “[o]ffences against the internal security of the State.”²⁵⁰ Similarly, as USIP notes:

Over time, as Hussein consolidated power, the [Iraqi National Police] became increasingly marginalized and their responsibilities for internal security and protecting the regime were taken over by the various security organizations. The police remained responsible for law enforcement, but the pervasiveness of the regime’s security apparatus and its brutal methods meant that crimes were more likely to be committed by regime operatives than criminals.²⁵¹

At first, Saddam Hussein was careful to play mentee to al-Bakr and not to challenge his mentor, but it was undeniable that power was steadily gravitating toward the apprentice.²⁵² When al-Bakr resigned²⁵³ on July 16, 1979, Hussein was waiting, and he became President, Secretary-General of the Ba’ath Party Regional Command, RCC Chairman, and Commander-in-Chief of the military.²⁵⁴ As Marr expertly notes, “[t]he

248. *Id.*

249. JAMES DOBBINS, RAND CORP., AMERICA’S ROLE IN NATION-BUILDING: FROM GERMANY TO IRAQ 178 (2003), available at http://www.rand.org/pubs/monograph_reports/MR1753/.

250. Iraq Penal Code pt. 2, ch. 2, Law No. 111 of 1969, available at <http://www.ictj.org/static/MENA/Iraq/iraq.penalcode.1969.eng.pdf>.

251. ESTABLISHING THE RULE OF LAW, *supra* note 247, at 5.

252. MARR, *supra* note 226, at 145.

253. Although al-Bakr cited personal reasons for his resignation and his health had been deteriorating, at least one of Hussein’s biographers questions the voluntary nature of al-Bakr’s resignation. See Saïd K. Aburish, *How Saddam Hussein Came to Power*, in THE SADDAM HUSSEIN READER: SELECTIONS FROM LEADING WRITERS ON IRAQ 41, 50–51 (Turi Munthe ed., 2002) (noting that the author has “interviewed more than a hundred Iraqis, a knowledgeable collection of people who belong to different political groupings with different agendas, and not a single one accepts the Bakr resignation on face value”) [hereinafter Aburish, *How Saddam Hussein Came to Power*].

254. MARR, *supra* note 226, at 178.

changing of the guard marked a decisive shift, already under way, from a one-party state to a personal, autocratic regime, dependent for security—and increasingly for decisions—on Saddam Husain and his close family members and cohorts.”²⁵⁵ Less than two weeks later, Hussein engaged in a Stalinist-style purge lasting two weeks and resulting in the deaths of twenty-two top Ba’ath leaders and the imprisonment of forty others.²⁵⁶ The show trials were videotaped and “distributed to all security offices, to be shown to the public as a warning to ‘other traitors and conspirators.’”²⁵⁷ Also at this time, a formidable personality cult—which would last for the next twenty-four years—began to develop around Hussein.²⁵⁸

B. Post-Ba’ath Developments

In the past four years, Iraq’s political landscape has seen a dizzying array of changes as the United States and a new generation of Iraqi leaders have attempted to purge Iraq of its Ba’athist past. Iraq was under foreign occupation from April 2003 until June 28, 2004, when sovereignty was transferred (in principle) to the Interim Iraqi Government.²⁵⁹

Following the downfall of the Ba’ath regime in the spring of 2003, the United States created the Coalition Provisional Authority (“CPA”).²⁶⁰ On May 6, 2003, President Bush appointed L. Paul Bremer III, a former diplomat and ambassador to the Netherlands, as his special envoy and head of the CPA.²⁶¹ In July 2003, the CPA, in agreement with Iraqi political parties and former exiles, appointed the broad-based twenty-five member Iraqi Governing Council (“IGC”).²⁶² Mr. Bremer’s tenure was marked by

255. *Id.* at 177.

256. Aburish, *How Saddam Hussein Came to Power*, *supra* note 253, at 51, 54.

257. *Id.* at 54.

258. MARR, *supra* note 226, at 151. *See also* Aburish, *How Saddam Hussein Came to Power*, *supra* note 253, at 58 (“[T]he Iraqi media began calling him ‘knight’, ‘struggler’, ‘leader’, ‘son of the people’ and comparing him to Peter the Great.”).

259. Adam Roberts, *The End of Occupation: Iraq 2004*, 54 INT’L & COMP. L.Q. 27, 30, 32, 37 (2005).

260. In his outstanding book on the American intervention in Iraq, Thomas Ricks notes that the standard joke among military members interfacing with the CPA was that the acronym stood for “Can’t Produce Anything.” THOMAS E. RICKS, *FIASCO: THE AMERICAN MILITARY ADVENTURE IN IRAQ* 205 (2006).

261. *See, e.g.*, James Dao & Eric Schmitt, *Aftershocks: Postwar Planning; President Picks a Special Envoy to Rebuild Iraq*, N.Y. TIMES, May 7, 2003, at A1.

