



St Antony's International Review

The Future Of International Cooperation

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Notes on Contributors

Jeff Crisp is Director of Policy and Research at the Global Commission on International Migration and former Head of Evaluation and Policy Analysis Unit of the United Nations High Commissioner for Refugees (UNHCR).

Sir Marrack Goulding is Warden of St Antony's College and former UN Under-Secretary-General for Peacekeeping Operations.

Zachary Kaufman is a DPhil candidate in International Relations at the University of Oxford.

David Landau is an MPhil candidate in European Politics and Society at the University of Oxford.

Walter Mattli is University of Oxford Lecturer in International Relations, a member of the Institute of War and Peace Studies and former Associate Professor of International Political Economy at Columbia University.

James Milner is a DPhil candidate in Development Studies at the University of Oxford.

Kalypso Nicolaïdis is University of Oxford Lecturer in International Relations and former Associate Professor in Public Policy at Harvard University's Kennedy School of Government.





Welcome

It is with great pleasure that we welcome you to the inaugural edition of the *St Antony's International Review* (STAIR). Those of you familiar with St Antony's College, at the University of Oxford, will be aware of the College's prominent role as a graduate college that specialises in international research in the social sciences. The College engenders a unique ethos of open, accessible and engaged cross-disciplinary dialogue amongst its diverse body of graduate students and established scholars. This is reflected in the College's specialist area studies centres, its diverse seminar series, the range of prominent international speakers attracted to the College, and even in everyday social exchange.

As an initiative of the graduate students of the College, STAIR seeks to recreate the College's approach to nurturing constructive and accessible dialogue between emerging scholars, established academics and policy makers. The journal will be published in special editions focusing on international issues of contemporary relevance. Rather than adopting a specific theoretical or ideological perspective, it will attempt to showcase a diverse range of disciplinary, theoretical and empirical perspectives that relate to the chosen topic. Innovative features such as discussant pieces, critically engaged interviews and an extended editorial introduction are intended to construct a dynamic debate *between* the featured articles. It is hoped that this will offer a stimulating, interactive and thought-provoking forum from which new ideas will emerge. The journal actively seeks to encourage research students and young academics to publish their work alongside their more established peers.

We hope that you enjoy the journal and will continue to support our endeavours.







Editorial Introduction: 'The Future of International Cooperation' ⁵

by Alexander Betts and Matthew Eagleton-Pierce

Reflecting our aspirations for the journal, the inaugural edition invites empirical and theoretical reflection on the future of international cooperation. In the aftermath of the divisions created by the invasion of Iraq and the questions raised about the future relevance of the United Nations, mapping the contours of inter-state collaboration and identifying the bases of global governance is crucial to the prospects for peace and security. Whether 'coalitions of the willing' or regional structures will supersede global responsibility-sharing, whether religious divides will polarise the West from the Islamic World, or whether the United Nations will adapt through initiatives such as the High-Level Panel on Threats, Challenges and Change, are amongst the key questions that make 'The Future of International Cooperation' so germane for reflection and debate.

Empirical Context

How precisely states reach agreement on coordinating their behaviour in given issue areas is a question that has long vexed academics, diplomats and policy makers. In areas as diverse as the environment, security or trade, overcoming conflict, unilateralism or inactivity by tacit, negotiated or imposed means has been a central concern of international relations.¹ The post-Second World War period, the 1970s and the post-Cold War era all represent junctures at which change and re-evaluation attracted contemplation and innovation in both theory and governance. Our era arguably represents a point at which there is a need for profound questioning of the basis of inter-state cooperation.

Since the 1990s, in particular, globalisation has brought increased interdependence, time-space compression and interconnectedness, expanding the scope of social, cultural and economic interaction.² The opportunities and threats posed by such processes have once again called for response through global governance structures, multilateral approaches or *ad hoc* bilateral cooperation in order to regulate matters such as migration, capital markets, terrorism, international organised crime or infectious disease. As such processes have become increasingly transnational in nature so too have the responses required to adequately address them. Meanwhile, cultural and technological influences such as the media and the internet have led to a growing awareness of global events, selectively mobilising public opinion

A. Betts / M. Eagleton-Pierce 'Editorial Introduction' STAIR 1, No 1 (2005): 5-9.





- 6 and protest to direct government attention towards issues such as human rights and peacekeeping, previously delimited by Westphalian conceptions of state sovereignty.

The aftermath of 9/11, the consequences of the ‘war on terror’ and the invasion of Iraq, in particular, highlight the renewed need for reflection upon the existing structures of global governance and their inadequacies as well as the concerns of states and other actors in the face of these challenges. Responses based on isolationism, unilateralism, ‘coalitions of the willing,’ abdication of legal or normative responsibilities or aggression will have a profound impact on civilisation if they supplant the multilateral consensus that has emerged through the United Nations. The central empirical question is: what future role can international cooperation assume in light of the perceived cultural, religious, strategic, and political faultlines—whether at transatlantic or global levels?

Theoretical Context

Mainstream international relations commonly defines international cooperation as occurring “when actors adjust their behaviour to the actual or anticipated preferences of others through a process of policy coordination”.⁴ In many ways Keohane’s ‘consensus definition’ reflects the dominance of theoretical approaches to international cooperation by liberal institutionalism. Drawing upon microeconomic theory and, in particular, the notion of Prisoner’s Dilemma (PD), the idea of converging preferences draws on the assumption that states could be conceived as rational unitary actors in which exchange and interaction could bring positive sum gains.⁵ Overcoming collective action failure is based on the Olsonian logic of overcoming PD, in which states hold common goals in given issue areas but the non-exclusivity of the benefits from cooperation mean ‘free-riding’ will lead to ‘sub-optimal’ provision.⁶ This conception of international cooperation as synonymous with overcoming collective action failure dictated the theoretical diagnosis of the sources of cooperation and their solutions. Cooperation was therefore conceived as the creation of the systemic institutional conditions in which interests could converge. The function of regimes as ‘principles, norms, rules, and decision-making procedures,’⁷ hegemony and leadership,⁸ and epistemic communities⁹ were developed as a basis for creating stability and contributing to the convergence of expectations between states.

More recent critical writing has moved beyond a systemic level of analysis grounded in the assumptions of game theory to contribute to the literature on norms and to reflect on the ways in which state identities are socially constructed either internationally or domestically. Rather than assuming states to be rational actors, the constructivist literature argues





that the formation of state identity is mutually constitutive of ‘national interest’.¹⁰ In this context, the preferences of states are viewed less rigidly and are understood to be more cognitive than materialist. In its application to cooperation on human rights issues, the literature explores how many states have come to inculcate an inter-subjective acceptance of legal and normative structures enshrined in the human rights regime. 7

Approaches drawing on a Habermasian Critical Theory have stressed the role of argument—whether at a state, sub-state or transnational level—in persuading state actors of the merits of cooperative action.¹¹ There has been growing acknowledgement that non-state actors such as multinational corporations (MNCs) and transnational non-governmental organisations (NGOs) play a significant role in shaping state behaviour.¹² The question is whether any of the above theoretical approaches offer *significant* contribution to understanding contemporary international cooperation? If so, which insights remain most salient; does theory have any heuristic value in explaining or predicting the future prospects for international cooperation?

The Papers

The papers assembled in this edition invite critical reflection on these areas of theory and practice through a selective analysis of key issue-areas in which the cooperation between states is evolving and adapting. Transitional governance is, by definition, an area requiring international cooperation. In the absence of a viable and functioning state in need of external intervention following internal conflict or external aggression, collaboration by external actors may be required if the legacy of protracted insecurity, conflict or injustice is to be overcome and national reconciliation achieved. Given the contemporary cooperative efforts for post-conflict reconstruction in Iraq and Afghanistan in the context of the ‘war on terror’ and the growing significance of such endeavours in post-conflict societies such as Sierra Leone and Liberia, Sir Marrack Goulding’s contribution is of particular relevance. Drawing upon his personal experiences as United Nations Under-Secretary General for Peacekeeping, Sir Marrack discusses the role of the United Nations in post-conflict reconstruction. He draws on a range of past case studies in order to highlight the multi-dimensional complexities of post-conflict reconstruction and draw insights for the conditions required for successful reconstruction.

Zachary Kaufman meanwhile writes about the related topic of transitional justice by reviewing a number of global and national approaches in order to draw foreign policy lessons for the available methods of engaging with post-conflict transitional justice and reconciliation. His analysis of the range of options offered by national courts and military courts, military





- 8 commissions, foreign national courts, *ad hoc* UN tribunals, coalition treaty-based criminal tribunals, or structures adapted to be culturally or religiously specific draws upon cases such as Rwanda, Iraq, Nigeria, and the ICC to inform state approaches to international justice.

Jeff Crisp's paper evaluates the extent to which a new paradigm is emerging in the global refugee regime. In the context of growing intolerance towards asylum and migration in the North and towards the presence of refugees in protracted situations in the South, he considers the new approaches being adopted unilaterally, bilaterally and multilaterally by states to address the crisis. He reflects upon the new extraterritorial approaches and the motives underlying them to highlight a number of important issues for the future direction of the global refugee and migration regimes.

Kalypso Nicolaïdis' piece evaluates the future of transatlantic relations in the aftermath of the invasion of Iraq. She argues that cooperation between the EU and the US should be as much about 'living with our differences' as about reaching agreement. A cooperative relationship, she argues, need not be dependent upon a common European position. Even within Europe divergences can and should be accommodated. She explores what constructive diversity might imply for the Middle East peace process, the World Trade Organisation (WTO) negotiations and humanitarian intervention.

Meanwhile, in light of these empirical pieces, the interview with Walter Mattli offers insights to the broader questions of how the invasion of Iraq and the emerging doctrine of pre-emption might influence future international cooperation. Mattli assesses the role and limitations of international relations theory in responding to such questions. In line with STAIR's desire to foster cross-disciplinary dialogue, the two discussant papers by James Milner and David Landau critically review the papers by Jeff Crisp and Kalypso Nicolaïdis. Chris Bickerton reviews two books by Robert Cooper and Michael Mann that explore the issues of liberal imperialism and *Pax Globalis*. Miles Tendi's review of Francis Fukuyama's *State Building Governance and World Order in the 21st Century* considers the implications of 9/11 for state governance. And finally, Miriam Prys' review of O'Brien and Clesse's edited volume, *Two Hegemonies* contributes a historical dimension to the role of hegemony in global governance.

Notes

¹ Helen Milner, 'International Theories of Cooperation Among Nations: Strengths and Weaknesses,' *World Politics* 44, no. 3 (1992): 466-496.

² David Held and Anthony McGrew, 'The Great Globalization Debate: An Introduction' in *The Global Transformations Reader*, ed. David Held and Anthony McGrew (Oxford: Blackwell Publishing, 2003).





³ Samuel Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Touchstone, 1996).

⁴ Robert Keohane, *After Hegemony* (Princeton: Princeton University Press, 1984) 51.

⁵ Robert Axelrod, *The Evolution of Cooperation* (New York: Basic Books, 1984).

⁶ Mancur Olson, *The Logic of Collective Action*, (Cambridge: Harvard University Press, 1965).

⁷ Stephen Krasner, 'Structural Causes and Regime Consequences,' in *International Regimes*, ed. Stephen Krasner. (Ithaca: Cornell University Press), 1.

⁸ Charles Kindleberger, *The World in Depression 1929-39*, (London: Penguin, 1973), 292; David Calleo, *Beyond American Hegemony*, (New York: Columbia University Press, 1987), 104.

⁹ Peter Haas, 'Do Regimes Matter? Epistemic Communication and Mediterranean Pollution Control,' *International Organization*, 43, no. 3 (1989): 377-404.

¹⁰ Jeffrey Checkel, 'Norms, Institutions, and National Identity in Contemporary Europe,' *International Studies Quarterly* 43, no. 1 (1999): 83-114; Thomas Risse and Kathryn Sikkink, 'The Socialization of International Human Rights Norms Into Domestic Practices: Introduction,' in *The Power of Human Rights: International Norms and Domestic Change*, eds. Thomas Risse, Stephen C. Ropp and Kathryn Sikkink. (Cambridge: Cambridge University Press, 2002), 1-38; Alexander Wendt, 'Anarchy Is What States Make Of It: The Social Construction of World Politics,' *International Organization* 46, no. 2 (1992): 391-425; Jutta Weldes, *Constructing National Interests: The United States and the Cuban Missile Crisis* (Minnesota: University of Minnesota Press, 1999).

¹¹ Thomas Risse, 'Let's Argue!': Communicative Action in World Politics,' *International Organization* 54, no. 1 (2000): 1-39; Neta C. Crawford, *Argument and Change in World Politics: Ethics, Decolonization and Humanitarian Intervention* (Cambridge: Cambridge University Press, 2002).

¹² Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders: Transnational Advocacy Networks in International Politics* (Ithaca: Cornell University Press, 1998) explores the role of transnational NGOs; Rodney Bruce Hall and Thomas J. Biersteker, *The Emergence of Private Authority in Global Governance* (Cambridge: Cambridge University Press, 2003) offers insights into the growing influence of private sector actors in the global political economy.





