

On the Very Idea of Transitional Justice

by Jens David Ohlin

The phrase “transitional justice” has had an amazingly successful career at an early age.¹ Popularized as an academic concept in the early 1990s in the aftermath of apartheid’s collapse in South Africa, the phrase quickly gained traction in a variety of global contexts, including Rwanda, Yugoslavia, Cambodia, and Sierra Leone.² A sizeable literature has been generated around it, so much so that one might even call it a sub-discipline with inter-disciplinary qualities.³ Nonetheless, the concept remains an enigma. It defines the contours of an entire field of intellectual inquiry, yet at the same time it hides more than it illuminates. No one is exactly sure what it means.

One reason might be its combination of two very different kinds of words in a single phrase. “Justice” is perhaps the greatest of moral values, with a history that extends back to the moment man started criticizing the conduct of his fellow man. It is meant to evoke a universal, normative goal. “Transitional,” on the other hand, defines a particular situation, an exceptional and limited moment that stands in contrast to the universal goal. So the second term limits and qualifies the first in some important way, but how is totally unclear.

Is transitional justice some other *kind* of justice, fundamentally different from justice during non-transitional moments? Or is it simply *ordinary* justice, a familiar end-state that remains elusive because a society has been ripped apart by genocide or some other ethnic conflict?⁴ If it is the latter, the field is about how to achieve, in a very pragmatic way, the usual goals of justice in difficult times. If it is the former, the field fundamentally re-conceives our understanding of justice in the face of radical social violence.⁵ One is largely an exercise in social science, the other an exercise in moral philosophy. The current field of transitional justice straddles this distinction, and does so, I shall argue, in a somewhat uncomfortable way. Although the concept now dominates international affairs as an umbrella under which these problems are investigated, it remains fundamentally misunderstood. Specifically, the term “transitional justice” betrays a deep tension between two approaches to justice that goes to the heart of the burgeoning program of international criminal justice.

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TWO CONCEPTIONS OF TRANSITIONAL JUSTICE

Transitional justice can be interpreted in two different ways. In the first, transitional justice is just ordinary justice where the material circumstances make it difficult to achieve. What is meant by ordinary justice? Simply that the usual goals and rules of justice apply: to hold violators responsible for their actions and punish them accordingly, after a rigorous process of determining their guilt before a neutral decision maker.⁶ This view of justice implies many things; it implies, for example, that there can be no peace without justice for past abuses—that at least some form of punishment is required to restore balance to the moral order of a community. But this view of justice also implies many defendant-centered protections: that due process of law is respected (both in procedure and substance), that criminal defendants are punished according to public and prospective laws, and that procedural protections for defendants are a precondition of meaningful justice. These are the universal background conditions of ordinary justice, and apply in any sophisticated legal order committed to the rule of law.

Is transitional justice some other *kind* of justice, fundamentally different from justice during non-transitional moments? Or is it simply *ordinary* justice, a familiar end-state that remains elusive because a society has been ripped apart?

A view of transitional justice as ordinary justice requires that the basic rules of justice apply in all situations, including extraordinary moments after genocide, war, and ethnic conflict. Though all of the regular rules of justice apply, implementing them is a difficult policy matter to be investigated by theorists of transitional justice. All sorts of policy matters might be considered here, such as what kind of tribunal to constitute,⁷ how to integrate warring ethnic powers into a coherent cosmopolitan whole,⁸ and how to minimize future conflicts from flaring up again.⁹ Yet these are all pragmatic questions and do not implicate the most basic foundations of our conception of justice.¹⁰ The work of transitional justice, in this view, does not require revising the basic principles of justice; rather, it is a more modest inquiry into the appropriate institutional arrangements to achieve peace.

This is to be contrasted with transitional justice as a special kind of justice, where the regular rules of justice are supplanted by novel rules justified by the extraordinary nature of the moral fissure. This conception focuses on the goal of rebuilding broken communities—an imperative so important for both morality and law that the basic principles of justice are subject to revision.¹¹ In this conception, then, the difficulties inherent within a broken society are more than just pragmatic considerations that make peace difficult to achieve. Rather, they serve as *reasons* for tinkering with the basic principles of justice.¹² This view opens up a conceptual space within which new rules of justice are required, consistent with the demands of the time.

There is a logical appeal to this view of transitional justice. If one believes that basic principles of justice are abstract entities, residing as Platonic forms waiting for human theorists to pluck them from the ether, then it can be a little confusing to think of them as subject to revision when circumstances dictate. It would appear to violate our intuition that justice, whatever it is, is eternal and for the ages. However, if we view morality, with Hume, as stemming from basic background conditions of society, it would make sense that new rules are needed in societies so broken that they do not have the same background conditions.¹³ In modern societies, where law and government retain power, we live our lives within a socio-economic order with institutional avenues of redress when things go wrong. But in the midst of genocide and its aftermath, institutions disappear and participants are thrown into a chaotic hell that can only be described as a state of nature. This is why both Hobbes and Locke argued that more primitive laws applied in the state of nature and the rich program of rules known as the rule of law only come into force when the state of nature is replaced by a social contract, and hence, civilization.¹⁴ In the face of genocide, societies collapse back into a state of nature, quite literally and horrifically, and it is no wonder that a conceptual space opens up where different rules of justice might apply.¹⁵ This is the world of Hobbes and Locke.

One sees this view of transitional justice as special justice most often in questions of legal procedure. Normal justice requires a whole set of procedural protections for defendants. The right to counsel, the right to remain silent, the right to confront witnesses and evidence are all constitutive of due process and the notion of a fair trial; without these procedural protections, a justice system would be arbitrary and capricious and could not rightly be described as acting under the rule of law. Nevertheless, these procedural protections are sometimes suspended during moments of radical social violence through the establishment of alternate institutions of justice—the rationale being that standard rules of justice are either too burdensome given the circumstances, or unwarranted. The key to transitional justice is that justice be served for the victims, one might say, and that the normal safeguards of procedural justice are developed within the context of regular criminal behavior, not mass atrocity. One might have made this argument, for example, in Rwanda, where there was an initial attempt to conduct “regular” trials for *genocidaires*.¹⁶ This program was quickly abandoned after officials imprisoned tens of thousands of defendants, but had no lawyers or resources to bring them to trial. The result was community-based *gacaca* courts that operated far below traditional legal standards of due process. This struck some skeptics as unjust, but to proponents it seemed necessary to achieve “justice” for the community and the victims, even if due process had to fall by the wayside.¹⁷ In this case, the basic principles of justice were subject to revision. Ordinary justice usually abhors such brazen utilitarian balancing of rights.