262. *See, e.g.*, Patrick E. Tyler, *Iraqi Factions Agree on Members of Governing Council*, N.Y. TIMES, July 13, 2003, at § 1, 10. *See also* PHEBE MARR, UNITED STATES INST. OF PEACE, WHO ARE IRAQ’S NEW LEADERS? WHAT DO THEY WANT? 10 (2006), available at <http://www.usip.org/pubs/specialreports/sr160.pdf> (“The ICG [sic] of 2003 was designed to reflect the ethnic and sectarian distribution of the populations fairly. Among the IGC

a rising insurgency, escalating violence, and controversy. Lakhdar Brahimi, the United Nations special envoy, had a strained relationship with Mr. Bremer, claiming at one point that “Mr. Bremer is the dictator of Iraq.”²⁶³ Quite inexplicably, Mr. Bremer has argued that his disastrous policy of “deBaathification . . . was his most popular act.”²⁶⁴

On June 28, 2004, the CPA dissolved and sovereignty was transferred to interim President Sheikh Ghaz Mashal Ajil al-Yawer and interim Prime Minister Dr. Iyad Allawi, who would each hold power until elections in January 2005.²⁶⁵ Dr. Allawi is a secular Shi’a, who, according to *BBC News*, “ha[d] the advantage as prime minister . . . of being equally mistrusted by everyone in Iraq’s multifarious population.”²⁶⁶ On January 30, 2005, amidst rising violence, Iraqis elected the members of a 275-member Transitional National Assembly (“TNA”). It is estimated that fifty-seven percent of eligible voters took part in the election.²⁶⁷ Three months later, the TNA approved the Iraqi Transitional Government (“ITG”), and Jalal Talabani, a Kurdish leader, was named to the largely ceremonial post of President of Iraq, making him the “first Kurd to serve as president of an Arab-dominated country.”²⁶⁸ Ibrahim al-Jaafari, a Shi’ite, was named Prime Minister,²⁶⁹ the most powerful post.

On October 15, 2005, a constitution written largely by Shi’ites and Kurds was submitted to the Iraqi people in a referendum.²⁷⁰ Unlike their boycott of the January elections, Sunni Arabs participated heavily in the

and its accompanying cabinet, some 54 percent—a slight majority—were Shi’ah, 22 percent were Kurds, and some 16 percent were Arab Sunnis.”).

263. Dexter Filkins, *U.N. Envoy Wants New Iraq Government to Court Foes of Occupation*, N.Y. TIMES, June 3, 2004, at A16.

264. Fareed Zakaria, *Occupational Hazards*, N.Y. Times, Oct. 30, 2005, § 7 (Book Review), at 10.

265. Roberts, *supra* note 259, at 37; Andrea Carcano, *End of the Occupation in 2004? The Status of the Multinational Force in Iraq After the Transfer of Sovereignty to the Interim Iraqi Government*, 11 J. CONFLICT & SECURITY L. 41, 41 (2006).

266. *Who’s Who in Iraq: Iyad Allawi*, BBC NEWS, May 28, 2004, http://news.bbc.co.uk/2/hi/middle_east/3757923.stm.

267. John F. Burns, *The Iraqi Election: Assessment; Iraqis Begin Tabulating Results of Milestone Election*, N.Y. TIMES, Feb. 1, 2005, at A8.

268. *See, e.g.*, Edward Wong, *A Kurd Is Named Iraq’s President as Tensions Boil*, N.Y. TIMES, Apr. 7, 2005, at A1.

269. Al-Jaafari agreed to step down from the post amidst rising sectarian violence on April 20, 2006. *See, e.g.*, Kirk Semple & Richard A. Opiel, Jr., *Shiite Drops Bid to Keep His Post as Iraqi Premier*, N.Y. TIMES, Apr. 21, 2006, at A1.

270. *See, e.g.*, JONATHAN MORROW, UNITED STATES INST. OF PEACE, IRAQ’S CONSTITUTIONAL PROCESS II: AN OPPORTUNITY LOST 2–3 (2005), available at <http://www.usip.org/pubs/specialreports/sr155.pdf>.

referendum.²⁷¹ While seventy-nine percent of the voters approved the constitution, the vote was largely split along sectarian lines, with the Shi'ites and Kurds favoring the document and the Sunnis largely rejecting it.²⁷² At the time of the referendum, the results of a secret poll by the United Kingdom's Ministry of Defense were leaked to the British public. The poll left little doubt that coalition forces had overwhelmingly failed to win the peace in Iraq. Quite astonishingly, the poll indicated that eighty-two percent of Iraqis were "strongly opposed" to coalition troops' presence; sixty-seven percent of Iraqis felt less secure as a result of the occupation; and alarmingly, forty-five percent of all Iraqis believed that attacks against coalition forces were justified.²⁷³ Similarly, a January 2006 poll conducted by the Program on International Policy Attitudes, the Center for International and Security Studies at the University of Maryland, and the World Public Opinion Web site revealed that a whopping eighty-eight "percent of Sunni Arabs and [forty-one] percent of Shi'ites approved of attacks on US forces."²⁷⁴

On December 15, 2005 elections were again held, this time to elect a permanent Iraqi National Assembly. The elections were generally peaceful, and following the trend they set during the constitutional referendum, the Sunnis participated in large numbers and were rewarded with roughly one-fifth of the seats in the 275-member Assembly.²⁷⁵ Despite the peaceful nature of the elections, the seeds of sectarianism were evident. One astute observer has noted that "[f]ewer than one in ten Iraqis had voted for parties that crossed ethnic or religious lines."²⁷⁶ On May 20, 2006, Nouri Kamel al-Maliki, a Shi'a, was named Prime Minister and Iraq's first permanent government replaced the ITG.²⁷⁷ Despite heading a government of "national unity,"²⁷⁸ Al-Maliki's Iraq remains a powder keg, with ever-escalating sectarian violence between Shi'a and Sunnis—a fact

271. See, e.g., Edward Wong, *Iraqi Officials Declare Charter Has Been Passed*, N.Y. TIMES, Oct. 26, 2005, at A1.

272. *Id.* ("Two Sunni-dominated provinces, Anbar and Salahuddin, overwhelmingly rejected the constitution.")

273. Sean Rayment, *Secret MoD Poll: Iraqis Support Attacks on British Troops*, SUNDAY TELEGRAPH (London), Oct. 22, 2005, at 1.