Post-Conflict Reconstruction: Do We Understand What It Is?

by Sir Marrack Goulding

During the last 15 years, the international community, led by the United Nations, has developed a range of techniques for the prevention, management and resolution of conflict—for example, peace enforcement, sanctions, humanitarian intervention, peacemaking, peacekeeping, peacebuilding, and post-conflict reconstruction. Some of these techniques, such as peacemaking, have a long history and are widely understood. Others, including humanitarian intervention, have existed for a while but have only recently become a standard term in the international relations lexicon. Still others are newly emerged concepts, which scholars recognise widely but governments and international organisations understand less than perfectly, and which therefore prove difficult to implement. Post-conflict reconstruction is the prime example of this last category, closely followed by peacebuilding. Before embarking on an exploration of the characteristics of post-conflict reconstruction, it is necessary to state two caveats.

The first caveat relates to the United Nations (UN). Debate about the UN is often complicated by a lack of clarity about what constitutes 'the United Nations.' Does this phrase refer to the United Nations Organisation established by its Charter in 1945 with member states and six 'principal organs'?¹ Does it refer to the United Nations 'system,' which consists of the United Nations Organisation and the host of specialised agencies, programmes, funds and offices established by or accreted to it since 1945? Does 'the United Nations' imply the united—and often less than united—nations that are its member states? Or, does the term simply allude to the Secretary-General and his—or soon, let us hope, her—Secretariat?² In this article, 'the United Nations' refers to the entire United Nations Organisation, including its member states, principal organs and the Secretariat, but excluding the specialised agencies, etc., unless specifically indicated.

The second caveat regards the nature of conflict. It is a practitioner's caveat. Be careful about theory. Do not ignore or reject it; it can provide valuable insights into the nature of a conflict and the measures that can, in theory, bring that conflict under control. However, the practitioner must always keep in mind that every conflict has a character and dynamic of its own, and that the particular characteristics of the conflict in question may be a more important determinant of the actions necessary than those indicated by general theory. The member states often press the Secretariat

M. Goulding 'Post-Conflict Reconstruction' STAIR 1, No 1 (2005): 10-24.





to define and disseminate lessons learned from past conflicts. But they, and the Secretariat, must always remember that the Secretariat's priority should be to acquaint itself with the specific characteristics of each new conflict and avoid generalisation. 11

In the past, the Secretariat often has failed to maintain this priority. I sometimes shudder to remember how ignorant and amateurish we in the Secretariat were in the early 1990s, as we tackled the new conflicts that arose from the disintegration of the Soviet Union and Yugoslavia, states whose internal dynamics had not previously been on the agenda of the UN. The UN's first involvement in the Yugoslav wars was in November 1991 when Secretary-General Pérez de Cuéllar asked Cyrus Vance, the former US Secretary of State, to negotiate a cease-fire between the forces of the newly independent Republic of Croatia and those of the Socialist Federative Republic of Yugoslavia (SFRY) which was trying to prevent the Croatians from asserting their sovereignty in the Serb-inhabited parts of Croatia. Vance asked me, in my capacity as UN Under-Secretary-General for Peacekeeping Operations, to prepare a plan for the deployment of a UN operation to monitor the cease-fire. I did so, drawing on previous UN experience of such operations. But when the time came to negotiate the plan with the two sides, my staff's and my ignorance of the political dimensions of the conflict became painfully evident. And we found ourselves in the same predicament when the Bosnian war erupted a few months later.

Three sections follow. The first analyses the different types of post-conflict situations in which international involvement in reconstruction may be required. The second section analyses the different forms that reconstruction can take. And the third provides a list of the conditions that, in my view, have to be fulfilled if reconstruction is to succeed.

1. Types of Post-Conflict Situations

The following questions reveal the four variables of post-conflict situations:

1. Is the conflict between states or a conflict within a state?

Since the Cold War began to thaw in 1989, there have been few conflicts between states—i.e. few 'inter-state wars.' The high profile examples of this type of conflict were Iraq's invasion of Kuwait in 1990, the subsequent multinational operation to liberate Kuwait in 1991, the war between Ethiopia and Eritrea in 1998 and the invasion of Iraq by the United States and 'the coalition of the willing' in 2003. Almost all other recent conflicts have been civil wars—i.e. those occurring within a state. Occasionally, however, other states participate in the combat of civil wars, either to advance their own interests—for instance, the United States' actions in Afghanistan after





- 12 9/II or Rwanda's involvement in the Democratic Republic of the Congo—or to try to impose peace on the hostile parties—such as Nigeria in Liberia.

Some conflicts, however, do not exhibit the characteristics of either an inter-state or civil war. The conflict between Israel and the Palestinians, for instance, is neither an inter-state war, since Palestine is not yet a state, nor a civil war, as the Palestinians in the Occupied Territories are not Israeli citizens. Furthermore, the complicated wars that followed the break-up of Yugoslavia challenge the inter-state/civil war dichotomy. Was the war in Bosnia and Herzegovina (Bosnia), for example, a tripartite civil war between Bosnian Croats, Bosnian Muslims and Bosnian Serbs? Was it a civil war in which the neighbouring states of Croatia and what remained of the Socialist Federative Republic of Yugoslavia (SFRY) took part in order to advance their own interests? Or, was it an inter-state war between Croatia and the rump of the SFRY, on the one hand, and Bosnia on the other? Opinions differ, often violently, on such categorisations.

The main impact that the inter-state versus civil war distinction has on post-conflict reconstruction relates to the vexed issue of sovereignty. When the conflict is between states, international law and customary international practice permit international institutions to play a role in the prevention, management and resolution of the conflict, including post-conflict reconstruction. If reconstruction is required in a state emerging from a civil war, however, offers of international involvement may be resisted by that state's government on the grounds that this would constitute a violation of sovereignty. This is particularly problematic for the United Nations, because its Charter states unequivocally that 'nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.'³ All actions required after the end of a civil war fall under this restriction. The UN, therefore, must proceed with caution in these cases.

Sovereignty also becomes a complication when international institutions wish to engage in peacebuilding by helping to address the root causes of a recently ended civil war. These root causes often include intensely domestic issues, such as ethnic discrimination, unjust law enforcement, corrupt politics, and land tenure. If the government of the state concerned takes the position that any international involvement in these issues would violate its sovereignty, there is very little that international organisations can do. This can be especially threatening to the long-term peace process if the government was a protagonist in the conflict, rather than a newly constituted post-conflict government.

During the last 15 years, however, the supremacy of sovereignty has eroded somewhat, both in theory and in practice. In 1991, Secretary-Gen-





eral Pérez de Cuéllar stated publicly that international law must not stagnate but instead must keep pace with changes in international development. He suggested that, perhaps, a balance had emerged between the rights of states, as confirmed by the Charter, and the rights of individuals, as confirmed by the Universal Declaration of Human Rights. He questioned whether this new balance, therefore, called into question the notion that sovereignty was inviolable. This statement was remarkable to hear from a jurist of Latin America, a region that traditionally defends sovereignty vigorously. 13

A decade later, the International Commission on Intervention and State Sovereignty (ICISS), which is an independent body appointed by the Canadian government, made a persuasive case that 'state sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself,' and that 'where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.'⁴ Secretary-General Annan has, from the moment he took office, assiduously argued that international intervention—including military intervention—is justified in such circumstances, provided that the Security Council authorises the operation.

This modest loosening of the constraints of sovereignty has made it easier for the United Nations and other international organisations to contribute to post-civil war reconstruction in such countries or territories as Cambodia, East Timor, El Salvador, Guatemala, Haiti, and the former Yugoslavia (Bosnia, Eastern Slavonia, Kosovo, Macedonia). In some of these cases, the international contribution has taken the form of a transitional administration, thereby satisfying one of the most pressing conditions for post-conflict reconstruction. However, optimism must be restrained. ICISS has not submitted its report to either the General Assembly or the Security Council for endorsement, as it is unlikely that it would obtain majority approval in either body. The supremacy of sovereignty will gradually diminish not due to a formal vote but to the accumulation of precedents that will eventually constitute 'customary international practice' and, thus, legitimise by-passing sovereignty in certain clearly defined circumstances.

2. Why has the conflict come to an end?

Has one hostile party defeated the other? Have the two sides fought themselves to a standstill, and now are prepared to accept a cease-fire while they regroup for a possible resumption of conflict? Or, has a third party persuaded both participants that neither can win the war and that the least





- 14 bad option for all involved is to negotiate a settlement of the dispute that originally led to the conflict?

In the case of an inter-state war that has ended with one clear victor state, there are several possible outcomes. The victorious state could annex some, or all, of the losing state's territory on what it intends to be a permanent basis—as Iraq intended to do in Kuwait in 1990. Alternatively, the winner may occupy the other state's territory temporarily to establish an acceptable regime in that state—for example, the Allies' occupations of Germany and Japan in 1945 or Iraq, it was hoped, in 2003. Another potential outcome is that the winner could retain conquered territory as a bargaining chip for use in the eventual negotiation of a peace settlement, which is one of the two pretexts for Israel's occupation of various sectors of Arab territory since 1967—the other being the claim that these occupations are necessary to ensure the security of Israel and the settlements it has built illegally in the occupied Palestinian and Syrian territories. Finally, the victor could decide to withdraw from the loser's territory in due course, hoping that humiliation and defeat will deter further provocation. Various incursions by Israel into neighbouring Arab states and, perhaps, Iraq's original intentions toward Iran in the 1980s could be examples of this last scenario. Only the second and third of these outcomes—in other words, time-limited occupation for nation-building purposes and occupation as an incentive for the negotiation of a peace settlement—offer opportunities for international participation in post-conflict reconstruction.

The opportunity for international involvement in the nation-building context depends critically on acceptance of the occupation by the people of the defeated state. This condition rarely is fulfilled. It was fulfilled, however, in Germany and Japan after WWII for three reasons: the shattering defeat both countries suffered, their well-educated population's recognition that their leaders had led them disastrously astray and the comparatively benevolent nature of the allied occupation—with the exception of the Soviet occupied sectors of Germany and Austria. The norm, however, is that defeated people hate occupation by foreign armies. They resort to violence in order to resist, and hopefully end, the occupation. The occupying power then responds with overwhelming force and little concern for civilian casualties, thereby fuelling hatred and strengthening resistance. This scenario is unwinding in Iraq today and will continue to do so as long as the US-led occupation lasts.

Occupation as an incentive for the negotiation of a peace settlement can create opportunities for international participation in post-conflict reconstruction, provided that all parties concerned, namely the parties to the conflict and the international agents of post-conflict reconstruction, are in broad agreement on what the settlement will be and how it will be final-





ised. In the case of Palestine, those conditions were briefly met when the Oslo Accords were signed in 1993, and, subsequently, the Nobel Peace Prize was awarded to the Israeli and Palestinian leaders. The European Union and other donors invested heavily in the Occupied Palestinian Territories to strengthen the Palestinian Authority and to start building a future independent state of Palestine. Their generosity, however, turned to nought when extremists on both sides committed acts of terrorism, Israel continued to build settlements in the Occupied Territories, Palestinians resumed their armed resistance to the Israeli occupation, and Israel responded by destroying Gaza International Airport and other infrastructure funded by the European Union and other donors. 15

In the case of civil wars, different questions arise about why and how the conflict has ended. If one faction has won militarily, will it seek to embrace the other in national reconciliation? Or, will it discriminate against the losers, harassing them and curtailing their political and economic rights, even though this is likely to fuel further conflict? The first eventuality—national reconciliation—creates considerable opportunities for international participation in reconstruction and peacebuilding, provided that the above-mentioned sovereignty issues do not create obstacles. The second eventuality—persecution of the defeated—amounts to a return to the discriminatory *status quo* that preceded, and caused, the conflict. All that the international community can do is to try to persuade the victors that, unless they bring their policies into line with the Universal Declaration of Human Rights and subsequent international conventions in that field, conflict eventually will erupt again. This is a hard case to sell, however, not least because the victorious government can legitimately claim that the United Nations and other international bodies have no right to intervene in matters within its domestic jurisdiction. Thus, sovereignty becomes an obstacle again.

3. Why do nations apply double standards when asked to help consolidate a peace in order to prevent further human suffering and political and economic disruption? Why do some war-torn regions and countries receive international help and others do not?

There are at least five answers. One answer regards geopolitical constraints. After Hanoi's victory in the Vietnam War, few NATO countries were interested in helping to reconstruct—or, more accurately, construct the newly unified country. Another possible constraint is regional. For example, the Association of Southeast Asian Nations (ASEAN) has good relations with the West, but it consistently declines to support Western efforts to encourage peace and respect for human rights in Myanmar. Furthermore, some of its member states were less than enthusiastic about the West's eagerness to consolidate peace in Cambodia after the peace settlement was signed there.