This example suggests a basic distinction between our two models of transitional justice. Transitional justice as special justice is particularly focused on collective action—that of both victims and perpetrators. Mass atrocities are usually committed by one group against another; the paradigmatic case of genocide is one

ethnic group (not just a psychotic individual) that seeks the annihilation of another group.¹⁸ In addition to any individual moral and legal culpability, the *groups* stand against each other in a particular relationship as victim and perpetrator. This raises a host of moral as well as geopolitical problems, not the least of which is the threat of regional instability as victimized ethnic groups respond with reprisals against their oppressors.¹⁹ It is precisely these inter-group conflicts that transitional justice seeks to resolve by making sure that the victim-group gets justice and the moral balance of power is restored. This focus on the collective as the primary goal of special justice allows the interests of individuals to be sidetracked, not as entirely irrelevant perhaps, but as dwarfed by the larger problems of collective strife.²⁰ The proponent of special justice might therefore defend the repeal of individual procedural protections and respond to any complaints as being beside the point. What we are doing here, he might say, is repairing societies—a Herculean task if ever there was one—and this is our warrant for rewriting the basic principles of justice.

In contrast, transitional justice as ordinary justice is less concerned with the actions of collectives, mostly because the collective is only relevant when the crime in question is genocidal in nature. In times of relative peace, ordinary justice is concerned with the lives of individuals and their interactions with each other, when ordinary justice can train its gaze on making sure that each individual receives what justice demands. It is for this reason that the protections of the criminal trial are so central in ordinary justice. Of course, there are individual victims who matter as well. It is a calculus of individual victim and individual perpetrator—individuals both. In ordinary justice, no group-level considerations warrant special exceptions to generally recognized principles of justice.

None of this is meant to suggest that the two conceptions of transitional justice—as ordinary justice and as special justice—are mutually exclusive. One might find elements of both in many places. Indeed, as I shall argue in the third section, both conceptions are present at the very foundation of the new institutions of international criminal justice. But before pursuing this line of thought, it is important to evaluate arguments about transitional justice, identify where they go wrong, and suggest how they might be reformulated to address these concerns.

SPECIOUS ARGUMENTS ABOUT TRANSITIONAL JUSTICE

The conception of transitional justice as special justice is particularly susceptible to specious arguments. As suggested in the previous section, special justice encourages revision of the ordinary principles of justice in service of the laudable goal of restoring collective peace and security. Although this might be warranted in some circumstances, I will suggest here that the basic structure of this argument is dangerous and might spawn unfortunate conclusions. The problem stems from a willingness to make local exceptions to the basic rules of justice rather than seeking wholesale changes that apply in all circumstances. I consider two major questions. The first is whether the death penalty is an appropriate avenue of legal punishment for the greatest of all crimes—genocide. The second is whether the unprecedented

nature of World War II was reason enough to depart from the principle of legality, or *nullum crimen sine lege*, during the prosecution of Nazi war criminals. What unifies both is that each is susceptible to the dangers of viewing transitional justice as special justice.

The Death Penalty for Genocide

In 2005, I published an article in the *American Journal of International Law* arguing that, although a general norm of customary international law may be emerging that prohibits the death penalty, this norm should not apply to cases of genocide.²¹ Part of the argument stemmed from traditional customary law analysis.²² Simply put, few nations crippled by genocide have refrained from the death penalty because of a perceived duty under international law. Indeed, several countries resorted to the death penalty as a response to genocide and war crimes, including Rwanda after its genocide, the US and its Allies at Nuremberg, and Israel after it captured Eichmann.²³ In cases where the death penalty was prohibited—at the Yugoslavian tribunal, for example—it was because European abolitionist countries on the Security Council used the threat of their veto power to keep capital punishment off the table.²⁴

If the death penalty is available for a regular case of murder, how is it just, one might ask, for a perpetrator of genocide to live out the remainder of his life detained in the Hague or some other Western European prison?

Dramatic events have unfolded since the original article was published. Saddam Hussein was brought to the gallows in a macabre moment captured both by official newsreel and unofficial cell-phone camera. People around the world were shocked by images of Hussein with a noose around his neck and were horrified by the religious and political taunts during the final moments of what should have been a dignified and solemn end to a sober legal process. Although there is much to be criticized in an execution carried out in such fashion, we must carefully note that the criminal trial that preceded it lacked the safeguards and sophistication of a well-developed legal system. It would be an exaggeration to call it a kangaroo court or a show trial; it would be more accurate to call it a well-intentioned effort from a nation whose legal system remained underdeveloped for the simple reason that Hussein himself never allowed one to flourish. Had the trial been conducted with legal rigor, and the execution conducted with the necessary gravitas, the outcome might have been more legitimate.²⁵ As it stands, the execution seemed more like sectarian violence than national reconciliation, and ought to be criticized on that basis. However, these criticisms do not implicate the basic structure of my original argument: although many nations have abolished the death penalty, few nations actually victimized by genocide willingly forego executions for genocidal criminals.

The structure of my original argument can easily be misinterpreted. A central element of the argument is that context is relevant and that societies ripped apart by

genocide must rebuild themselves, lest they fall back into ethnic violence that could destabilize an entire region. This need to rebuild societies and restore regional order is paramount for international law, whose prime objective, codified in the UN Charter, is the maintenance of international peace and security.²⁶ Within this context, victims of genocide must feel that perpetrators will be adequately punished for their crimes. Light punishments run the risk of being viewed as illegitimate by the victim population, especially in a nation that retains the death penalty in its domestic penal system for regular crimes.²⁷ If the death penalty is available for a regular case of murder, how is it just, they might ask, for a perpetrator of genocide to live out the remainder of his life detained in the Hague or some other Western European prison?²⁸

The moral argument for allowing the death penalty for crimes of genocide denies that there is such a thing as an absolute right to life in all circumstances, which cannot be violated.