274. Charles Levinson, *Sunni Tribes Turn Against Jihadis*, CHRISTIAN SCIENCE MONITOR, Feb. 6, 2006, at 1.

275. See, e.g., Thanassis Cambanis, *Initial Tally Shows a Sectarian Split Among Iraq Voters: Shi'ite Coalition Dominates*, BOSTON GLOBE, Dec. 20, 2005, at A1.

276. GALBRAITH, *supra* note 9, at 3.

277. See, e.g., Jim Garamone, U.S. Department of Defense, American Forces Press Service, News Articles, New Iraqi Government Approved (May 20, 2006), <http://www.defenselink.mil/news/newsarticle.aspx?id=15715>.

278. *Id.*

that underscores the need for transitional justice mechanisms, explored below.

C. Transitional Justice in Post-Ba'ath Iraq

1. The Iraqi Special Tribunal

On December 10, 2003, just three days prior to the arrest of Hussein in a tiny cellar outside of Tikrit,²⁷⁹ Iraq's transitional IGC established the Iraqi Special Tribunal ("IST") to try Iraqis on international and domestic crimes.²⁸⁰ Despite concerns from human rights organizations,²⁸¹ the Bush administration ceded to the IGC's wish that Iraqis alone try Hussein.²⁸² The IST's jurisdiction covers the crime of genocide,²⁸³ crimes against humanity,²⁸⁴ war crimes,²⁸⁵ and specific provisions of Iraqi law.²⁸⁶ The IST covers such crimes committed during Ba'ath rule (between July 17, 1968 and May 1, 2003).²⁸⁷ In a controversial appointment, the IGC appointed Salem Chalabi, the nephew of the head of the Iraqi National

279. See, e.g., *Saddam Hussein Arrested in Iraq*, BBC NEWS, Dec. 14, 2003, available at http://news.bbc.co.uk/1/hi/world/middle_east/3317429.stm.

280. See, e.g., Vivienne Walt, *Tribunal in Iraq Targets Hussein*, BOSTON GLOBE, Dec. 11, 2003, at A34.

281. Peter Slevin, *Iraqi Governing Council Says It Wants to Try Hussein*, WASH. POST, Dec. 15, 2003, at A9 ("[I]t's . . . important that the trial not be perceived as vengeful justice. For that reason, international jurists must be involved in the process.") (quoting Ken Roth, Executive Director of Human Rights Watch). See also Walt, *supra* note 280 ("Lawyers who have researched Hussein's government for years warned yesterday that Iraq's judges were unprepared to try war crimes suspects in hearings that might involve hundreds of witnesses and millions of documents.")

282. See Slevin, *supra* note 281 ("The Bush administration expects to advise Iraqi investigators and judges, but will leave the principal decisions to Iraqis . . ."). The Statute of the Iraqi Special Tribunal does, however, require "[t]he President of the Tribunal . . . to appoint non-Iraqi nationals to act in advisory capacities or as observers to the Trial Chambers and to the Appeals Chamber." Statute of the Iraqi Special Tribunal art. 6(b), available at http://www.cpa-iraq.org/human_rights/Statute.htm (last visited Oct. 23, 2007). It also allows for the "Governing Council or the Successor Government, if it deems necessary, [to] appoint non-Iraqi judges who have experience in the crimes encompassed in th[e] statute." *Id.* art. 4(d).

283. Statute of the Iraqi Special Tribunal art. 11.

284. *Id.* art. 12.

285. *Id.* art. 13.

286. *Id.* art. 14. Three crimes in particular are delineated: "attempt to manipulate the judiciary or involvement in the functions of the judiciary," *id.* art. 14(a); "the wastage of national resources and the squandering of public assets and funds," *id.* art. 14(b); and "[t]he abuse of position and the pursuit of policies that may lead to the threat of war or the use of the armed forces of Iraq against an Arab country," *id.* art. 14(c).

287. See *id.* art. 1(b).

Congress (“INC”) and neo-conservatives’ favorite Iraqi exile Ahmed Chalabi, to head the IST.²⁸⁸ Salem Chalabi has estimated that one hundred Iraqis would be tried before the IST.²⁸⁹

Saddam Hussein’s dramatic trial got underway on July 17, 2005 with the filing of charges for a little known massacre perpetrated by the dictator in the Shi’ite town of al-Dujail that resulted in the death of about 380 people.²⁹⁰ In April 2006, Hussein and six co-defendants were charged with genocide for the savage al-Anfal campaign conducted against the Kurds in the late 1980s.²⁹¹ On November 5, 2006, the IST convicted Saddam of crimes against humanity and sentenced him to death by hanging.²⁹² On December 26, 2006, Iraq’s highest court rejected Saddam’s appeal and upheld his death sentence.²⁹³ He was executed on December 30, 2006 in what many observers considered a sectarian lynching that would further destabilize Iraq.²⁹⁴ During the summer of 2007, an

288. See, e.g., *Iraqis Distrust Saddam Tribunal*, THE AUSTRALIAN, Apr. 22, 2004, World, at 7 (noting disfavor among Iraqis of the recently returned Ahmed Chalabi and that “[m]any feel Saddam should be prosecuted by people who lived under his brutal rule”). Five months into his three-year term, the American-educated Salem Chalabi was dismissed by Prime Minister Allawi. John F. Burns & Dexter Filkins, *Iraqis Battle Over Control of Panel to Try Hussein*, N.Y. TIMES, Sept. 24, 2004, at A13.

289. David M. Gersh, Note, *Poor Judgment: Why the Iraqi Special Tribunal is the Wrong Mechanism for Trying Saddam Hussein on Charges of Genocide, Human Rights Abuses, and Other Violations of International Law*, 33 GA. J. INT’L & COMP. L. 273, 288 (2004).