- 16 A third constraint concerns donor states' national interests. The state or states concerned may or may not matter to a potential donor state. Ethical constraints provide another answer. A donor state may feel that the post-conflict government is one that they cannot ethically support? Civil war has so far been avoided in Zimbabwe, but whether the international community would be willing to help President Robert Mugabe to consolidate the existing situation there is certainly questionable. One last potential constraint on a donor state's involvement regards doubts about the durability of the peace. In some parts of the world, especially in Western and Central Africa, many peace agreements are signed, but few are implemented. Donor governments are understandably reluctant to commit resources unless it is clear that there is a peace to build.

We have to recognise that the international donor community will not be prepared to contribute to post-conflict reconstruction in all cases. Even if it does decide to contribute, states may not have the long-term commitment to support reconstruction programmes that may take decades to produce the desired results and which may be disturbed by outbreaks of renewed conflict. Furthermore, states may lack the tact to operate from the back seat, allowing nationals of the country or countries concerned to lead the reconstruction programmes in their own country.

4. To what extent will the governments and people of the post-conflict states allow outsiders to advise and guide them in the reconstruction of their country?

As already mentioned, international reconstruction programmes, more than any other type of international peace operation, encroach on issues of an essentially domestic nature and may violate the perceived sovereignty of the country concerned. As a result, international officials engaged in such activities are more exposed to local hostility than their military colleagues because they give the impression of being a permanent fixture rather than a transitional stop-gap deployment.

I learned this lesson in El Salvador. For three years, we in the UN, with the support of five interested countries, had worked day and night to mediate a negotiated settlement between the government and the insurgent movement Farabundo Marti Liberation Front (FMLN)⁵. On the day the peace agreement was signed, we were national heroes, applauded and embraced everywhere. As is usually the case after a peace settlement has been negotiated, a 'multifunctional'⁶ UN peacekeeping operation remained in the country to help implement the agreement and to participate in an extensive reconstruction programme. Within a few weeks, the mood had changed. The UN representatives and staff were no longer heroes, and the locals began referring to them as *la Peste Blanca* (The White Death) after





the white UN vehicles that clogged their roads and crowded their beaches at the weekend. 17

This change in perception is an important aspect of post-conflict reconstruction after a civil war. Once the fighting has ended and the settlement has been signed, international mediators and agencies of reconstruction must leave the lightest possible footprint, delegating the work to indigenous institutions and individuals. The suffering people want their country back.

II. What is Reconstruction?

The definition of reconstruction is the second set of issues referred to in the introduction of this article. 'Post-conflict reconstruction' is a very broad concept involving six aspects:

- security
- political reconstruction
- justice
- human rights
- economic and social reconstruction
- civil society

All six of these components are more relevant to civil wars than to wars between states, but they also can have some relevance in the post-conflict reconstruction following inter-state wars. A current example, of course, is the situation in Iraq, where the United States and Britain, in a bizarre throwback to the nineteenth century, have toppled a regime they did not like and are trying to replace it with one more amenable to their interests. This occasionally worked in nineteenth century Africa, but it will not work in the Middle East in the twenty-first century.

1. Security

Obviously, security is a necessary condition for the success of the five other components of reconstruction. The question is, who will provide the security? As we see daily in Iraq, occupying powers cannot provide security without causing more problems for themselves and making dissidents in the occupied territory resent them all the more. Usually, the state's existing security forces cannot provide adequate security themselves. In civil war, the government's police and military forces often find it difficult to win credibility as an unbiased force for national reconciliation due to previous involvement in the conflict. Similarly, after an inter-state war, the defeated and occupied state's security forces are unlikely to want to work for the





- 18 recent enemy—and the latter is unlikely to have much confidence in their loyalty or competence.

Two alternative solutions to the problem of security have emerged in recent years. One is to remove from the existing police force individuals who were responsible for violations of human rights during the conflict and to recruit in their place former rebel combatants with a clean human rights record. This was the solution envisaged for Namibia and Cambodia, but it did not work well in either case. The other solution is to disband the existing police force, establish a new one and include in its ranks demobilised combatants from both sides. This option is better than the first in terms of national reconciliation, but it takes longer to achieve and costs more. It also requires more international involvement both in training the new police force—Spain played the lead role in El Salvador—and in maintaining order until a new police force is ready. Governments, however, do not like lending their police officers to the UN for executive police duties, rather than advisory or monitoring ones, and it is usually impossible to avoid reliance on the old force until the new one is ready.

As regards the post-conflict role of military forces, the norm advocated by international mediators is that the military should have no role in the maintenance of internal security, other than to come to the aid of the civil power in extreme circumstances. Countries in which the military historically have played an important role in politics and the maintenance of internal security, however, do not always receive this advice well.

2. Political Reconstruction

A constitution accepted by both sides and in force must exist, or new political institutions must conform to that constitution. A completely redrafted constitution is rarely required. Namibia and Cambodia are the only cases that come to mind. The norm is that, as part of the negotiated settlement, the two sides agree on amendments needed to the existing constitution, an internationally monitored parliamentary election is held and the new parliament then approves the amendments.

As in the case of security, there is a potentially dangerous constitutional gap after the end of the fighting and before effective political structures have begun to function. In most negotiated settlements, the UN fields a multifunctional peacekeeping operation which has responsibility for ensuring, as best it can, that the two sides honour the commitments that they accepted in the peace agreement and for using its good offices⁷ to resolve differences in interpretation of the peace agreement. Such operations include civilian specialists to perform these and other non-military duties. In Cambodia, the head of the UN Transitional Authority in Cambodia (UNTAC) was even





given powers, during the transitional phase, to determine policy himself, if the leaders of the four factions could not agree among themselves. Special Representatives of the UN Secretary-General have also received executive political powers in the transitional administrations in such disputed territories as Eastern Slavonia, Kosovo and East Timor.⁸ 19

These measure, however, are interim ones and largely stop-gap in nature. If political reconstruction is to succeed, the representatives of the people of the state concerned must reach an agreement on what the new political structures should be and must pledge to work within them.

3. *Justice*

A functioning and honest judicial system is another essential element in post-conflict reconstruction. But, at the end of civil wars this condition is only rarely fulfilled. Even if the judges survive the war and remain in office, their infrastructure—police, courts, lawyers—is likely damaged and they themselves may be tainted by association with government excesses during the war. In some cases, such as Somalia, the judicial system has disappeared completely and a new one developed.

Some advocate setting up a basic judicial system that could mobilise urgently as an interim solution while a war-torn country restores its own system. Its judges and lawyers would be from foreign countries and would be recruited on a stand-by basis, committing themselves to be ready to travel at x days notice. The foreign judges, lawyers and personnel would bring with them a basic criminal code, basic rules of evidence and basic court procedures endorsed by the Security Council. They would remain in the field only as long as it took to establish a new national judicial system.

This temporary foreign judicial system may seem an unduly complicated, short-term arrangement that would be difficult to implement. This may be true, but experience shows that the implementation of peace settlements is vulnerable to the crime wave that usually follows the end of a civil war. Demobilised combatants from both sides, unable to find employment in an economy ravaged by war and without any other source of income, turn to crime to feed themselves and their families. In El Salvador, for instance, young draft-dodgers and refugees who had spent the war in California flooded back to their own country as soon as the war ended and immediately infected it with the gang culture of Los Angeles. The same phenomenon has occurred in Bosnia, which has become one of the organized crime centres of Europe. If there are no effective institutions for law enforcement, the criminals prosper and the honest suffer.





20 4. *Human Rights*

Respect for human rights is another essential element of post-conflict reconstruction. Most civil wars are, to some extent, a response to violations of human rights, such as brutal methods of law enforcement, official corruption, kidnappings for ransom, unjust courts, ethnic discrimination, and inequitable division of the national wealth and so on. These are among the root causes that must be addressed in order to avoid future conflict. The causes of conflict are, of course, intensely domestic in nature and, therefore, difficult for international agencies to handle. Nevertheless, from the 1989 Namibia operation onwards, all UN mediations and all multifunctional operations fielded by the UN to help parties implement a negotiated settlement have given high priority to establishing the local structures and procedures needed to reduce the risk that human rights abuses will recur and provoke a new conflict.

The peace agreement must include, in particular, the following four provisions:

- A provision that requires both sides to respect human rights. In El Salvador, the agreement on human rights was the first to be signed, while fighting was still going on and eighteen months before the two parties signed the full package of agreements.
- A provision for reform in fields where people's rights have been violated institutionally. In the Guatemala settlement, for instance, there were agreements on human rights generally, on the human rights of those who had been displaced by the war and on the rights of indigenous peoples, primarily the Maya, who had suffered centuries of discrimination and brutality and whose resentment at their exclusion from society had been a major cause of the war.
- A provision for the establishment of a permanent independent institution—ombudsman, commissioner for human rights, etc.—to monitor how well human rights are respected.
- A provision for the appointment of a commission to prepare and publish a comprehensive report on the human rights violations that occurred during the conflict. This process is often very painful. The commission will point fingers, name names, reopen old wounds, revive old grief and anger and cause much stress for the leaders of both sides. All recent experience shows, however, that such exercises, painful though they are, have a cathartic and therapeutic effect, providing an account that enables people to put the past behind them and move on to a better future.





5. *Economic and Social Reconstruction*

21

For many, economic and social reconstruction is what ‘post-conflict reconstruction’ is all about. It is certainly an important element in reconstruction, but it should not receive priority over security, political reconstruction and justice, the establishment of which are necessary conditions for economic and social reconstruction to succeed. One of the mistakes of the international community in Cambodia was to pledge a huge sum of money for the economic reconstruction of the country without taking sufficient account of the severe political and security problems that threatened the future of the peace process. That threat needed not money—that could come later—but rather a political input from the major powers and Cambodia’s neighbours.

Nevertheless, economic and social reconstruction is of great and long-term importance if a state is to move from civil war to participatory politics and a stable peace. This process requires a commitment of resources and discreet advice by the international community over a period of at least ten years. It also demands effective coordination in selecting and implementing the various projects which will be proposed by well-intentioned states and intergovernmental organisations. Coordination is essential, which is acknowledged by everyone but rarely achieved. Over the years, the UN system has devoted a great deal of time to improving coordination, but it has largely failed. This failure is due to the fact that each of the agencies has its own intergovernmental policy-making body, its own mandate, its own chain of command and its own budget. The UN’s own failings in this respect diminish its credibility as a coordinating agency for the wider international community. This is a long-standing problem that needs more serious and effective attention.

It is also important to bear in mind that economic reconstruction is not only a long-term objective. It should begin immediately, as soon as the peace agreement is signed, provided that, as already stated, the necessary steps are being taken to establish the security, political and legal structures without which economic and social reconstruction cannot succeed. Special priority must be given to the creation of employment for demobilised combatants. The same can be said of social reconstruction, which entails the restoration of social services such as health, education and the provision of utilities. Early progress in this field can do a great deal to convince the people that real changes are under way and that it is in their interests to accept and cooperate with both the international providers of reconstruction and the emerging post-conflict political structures.





22 6. Civil Society

Finally, post-conflict reconstruction must include restoration of the state's civil society institutions. Civil war often severely damages these civil institutions by incapacitation, by political dissension within their ranks, persecution by one side or the other, threats to their financial viability through a shortage of funds and a loss of international connections. Skilful international mediators will involve civil society institutions in the peacemaking process, informing them—as far as confidentiality permits—about the progress of the negotiations, encouraging them to spread the word about the benefits that citizens will gain if the two sides make the concessions needed for a settlement and consulting them about how to undertake post-conflict reconstruction.

This sort of dialogue between mediators and civil society institutions brings benefits to both. It empowers the institutions and gives them hope for the future, and it provides the mediators with both a sounding board and a means of spreading the truth about the negotiations, a truth which the parties' own public utterances often distort.

The institutions of civil society have an equally important role after the conclusion of a peace settlement. They can help return and resettle refugees, find jobs for demobilised combatants and care for orphans and war-wounded, among other tasks. Such institutions also can be watchdogs that will bark if they find that the provisions of the peace settlement are not being respected.

Civil society institutions also can play an important role in international efforts to address the root causes of the recently ended conflict. As already stated, these are usually sensitive domestic issues which often give rise to the sovereignty problem and in which neither side may want foreigners to participate. Local non-governmental organisations (NGOs) that support the peace settlement can provide a channel through which foreign NGOs and governments can contribute ideas, experts and money, to local efforts to ensure the full implementation of the peace settlement is fully implemented.

III. The Conditions Required for Successful Reconstruction

To conclude, here are the seven conditions which, in my view, must be fulfilled for post-conflict reconstruction to succeed:

- There must be a fully negotiated and genuinely accepted peace agreement between the hostile parties, be they states or factions within a state.
- The agreement must address the root causes of the conflict (a mere cease-fire agreement is not enough, though it can be useful as a pre-





ude to negotiation of a comprehensive settlement) and should include 23
an agreed timetable for the implementation of its various provisions.