If a criminal justice system is viewed as illegitimate in the wake of genocide, the consequence is more than just a scholarly anxiety. Victims are persuaded to lay down their arms and forgo reprisals on the assumption that justice can be accomplished in the courtroom, through the rule of law, with individual accountability for specific criminal actions. To the extent that victims lose faith in this process, they will take their arms and engage in violent, self-help initiatives. Indeed, it is precisely this fear that gives the international community the right, the duty, and the jurisdiction to intervene in such cases and create a process of international criminal justice.²⁹ When the Security Council authorized the creation of the ICTY and the ICTR, it did so explicitly by invoking its Chapter VII authority to restore collective peace and security, and upon a factual finding that a criminal tribunal was necessary for this end.³⁰

One can already see the danger of this argument; it would seem as if its structure implies that transitional justice requires the death penalty for genocide, even though it may be impermissible in other contexts, as the project of transitional justice might otherwise collapse. Since some victims demand capital punishment for genocide—feeling, legitimately, as if a twenty-year sentence would be inadequate for a genocidal conspirator responsible for the death of thousands of civilians—then the basic rules of justice must be altered within the context of transitional justice. This is an exercise in exceptionalism par excellence. Under this view, we make an exception to the basic rules of justice—rewrite them for the occasion, as it were—because transitional justice has its own needs, its own arguments, and its own internal logic.

This is, of course, the very kind of argument we must remain vigilant against and it would be a pity if my argument about the death penalty were misunderstood

in this fashion. How best to interpret the argument, then, so that it does not run afoul of this problem? How do we understand the death penalty without resorting to some brand of exceptionalism about justice? This objection fails to distinguish the moral argument from the legal argument. Any analysis that confuses the two will undoubtedly warp both; and the result will be confusion about transitional justice and the role it plays in any generalized theory of justice.

The legal argument about the death penalty's permissibility in cases of genocide appeals to transitional justice because the whole legal basis for UN involvement in transitional justice is a threat to international peace and security. Indeed, as we have mentioned before, the Security Council is unable to take any action under its Chapter VII authority unless it finds that such action is required to restore collective peace and security.³¹ This was precisely what the Security Council found when it authorized the creation of the ICTY and the ICTR—that an international tribunal was a necessary precondition for restoring regional stability and convincing victim groups to forgo reprisal attacks, put down their arms, and litigate grievances about past abuses in court. For example, the end of the Balkan wars left many Kosovo Albanians angry and itching for revenge against ethnic Serbs. Similarly, the end of the Rwandan genocide left the Tutsi population in control of the government but poised for reprisals against former members of the Hutu Power movement who fled to neighboring countries. In both instances, the risk of ongoing regional war was very real.

The demands of transitional justice are therefore relevant to the legal argument. Since international legal institutions such as the United Nations and the Security Council only gain entry into the situation when there are larger implications for collective security, it makes sense to frame the debate in terms that are relevant for transitional justice. This was precisely the point of my argument in 2005: to suggest that international tribunals that fail to recognize the death penalty for crimes of genocide might frustrate the very goals they were originally constituted to achieve, i.e., collective security.³² The point is to place the retentionist argument in terms cognizable by international law and relevant for collective peace and security, arguably the most important goal of international law. In this sense, then, the demands of transitional justice are certainly relevant for the legal argument. This implies a view of transitional justice as special justice, as a unique moment in geopolitical history—hardly surprising given that international law's obsession with collective peace and security is all about these unique moments and how to weather them with the least violence.

This legal argument must be separated from the moral argument, which is logically distinct. The moral argument for allowing the death penalty for crimes of genocide denies that there is such a thing as an absolute right to life in all circumstances, which cannot be violated.³³ At first glance it might appear that the moral argument is an exercise in precisely the kind of exceptionalism that I decried as part of transitional justice as special justice. If we are claiming that the death penalty's permissibility should be viewed differently in cases of genocide, it would

appear that we are carving out a special logical space and using the facts of transitional justice as our warrant for doing so.

But the moral argument does *not* suggest that there is an absolute right to life in ordinary times and that the unique demands of transitional justice justify abrogation of that right in service of greater utilitarian ends. This would be a disastrous moral argument. Rather, the moral argument appeals to rights forfeiture, or the idea that the genocidal criminal has forfeited his right to life by virtue of his actions.³⁴ This consideration, when combined with the knowledge that simple prison terms may be insufficient retributive punishment for the attempted annihilation of an entire race or ethnicity, suggests the complicated conclusion that the death penalty for genocide is entirely consistent with a generally recognized right to life. We are not in the business of offering exceptions to this universal right. This would be to concede too much. Rather, the retentionist is denying the right's *universality* in the first place, on the assumption that there are many instances where the right does not apply; and chief among them is the genocidal criminal who has conspired to wipe out an entire race.

The absolute novelty of the Nazi conspiracy, combined with the shocking efficacy with which it was carried out, meant that the international community had not criminalized this behavior because *they had never seen it before.*

Can the legal and the moral be separated so easily? Is not the legal argument, at its heart, also a moral one? In other words, what is the point of the legal argument unless it is meant to justify—both legally *and* morally—the use of the death penalty in cases of genocide? The answer here is that the legal argument—which appeals to transitional justice as special justice—is merely meant to frame the question in terms familiar to international law, instead of pure human rights law as abolitionists would have it.³⁵ One might think of it as similar to a foundational, *jurisdictional* question. In other words, the subject of genocide is a concern for international lawyers because it implicates questions of collective peace and security. And although collective peace and security could not resolve, by itself, all questions about the law of genocide (how it is defined, how it is prosecuted, etc.), it does nonetheless inform how the law of genocide should be approached and why international law should encourage a resolution that is considered just by local standards.

Within the space opened up by international law, the moral argument can complete its work. Many activities are permissible by the standards of international law, but whether they are advisable according to an all-things-considered moral judgment is a different matter. It is precisely within this area that one would want to prevent an argument that justifies unscrupulous conduct by appealing to the demands of transitional justice. This would amount to utilitarian balancing of the most egregious kind. Appealing to transitional justice at the level of international law,

as was the case with our argument about the death penalty, is not only permissible, but inevitable, and entirely consistent with the basic goals of the international legal order.