290. See The Law Library of Congress, *Saddam Hussein Trial: Historical Context*, <http://www.loc.gov/law/help/hussein/context.html> (last visited Oct. 23, 2007); Colin Freeman, *Village Holds Hope for Justice: Nation’s War-Crime Trials About to Start*, S.F. CHRON., Mar. 8, 2005, at A1.

291. *100,000 Murders—Saddam on Fresh Charges of Genocide Against Kurds*, DAILY TELEGRAPH (Austl.), Apr. 6, 2006, World, at 33. For background on the Anfal campaign, see generally Human Rights Watch, *Genocide in Iraq: The Anfal Campaign Against the Kurds* (July 1993), <http://www.hrw.org/reports/1993/iraqanfal>.

292. Borzou Daraghi, *Hussein May Be Hanged by Spring, Lawyer Says*, L.A. TIMES, Nov. 7, 2006, at A9.

293. Brian Whitaker, *Saddam to Hang Within 30 Days*, GUARDIAN (London), Dec. 27, 2006, at 1.

294. In an interview with Jim Lehrer of PBS, President Bush explained, “It basically says to people, ‘Look, you conducted a trial and gave Saddam justice that he didn’t give to others But then when it came to execute him, it looked like it was kind of a revenge killing.’” Jim Rutenberg, *Bush Widens Iraq Criticism Over Handling of Executions*, N.Y. TIMES, Jan. 17, 2007, at A8.

For criticism of the IST in general, see Human Rights Watch, *Judging Dujail: The First Trial Before the Iraqi High Tribunal*, VIII. Conclusions (November 2006), http://hrw.org/reports/2006/iraq1106/9.htm#_Toc151270369 (“The court’s conduct . . . reflects a basic lack of understanding of fundamental fair trial principles, and how to uphold them in the conduct of a relatively complex trial. The result is a trial that did not

Iraqi court sentenced Saddam's infamous cousin, Ali Hassan al-Majid (also known as Chemical Ali), to death for genocide, war crimes, and crimes against humanity committed during the Anfal campaign, which killed 182,000 people.²⁹⁵ On September 4, 2007, an Iraqi appeals court upheld al-Majid's death sentence.²⁹⁶

Prior to the IST's establishment, a number of options to prosecute Hussein and his cohorts were considered, ranging from prosecution before an international tribunal established by the United Nations Security Council,²⁹⁷ to prosecution before the recently established International Criminal Court,²⁹⁸ or a hybrid court that would include both local and international jurists.²⁹⁹ The decision to try Hussein and other top Ba'athists by an all-Iraqi tribunal has been the subject of heated criticism. First, human rights lawyers questioned whether Iraqi judges with little experience in international criminal law were up to the monumental task of trying Hussein in a case that would likely include "hundreds of witnesses and millions of documents."³⁰⁰ Second, some observers have argued that trying Hussein before an all-Iraqi tribunal would not greatly enhance the capac-

meet key fair trial standards." See also John Gibeaut, *Behind the Scenes with the American Advisers to the Iraq v. Saddam Hussein Court*, 93 A.B.A. J. 34 (May 2007) ("At times, the proceedings resembled pure farce.").

295. *Chemical Ali to Die in Victims' Town*, THE AUSTRALIAN, July 16, 2007, at 12.

296. Damien Cave, *Death Sentence Upheld for Hussein Henchman Known as Chemical Ali*, N.Y. TIMES, Sept. 5, 2007, at A12.

297. See, e.g., *Forum Options for Prosecution of Iraqi Atrocity Crimes: Before the Comm. on Gov't Affairs, U.S. Senate*, 108th Cong. 3 (Apr. 10, 2003) (statement of David J. Scheffer, Senior Vice President, U.N. Association of the U.S.A., Former U.S. Ambassador-at-Large for War Crimes Issues (1997–2001)).

298. See, e.g., *Options for Hussein Trial Run Gamut*, DALLAS MORNING NEWS, Mar. 30, 2003, at 19A.

299. See, e.g., Editorial, *When Hussein Goes to Trial*, MILWAUKEE JOURNAL SENTINEL, Mar. 9, 2004, at 12A.

300. Walt, *supra* note 280. See also BUILDING THE IST, *supra* note 133, at 8 (noting the "lack of experience with international criminal law among Iraqi judges"); Gersh, *supra* note 289, at 280 ("[T]he Iraqi judiciary simply does not have the expertise to carry out so complex a trial in a manner that will withstand international scrutiny."). But see *Opening Statement by Pierre-Richard Prosper*, *supra* note 2, at 3 ("I am aware that there are those who say the Iraqis are not up to the challenge. . . . I am convinced that there are qualified Iraqi jurists both within and outside of Iraq who are ready and willing to accept the mandate of justice."). A related argument is the degree to which the Iraqi judiciary has been infected by corruption. See, e.g., Craig T. Trebilock, *Note from the Field: Legal Cultures Clash in Iraq*, 2003 ARMY LAW. 48, 48 (2003) (noting the difficulty civil affairs attorneys had working with "a legal system that was broken from years of corruption and political influence"). For an interesting article on the role American military lawyers played in training Iraqi judges for the IST, see Erik Holmes, *Tribunal on Trial*, ARMY TIMES, Jan. 22, 2007, at 24.

ity of the local judiciary.³⁰¹ Third, observers have argued that the IST's legitimacy has been weakened as a result of its composition, a point that leaves the IST susceptible to the claim that it is nothing more than a tool of the United States "dispensing victors' justice."³⁰²

2. De-Ba'athification

The very first order passed by the American-controlled CPA was the "De-Ba'athification of Iraqi Society."³⁰³ As of this writing, the policy has resulted in up to eighty-five thousand Ba'athists, most of them Sunni Arabs, losing their jobs.³⁰⁴ Prima facie, it is remarkable how closely the CPA's plan for de-Ba'athification resembles Act No. 451/1991, the needlessly harsh lustration law enacted in the Czech Republic. Clearly and quite unfortunately, Mr. Bremer and company never bothered to consider Act No. 451/1991 in formulating their own vetting program embodied in CPA Order Number 1 ("Order No. 1"). Nor did Mr. Bremer consider the views of a joint and interagency workshop convened by Army staff, conducted on December 10–11, 2002. The group categorically advised against the type of top-down de-Ba'athification Order No.