- There must be an international agency, resident in the state or states concerned, to monitor the parties' implementation of the agreement and to help them resolve any disputes that may arise about its interpretation.
- The international agency must take the lead in encouraging other states and agencies to help implement provisions in the agreement which require international cooperation, especially in the field of economic reconstruction. The chosen agency also must coordinate such programmes in order to avoid inconsistency or duplication.
- The international agency must discreetly encourage civil society institutions in other states, especially donor states, to participate in the reconstruction.
- The parties must 'sell' the agreement to their supporters and ensure that they understand what it implies for them and that they do not obstruct its implementation.
- In states emerging from a civil war, priority must be given to six objectives:
 - a. the establishment and maintenance of security, with international involvement being as brief as possible and preferably advisory rather than executive;
 - b. the creation of any new political institutions provided for in the peace agreement;
 - c. the re-establishment of an effective judicial system;
 - d. the disarmament, demobilisation and reintegration of combatants, other than those retained in, or recruited for, the state's national armed forces;
 - e. the establishment of an independent institution to monitor human rights and advocate reform where reform is needed; and
 - f. the establishment of a commission to report on the violations of human rights that occurred during the war.

On the basis of my professional experience, peace settlements rarely fulfil all of these conditions. In my view, the one that came nearest to it was El Salvador. Consequently, there is clearly a need for further comparative research to critically reflect on the circumstances under which these conditions can best be achieved.





24 Notes

¹ The principle organs include the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council (now defunct), the International Court of Justice and the Secretariat, headed by the Secretary-General.

² When I joined the Secretariat, I soon learned that if an ambassador said, “This has been a success for the United Nations,” he or she meant a success for the Member States, but if the remark was, “The United Nations has made a mess of this one,” it meant the Secretariat.

³ Charter of the United Nations, Article 2 (7).

⁴ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, (Ottawa: International Development Research Centre, 2001).

⁵ *Frente Farabundo Martí para la Liberación Nacional*.

⁶ I use the term ‘multifunctional’ because the UN was mandated to perform not only the military duties undertaken by ‘traditional’ UN peacekeeping operations, but also civilian duties in the fields of law and order, human rights, the resettlement of refugees, constitutional reform, electoral reform, etc.

⁷ ‘Good offices’ is one of the more useful examples of UN-speak. It means action to explore whether opportunities exist for third-party mediation between two hostile parties and, if so, the undertaking of such mediation.

⁸ This is the normal title for the heads of multifunctional peacekeeping operations, who are invariably civilians. Traditional peacekeeping operations are almost always headed by military officers.





Living with Our Differences¹

25

by Kalypso Nicolaïdis

It is telling that the war in Iraq has changed the very way the transatlantic question is habitually posed in Europe from “how to resolve US-EU conflicts?” to “how should we deal with American power?” Differences that were simply taken as factors in the global and regional orders are now exposed as our central concern: the overwhelming asymmetry of military power between the United States and the European Union (and indeed the rest of the world); and the divisions within the EU as to what to do about it. There is of course a need to patch things up both on the transatlantic and intra-European front—the two are interconnected—and to devise a European global strategy for the new era of American Empire. This is the agenda of the Kastellorizo meeting of EU foreign ministers.

My purpose here is to make a simple point: a prerequisite for doing things together is to *learn to live with our differences*. This is true *between the EU and the US* where we need to define a constructive and conscious division of labour in tackling some of the most pressing problems before us and creating a more secure and just world. This is also true *within the EU* where we need to learn to disagree better, and moreover to draw strength from our diversity. Intra-EU diversity in turn can be better exploited to foster transatlantic cooperation. In short, we need to move beyond the universal assumption that pervades for instance our EU constitutional debates that the one and only secret of success and effectiveness on the international scene is to acquire a more unified voice and a more ‘common’ foreign policy.

EU vs. US:

Avoiding The Dual Pitfalls of Rivalry and Western Hegemony

The discourse in Europe on how to deal with the United States has been ripe with traditional balance of power thinking. The French have brought back to the fore the old Gaullist theme of counterweight or counterbalance to the US. The Belgian and Germans follow suit *sotto voce*. On the other side, the British and the ‘other Europe’ proclaim their continued loyalty to the alliance and argue that being ‘inside the tent’ is the most effective way to constrain or tame the US: balancing vs. bandwagoning as the two traditional responses to hegemony. It is important to note what the two sides have in common: in both cases, the strategy is about influencing the US, from without or from within, harnessing its unilateralism, making the case for multilateralism. In the context of the Iraq crisis, some have argued that

K. Nicolaïdis ‘Living with Our Differences’ STAIR 1, No 1 (2005): 25-36.





- 26 France and the UK only disagreed on means not on ends. If this is true, it certainly has not pervaded public discourse and perception.

Perhaps member states in the EU do not need to agree on a general concept or a label for their strategy towards the US. Each member state will continue to have its diplomatic culture and slogans, notions which chime with its public opinion. Nevertheless, ministers may ask, what ideas may help both side moves towards each other?

To start with, Europeans could agree on one thing, that is, to *move beyond such balance of power thinking*. What is the point! Unipolarity in the security realm is a fact. So is multipolarity in diplomatic terms. The EU approach to US power should not be defined in structural terms—unipolar vs. multipolar world, friends vs. rivals. If clash there is between the current US administration and some governments in Europe this is a *clash in civilisation*. It is the very sense that we share basic political values (rule of law, democratic self determination, human rights as individual rather than collective rights), but that we disagree on how to promote them consistently, that has made the recent dispute so acrimonious. The US does not qualify as the EU's 'other'—if the EU needed one at all it has its own past. Nor can the EU's values-based foreign policy be captured by another power's reading of these values, even if it claims to share them.

Moreover, the EU's position *vis-à-vis* the US can only be *contingent* on the policies and attitudes of the US itself. It is bound to vary over time, across issues, administration in power and global developments. Therefore, Europeans should define the relationship in terms of *ad hoc* *Madisonian checks and balances*, whereby respective roles oscillate on a case by case basis. Under a Madisonian logic, parties form a single cooperative system, and adjust their strategies according to changed circumstances.

Under this logic, cooperation need not be among equals—concerts of nations, alliances or international regimes are all about how to manage peaceful relations given asymmetric power. The call for an 'equal partnership' between the US and the EU is premature and wishful thinking or at best irrelevant. It does not help make sense of the mix of centrifugal and centripetal forces that characterise the relationship.

Instead, strategic thinking in the EU must undergo its *Copernician revolution*. To the extent that the EU is a union of post-colonial nation-states, its guiding principle in defining its role in international affairs must be to reverse the logic of traditional colonialism: giving a voice to the rest of the world inside its own polity. To start with, why not ask today: what kind of EU strategy with regards to the world superpower would the rest of the world like to see? Indeed, seen from the rest of the world, transatlantic rows must appear very parochial.





There is no single 'rest of the world' of course. But it is fair to say that most countries know what they do *not* want the US-EU relation to be: *all-out rivalry or Western hegemony*. Heightened and continued rivalry between the US would be bound to spell global instability. It would weaken the reach and effectiveness of international organisations—above all the United Nations (UN)—which would most probably be increasingly deemed irrelevant by the US. And on an issue-by-issue basis, most countries usually resent being asked to take sides as we have seen with the dispute over the International Criminal Court.

At the same time, there is little appetite in the developing world for the kind of 'Western hegemony' that characterised the heydays of neo-liberalism. The combined economic power of the two sides already overwhelms the rest of the world. And while the US does not need the EU on the military front, the latter's growing military capacity is not irrelevant to North Atlantic Treaty Organisation (NATO). Prospect of the US and the EU 'making up' through exclusive transatlantic economic deals, or that of NATO supplanting the UN (or filling the vacuum) as global police conjures up a world entirely shaped by 'Western' interests.

A European strategy must be inspired by the imperative of avoiding these two pitfalls, destructive rivalry and hegemonic arrogance. But the diversity of issues and actors involved make it impossible to prescribe a magic formula to encapsulate such a middle strategy. Instead, and most likely, the European strategy that is likely to develop in the near future will oscillate between two poles—call this schizophrenia, ambivalence or simply differentiation. On one hand, well intentioned liberals on both sides of the Atlantic are right to insist on the shared values and interests that must continue to guide transatlantic cooperation on all fronts. Our longstanding transatlantic partnership will need to be revisited based on a multifaceted division of labour between the two sides and drawing on our complementary strengths and inclinations.

On the other hand, and to satisfy the yearning for a new kind of international relations of many of its members, the EU should not hesitate to take stands on a case by case basis as *an alternative power* to the United States, with its different methods, policy concerns and priorities and its own ways of making friends and indeed enemies. In parallel, rather than with or against. At its best, this alternative power would lend its know-how and resources to the advocacy and implementation of alternative approaches to social, economic and political management, as is currently the case for instance in the Genetically Modified Organisms (GMO) affair under World Trade Organization (WTO). It may even come to refer to itself not in terms of 'power' at all, but as an intervenor, a global partner, a 'vanishing mediator' in the words of Etienne Balibar. The test here for Europeans lies not





- 28 with US appreciation but with their ability to do their own thing in a world dominated by US hegemony.

There is little doubt that these two poles for middle strategy will continue to coexist in Europe, along with the more extreme temptations of rivalry and Western hegemony. Not only because some member states are more inclined towards one or the other, or because the choice of emphasis between them needs to be issue-specific, but because the emphasis will depend, to no small extent, on the attitude of the US itself. In any event, actors who shape the EU's role in the world are far from having articulated the meaning of this 'European alternative'—a global role for the EU which does not aim to replicate the traditional parameters of powerhood.

The EU as a Civilian Power with Military Assets

In the wake of the Iraq War and at this crucial constitutional moment, can European diplomats agree anew on some of the relevant parameters for this global role? On both sides of the Atlantic, Robert Kagan has come to provide the intellectual benchmark—reflecting the view of the current US administration and a great part of the US foreign policy establishment and scholarship. Accordingly, Europeans, rather than humbly and gratefully accepting that their Kantian paradise can only survive in a Hobbesian world thanks to American military strength, are trying to make a virtue out of necessity by propounding their own, alternative and allegedly naive view of international affairs.

Of course, Europeans must acknowledge that Kagan's view is right on many counts—that having successfully built a zone of peace on their continent colours the way most of them see the world. That they have achieved this peace under the umbrella of the US security guarantee in the last half century. That the end of the Cold War was cashed in by Europe as a peace dividend in contrast to continued military build-up for the US. That there are places and instances in the rest of the world where the occasional use of military force by outside actors may be legitimate. And that they, the Europeans, have been unable as of yet to forge a meaningful post-Cold War strategy because of their disagreement over what such use of force means to them in practice. Beyond these important truths, EU politicians must articulate a collective response to Robert Kagan so as to be better understood in Washington through EU lens. For a start, can they agree on the following propositions?

- I. *As it stands today, the EU is not Kantian because it is (militarily) weak; it is (militarily) weak because it is Kantian.* If valuing the sources of power other than military force underpins the EU internally then it must also do so externally. This is the EU's great lesson, the result





of a painstaking collective learning process, not a second best. 29
Europeans do not defend the rule of law, the pre-eminence of the UN and multilateral institutions or question the role of military force as a means of resolving conflict because they are weak (although of course, there is no denying that the law serves the interest of the weak). Rather, Europeans have *chosen* not to go down the military route on a scale comparable to the US, preferring instead to allocate significant resources to ambitious social programs. This philosophy is increasingly being translated into an EU foreign policy approach, where nation-building and a more generous—if still insufficient—aid budget are seen as the external corollary of states that are active in the domestic arena.

2. *The EU is not wielded to pacifism but to peacemaking.* The historical experience of European states has promoted an explicit recognition of the fact not only that fighting wars is of little use if the subsequent peace is not won, but also that war itself is a recognition of failure. For Europeans, conflict avoidance and prevention is the name of the game. Yet, this does not preclude the development and deployment of military force, and therefore the expansion of intervention capacity (Petersberg task) and even defence commitments as the new EU constitution makes clear. But it implies that the use of force should be seen only as a necessary prerequisite to the deployment of *civilian* tools and at the service of civilian goals. Civilian powerhood refers not only to the civilian means of foreign policy—as the favourite but not only instruments of influence—but also to the civilian ends of intervention, notably reconstruction. As the joint declaration of the member states in February 2003, at the eve of the Iraq War testifies, Europeans can agree on the threat of force at least if the emphasis is on its use as last resort. In this sense, civilian powerhood is compatible with increased military strength, for member states of the EU who may decide to choose such a route together. But there will always be divergence among as well as within states as to what the use of force as ‘last resort’ actually implies.
3. *The world beyond is EU-compatible.* Ours is a world that is far from being a desolate ‘Hobbesian’ landscape beyond the Kantian European island. It is closer to a pre-Kantian world with a great number of Hobbesian islands, in the form of rogue states, failed states or local zones of conflicts. The progressive socialisation of governing elites as well as the growing interconnections between civil societies around the world has meant that zones of peace and democracy by contagion coexist with zones of chronic instability. This does not





make the terrorist threat less real. Clearly, rogue states and other Hobbesian realities need to be dealt with. But we must consider that our very actions in these cases will themselves contribute to the Hobbesian vs. Kantian character of the international system. The great majority of countries that have affirmed their commitment to or at least their reliance on international organisations must be taken at their word. This is at least what the EU has tried to do, from Iran to Central America.