The Nuremberg Legality Problem

Consider a second example where one might find the dangerous results of an appeal to transitional justice as special justice. The most trenchant criticism of the Nuremberg trials appealed to the principle of legality, or *nullum crimen sine lege*. The Nazi defendants were charged with aggression, crimes against humanity, and war crimes, but there were few sources of law from which prosecutors could establish that these crimes were already part of international law. While it is true that the Kellogg-Briand Pact outlawed aggressive war, there was absolutely nothing in the very brief treaty that mentioned criminal liability for individuals for aggression, as opposed to state responsibility for the conduct.³⁶ Similar problems remained for the charge of crimes against humanity.

For sixty years, a vigorous, highly theoretical debate about these problems has lingered. The discussion continues because of the trial's overall importance for Germany's war guilt, but perhaps more importantly because of Nuremberg's status as the basic precedent upon which modern international criminal law is founded. In the aftermath of World War II, there were only two logical possibilities. The first is to deny that the prosecutions violated the principle of *nullum crimen sine lege*, and argue that the defendants were charged with crimes that were already well established in international law. This took a fair amount of creative lawyering and strategic scholarship.³⁷ Certainly this was the strategy of the judges at the International Military Tribunal, for they could never admit that their guilty verdicts violated one of the most fundamental principles of criminal law.³⁸ The judges went to great lengths to demonstrate, in whatever tortured way they could, that there was nothing novel in the convictions and that every crime was pre-existing in international law. There could be no retroactive punishment.

The other logical possibility is to bite the bullet and admit that the prosecutions violated the principle of legality, but also maintain that in this situation it was justified. In many ways this is the more intellectually responsible position because it avoids the difficult contortions involved in finding individual criminal liability for aggression and crimes against humanity before 1945.³⁹ Variations on this position have been formulated and expressed by Kelsen and Cassese.⁴⁰ In this case, although *nullum crimen sine lege* is a basic principle of justice, the Allies were permitted to make exceptions to this principle because of the extraordinary nature of the circumstances. To refuse to prosecute on account of a commitment to *nullum crimen sine lege* would hardly have satisfied Jewish victims of the Holocaust. This is clearly an example of what I have called exceptionalism based on an appeal to transitional justice as special justice.

Of course, the position is no doubt motivated by the fact that there were few meaningful alternatives; what is often lost in these discussions is a concrete alternative to the Nuremberg trials. In a sense, there were really only three options.

The Allies could let Nazi leaders go free, the Allies could execute them on the battlefield (as Churchill had assumed would be the case),⁴¹ or the Allies could put them on trial with full knowledge that the prosecutions would not entirely conform to the legality principle. Of course, the first option had to be rejected. Simply letting the Nazis go free, to live out the rest of their lives in hiding in Argentina, or some other distant country, would not have been an appropriate response to the horrors of the Nazi regime. And although summary executions were certainly possible—Churchill's position did have historical precedent, after all—it was much more preferable to grant them at least most of the protections of due process and fairness that would result from submitting their fate to a judicial decision maker.

As one can see, there are two possible versions of this argument. The first, naïve version, as I shall call it, simply says that the principle of legality was violated and that the needs of transitional justice justified it as an exception to the general rule. This suggests a broader implication, i.e., that the rules of justice are up for grabs in times of transitional justice. As I have said before, this is precisely the kind of poor argument that must be avoided. The second version of the argument—the nuanced version, as I shall call it—rejects this calculus and appeals instead to *Realpolitik*. The basic rules of justice are not subject to revision based on the demands of transitional justice. All we can do is attempt to comply with as many of the universal rules of justice as possible. And to the extent that circumstances prevent our total compliance with the basic rules—including the principle of legality—we should make note of it and move on. In this case, the absolute novelty of the Nazi conspiracy, combined with the shocking efficacy with which it was carried out, meant that the international community had not criminalized this behavior because *they had never seen it before*.⁴² This does not create exceptions to the basic rules of justice, but simply encourages us to recognize when our international institutions fail to fully live up to them.

THE FOUNDATIONS OF INTERNATIONAL CRIMINAL JUSTICE

The inevitable question is whether we can eliminate the conception of transitional justice as special justice—banish it, as it were—and replace it entirely with the conception of transitional justice as ordinary justice. This would seem to be the natural conclusion, if I am right that transitional justice as special justice can promote specious reasoning. Our best course of action would be to revise our understanding of transitional justice and limit it to its ordinary justice variety; but I argue in this section that this revision is unlikely to succeed. I am a pessimist in this regard because the tension between the two conceptions of transitional justice goes to the very heart of international criminal justice; it is the inherent paradox upon which the entire field is structured.

As discussed above, transitional justice as ordinary justice is particularly concerned with the fate of individuals, while transitional justice as special justice adds a distinct concern with the fate of collectives—ensuring that victim groups and their aggressors peacefully co-exist, and opening up a special logical space to make this happen. Ordinary justice, on the other hand, concentrates less on the collective

aspect, content instead to ensure that individuals get what they deserve. The tension exists at the very foundation of international criminal justice, which is at once individual and collective. At the individual level, we are dealing with a system of criminal law whose only concern is making sure that guilty individuals—and only the guilty—are punished for their wrongdoing. The entire system of criminal law is designed to achieve this end. We investigate crimes, prosecute wrongdoers, and convene trials under the rules of evidence to make sure defendants are truly guilty and the innocent go free. Most importantly, a society engages in these prosecutions for the simple reason that wrongdoing must be punished. Justice demands it. This is the internal logic of criminal law and it is inescapable. In criminal law, we do not pick and choose between cases based on social considerations. What matters is whether the law has been violated. All true criminal courts are convened for this purpose.

Genocide and crimes against humanity are by their nature special, and some element of special justice must be marshaled against them.

But international criminal law is also based on geopolitical considerations. As noted above, the Security Council authorized the creation of the ICTY and ICTR based on its Chapter VII authority to restore collective peace and security. The Security Council would therefore have had no legal authority to unilaterally set up a binding institution of criminal adjudication for individuals, *but for* the presence of the larger geopolitical considerations. The ICTY and ICTR were not created by voluntary treaty commitments—this would have been entirely ineffective. Rather, the Security Council created the ad hoc tribunals on its own initiative, imposed it on the member states of the United Nations (some of whom were recalcitrant),⁴³ and made it binding as a matter of international law by invoking Chapter VII of the UN Charter.