301. See, e.g., Human Rights Watch, *Saddam Hussein's Trial: Bringing Justice for the Human Rights Crimes in Iraq's Past* (December 2003), http://hrw.org/english/docs/2003/12/19/iraq6770_txt.htm (last visited Oct. 22, 2007) ("The capacity of future domestic courts can be strengthened by having national staff working alongside internationals with expertise in prosecuting these types of cases. A mixed domestic-international tribunal in Iraq could leave a truly positive legacy."). See also Gersh, *supra* note 289, at 292–93 ("Trying Saddam . . . will do little to improve the capacity of the Iraqi judiciary. Saddam's trial will revolve around complex allegations of genocide, war crimes, and human rights violations. These are issues that an Iraqi judge is unlikely to ever see again, unless he participates on an international tribunal.") (footnote omitted).

302. See, e.g., Slevin, *supra* note 281 ("There is the risk . . . that prosecutions undertaken by Iraqi courts supported only by American forces will be seen as dispensing victors' justice.") (quoting law professor Diane F. Orentlicher). See also Edward Alden, *Plans for Iraqi-led Courts to Try Saddam's Regime*, *FIN. TIMES* (London), Apr. 8, 2003, at 6 (citing critics who "say that an international tribunal could be important in helping to heal the divisions caused by the war and in giving legitimacy to the American effort"); Ruti Teitel, *The Law and Politics of Contemporary Transitional Justice*, 38 *CORNELL INT'L L.J.* 837, 844 (2005) ("In any event, the selection of judges by what was widely viewed as a wing of the occupation, as well as the role of the United States in the 1980's, would seem to make the Iraqi case equally vulnerable to the claim to victor's justice.").

303. See Coalition Provisional Authority [CPA] Order No. 1: De-Ba'athification of Iraqi Society (May 16, 2003), available at http://www.cpa-iraq.org/regulations/20030516_CPAORD_1_De-Ba_athification_of_Iraqi_Society_.pdf.

304. *All Things Considered: Bush Prods Maliki to Let Baathists Back In* (Nat'l Pub. Radio broadcast Jan. 12, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=6840339>.

1 would implement.³⁰⁵ Rather, the group encouraged a bottom-up approach similar to that employed in the dismantling of the Nazi party in post-war Germany.³⁰⁶ Nor did Mr. Bremer heed the advice of those on the ground, including General Jay Garner, Bush's first head of the post-war mission in Iraq, who claimed the policy was "too hard," or the CIA station chief in Baghdad, who claimed the policy would "undercut the operation" of Iraq.³⁰⁷

Section 1(2) of Order No. 1 reads: "Full members of the Ba'ath Party holding the ranks of . . . Regional Command Member . . . Branch Member . . . Section Member . . . Group Member . . . are hereby removed from their positions and banned from future employment in the public sector."³⁰⁸ Like Act No. 451/1991, Order No. 1 mandates vetting for certain classes of people employed in the public sector. Section 1(3) reads: "Individuals holding positions in the top three layers of management in every national government ministry, affiliated corporations and other government institutions (e.g., universities and hospitals) shall be interviewed for possible affiliation with the Ba'ath Party, and subject to investigation for criminal conduct and risk to security."³⁰⁹

The process of de-Ba'athification is carried out by the Iraqi de-Ba'athification Council, established on May 25, 2003 by CPA Order Number 5.³¹⁰ In an act that stunningly demonstrates the CPA's egregious incompetency and failure to engage the aspirations of ordinary Iraqis, the CPA named Ahmed Chalabi as the head of the Iraqi de-Ba'athification Council.³¹¹ Once the golden boy of the Pentagon,³¹² Mr. Chalabi has

305. See CONRAD C. CRANE & W. ANDREW TERRILL, STRATEGIC STUDIES INSTITUTE, RECONSTRUCTING IRAQ: INSIGHTS, CHALLENGES, AND MISSIONS FOR MILITARY FORCES IN A POST-CONFLICT SCENARIO 14–15, 17 (2003), available at <http://www.strategicstudiesinstitute.army.mil/pdf/PUB182.pdf>.

306. *Id.*

307. RICKS, *supra* note 260, at 159 ("These are the people who know where the levers of the infrastructure are, from electricity to water to transportation . . . Take them out of the equation and you undercut the operation of this country . . .") (paraphrasing the CIA station chief's warning to Bremer).

308. See CPA Order No. 1 § 1(2).

309. *Id.* § 1(3).

310. CPA Order No. 5: Establishment of the Iraqi De-Ba'athification Council (May 25, 2003), available at <http://www.cpa-iraq.org/regulations/CPAORD5.pdf>.

311. See, e.g., Tom Hundley & Stephen Franklin, *Baathist Purge Formalized; Council Reveals Guidelines on Ex-Party Leaders*, CHI. TRIB., Jan. 12, 2004, at 7.