An US-EU Division of Labour? Along Which Lines and to What Extent? And How Explicit Should it Be?

Even in its latest version incorporating military capacity, this European story of civilian powerhood suggests that differences between Europe and the United States must be valued, and reinforced if we are to counter the challenges facing us in the decades ahead. Irrespective of the policies of its individual member states, the EU as a whole will not change the essential parameters of the US superpowerhood; but it can aim at a more optimal division of labour, by striking implicit or explicit bargains with the US or by doing its own thing. A division of labour drawing on our respective strengths and inclinations as well as simply acknowledging our divergent policy concerns. Differences and complementarities exists along various dimensions:

- I. *Geographical:* Both the US and the EU are global actors with regional strategies. The EU must reassure Washington of its commitment to global order. At the same time, for the EU to recognise and proclaim that its next strategic priority will be to export justice and stability to its own 'zone of peace' would not mean retreating to a regional role while leaving the global stage to the US. The global impact of progressively expanding the EU's zone of peace and prosperity cannot be underestimated. First, enlargement is the EU's most powerful foreign policy tools: the prospect of membership for Turkey would constitute the most powerful signal that the EU is indeed a 'world partner' which will not banish the Muslim world as Europe's 'other.' And clearly, an EU bordering Iraq and Russia is not irrelevant to the supply of global order. Beyond enlargement, the construction of a Euromed region constitutes the best hope for the peoples bordering the *Mare Nostrum*—notwithstanding the crucial role of US arbitration in the Middle East in the immediate future. Beyond, the EU's wider neighbourhood should be its grand project of the next decade and the next frontier of its constitutional ambitions.





2. *Functional*: Cartoons, pride and prejudice have obscured a crucial point. When it comes to global intervention, the different policy agendas of the US and EU have led, through painful trial and error in the last few years, to a rather productive division of labour between the front-end and the back-end of missions. There is nothing wrong with Europeans continuing to invest in reconstruction and stabilisation, anticipating the requirements of nation-building in conflict-prone regions—from policing to support in developing a legal infrastructure. Good cop-bad cop routines can be effective; so can competition in winning ‘hearts and minds’. But the EU must stubbornly keep on the table the core bargain eschewed by the US in the case of Iraq: the US must recognise limitations of its own power and the need for pluralism in world governance *in exchange for* the EU helping to legitimise this power and mobilising its own civilian capacities. Why shouldn’t Europeans accept to do the dishes if Americans consult on the menu? At its best, the US can create worthy recipients for Europe’s constructive engagement. At its worse, it will alienate more renegades whose impulses the EU can seek to moderate, as the ‘alternative power.’ 31
3. *Temporal*: Crucial to their respective roles, the US and the EU also have different temporal horizons. Europeans are turtles, Americans are hares. Where Americans like to drop by, Europeans have staying power (there is widespread acknowledgement in the Middle East that it is the Europeans’ long-term presence on the ground which prepared these grounds for the Quartet and American public diplomacy). The long-term is the EU’s comparative advantage and prevention should be its response to US’s pre-emptive strike. Since 9/11 US policymakers have made much of dealing with root causes. But this requires engagement, cooperation and assistance, rather than containment and coercion. Since the measure of success in the prevention field is that there is nothing to report, this strategy is not likely to win many votes. Similarly, micro involvement and assistance, requiring the acquisition of detailed local knowledge is unglamorous and painstaking. But the less democratic EU can afford slow and discrete results. Its machinery is not subject to short-term Union-wide electoral cycles but to the long-term constraint of its own civilian logic. The EU needs to spend more on these cost-effective approaches and explain their logic to its public. And even as it becomes more accountable with time, European public opinions might stay more patient.

Along each of these dimensions, the EU can and should be the United States’ partner at times, while simply following its own logic.





32 *The EU Mosaic: Can Weakness Be Turned into Strength?*

The standard assumption these days is that Europeans agree on most things—including the above description of EU comparative advantage and most topics on the global governance agenda—except how to deal with American power in times of crisis. It is unsurprising that the Iraq War found EU member states hopelessly divided. As witnessed at the European Convention, the standard response is, unsurprisingly to tinker with institutions and processes in order to mould a single purpose out of the EU mosaic: institutions and mechanisms that can enhance the likelihood of a ‘European reflex’ (consult first, early and intensively); institutional machinery to foster a more unified voice in foreign policy, emulating to the extent possible the relative success of the trade area. The arguments have been well rehearsed and are now translated into constitutional reform—including a foreign affairs minister with double accountability and joint European civil service.

Yet neither a treaty article nor even in the short-term institutional habits are likely to change deeply entrenched national diplomatic cultures. The obligation of loyalty has been in the treaties since Maastricht. Is loyalty not more likely to become the rule if the Union focuses on the causes and occurrences of ‘disloyalty’ and adopts practices which seek to turn diversity into strength? Can the leveraging of complementarities *within* the EU replace confrontation or false harmony? I believe so, along the following five principles:

- I. *Member states must learn how to agree to disagree.* Heads of States have little incentive to consult with their European colleagues if they fear that they will be precluded from acting on their own in case of disagreement, or perhaps worse, that if there is agreement, this will only be on bland minimal positions or actions—a favourite of EU bashers and satirists. This was the dilemma on both sides during the Iraq saga. If EU consultation as a first resort is to have any meaning, there must be an understanding that member states can agree to disagree without mutual accusations of letting the Union down or ‘caring only about one’s national interest.’ For what is wrong with national interest? Isn’t an enterprise like the EU premised on the understanding that national interests are often best served by acting together? Those who bemoan the fact that *national* interests too often trump the so-called *common* interest fail to understand the logic of positive sum games. This first principle still leaves many questions open: does this mean deciding that the Union will only act in relatively consensual areas (for example Bosnia)? Or does it mean a generalisation of coalitions of the willing, constructive abstention and enhanced cooperation in





foreign and security policy? Does it mean a carving out of areas of foreign policy between member states? Or simply a new approach to 'multi-voice' declaratory diplomacy? 33

2. *The EU itself must remain multipolar.* At the institutional level, turning diversity into strength implies a definite commitment to a multipolar EU with strong coordinating mechanisms—as with a new foreign minister. The EU was invented to forestall age-old temptations of hegemony within Europe as reflected in the original bargain of the Treaty of Rome, balancing weights according to size with equality within states. Small and medium states will not indefinitely acquiesce to an EU where the population principle increasingly prevails. Equal access to leadership by less powerful states *within*, constitutes a powerful signal to the rest of the world that the EU does not only follow the logic of power politics. In this light, the suggestion of the Convention to almost abandon rotation among member states in the Council can only be detrimental. For the sake of a multipolar Europe, the Intergovernmental Conference (IGC) must re-establish the best elements of the old system of rotation *alongside* the new European Council chair.
3. *Special bilateral relationships must be made to work for the Union.* Special relationships between individual or groups of member states and outside actors may rest on history or geography; they may be conjunctural or structural; rely on personal, cultural or bureaucratic ties. They may reflect different allegiances linked to different views as to how to deal with the rest of the world. They can also reflect world politics of the moment (for example, Chirac's popularity in the Arab world). The question here is whether and how a set of special relationships at a given moment in time can be made to work for the Union as a whole to address a particular problem. Here we must ask together: how can individual member states put their credibility at the service of the Union, without necessarily acting and speaking in its name?
4. *Diplomatic and popular mutuality need to be pursued alongside consensus.* Part of the answer lies in greater mutual trust and mutual knowledge between national diplomacies in the EU, a deeper respect for each others' positions—even obsessions. Paradoxically, the problem lies in the fact that meetings at all levels in the EU, from diplomats to political directors, ministers and heads of states concentrate on basic commonalities and the crafting of infamously innocuous communiqués (for example, the EU will never use force... except when absolutely necessary). Instead, more of





these meetings could be devoted to the plain-speaking exposition of different national priorities and the concerns that lie behind them (this might have avoided Jacques Chirac's ill-advised outburst against new member states in February 2003). Beyond the world of diplomats and bureaucrats, one of the lessons from the Iraq crisis is that European public opinions may not lag behind but lead in this spirit of mutuality. When the history of Europe is written 20 years from now, we may well see a fundamental divergence between diplomatic history and social history. There seems to have been more (or at least better) dialogue across borders between the peoples than the elites of Europe. This crisis should motivate EU leaders to explore new avenues of communication with EU citizens on foreign policy but also in engaging more forcefully in trans-European debate over Europe's role in the world.

5. *It is as itself a microcosmos that the EU can influence the rest of the world.* The EU's global influence lies in its power of attraction more than its projection of power. And this power of attraction in turn lies in its diversity. Ultimately, the EU's claim to fame is that it is one of the most formidable machines ever invented for peacefully managing differences. The formula of the EU as a model for both regional and global governance is certainly too crude. The EU cannot be a model to be promoted or emulated wholesale, but it can serve as an inspiration for other instances of cooperation or at least an interlocutor. It may be more appropriate to speak of the EU as a pioneer in long-term inter-state peace building, a pioneer acting through trial and error and thus designing options for peaceful governance. The EU and its experience can serve as precedents, good or bad, exportable or not, for the rest of the world. The success of its attempts at conflict resolution in the rest of the world is predicated on its practice of the politics of recognition and the politics of empathy inside its borders—a practice too often found wanting. The characteristic of the EU as a microcosmos, managing within itself many of the tensions present in the rest of the world constitutes its greatest source of legitimacy. In some ways, such legitimacy from diversity is the twenty-first century equivalent to what the American melting-pot may have represented a century ago.

Finally then, how can such a European 'constructive diversity' contribute to fostering progress in specific areas the transatlantic relations?

Devising a transatlantic strategy for the Middle East. According to Tony Blair, his hand would have been strengthened if the EU could have pressed





Washington to recognise that "dealing with Iraq has to fit into a broader vision of the Middle East that also encompasses a resolution of the Israeli-Palestinian conflict." What he should have added is that this is an area where differences must be exploited to their fullest. First because, in a final settlement process, the division of labour between the EU and the US is clear but requires intense coordination: the former must deliver the Palestinians, the latter deliver Israel. It is only as part of a broader strategy that the efforts of the EU to keep the Palestinian authority afloat. But as importantly, because different EU member states can, if not deliver, at least use their clout respectively with different Arab states, ruling families, non-state actors and sub-regions.

Revisiting the United Nations. The time has come to revisit the premises of the UN Charter regarding the link between enforcement of its fundamental norms (human rights, non-proliferation) and the use of force or coercive diplomacy. Europeans should not be associated with the *status quo* and the upholding of traditional sovereignty norms, while the US would stand for freedom and the 'aggressive' promotion of human rights. Indeed numerous examples from the 1990s such as Kosovo and Sierra Leone illustrate the contrary. But to be consistent with its loyalty to the UN and multilateralism, should the EU not campaign for the institutionalisation within multilateral institutions of a generalised strategy of human rights-based intervention? In doing so, the fact that different attitudes to the use of force—from neutral states to nuclear powers—coexist within the EU itself will be a key asset.

Linking the Doha Round and transatlantic economic cooperation. Global economic governance is clearly an area where the US and the EU must rekindle their cooperation. But they must resist the sirens of introverted transatlantic initiatives, free trade areas and the likes. Instead they must focus on a joint commitment to the Doha Round as genuinely a development round. A good place to start would be the promotion of *regulatory development*, where the US and the EU have different and complementary experiences and resources to offer: the US standards of regulatory consultation; the EU experience in mutual recognition (for example, the management of continued regulatory diversity). For instance, the managed liberation of the movement of people as professionals (temporary) through the mutual recognition of qualification, licensing and certification requirements is high on the list of many third world countries. The US and the EU could commit to the negotiation of 'open' Mutual Recognition Agreements (MRA) in this field and devise procedures for their multilateralisation, not only as a means of reinforcing transatlantic ties but as the basis for addressing the needs of developing countries for greater access to the benefits of globalisation.





- 36 *Reinvigorating transatlantic networks.* Finally, for differences between Europe and the United States to be constructively exploited rather than denied, requires much deeper and sustained dialogue between all levels of our societies and political classes. European leaders must combat anti-Americanism in Europe and the rest of the world for fear that it might become a self-fulfilling prophecy and drive the US out of multilateral forums. Clearly however, the different nations of Europe would do so in different voices.

Notes

¹ This contribution was written in preparation for the EU foreign ministers informal meeting on transatlantic relations in May 2003, during the EU Greek presidency. For their feedback I would like to thank Peter Dunn, Thierry Fabre, Andrew Hurrell, Robert Howse, Anand Menon, Dimitri Nicolaïdis, Michael Petrou, Simon Saunders and Jennifer Welsh. This article is based in part on Nicolaïdis and Howse, 'This is my eu-topia: Narrative as Power,' *Journal of Common Market Studies* 40, no. 2 (2002): 767-792; and Menon, Nicolaïdis, and Welsh, 'In Defense of Europe,' *Working Paper*, European Studies Centre, University of Oxford, 2003.