One would think that the new International Criminal Court would be immune from such considerations, since it was created by voluntary treaty commitments through the Rome Statute. No state was forced to sign the treaty, and many have declined to do so. However, the ICC is required to take cases referred to the prosecutor by the Security Council when the Council deems a criminal investigation necessary for the maintenance of the international peace and security.⁴⁴ The Council issued such a directive last year when it invoked its Chapter VII authority and referred the Darfur situation to the court.⁴⁵ The referral preempted the prosecutor's discretion in the matter and directed him to conduct an investigation and commence prosecutions for any wrongdoing.⁴⁶

This process of Security Council referrals raises numerous procedural questions for the operation of the new ICC. In order to have legal jurisdiction over a case, the court must find, as a matter of law, that the criminal matters in question are sufficiently grave as to be of importance to the international community.⁴⁷ If another state objects and wants to prosecute the defendants in a national court, the

ICC must determine whether the national prosecutions would be sincere, honest, and effective.⁴⁸ But if the Security Council has required the referral to the ICC on the basis of a Chapter VII finding that the situation implicates matters of collective peace and security, is the ICC empowered to decide this question for itself, or must it accept the Security Council's finding without any further discussion? No one really knows. The Security Council is the highest law-making authority in the UN system of international law, but what role its pronouncements should have in criminal matters is entirely uncertain, because the Security Council, and international law in general, has never before been so involved in the project of criminalizing and punishing individual behavior. This process, begun in earnest at Nuremberg, has now blossomed into a central focus of the international legal order; but not without raising some serious concerns.

We achieve group justice by subjecting these unspeakable crimes, perpetrated by the most horrendous of maligned hearts, to the most banal and pedestrian processes of our legal system.

The ICC, as I have argued elsewhere, is really, then, two courts in one.⁴⁹ When commencing an investigation after a referral from a state party to the Rome Statute, the prosecutor has independent authority to base his prosecutorial decisions on pure criminal law considerations. What is the wrongdoing here? Who should be put on trial? What crime should they be charged with? Is this the appropriate legal forum in which to conduct the prosecution? But when required to take on a case after a Security Council referral, the ICC stops looking like a traditional criminal court. Of course, it is still a criminal court in that it judges and punishes individual conduct, but it is more than a criminal court if it is required to take cases when collective peace and security demands it. One might think of this process as a hijacking of criminal law by the international legal system to achieve the twin aims of international law: trans-national peace and collective security. In such cases, the ICC looks less like a pure criminal court and more like an organ of the United Nations, adjudicating individual conduct only because it will promote some greater goal at the collective level. One might call it a "security" court instead of a criminal court.⁵⁰

None of this is meant to suggest that the process of Security Council referrals is somehow regrettable or objectionable. Indeed, the Security Council should have the authority to make binding referrals to the ICC in the wake of genocide or war crimes. The underlying purpose in setting up the ICC was to create a successor court to the ICTY and ICTR, which were truly ad hoc in nature. Their jurisdictions were confined by date and geography, and their mandate will eventually expire.⁵¹ In their place, the more general ICC will continue its work, prosecuting war crimes and genocide wherever they may happen, with an institutional bureaucracy already in place and ready to spring into action as circumstances require.

The tension between special and ordinary justice at the ICC is not limited to cases of Security Council referrals. Indeed, the two conceptions of transitional justice come face to face in all aspects of the court's operation. On the one hand, the ICC is operating as a traditional criminal court, concerned solely with the guilt or innocence of the accused; nothing else matters. The trial must be conducted in accordance with the basic principles of justice well known to all sophisticated systems of criminal law. Although the substantive crimes being prosecuted are horrific as compared with national penal systems—genocide instead of isolated cases of murder, crimes against humanity instead of isolated cases of rape—this cannot justify abrogation from the fundamental principles of criminal adjudication, because these principles derive from the basic principles of justice. This is transitional justice as ordinary justice.

However, the mere fact that the choice of cases is so dependent on geopolitical considerations indicates that the ICC is jurisdictionally defined by transitional justice as special justice. Although international criminal justice is pursued—or at least ought to be pursued—with the same fidelity to the basic principles of justice as domestic criminal law, it is nonetheless a different process, in a different location, with different personalities. It is more than just a logical space with its own legal precedents; it is a literal space, outside the boundaries of national law, designed to deal with crimes that are inherently international⁵² in character: genocide, war crimes, crimes against humanity, and aggression.⁵³ These are not just ordinary crimes. They are extraordinary, requiring a sophisticated legal culture through which they are defined and analyzed to determine standards of guilt, which defenses apply, and the elements of each offense. This is the kind of transitional justice as special justice that is entirely appropriate—and inescapable.

One sees this tension at the level of the substantive offenses. Genocide and crimes against humanity are by their nature special, and some element of special justice must be marshaled against them. They are by definition collective in nature. The paradigm of genocide is the attempt by one ethnic group to destroy the other, to annihilate them by forcing them from their homes and killing them. Genocide is not simply the attempt by a single individual to kill another human being while being motivated by racial animus. This is a hate crime, but it is not genocide.

Genocide must be backed up by a group plan, policy, or desire to wage existential war on another ethnicity. This conception is borne out by history. During the Holocaust, the Germans wanted to annihilate the Jews. Of course, one might argue that it was only the Nazi leadership—or even just Hitler—that wanted to destroy the Jews. But this reading of history is entirely insensitive to the fact that the crime was not just racial in its definition of the victims, it was also racial in its definition of the *perpetrators*. The Germans saw themselves as a superior Aryan race that would wipe out the inferior Jewish people. One need not subscribe to Goldhagen's controversial thesis that ordinary Germans supported the Holocaust to understand this key point about the collective nature of the Holocaust.⁵⁴

Similarly, the Rwandan and Yugoslavian genocides of the most recent decade were pursued by one group against another. The Hutu, as a group, desired the destruction of the Tutsi, while the Serbians were motivated by a grand desire to expel their enemies and create an ethnically homogenous Greater Serbia. To deny this collective characteristic of the genocide is to engage in the most wishful of thinking. There has been a tendency, since the Enlightenment, to interpret all action at the level of individuals as rational agents, and to deny the ties that bind us together as unfortunate holdovers of the Romantic era.⁵⁵ But the history of the twentieth century suggests that group ties are not only central to our daily lives in a national culture, but also, regrettably, a contributing cause of genocide.