312. A study from the Congressional Research Service estimated that the Iraqi National Congress Support Foundation ("INCSF") received \$32.65 million in U.S. support between 2000 and 2003. KENNETH KATZMAN, CRS REPORT FOR CONG., IRAQ: POST-SADDAM GOVERNANCE AND SECURITY 45 (2006), available at <http://fpc.state.gov/documents/organization/76320.pdf>.

since fallen out of favor with some (but unfortunately not all) American policymakers as a result of accusations that he embellished intelligence to the Defense Department prior to the American invasion, and once the invasion had taken place, shared American intelligence with Iran.³¹³ Mr. Chalabi once had far greater aspirations than head of the de-Ba'athification Council, but high political office has proven elusive as he has no following in Iraq.³¹⁴ Chalabi's impact on the de-Ba'athification policy can not be overemphasized. Marine General Anthony Zinni, who oversaw the 1998 Desert Fox Raids on Iraq, has claimed, "I think the de-Baathification . . . was at Chalabi's insistence . . . Iraqis told me this, Iraqis from inside during the war said that Chalabi was pushing Bremer to get rid of all of the Baathists because he wanted to put his people in those position, he could control them."³¹⁵ Peter Galbraith goes even further in his assessment of Chalabi's persuasiveness. He writes, "Ahmed Chalabi's role in the events leading to the American invasion of Iraq cannot, in my view be overstated. If it were not for him, the United States military likely would not be in Iraq today."³¹⁶ For an unpopular yet ambitious figure to be given an exceedingly important post which can easily be manipulated to harm political rivals or enemies speaks to the CPA's sheer incompetency.

Concerns with Mr. Chalabi's performance arose soon after his appointment. Former CIA analyst and Iraqi scholar Kenneth Pollack, for example, testified to the Senate Foreign Relations Committee that he believed Mr. Chalabi was forging documents in his role as head of the Council.³¹⁷

Like Act No. 451/1991, Order No. 1 has been the subject of much criticism³¹⁸—and for good reason. Like Act No. 451/1991, it fails to

313. See, e.g., John F. Burns, *Hussein Tribunal Shaken by Chalabi's Bid to Replace Staff*, N.Y. TIMES, July 20, 2005, at A9. See also GEORGE TENET, AT THE CENTER OF THE STORM: MY YEARS AT THE CIA 397 (2007) ("Chalabi had almost no following in Iraq but quite a large one among some circles in the U.S. government.").

314. See TENET, *supra* note 313, at 397, 446 ("In the December 2005 elections, Chalabi's party garnered about 0.5 percent of the vote and won not a single seat in Parliament.").

315. RICKS, *supra* note 260, at 163–64.

316. GALBRAITH, *supra* note 9, at 86.

317. See, e.g., Eli Lake, *Allawi Runs with Alleged Baathists*, N.Y. SUN, Jan. 28, 2005, at 1.

318. See, e.g., Doug Struck, *Man Who May Lead Iraq Eyes Ex-Baathists; Jaafari Says He Would "Purify" Government of Many from Former Ruling Party*, WASH. POST, Feb. 18, 2005, at A18 ("[Prime Minister] Allawi and others argue that Bremer's move crippled Iraq's government and security systems . . ."); Teitel, *Contemporary Transitional Justice*, *supra* note 302, at 843 ("The post-invasion rush to debaathification involving speedy

make individualized assessments and instead espouses the principle of collective guilt—a grossly unfair concept when one considers the pressure to join the Ba’ath Party in Saddam’s Iraq. Also, similar to Act No. 451/1991, Order No. 1 deprived the struggling new Iraqi government of much needed talent, served to create a security vacuum, and helped fuel the insurgency.³¹⁹ Finally, Order No. 1 achieved the nearly impossible; it further destabilized an already dangerously unstable country—the exact opposite of what transitional justice mechanisms are supposed to do. It actually made attainment of national reconciliation a more remote, rather than a closer, goal. Fareed Zakaria, the thoughtful editor of *Newsweek International*, in his review of George Packer’s Iraq war chronicle *The Assassins’ Gate*, states:

As a balancing act that kept Iraq’s three communities at peace, it [CPA Order No. 1] was a disaster. Bremer’s decisions signaled to Iraq’s Sunnis that they would be stripped of their jobs and status in the new Iraq. Imagine if, after apartheid, South Africa’s blacks had announced that all whites would be purged from the army, civil service, universities and big businesses. In one day, Bremer had upended the social structure of the country. And he did this without having in place a new ruling cadre that could take over from the old Sunni bureaucrats.

These decisions did not cause the insurgency, though it is worth noting that for the first few months of the occupation, Sunni Falluja was much less of a problem for the United States than was Shiite Najaf. But Bremer fueled the dissatisfaction of the Sunnis, who now had no jobs but plenty of guns. And most especially, his decisions added to the chaos and dysfunction that were rapidly rising in Iraq.³²⁰

Had Bremer and company consulted ordinary Iraqis rather than the self-serving Mr. Chalabi, they would have likely embarked upon a quite

purges of the military and the police, arguably sacrificed present security to the claims of justice, leaving the country with a real military and security vacuum.”).

319. See, e.g., *id.* (“[T]here was a rush to debaathification, resulting in the evisceration of existing institutions, such as the Iraqi parliament and army. These purges needlessly sacrificed potential sources of legitimacy concerning, for example, ongoing constitutional reform at the time.”). See also BAKER & HAMILTON, *supra* note 3, at 21 (“Most of Iraq’s technocratic class was pushed out of the government as part of de-Ba’athification.”); Susan Sachs, *Aftereffects: Sovereignty; Iraqi Political Leaders Warn of Rising Hostility if Allies Don’t Support an Interim Government*, N.Y. TIMES, May 18, 2003, § 1, at 22 (“But some professors said the purging process could go too far, replacing corrupt deans with incompetent ones whose only qualification was their lack of Baathist links.”). See also TENET, *supra* note 313, at 427 (“We soon began hearing stories about how Iraqis could not send their kids to school because all the teachers had been dismissed for being members of the Ba’ath Party.”).