Which EU? A Critical Response to Kalypso Nicolaïdis

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by David Landau

The post-enlargement European Union (EU) faces different challenges to the evolving character of EU-US relations than the pre-enlargement fifteen because of the nature and scope of the new member states' attitudes towards cooperation with the United States. Without acknowledging these differences, Nicolaïdis' observation regarding the impact of the Iraq controversy on transatlantic affairs is skewed towards the West European view. The Europe of fifteen to which Nicolaïdis implicitly refers is a Europe dominated by Britain, France, and Germany, all of whom are leaders in the intense debate concerning the effects of US power on Europe. But the recently expanded Europe of twenty-five includes central and east European actors who maintain more positive views towards the future of transatlantic relations. Can the EU bridge this political gap between old and new member states? If not, will EU-US relations be dominated by a complex system of disparate member state relations with America?

Given the EU's already limited capacity to formulate a common foreign policy, the entry of ten new member states is likely to further complicate EU-US relations. Following Nicolaïdis' example, the debate over European support for Iraq nicely illustrates this point. As the French and German governments were busy criticising the Bush administration for its hasty and allegedly illegal war, several of the then candidate states were offering their political and military support for US action. Whereas only six of the fifteen current member states initially joined the 'Coalition of the Willing',¹ coalition members were found among eight of the ten candidate states.² All four of the applicant states on track for a post-2004 accession date joined the Coalition as well.⁵ A higher proportion of candidate and applicant than member states also contributed troops to the American-led effort.⁴ On the eve of enlargement in 2004, Europe was thus deeply divided over the shape EU-US relations should take. More importantly, the central and east European countries' priorities seemed divided between America and their European neighbours.

Politically and economically, countries such as Poland and Romania stood to benefit from support for and participation in the Iraq War despite the opposition expressed by influential EU powers. The weakness of EU foreign policy enabled the member and candidate states to adopt separate – even if unpopular – views toward the US based on each state's calculation

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38 of its own best interest. Poland used the opportunity to demonstrate its strength as both an east European power and potentially strong new member state of the EU. Romania used the chance to strengthen ties between Bucharest and Washington at a time when national economic restructuring was underway and lucrative foreign investments were sought. Even today Romania and Bulgaria continue to vie for US attention in hopes that the American government will build a new military base on their soil – all while coming closer to becoming members of an EU unsure of how to direct the future of EU-US relations.⁵

If the EU is to act in unison to orchestrate a coherent transatlantic policy with respect to the US, then it will need to come to terms with the optimism pervading central and east European positions towards American cooperation. On this point, Nicolaïdis is correct to assert that the member states must learn to agree to disagree, to live with their differences. This is especially true of an enlarged Europe marked by the strengthening of already present differences, a Europe in which EU-US relations are characterised by a cacophony of voices sending discordant signals overseas. Before the EU can work on improving transatlantic cooperation with America, it must first figure out how to accommodate a highly opinionated Union of twenty-five.

Notes

¹ The six states are Denmark, Italy, the Netherlands, Portugal, Spain, and the United Kingdom. Norway joined the coalition in 2004 but was not an initial member. See <http://pwhce.org/willing.html> (accessed Jan. 31, 2005).

² The eight states are the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, and Slovenia. Only Malta and Cyprus did not join the Coalition.

³ Applicant states include Romania, Bulgaria, Croatia, and Turkey.

⁴ For an up-to-date tally of all countries' military commitments to Iraq, see <http://www.globalsecurity.org> (accessed Jan. 31, 2005).

⁵ Gabriel Partos, 'US military eyes Balkan bases,' *BBC News*, World edition, Jan. 14, 2005. <http://news.bbc.co.uk/2/hi/europe/4174901.stm>.





A New Asylum Paradigm? Globalisation, Migration and the Uncertain Future of the International Refugee Regime

by Jeff Crisp

“Stop the asylum invasion.” “New shambles over asylum.” “Poison gang are asylum seekers.” “Asylum blamed for AIDS crisis.” “Asylum threat to house prices.” These are a few of the front page headlines that have appeared in British newspapers during the past year.¹

As these headlines demonstrate, in recent times we have witnessed an extraordinary (and extraordinarily successful) effort on the part of the press, supported by certain pressure groups and politicians, to convince the British public that the majority of asylum seekers are cheats, criminals and charlatans. Some commentators have suggested, somewhat naively, that the current challenge to asylum in the United Kingdom is simply a result of the competition for newspaper sales, and that it has no deeper social or political significance. This article presents a different argument, suggesting that recent developments in UK refugee and asylum policy are a manifestation of much broader and deeper trends, that are providing an important challenge to the international refugee protection regime.

That regime can be summarized quickly. In the 50-year period between the 1920s and the 1970s, a series of steps were taken to ensure that the international community could respond to refugee movements in a predictable and principled manner, protecting the rights of people who had been displaced by persecution or armed conflict. Those steps took three essential forms:

- The establishment of international institutions: for example the League of Nations High Commissioner for Refugees, the United Nations (UN) Relief and Rehabilitation Administration, the International Refugee Organisation and, in 1951, United Nations High Commissioner for Refugees (UNHCR);
- the introduction of international legal instruments, such as the UN Refugee Convention, the 1967 Protocol to that Convention, and the 1969 Organization of African Unity Refugee Convention; and,





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- the development of international norms relating to the treatment of refugees, such as the right to leave one's own country, the right to seek and enjoy asylum in another state, and the principle that refugees should only go back to their country of origin on a voluntary basis.

The following pages of this article suggest that the international refugee regime—its institutions, legal instruments and norms—are now under serious pressure. And as a result of that pressure, a new asylum paradigm appears to be emerging, based on the notion that the movement of refugees, asylum seekers and irregular migrants can be effectively 'managed', thereby ensuring that such population movements take place in an orderly, predictable and organised manner.²

Some Qualifications

Before going on to explain these developments, it is necessary to qualify the previous statement in three specific ways. First, we should not imagine that there was ever a 'golden age' of asylum. States and other actors have always been prepared to violate the laws and norms of refugee protection when it suits them to do so.

Second, and as a corollary to the preceding point, the challenge to asylum is not a particularly new phenomenon. Even in the early 1980s, for example, at a time when the UK was receiving only 4,000 asylum seekers a year, there were already clear signs that European governments were preparing to tighten up their asylum legislation. At that time, African countries also were beginning to violate the principle of *non-refoulement*, forcing or inducing refugees to go back to countries where they would be at risk.³ So, the current challenge to the international refugee regime is not particularly new, although it certainly has gained an increased impetus in the past few years.

Third, while the challenge to asylum appears to be a global phenomenon, it has taken different forms in different places. It would be misleading to suggest, for example, that Australia's refugee policy is the same as that of Norway's, or that refugees in Uganda are confronted with exactly the same protection problems as those in Kenya. Clearly there are national and regional variations.

Fourth, we have to be careful when making sweeping statements about the challenge to asylum. British asylum policy, for example, would appear to have become far more stringent in recent years. However, the figures tell a more complex story. Between 1997 and 2001, the UK gave refugee or humanitarian status to more than 147,000 people, compared with just





40,000 people in the period between 1987 and 1991—i.e. almost a 400 per cent increase in a decade. 41

But these qualifications do not detract from the central point of this article: namely, that the past three decades have witnessed a declining willingness on the part of states to admit refugees onto their territory, to allow them to remain there, and to provide them with the rights to which they are entitled under international refugee law. As the High Commissioner for Refugees, Mrs Sadako Ogata, said before she left office in 2000 “Many countries are blatantly closing their borders to refugees, while others are more insidiously introducing laws and procedures which effectively deny refugees admission to their territory.” “The threat to asylum,” she observed, “has taken on a global character.”

The next sections of this article look more closely at the reasons why the international refugee regime has come under such pressure in recent years. And, in providing that analysis, the article makes a somewhat crude distinction between the less-developed countries of the world and the industrialised ones.

Asylum, Poverty and Politics in Less-Developed Countries

The declining commitment to asylum amongst the world’s developing countries is a consequence of several interrelated political and economic trends. In the 1960s and 1970s, many of the world’s refugees were the product of anti-colonial struggles and wars of national liberation and were, therefore, welcomed by neighbouring and nearby states, which had shared the same experience. The relative prosperity of many former colonial states in the early years of independence, coupled with the modest size of the refugee movements which took place at that time, also enabled those countries to bear the brunt of refugee influxes without too much strain.

These favourable conditions for asylum were reinforced by the relatively generous provision of international aid. In most developing regions, an implicit deal was struck, whereby states admitted refugees to their territory and provided land on which they could live and farm, while Western donor states provided the funding—much of it channelled through UNHCR—that was required to feed, shelter, educate and provide health care to these exiled populations. As well as being an important humanitarian gesture, such assistance played a useful role in the efforts of Western states to establish friendly relations with developing countries, thereby reinforcing their efforts to contain the threat of communist expansion.

During the past two decades, the political and economic underpinnings of asylum that existed in the 1960s and 1970s have been progressively dis-





42 mantled. Sheer numbers have played a part in this process, because the scale and speed of refugee movements increased significantly in the 1980s and 1990s, due to the new forms of armed conflict and communal violence that flared up as the Cold War came to an end. No longer the victims of anti-colonial struggles, the new generation of refugees have not always been able to count on the sympathy and solidarity of the countries to which they have fled.

During the 1980s and 1990s, countries such as Guinea, Malawi and Pakistan, all of which had previously admitted very large numbers of refugees, also began to feel that their generosity was too easily and quickly forgotten by the international community. Once the emergency was over and media attention had shifted elsewhere, levels of international assistance began to decline, and host countries were left to cope with the environmental and economic impact of the influx.

Once the Cold War had come to an end, donor states had less interest in using refugee assistance programmes as a means of developing closer ties with actual and potential allies in the fight against communism. Indeed, many of the world's largest refugee populations are currently to be found in countries that have little geopolitical significance and have been bypassed by the process of globalisation.

At the same time, these very same countries have been confronted with a wide range of political, economic and social problems—high levels of population growth and unemployment, declining levels of official development assistance, environmental degradation, the HIV/AIDS pandemic and the imposition of structural adjustment programmes that led to cuts in public sector spending, services and jobs. Not surprisingly in this context, local populations began to resent the fact that refugees received free food, education and health care from the international community, while they were living in increasingly desperate circumstances and received almost no services from their own state.

The increasingly hostile reception accorded to refugees in developing regions can also be attributed to political developments at the national level. Prior to the 1990s, authoritarian governments and one-party states in Africa and other less-developed regions were relatively free to offer asylum to large refugee populations when they considered such a policy to be consistent with their own interests. But with the end of the Cold War and the introduction of pluralistic systems of government in many parts of the world, the refugee issue has achieved a new degree of political salience.

As in the industrialised states, both governments and opposition parties in less-developed regions have sought to mobilise popular support by promoting nationalistic and xenophobic sentiments and by blaming their





country's ills—such as insecurity and unemployment—on the presence of refugees, asylum seekers and illegal immigrants. In countries where large numbers of people are living at or below the poverty line—Côte d'Ivoire, Guinea, Pakistan and South Africa provide good examples—such messages can have a potent appeal to voters.

The notion that refugee movements bring insecurity and economic hardship to local populations should not be entirely discounted. Indeed, there is evidence to suggest that problems such as crime, environmental devastation and declining wage rates can become more serious when large numbers of refugees enter an area, especially when those refugees receive inadequate assistance and are obliged to pursue survival strategies that impact negatively on local communities.

There are two other factors that have to be taken into account when explaining the decline of asylum in less-developed regions. The first is the role of UNHCR. According to some critics, UNHCR has, in recent years, become preoccupied with the task of providing humanitarian assistance and has not acted with sufficient vigour in relation to those states that disregard the basic principles of refugee protection.⁴

Indeed, some commentators have argued that UNHCR has actively participated in initiatives that withdraw or limit the protection available to refugees. The forced return of Rwandan refugees from Tanzania in 1997 is one case in point. Another is the decision to accommodate Afghan refugees in the volatile border area of Pakistan following the US bombing of the Taliban and Al-Qaeda in 2001. According to this critique, UNHCR, the most important institution within the international refugee regime, has paradoxically been a factor in that regime's decline.

Second, if we are to understand the challenge to asylum that has taken place in less-developed regions, then we must look to the example that has been set by the world's most prosperous and powerful states. The fact of the matter is that the industrialised states of Western Europe and North America—those states which played a leading role in the establishment and development of the international refugee regime—have in many respects led the effort to challenge the principles on which that regime is based.

Asylum and Migration in the Industrialised States

Most of the people who abandon their homes to escape from persecution and armed conflict either remain in their own country as internally displaced people or seek asylum as refugees in a neighbouring or nearby state. In other words, they remain in their region of origin. Between 1992 and 2001, for example, developing countries accommodated, on average, more





44 than 70 per cent of the world's refugee population. At the beginning of 2002, around nine million of the world's twelve million refugees were to be found in the world's two least developed continents, Africa and Asia.