At the level of international criminal law there is some confusion on this point. Several scholars have suggested that a defendant is guilty of genocide when he or she commits a murder with the individual intent to destroy another ethnic group, regardless of whether this murder is committed as part of a larger group plan. The wording of the Rome Statute lends support to this position.⁵⁶ Under this view, the lone homicidal racist who kills one member of another race in the United States would be guilty of genocide as long as he wants to destroy an entire race. It does not matter, on this view, that there is no one else who shares the same genocidal plan. While such an event would undoubtedly be horrible—and criminal—it does not fall under our classic understanding of the term genocide. The crime of genocide is irreducibly collective.⁵⁷

Nonetheless, our modern system of international criminal justice can do nothing to punish an entire ethnic group. Although some institutions of international law are dedicated to adjudicating the actions of states and attributing state responsibility where necessary (think of the ICJ), ad hoc and permanent international criminal tribunals are limited to adjudicating the conduct of individuals. Only individuals can stand trial before the ICC and only individuals have served jail sentences handed down by the ICTY and ICTR. This is the essential project of criminal law. To suggest otherwise, to claim that criminal trials should adjudicate the actions of large groups, offends every Enlightenment principle we have about criminal law. We do not punish individuals based on blood guilt.⁵⁸ Although the actions of the collectives to which they belong may bring upon them collective shame and guilt, the actions of the group do not impose criminal liability on its members (in the absence of specific, individual, culpable conduct). Therefore, this constraint about criminal law is entirely necessary.

This presents a puzzle for transitional justice. The whole point of holding trials in the wake of genocide is to repair the breach between warring ethnic groups. We saw this in the jurisdictional analysis of the ad hoc tribunals and the new ICC; these international criminal institutions gain their very legitimacy from the need to repair these group conflicts. They carry the hope that ethnic groups victimized by genocide can receive the justice they were denied on the battlefield, in the camps, or in the ovens. This is special justice if ever there was. But how do we achieve this group justice? We achieve it by plucking individuals from the chaos, holding out their

actions as worthy of public condemnation, and warranting individual criminal punishment. We achieve this justice by subjecting these unspeakable crimes, perpetrated by the most horrendous of maligned hearts, to the most banal and pedestrian processes of our legal system: rules of evidence, procedure, penal statutes, and precedent. This is not an attempt to redress the balance between ethnic groups, it is the technical and bureaucratic handling of the individual. This is ordinary justice of the most ordinary kind. The two sides of transitional justice come face to face in the ashes of genocide.

Notes

¹ See Louis Bickford, "Transitional Justice," in 3 *The Encyclopedia of Genocide and Crimes Against Humanity* 1045–1047 (New York: Macmillan, 2004) (noting that the term's origin is unclear but was only popularized in academic literature in 1992).

² See, e.g., Neil Kritz (ed), *Transitional Justice: How Emerging Democracies Reckon With Former Regimes* (1992).

³ See, e.g., Ruti Teitel, *Transitional Justice* (Oxford: OUP, 2002).

⁴ See, e.g., Eric Posner & Adrian Vermeule, "Transitional Justice as Ordinary Justice," 117 *Harvard Law Review* 761, 763–64 (2004) (arguing that transitional justice is not qualitatively different from domestic justice because the latter includes its own series of transitions).

⁵ See Teitel, *Transitional Justice*.

⁶ My conception of ordinary justice differs somewhat from that offered by Posner and Vermeule, "Transitional Justice as Ordinary Justice," 768–69; who view both domestic and post-genocidal justice systems as being inherently transitional in some sense. Their argument comes down to the proposition that although post-genocidal justice systems present certain difficulties, they are merely the same difficulties found in domestic criminal systems, although perhaps writ large, and that theorists are inclined to exaggerate the degree to which domestic legal systems are paragons of neutrality and fairness.

⁷ For example, there were vigorous discussions, in both academic and political circles, after the collapse of apartheid over what kind of tribunal was most appropriate. The Truth and Reconciliation Commission model was devised to promote community healing and reparation by giving perpetrators an incentive to fully disclose their participation in apartheid without fearing lengthy imprisonment. This calculation was explicitly driven by socio-political concerns. This model was adopted in other countries with some modifications. See William Schabas & Shane Darcy (eds), *Truth Commissions and Courts: The Tension Between Criminal Justice and the Search for Truth* (2004).

⁸ This is obviously the most difficult aim of transitional justice. Although all programs are designed with this in mind, it is difficult to achieve it in reality. Lingering ethnic hostilities remain in Yugoslavia between ethnic Serbs and ethnic Albanians. Likewise, although the Tutsi succeeded in taking control of Rwanda and ending the genocide, they have not succeeded in building an ethnically cohesive society with Hutus, many of whom fled the country. Nonetheless, this was the goal. See, e.g., Organic Law No. 08/96, Aug. 30, 1996, Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Since 1 October 1990 (noting that prosecution of past crimes was necessary for purposes of reconciliation); Payam Akhavan, "The International Criminal Tribunal For Rwanda: The Politics and Pragmatics of Punishment," 90 *American Journal of International Law* 501, 505 (1996) (discussing "post-conflict peacebuilding" as rationale for creating the ICTR); UN Doc. S/PV.3453, at 15 (1994) (Security Council comments from Rwandan representative that national reconciliation required criminal prosecutions demonstrating an end to impunity).

⁹ Reprisal attacks continue between Serbs and Albanians in Yugoslavia. Similarly, Hutu forces who fled Rwanda after the Tutsi gained power have continued to arm themselves and threaten military attacks.

¹⁰ One might debate what the rules of justice are (and what provides their foundation), but this is a logically distinct issue from whether the rules of justice are universal or require amendments in special circumstances.

¹¹ See Teitel, *Transitional Justice*, 6 (arguing that "[w]hat is deemed just is contingent and informed by prior injustice" and that "[r]esponses to repressive rule inform the meaning of adherence to the rule of law"). Posner and Vermeule, "Transitional Justice as Ordinary Justice," 791 ("The case for retroactive justice need not rest (solely) on a morally disreputable passion").