320. Zakaria, *supra* note 264.

different process. In the remarkable 2004 study *Iraqi Voices*, the International Center for Transitional Justice and the Human Rights Center at Berkeley explain a comprehensive survey they conducted on Iraqi attitudes toward transitional justice. On the subject of de-Ba'athification, the study's findings are worth quoting at length:

It is significant that most respondents differentiated between the Ba'ath party leadership and those who actually ordered or committed human rights violations, and Ba'ath party *members* in general. With a few exceptions, respondents were reluctant to place the entire Ba'ath party membership on trial, and there was widespread recognition that Ba'ath party membership was a technique for survival under the old regime that did not necessarily mean direct participation in human rights crimes.³²¹

In April 2004, Bremer's Order No. 1 was significantly relaxed, allowing "the quick return to the government payroll of former Baath Party members 'who were Baathists in name only.'"³²² As part of the rollback, and in an effort clearly designed to fill the security vacuum Order No. 1 helped create, "senior army officers, including generals and full colonels, [were] allowed to return"³²³ Moreover, in the new strategy unveiled by President Bush on January 11, 2007 calling for a surge of more than 20,000 soldiers and marines to Iraq, the President also called for easing the disastrous policy.³²⁴

321. IRAQI VOICES, *supra* note 2, at 28.

322. Edward Wong, *Policy Barring Ex-Baathists from Key Iraq Posts is Eased*, N.Y. TIMES, Apr. 23, 2004, at A10.

323. *Id.*

324. See, e.g., *Strategy Highlights*, SAN JOSE MERCURY NEWS, Jan. 11, 2007, at A3; "The Most Urgent Priority for Success in Iraq Is Security," *Bush Says*, N.Y. TIMES, Jan. 11, 2007, at A18 ("And to allow more Iraqis to re-enter their nation's political life, the government will reform de-Baathification"). See also Michael R. Gordon & Jeff Zeleny, *Latest Plan Sets a Series of Goals for Iraq Leaders*, N.Y. TIMES, Jan. 8, 2007, at A1.

This appears to be the sole recommendation from the largely ignored Iraq Study Group that President Bush chose to implement in his new Iraqi strategy. In Recommendation 27, the Iraq Study Group explains: "Political reconciliation requires the reintegration of Baathists and Arab nationalists into national life, with the leading figures of Saddam Hussein's regime excluded. The United States should encourage the return of qualified Iraqi professionals . . . into the government." BAKER & HAMILTON, *supra* note 3, at 65.

Despite the prominence President Bush has placed on reversing de-Ba'athification, Prime Minister al-Maliki has been slow to act. In September 2007, he promised that lawmakers would further revise the policy, but the issue is consistently preempted by debate on more pressing affairs, such as the latest bombing to occur. See, e.g., *Cave*, *supra* note 296.

CONCLUSIONS AND RECOMMENDATIONS

Post-conflict nations are best served when a holistic approach to transitional justice is taken and efforts at achieving both peace and justice are balanced. The typology proposed by Juan E. Méndez, the President of the ICTJ, that post-conflict nations owe four duties to victims—justice, truth, reparations, and lustration,³²⁵ provides a useful model for considering transitional justice approaches in post-Ba'ath Iraq.

A. Prosecution and Justice

Méndez first calls for “an obligation to do justice, . . . to prosecute . . . the perpetrators of abuses when those abuses can be determined to have been criminal in nature.”³²⁶ The *Iraqi Voices* study of Iraqi social attitudes toward transitional justice found “considerable support for holding perpetrators accountable through legal trials.”³²⁷ This is understandable, not only from the purely emotional perspective of a people who have suffered greatly, but particularly so when one considers the primacy of justice in Muslim culture. One Islamic scholar has referred to justice as “the defining theme of Islamic ethics,”³²⁸ noting that “[t]he major characteristics of the society envisioned by the Qur’an are compassion, or kindness, honesty, and justice.”³²⁹ The same author argues that the “Qur’an says that . . . God has called for justice.”³³⁰ Indeed, the Qur’an gives the following incantation: “Say: ‘My Lord hath commanded justice; and that ye set your whole selves (to Him) at every time and place of prayer, and call upon Him, making your devotion sincere as in His sight: such as He created you in the beginning, so shall ye return.’”³³¹

With the establishment of the IST, the question becomes who that Tribunal will try. While the Ba'ath party delineated several layers of leadership,³³² for the purposes of transitional justice, three layers of culpability can be identified: Saddam and his inner circle; mid-ranking members—the cogs in the Ba'ath machine (one eminent Iraqi journalist estimates

325. *Supra* note 58 and accompanying text.

326. *Id.*

327. IRAQI VOICES, *supra* note 2, at 25.

328. TAMARA SONN, A BRIEF HISTORY OF ISLAM 9 (2004).

329. *Id.* at 8.

330. *Id.* at 9.