While most refugees remain in their region of origin, a growing number have looked for safety and security further afield by seeking asylum in the industrialised states of Western Europe, North America and, to a much lesser extent, Australasia and Japan. In doing so, they join a broader stream of international migrants whose primary objective is to look for work, to attain a better standard of living or to join family and community members who have already moved to another part of the world.

In reality, it has become increasingly difficult to make a sharp distinction between refugees and other international migrants. For, in many cases, people move from one country and continent to another in response to a complex set of threats, hardships and opportunities. Fear of persecution and the threat of violence may coexist with a desire to gain access to the opportunities, services and resources that are available in the industrialised states.

Irrespective of their exact motivation, a large proportion of those people who have managed to move from poorer and less stable parts of the world to one of the industrialised states have sought to secure the right of residence there by submitting a claim for refugee status. Indeed, given the very limited opportunities that have existed for legal migration from the 'South' to the 'North' since the global economic crisis of the 1970s, it has been one of the few routes available to them.

Over the past twenty years, almost nine million asylum applications have been submitted in the states of Western Europe and North America. In the early 1980s, the number of applications filed each year stood in the region of 150,000, but thereafter the number increased very rapidly—from 250,000 in 1987 to a peak of 850,000 in 1992. While the annual totals have subsided since that time, they have remained at a relatively high level—between 500,000 and 600,000—in each of the past four years.

The presence of these asylum seekers has met with mixed reactions. Refugee and human rights advocates have consistently pointed out that asylum seekers tend to come predominantly from those countries that are most seriously affected by persecution and armed conflict—Afghanistan, Iraq, former Yugoslavia, Sri Lanka and, most recently, Zimbabwe. According to this argument, it is reasonable to assume that a large proportion of them have a valid claim to refugee status or some other form of humanitarian protection.

Rejecting this claim, governments have pointed out that less than a third of all asylum applicants in the industrialised states are eventually recognised





as refugees or given permission to remain in their intended country of asylum. On the basis of such statistics, they argue that asylum procedures have been abused by large numbers of economic migrants who have no need of international protection and have used illegal or irregular means to enter the country where they have submitted an asylum request. 45

Responding to this abuse, over the past 15 years governments have introduced a barrage of measures designed to prevent or deter people from arriving on their territory and seeking asylum there. Such measures include extended visa requirements, carrier sanctions, pre-boarding documentation checks at airports, readmission agreements with transit countries, the interdiction and mandatory detention of asylum seekers, restrictive interpretations of the refugee definition, restrictions on freedom of movement, the withholding or withdrawal of social welfare benefits and limitations on the right to work.

The introduction of these measures has been surrounded by considerable controversy and political turmoil. The issues of asylum and migration have risen to the top of the political agenda in many of the industrialised states. And, in a number of countries, the fate of governments and opposition parties has been determined by public attitudes towards the asylum issue.

While it may only be in Britain that asylum seekers have been seen as a threat to house prices, the citizens of many other industrialised states now appear to perceive illegal and irregular migration as a threat to other aspects of their way of life. Of course, such opinions are not shared by all of the citizens or politicians in the world's more prosperous countries. But, recent opinion polls and election results would appear to suggest that the challenge to the international refugee regime has the support of a significant number of people in Western Europe, North America and Australia.

Why, exactly, have attitudes towards asylum become so negative in the industrialised states? The next part of the article seeks to answer that question, drawing attention to three major clusters of factors—racism, terrorism and globalisation, the limitations of public policy and the role of the media and political leadership.

Racism, Terrorism and Globalisation

A number of commentators have suggested that public opinion in the industrialised states generally is not averse to migration *per se*. Indeed, traditional settlement countries such as the United States (US), Canada and Australia owe their modern existence to international migration (albeit migration of a selective type) and continue to view it favourably.





46 According to this argument, which appears to have some validity, migration is acceptable to the public when it is modest in scale, orderly in nature and appears to meet national or local labour market needs. Britain's readiness to accept significant numbers of immigrants from Asia and the West Indies in the 1950s and 1960s, at a time when the country was more insular and racist than it is today, would appear to support this case.

Immigration is not appreciated, however, when it involves large numbers of people who enter the country in an irregular or illegal manner and who appear to bring little financial or social capital with them. And that, of course, is how asylum seekers are generally perceived today in the industrialised states.

While this argument has a certain element of truth, it hides a more uncomfortable reality—the reality of racism, religious prejudice and the inequitable nature of global power relations. Is the current outcry about asylum seekers in the UK and other European countries really because the people concerned have come to the country without a visa and have thrown away their passport? Or, is it because a considerable proportion of them are young men, originating from countries in the Middle East and Central Asia, which are associated in the public mind with radical Islam and political violence? In this respect, it could be argued that an important connection exists between the 'war on terror' and the mounting challenge to asylum since the events of 9/11.

Finally, there is an important link to be explored between the challenge to asylum and the process of globalisation. Globalisation appears to have prompted the movement of people from one part of the world to another by exacerbating socio-economic differentials between and within states. In general, those migrants and asylum seekers who make their way to Europe and North America come from countries and communities that have lost out in the globalisation process. At the same time, globalisation has facilitated the movement of migrants and asylum seekers through the establishment of complex social, technological and cultural networks that link the less-developed countries to the industrialised ones.

As many commentators have pointed out, while globalisation is predicated on the principle of free movement—of goods, services, information, capital and highly qualified personnel—it does not admit the principle of free movement for people who are poor, relatively unskilled or who are escaping from persecution and violence. So, while globalisation has created the conditions which prompt and enable people to migrate, it has also prompted the world's more prosperous states to obstruct such movement. In this respect, the challenge to asylum has exposed an important contradiction in the process of globalisation.





The Limitations of Public Policy

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One of the most striking features of the asylum issue in the industrialised states is the extent to which it has proved impervious to the usual instruments of public policy. Of course, the restrictive measures introduced in the late 1980s and 1990s did succeed in first reducing and subsequently stabilising the number of asylum applications submitted in the world's richer countries.

But, there is also considerable evidence to suggest that these measures also prompted asylum seekers and other migrants to move to alternative destinations, to identify new migratory routes and to fuel the growth of an industry that is dedicated to human smuggling and is linked to other illicit transnational activities—the trafficking of women and children for sexual purposes, as well as the smuggling of narcotics, firearms and other prohibited goods.

In the case of the UK, migrants, asylum seekers and their smugglers have been particularly adept in remaining one step ahead of the state. Over the past decade, British governments have introduced an almost constant stream of legislative and administrative measures, all of them designed to limit the number of asylum applications the country receives. And yet, the figures have risen quite consistently from just over 30,000 in 1992 to more than 110,000 in 2002.

As well as failing to control the numbers in the way they would like, the industrialised states generally have found it very difficult to establish effective and expeditious procedures to process claims to refugee status. This problem manifests itself in a number of ways—in the prevalence of asylum backlogs, delays in status determination, in a failure to ensure the removal of asylum seekers whose claims to refugee status have been rejected, and, in the *de facto* or *de jure* declaration of amnesties for irregular migrants.

These developments have had three consequences. First, they arguably have made seeking asylum a less risky business and therefore a more attractive proposition for potential migrants. In other words, they actually have encouraged people to make use of the asylum route into the industrialised states.

Second, they have entailed considerable costs. While the accuracy of the figures is somewhat doubtful, the industrialised states claim to spend in the region of \$10 billion each year on their asylum systems—a figure that is far higher than the \$850 million that UNHCR spends on almost 20 million refugees and other displaced people around the world.

Third, the difficulties and inefficiencies experienced by asylum systems in the industrialised states have communicated an impression of govern-





48 mental hesitancy and incompetence that has played into the hands of those newspapers and politicians who argue that the issue of asylum can only be resolved by means of draconian measures that give much greater weight to the imperative of immigration control than respect for human rights.

In this respect, asylum policy in the industrialised states may have become a proxy for a more general authoritarian political agenda. In other words, if you can first establish the case for detaining asylum seekers without trial, requiring them to carry identity cards and subjecting them to random checks, then eventually you may be able to introduce similar controls in relation to other sectors of the population.

The Role of the Media and Political Leadership

The tabloid press in the UK has done an extremely effective job in weaving together the concerns and fears of the British public and associating them with the asylum seeker—illegal immigration, radical Islam, terrorism, crime, disease, an overstretched health service and, to make it all worse, falling property prices.

There is something quite farcical about the frenzied way in which the British tabloids have treated the asylum issue. But, this is hardly a laughing matter. To quote from a spokesman of the far-right British National Party "There's an old saying that you need a bit of luck in politics. Well, we've had quite a bit of luck in that newspapers have become obsessed with the asylum issue. I have not been able to believe the *Daily Express*. Issue after issue, day after day, asylum this, asylum that. So we now have the luxury of banging on people's doors with the mainstream issue of the day."

The tangible results of these developments are to be found in the rising tide of violence inflicted on refugees and asylum seekers—incidents that are reported in the headlines of the very same newspapers that have whipped up such xenophobic sentiments: "Thugs attack asylum seeker." "Refugee hurt in city gang attack." "Afghan man beaten to death after night out." "Refugee fled Saddam's torture, only to be attacked by racists."

Regrettably, the inability of the industrialised states to address the asylum issue effectively has proven to be socially and politically corrosive. Rather than showing real leadership in this area of public policy, governments and opposition parties in Europe and other continents have too often been locked into an unseemly competition to talk tough on asylum, to scapegoat the asylum seeker and to mollify the more rabid sections of the media.

An almost inevitable effect of these negative political tactics will be to reinforce the marginalization of those asylum seekers who are recognised as refugees, making it more difficult for them to find work and to contribute





to the economy of the country where they have been granted asylum. In this way, the notion of the dependent refugee, unable to get a regular job and relying on social welfare benefits, will become a self-fulfilling prophecy. 49

Looking to the Future

Having looked at the past and the present, the final section of this article will examine the future of the international refugee regime and continue to focus on the situation in the industrialised states.

Throughout the 1990s and the early 2000s, the industrialised states pursued a two-track approach to the asylum issue. On one hand, they introduced the range of restrictive measures described earlier, in the hope that these measures would limit the number of asylum seekers arriving and remaining on their territory. At the same time, and perhaps recognising that these restrictive measures would not work very effectively, they examined—and to a limited extent pursued—a range of alternative asylum and migration policy measures.⁵

Some states (and the European Union) looked at the possibility of reducing migration pressures in countries and regions of origin by means of development assistance, debt reduction, the promotion of human rights and good governance. Others began to look into the possibility of opening up regular channels of labour migration, so as to meet their own labour needs and make it unnecessary for migrants to move by illegal and irregular means. During the 1990s, governments also began to place their faith in migration information campaigns so as to counter the unrealistic expectations of potential migrants living in low- and middle-income countries.

While such proposals remain on the table, they have been overshadowed to a considerable extent by a newer and more radical approach to the asylum issue based on the notions of 'extraterritorial processing' and 'protection in regions of origin'. Such concepts are at least 10 years old and were operationalised, to some extent, in the early 1990s in the US treatment of asylum seekers from Haiti. But, they have recently gained a new degree of prominence, not least because of Australia's policy of initially detaining and subsequently refusing to allow the disembarkation of asylum seekers who arrive in the country by boat⁶, and because of a controversial report prepared jointly by the UK Cabinet Office and Home Office in early 2003.⁷

According to the recommendations presented in that report, the UK should in future not process any asylum applications on British territory, with the possible exception of some special groups, such as children, disabled people and high-profile political dissidents. All other asylum applicants should be removed from the country.





50 Some of these applicants would be sent to a regional processing centre on the outskirts of the European Union—Albania, Croatia and Ukraine apparently being some of the locations under consideration—where their applications for refugee status would be examined. Successful applicants would subsequently be resettled in the UK or another EU country. Rejected applicants would be returned to their country of origin.

According to the report, other asylum seekers would be removed to so-called ‘protection areas’ in their regions of origin, locations where some of the money saved on the UK’s domestic asylum procedures would be used to enhance the protection and assistance available to refugees. The report suggested that as a result of these measures, people who faced the threat of persecution and armed conflict in their own country would no longer need to move halfway around the world, spending large amounts of money and taking huge risks in the process in order to find a safe refuge.

Since that report was originally prepared, the UK has repeatedly modified these proposals but has—like a number of other European states—continued to express its interest in the concepts of regional processing and protection in regions of origin. At the same time, UNHCR has made its own proposals in relation to the future of asylum in Europe, which would limit regional processing to asylum seekers from countries that do not normally produce refugees and would bring any regional processing centre within the boundaries—and the legislation—of the EU.

Inevitably, these new approaches to the asylum issue have met with very mixed opinions. Those who support the notions of regional processing and protection in regions of origin argue that these innovations constitute a genuine attempt to provide protection to *bona fide* refugees, while simultaneously addressing the issue of illegal and irregular migration undertaken by people who do not have a valid asylum claim.