¹² Of course, theorists using this style of argumentation do not usually advertise their arguments with this language. It would be rhetorically disadvantageous to refer to one's suggestion as "tinkering" with the basic rules of justice. But nonetheless this is precisely the end-result of such arguments. Teitel refers to her account as constructivist because she claims that our notion of the rule of law is socially constructed. See

Teitel, *Transitional Justice*, 19.

¹³ The idea that the rules of morality might have emerged differently if we lived in a social order with different background conditions goes back at least to Hume, if not further. See David Hume, *An Enquiry Concerning the Principles of Morals* (Hackett) (noting that rules of justice emerge in a society that suffers from, *inter alia*, a scarcity of resources that must therefore be regulated).

¹⁴ For Hobbes, the only applicable law in the state of nature was natural law, or *lex naturalis*, the most basic principles of law that do not depend on the establishment of a social contract. See Thomas Hobbes, *Leviathan* (1660) (citing as the first law of nature the right of man to use his power for preservation and self-defense). It was the very skeletal nature of the *jus naturale* that makes the state of nature nasty, brutish, and short. A similar account of natural law is provided by John Locke in his *Two Treatises of Government* (1690), though for Locke the state of nature was not inevitably a state of war. For Locke, the fact that natural rights are so difficult to vindicate in the state of nature (one might not be strong enough to exercise one's right to self-defense against an attack) requires the establishment of the social contract and government.

¹⁵ In essence, genocidal conflict involves the collapse of inter-group arrangements and the return to an international state of nature. The idea of viewing the relationship between states as being analogous to the relationship of individuals in the state of nature, requiring therefore a social contract, has a long tradition. See generally John Rawls, *The Law of Peoples* (1999) (suggesting two-tiered social contract where individuals contract together to form nation-states who then bargain for a second contract to form international arrangements); cf. Charles Beitz, *Political Theory and International Relations* (1979); Thomas Pogge, "An Egalitarian Law of Peoples," 23 *Philosophy and Public Affairs*, 195 (1994) (criticizing Rawlsian international original position).

¹⁶ Rwandan officials originally planned extensive trials with Western standards of due process, but quickly realized that they had neither the resources nor the time to try the roughly 100,000 defendants in custody. They resorted instead to community-based *gacaca* courts. For a discussion of the functioning of these courts, see Mark A. Drumbl, "Rule of Law Amid Lawlessness: Counseling the Accused in Rwanda's Domestic Genocide Trials," 29 *Columbia Human Rights Law Review* 545, 548 (1998) (discussing erratic nature of the prosecutions); L. Danielle Tully, "Human Rights Compliance and the *Gacaca* Jurisdictions in Rwanda," 26 *B.C. International & Comparative Law Review* 385, 402 (2003) (arguing that the genocide's devastation made traditional trials impossible). This is not surprising given that the genocide was carried out not by advanced technology but rather by machete attacks conducted by thousands of perpetrators.

¹⁷ Tully, "Human Rights Compliance and the *Gacaca* Jurisdictions in Rwanda," 395–400 (arguing that *gacaca* courts, though flawed, were the last best chance to deal with the genocide).

¹⁸ On the collective nature of these crimes, see generally George P. Fletcher, "The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt," 111 *Yale Law Journal* 1499 (2002); Claus Kress, "The Darfur Report and Genocidal Intent," 3 *Journal of International Criminal Justice* 562 (2005).

¹⁹ See Jens David Ohlin, "Applying the Death Penalty to Crimes of Genocide," 99 *American Journal of International Law* 747, 763–764 (2005) (arguing that the Rwandan public was willing to forego reprisals only insofar as they believed that the justice system would deal with the *genocidaires*).

²⁰ See Teitel, *Transitional Justice*, 66 (suggesting that "the role of criminal justice in transitional times... goes beyond the concerns ordinarily internal to criminal justice").

²¹ See Jens David Ohlin, "Applying the Death Penalty to Crimes of Genocide," 99 *American Journal of International Law* 747, 761 (2005).

²² Customary international law goes beyond codified treaties or international agreements and is created by the reciprocal practice of states acting according to a perceived legal duty.

²³ Eichmann received the only capital sentence handed down in an Israeli Court. Although it was supported by the general public, there was some debate in intellectual circles. The philosopher Martin Buber objected, as did Karl Jaspers, who suggested that Eichmann should be detained until such time as a competent international tribunal could be convened. See Hannah Arendt, *Eichmann in Jerusalem* 251 (1963); Karl Jaspers, "Who Should Have Tried Eichmann?" (interview by François Bondy, trans. A. Cassese), *Journal of International Criminal Justice* (forthcoming) (arguing that Israel had no authority or jurisdiction to prosecute Eichmann just because the victims of the Holocaust were Jews).

²⁴ See Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, UN Doc. S/25704, at 28 (1993) (recommending that the ICTY Statute exclude the death penalty). The United States was also aware that the death penalty issue was a non-starter on the Security Council because of European objections. See Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal For Rwanda* 583 (1998) (quoting Madeleine Albright).

²⁵ It is unfortunate that the execution proceeded before Hussein's trial for genocide against the Kurds was complete. (The death sentence was carried out after he was found guilty of crimes against humanity for the killing of 147 people in Dujail.) This robbed the legal community of a significant precedent that would have expanded the jurisprudence of genocide.

²⁶ The duty to preserve international peace and security is not simply limited to one provision of the Charter, but is rather pervades the entire document. See UN Charter, pmbll., Art. 1, Art. 39, Art. 42, Art. 43, Art. 52, Art. 54.

²⁷ The Rwandan delegate to the United Nations complained bitterly about the structure of the ICTR, calling it “ineffective” and noting that it seemed designed to appease the conscience of the international community rather than produce justice for Rwandans. UN Doc. S/PV.3453, at 14 (1994). See also José Alvarez, “Crimes of States/Crimes of Hate: Lessons from Rwanda,” 24 *Yale Journal of International Law* 365, 409 (1999) (asking how the ICTR achieved “justice” when its effect was to grant the planners of the genocide lower sentences than they would have received in domestic courts authorized to impose the death penalty).