331. THE HOLY QURAN, Surah 7:29 (Yusufali trans.).

332. These include the following ranks: “Udw Qutriyya (Regional Command Member), Udw Far (Branch Member), Udw Shu’bah (Section Member), and Udw Firqah (Group Member).” See CPA Order No. 1 § 1(2).

this would encompass 3,000 members);³³³ and the general Ba'ath party membership (estimated to be more than one million).³³⁴ Only the first layer—Saddam and his inner circle—should be tried by the IST. Those individuals who committed human rights abuses but were not members of the inner circle should be prosecuted in ordinary Iraqi criminal courts.³³⁵

For purposes of competency, capacity building, and legitimacy, it is certainly unfortunate that the Bush administration chose to demonstrate its hostility toward international justice and cave in to Iraqi demands that the tribunal be composed solely of Iraqi judges and prosecutors. Nonetheless, as Hussein's cohorts are tried, the international community may still, and must, press for a greater background role, thereby enhancing the IST's competency, capacity building, and legitimacy. Such a role is expressly authorized by article 6(b) of the IST's statute:

The President of the Tribunal shall be required to appoint non-Iraqi nationals to act in advisory capacities or as observers to the Trial Chambers and to the Appeals Chamber. The role of the non-Iraqi nationals shall be to provide assistance to the judges with respect to international law and the experience of similar tribunals (whether international or otherwise), and to monitor the protection by the Tribunal of general due process of law standards.³³⁶

B. Truth and Reconciliation

Méndez next calls for an “obligation . . . to grant victims the right to know the truth.”³³⁷ As some form of amnesty is often “a necessary prerequisite for a [truth] commission,”³³⁸ all truth commissions allow for forgiveness. Forgiveness is an Islamic virtue. As one Islamic scholar notes, “[v]ariations on the term ‘be compassionate’ or ‘show mercy’ . . . occur hundreds of times in the Quran.”³³⁹ While the Qur'an affirms the Biblical injunction “an eye for an eye,” it also declares that eschewing retaliation and embracing forgiveness is an act of atonement:

And We ordained for them: ‘Life for life, eye for eye, nose for nose, ear for ear, tooth for tooth, and wounds equal for equal.’ But if anyone remits the retaliation by way of charity, it is an act of atonement for him-

333. Amir Taheri, *Put Saddam's Henchmen on Trial*, JERUSALEM POST, Dec. 12, 2003, at 20.

334. *Id.*

335. *Id.*

336. Statute of the Iraqi Special Tribunal art. 6(b).

337. *Supra* note 58 and accompanying text.

338. *See supra* notes 84–85 and accompanying text.

339. SONN, *supra* note 328, at 8.

self. And if any fail to judge by (the light of) what God hath revealed, they are (no better than) wrong-doers.³⁴⁰

A truth commission would likely be seen in this light, and therefore supported by ordinary Iraqis. There are two reasons, however, to counsel against the establishment of such a commission at this time. First, it is questionable whether there is a truth to reveal in Iraq. As noted above, the Swiss Peace Foundation's study on truth commissions concludes that they are particularly useful in two scenarios: where "the systems of abuse . . . [were] designed to hide the facts [and] [t]orture and related abuses were committed largely in secret" or where the truth is not hidden, but "multiple 'truths'" exist,³⁴¹ neither of which applies to post-Ba'ath Iraq. As *Iraqi Voices* notes, some of the participants in the study were skeptical as to the value of a truth commission. The horrors which beset Iraq were no secret; Iraqis knew that the Ba'athist regime was a barbaric reign of terror that had no appreciation for human life or dignity.³⁴² Whether there is truth to reveal is therefore questionable.

A second concern is that Iraq lacks the requisite civil society to undertake the challenges inherent in a truth commission.³⁴³ For example, Kanan Makiya, in his introduction to the 1998 edition of *Republic of Fear*, excerpts a document signed by hundreds of exiled Iraqis:

Civil society in Iraq has been continuously violated by the state in the name of ideology. As a consequence the networks through which civility is normally produced and reproduced have been destroyed. A collapse of values in Iraq has therefore coincided with the destruction of the public realm for uncoerced human association.³⁴⁴

Ultimately, the decision as to whether and when to establish a truth commission is one that the Iraqi people alone should make.

C. Reparations

A third obligation owed to victims, argues Méndez, is the "grant[ing] [of] reparations to victims in a manner that recognizes their worth and their dignity as human beings."³⁴⁵ While the prosecution of Hussein and his henchmen is a clear form of retributive justice, reparations can be seen as a direct form of restorative justice, as they demonstrate efforts to assuage the horrors Iraqis suffered under the Ba'ath regime. A compre-

340. THE HOLY QURAN, *supra* note 331, Surah 5:45.

341. See *supra* notes 70–71 and accompanying text.

342. IRAQI VOICES, *supra* note 2, at 39.

343. See *supra* notes 78–79 and accompanying text.

344. MAKIYA, *supra* note 2, at xxx.

345. See Méndez, *supra* note 58 and accompanying text.

hensive reparations system should be undertaken immediately through the establishment of a commission to investigate and determine disbursements to victims. Reparations should take the form of both material and symbolic support; the former focusing on rebuilding lives, the latter on restoring dignity.³⁴⁶

D. De-Ba'athification

Finally, Méndez suggests that “states are obliged to see . . . that those who have committed the crimes while serving in any capacity in the armed or security forces of the state should not be allowed to continue on the rolls of reconstituted, democratic law-enforcement or security-related bodies.”³⁴⁷ As argued above, the overzealous and partisan de-Ba'athification process in Iraq sacrificed scarce Iraqi talent and further exacerbated sectarian divisions by assigning collective guilt rather than making individualized assessments. Since its implementation, de-Ba'athification in Iraq has been significantly moderated, and under pressure from the Bush administration, Prime Minister al-Maliki has vowed to go further.³⁴⁸ This is certainly a welcome development. The remaining question, which can only be answered in time by the Iraqi people, is whether this and other efforts made toward transitional justice thus far are too little, too late.

346. IRAQI VOICES, *supra* note 2, at iii.

347. Méndez, *supra* note 58 and accompanying text.

348. *See supra* note 324.