²⁸ Defendants convicted by the ICTY are housed in prisons by European and Scandinavian states that volunteer the use of their facilities for the completion of international criminal sentences. Many of these jurisdictions have far more liberal attitudes about rehabilitation than Americans, who are generally uncomfortable with the difficult lifestyle inflicted on American prisoners and are somewhat confused to learn that European prisoners live in relative comfort when compared to their American counterparts.

²⁹ See *Prosecutor v. Tadić*, Decision on Jurisdiction, No. IT-94-1 (Aug. 10, 1995) (upholding jurisdiction of the ICTY on the grounds that the Security Council was authorized by the Charter to take any actions necessary to restore collective peace and security, including the creation of ad hoc criminal tribunals).

³⁰ Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 995, annex, pmbll., 33 I.L.M. 1602 (Nov. 8, 1994); Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, annex, pmbll., 32 I.L.M. 1203 (May 25, 1993).

³¹ William A. Schabas, *The Abolition of the Death Penalty in International Law* (2002).

³² The tribunals have only been partially effective in this regard. Ethnic unrest still lingers in Yugoslavia, the status of Kosovo is uncertain, Sarajevo never returned to its cosmopolitan past, and Rwanda still teeters on the verge of ethnic violence with neighbor countries where Hutu extremists sought refuge after the genocide. For a discussion of the Rwandan situation, see, generally, Roméo Dallaire, *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (2003).

³³ Some countries have enshrined an absolute right to life, either in these terms or as a commitment to “human dignity.” Compare Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948) (right to life, liberty, and security of person), with European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221 (Nov. 4, 1950) (providing for exceptions to the right to life, including penal sentences handed down by a lawfully constituted court). See also Schabas, *The Abolition of the Death Penalty in International Law* (viewing death penalty as violating a universal right to life).

³⁴ On the notion of rights forfeiture, see, generally, Stephen Kershner, *Desert, Retribution, and Torture* 125 (2001).

³⁵ See Schabas, *The Abolition of the Death Penalty in International Law* (expressing retentionist position in terms of international human rights law).

³⁶ See General Treaty for the Renunciation of War, art. 1 (Aug. 27, 1928) (outlawing war “as an instrument of national policy in their relations with one another”).

³⁷ See, generally, Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (Boston: Little Brown & Co., 1992).

³⁸ See Judgment, International Military Tribunal at Nuremberg (Sept. 30–Oct. 1, 1946). Although the court noted that the maxim “had no application to the present facts,” the court nonetheless insisted that German officials must have known that Germany had signed treaties renouncing aggressive war and that they were therefore “acting in defiance of international law.”

³⁹ See Judgment, International Military Tribunal at Nuremberg (appealing to the laws of war contained in the Hague Convention). The court admitted that the Hague Convention included no mention of individual criminal liability or trials but noted that military tribunals had traditionally prosecuted such offenses as violations against the laws of war.

⁴⁰ See, e.g., Hans Kelsen, “Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals,” 31 *California Law Review* 530 (1943). Cf. Antonio Cassese, *International Criminal Law* (New York: Oxford University Press, 2003) (concluding that international tribunals must be given wider latitude with the nullum crimen principle than domestic courts).

⁴¹ See Peter Maguire, *Law and War: An American Story* (New York: Columbia University Press, 2000), 90–91.

⁴² See Robert H. Jackson, Opening Address for the United States, International Military Tribunal at Nuremberg (Nov. 21, 1945) (“The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated.”).

⁴³ Serbian nationalists in Yugoslavia were, for obvious reasons, opposed to the creation of a tribunal designed primarily to prosecute members of their ethnic own community. Rwanda, as a rotating member of the Security Council, voted against the creation of the ICTR because the tribunal’s statute did not allow for

the death penalty. See *supra* note 25.

⁴⁴ See Rome Statute, art. 13(b).

⁴⁵ The Security Council's directive was contained in S.C. Res. 1593 (March 31, 2005). See also Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General (2005) (recommending referral to ICC prosecutor after finding evidence in Darfur suggesting war crimes and crimes against humanity).

⁴⁶ To the dismay of some, no prosecutions have yet occurred. See generally, Antonio Cassese, "Is the ICC Still Having Teething Problems?" 4 *Journal of International Criminal Justice* 434 (2006) (critiquing "overly cautious attitude of the Prosecutor").

⁴⁷ Rome Statute, art. 1 (the court "shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern").

⁴⁸ Rome Statute, art. 17.

⁴⁹ See George P. Fletcher & Jens David Ohlin, "The ICC—Two Courts in One?" 4 *Journal of International Criminal Justice* 428 (2006).

⁵⁰ Fletcher and Ohlin, "The ICC—Two Courts in One?" 431.

⁵¹ The completion strategy for the ad hoc tribunals is a subject of much debate. See Carla Del Ponte, Address to UN Security Council (June 30, 2004) (arguing that the ICTY can only complete its work when it prosecutes high-profile defendants still at large and the domestic legal systems of the former Yugoslavia are equipped to handle their own prosecutions).

⁵² These crimes are not limited to international armed conflicts but also apply to internal armed conflicts. Nonetheless they are always of concern to the international community.

⁵³ Aggression is perhaps the most international and collective of crimes because it involves the violation of a state's territorial integrity by another state. Although the crime was prosecuted at Nuremberg, it was not included in either the ICTY or ICTR Statutes and cannot be prosecuted at the ICC until state parties to the Rome Statute agree to a definition of aggression. See Rome Statute for an International Criminal Court, Article 5(2). Agreement on a definition is unlikely in the foreseeable future.

⁵⁴ See Daniel Goldhagen, *Hitler's Willing Executioners: Ordinary Germans and the Holocaust* (London: Abacus, 1997).

⁵⁵ On this point, see George P. Fletcher, *Romantics at War: Glory and Guilt in the Age of Terrorism* (Princeton, New Jersey: Princeton University Press, 2002).

⁵⁶ See Rome Statute, art. 6 (requiring for a charge of genocide that the defendant have an intent to destroy another ethnic group but saying nothing about a collective plan on behalf of the aggressors).

⁵⁷ See Fletcher and Ohlin, "Reclaiming Fundamental Principles of Law in the Darfur Case," 3