Others, most notably human rights and refugee organisations, have suggested that these new approaches are simply a new tactic in the challenge to the principle of asylum and are designed to ensure that the world’s less-developed countries continue to bear a disproportionate responsibility for the world’s refugees.

Whatever the motivation and justification for these recent proposals, it would be naïve to think that new asylum policies, based on the notions of regional processing and protection in regions of origin, will prove easy to implement. As the UK’s Refugee Council has pointed out, numerous practical considerations will have to be taken into account if these approaches are to be implemented⁸:





- Will asylum seekers who have made their way to Europe quietly accept their removal to a regional processing centre or to a protection area in their region of origin? 51
- Will it be possible to manage and uphold human rights standards in processing centres where a considerable number of very disappointed people from a wide variety of different countries and cultures are detained?
- If such centres and areas are established, will it be possible to exclude human smugglers seeking new clients from amongst the mass of people whose dreams of moving to the industrialised states have been shattered?
- Is it possible to establish areas that are genuinely safe and secure for refugees in troubled locations such as West Africa or the Horn of Africa?
- Will Western governments really be able to transfer funds that are currently used for domestic asylum purposes to their overseas development and humanitarian assistance budget?
- Even if such funding is available, will states agree to the establishment of regional processing centres and protection areas on their territory?
- If asylum seekers know that they will be removed to a regional processing centre or a protection area in their region of origin, why would they even submit a claim to refugee status and present themselves to the authorities? Would it not be less risky for them to simply enter their country of destination and to remain there illegally?

While such questions remain to be answered, the significance of recent proposals in relation to extra-territorial processing and protection in regions of origin cannot be disputed, for these proposals represent an important shift in the asylum paradigm.

Traditionally, the international refugee regime has functioned by responding in a reactive manner to the arrival of refugees and asylum seekers in potential host countries. Today, states and other actors are increasingly talking in terms of the need for more effective migration management, whereby the movement of people from one part of the world—including refugees and asylum seekers—assumes a more predictable, orderly and organized form.

It is for this reason that a number of European governments have begun to express a new interest in organized refugee resettlement programmes and in humanitarian visa systems, which would allow asylum seekers to





- 52 submit a claim to refugee status in their country of origin. Similarly, it seems likely that in the years to come, the industrialised states will seek to use their combined economic and diplomatic weight to ensure that countries of origin in less-developed regions re-admit nationals whose claims to refugee status have been rejected.

It is difficult to question the advantages of predictable and orderly population movements—not least for refugees and asylum seekers themselves, who often encounter numerous threats to their security and welfare in the search for a safe haven in another country. But, in pursuing the objective of migration management, two issues must be taken into account.

First, migratory movements involving refugees and asylum seekers are inherently chaotic and unpredictable, involving individuals and groups of people with strong fears, emotions and aspirations. While the notion of migration management has a reassuringly technocratic ring to it, we can be sure that the reality will prove to be considerably more complex, controversial and costly than this concept implies.

Second, and to return to the opening theme of this article, the international refugee regime has a long and proud history of providing protection to people whose lives and liberty are at risk. In seeking new approaches to the issue of asylum, the fundamental human rights principles on which that regime is founded must be jealously guarded.

Notes

¹ An earlier version of this article was published in the UNHCR series *New Issues in Refugee Research* (Evaluation and Policy Analysis Unit: UNHCR). See <http://www.unhcr.ch/cgi-bin/texis/vtx/research>.

² See also Jeff Crisp, 'Refugees and the Global Politics of Asylum,' in *The Politics of Migration: Managing Opportunity, Conflict and Change*, ed. Sarah Spencer. (Oxford: Blackwell Publishing, 2003).

³ See, for example, Jeff Crisp, 'Voluntary Repatriation Programmes for African Refugees: a Critical Examination,' *Refugee Issues*, no. 2 (1986).

⁴ There is now a voluminous literature which expresses this point of view. See, for example, Gil Loescher, *The UNHCR and World Politics: A Perilous Path* (Oxford: Oxford University Press, 2001).

⁵ These alternative approaches are examined in Jeff Crisp and Damtew Dessalegne, 'Refugee Protection and Migration Management: the Challenge for UNHCR,' *New Issues in Refugee Research*, Working Paper no. 64, Aug. 2002 (Evaluation and Policy Analysis Unit: UNHCR). Available at: <http://www.unhcr.ch/cgi-bin/texis/vtx/research>.





⁶ 'Protecting Australia's Border,' Research Note no. 24, (Canberra: Department of the Parliamentary Library), Nov. 2003. See also, Amnesty International, 'Offending Human Dignity: the "Pacific Solution",' Report no. ASA 12/009/2002, Aug. 2002; and Human Rights Watch, 'By Invitation Only: Australian Asylum Policy,' (New York: Human Rights Watch), Dec. 2001.

⁷ For details and a critique of the UK proposal, see Gregor Noll, 'Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones,' *European Journal of Migration and Law* 5, no. 3 (2003): 303-341; and Amnesty International, 'Unlawful and Unworkable: Amnesty International's Views on Proposals for Extra-territorial Processing of Asylum Claims,' Report no. IOR 61/004/2003, (London: Amnesty International), June 2003.

⁸ Refugee Council Briefing, 'Unsafe Havens, Unworkable Solutions; a Refugee Council Position Paper on the UK Proposals for Transit Processing Centres for Refugees and Regional Management of Asylum,' (London: Refugee Council), May 2003.



Response to Jeff Crisp: 'A New Asylum Paradigm?'

by James Milner

Jeff Crisp's article presents a characteristically compelling and insightful overview of the current state of the international refugee regime. Crisp challenges the reader to ask if we have passed the 'point of no return' in the increasingly heated debate on asylum, or if it is still possible to articulate a convergence between the interests of Northern and Southern states, on the one hand, and the protection needs of refugees, on the other. Indeed, while the future of the international refugee regime appears to be uncertain, Crisp's presentation of the various causes of this uncertainty provides policy makers with many of the ingredients of a possible antidote.

Given the recent pledges by the United Kingdom (UK) Conservative Party to withdraw from the 1951 Refugee Convention and deny the right to seek asylum in the UK if elected to power in the up-coming election, it is clear that the refugee regime is now in need of this antidote more than ever.

Crisp clearly frames the question of asylum and refugee protection as a political question, therefore requiring a political solution. As he rightfully argues, "states and other actors have always been prepared to violate the laws and norms of refugee protection when it suits them to do so." Indeed, the challenges we are witnessing today are not new but have been experienced in different ways and in different places since the very origins of the regime in the 1920s. What is significant, however, is the scale of the current challenge: as more people seek asylum, and as the barriers to that protection become greater in all parts of the world, victims of war and persecution are increasingly left in conditions of insecurity and uncertainty.

But, do these challenges constitute a new paradigm? If we take a paradigm to mean "a theoretical perspective that gives direction to research by indicating what problems in a field of inquiry are more important than others and what criteria should govern their investigation,"¹ then the answer would appear to be no. The problems confronting refugee protection remain political problems. Likewise, the criteria that should be used to govern our understanding of these problems remain the realisation of the principles of international refugee law. What we appear to be faced with is an intensification and acceleration of old problems and the creation of new intersections of these problems.



It is in the understanding of these new intersections where the convergence between state interest and refugee protection may be found. Greater headway likely will be made by identifying, examining and addressing the many challenges to asylum individually, instead of attempting to resolve the tension through a single sweeping solution. Indeed, this is the greatest contribution of Crisp's article: by detailing the various causes of restrictions on asylum in the North and the South, he provides the reader with a useful way of disaggregating the problem, which is the first step towards identifying solutions.

In his treatment of asylum countries in the South, or less-developed countries, Crisp rightly argues that "the declining commitment to asylum amongst the world's developing countries is a consequence of several interrelated political and economic trends." Host countries today often cite security concerns, environmental degradation and lack of support from donor governments as a justification for placing restrictions on the asylum they offer. Refugees are increasingly 'warehoused' in remote camps, cut-off from local communities and fully dependent on international assistance. As donor interest fades, and assistance to these protracted refugee situations is further reduced, the crisis in asylum deepens.

Crisp emphasises how many of the causes of this crisis in asylum derive from the action or inaction of external actors. Declining donor engagement, the imposition of structural adjustment and democratisation and the changing nature of conflict since the end of the Cold War, have placed increasing pressure on host states in regions of refugee origin. If donor states want countries of first asylum to respond more generously to the presence of refugees, they would do well to understand how a reconsideration of their engagement in the region may alleviate the pressure on host states.

Crisp then turns his lens to the industrialised North and argues how the failures of public policy, political leadership and the increasing electoral currency of fear have contributed to the increasing climate of anti-refugee sentiment in Western Europe and North America. Once the problem is characterised as chaotic, unworkable and prone to abuse, it is only reasonable for the voters to demand protection from the 'asylum invasion'. As a result, toughness on the asylum question is seen as the measure of leadership potential, and containing refugees in regions of origin and managing their entry through resettlement programmes are seen as the best solution.

Such proposals, which seek to transfer asylum processing to regions of refugee origin, are deeply flawed. They do not conform to international human rights and refugee protection standards. They fail to understand the burdens, pressures and priorities of countries in those regions. They ignore the fact that such programmes would place asylum seekers at considerable





56 risk, and that the United Nations (UN) agencies supposedly charged with the management of these programme are understaffed, underfunded and unable to assume this responsibility. As such, these proposals are misguided and unworkable for political, legal and ethical reasons.

As misguided as the regional processing proposals may be, they do highlight the importance of linking the North and the South. The plight of today's refugees is a global problem and requires a global solution.

Increased external engagement in regions of refugee origin, comprehensive solutions to protracted refugee situations and a more holistic approach to ensure effective refugee protection in the regions of origin constitute the best way to address the significant concerns of Western states, meet the protection needs of refugees and respond to the problems of countries of first asylum. Such a holistic approach would ensure effective protection in the region of origin, thereby diminishing the need for individuals to migrate to Europe to seek such protection; would be structured around managed, comprehensive responses, thereby ensuring the predictability sought by European states; and would work towards the comprehensive solution of protracted refugee situations, thereby contributing to both the protection of refugees and the legitimate concerns of countries of first asylum.

The success of such an approach will depend entirely on the commitment of the international community to see it succeed. In the short-term, donor and resettlement countries, in cooperation with countries of asylum in the regions and the United Nations High Commissioner for Refugees (UNHCR), will have to engage in concerted and sustained capacity-building initiatives to improve the protection environment in countries of asylum, the capacities of local and international non-governmental organisations (NGOs), and the ability of UNHCR to play its essential supervisory and co-ordinating role. Comprehensive approaches to protracted refugee situations will also depend greatly on enhancing the complementary use of the three durable solutions—repatriation, local integration and third country resettlement.

In the long-term, governments, individually and collectively, must consider how elements of their external policies and programmes, including trade, aid, development, strategy and diplomacy, may be brought to bear in not only addressing, but also preventing, refugee flows. Ultimately, it must be recognised that the most efficient, effective and humane approach to refugee situations is their prevention, and that by engaging the failing and failed states of today, the international community prevent the refugee movements of tomorrow.

Crisp's article sets us on the path to such a solution by shedding considerable light on the nature and elements of the problem, and by effectively





breaking the seemingly overwhelming problem of asylum into manageable and identifiable elements. The problems are not new, but our responses must be innovative, comprehensive and global if we are to give certainty to the future of the international refugee regime. 57

Notes

¹ Charles W. Kegley and Eugene R. Wittkopf, *World Politics: Trends and Transformation* (New York: St. Martin's Press, 1993), 584.



*The Future of Transitional Justice*¹

by Zachary D. Kaufman

I. Introduction

The tenth anniversary of the 1994 Rwandan genocide—in which approximately one million Tutsi and moderate Hutu were massacred in about one hundred days—provides an appropriate opportunity to consider the future of ‘transitional justice.’² Transitional justice involves states and societies shifting from a situation of conflict to one of peace and, in the process, using judicial and/or non-judicial mechanisms to address past human rights violations. The number and diversity of transitional justice options have never been greater than they are today. In addition, the tense and shifting international landscape, especially since 11 September 2001 and the subsequent US-led invasions of Afghanistan and Iraq, has both promoted and impaired international cooperation on these important issues. Recent efforts to bring to justice Osama bin Laden, Saddam Hussein, Slobodan Milošević, Radovan Karadžić, Ratko Mladić, Charles Taylor, Théoneste Bagasora, Augusto Pinochet, Hissène Habré, Luis Echeverría, and other suspected perpetrators of atrocities in the Balkans, Rwanda, Sudan, Sierra Leone, Liberia, the Democratic Republic of Congo, Uganda, Burundi, Chad, Chile, East Timor, Cambodia, Iraq, Mexico, and the United States demonstrate how relevant and crucial issues of transitional justice are today and, unfortunately, will be for the foreseeable future.

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

Z.D. Kaufman ‘The Future of Transitional Justice’, *STAIR* 1, No 1 (2005): 58-81.



prosecutions through an international criminal tribunal (ICT), executions on sight, executions *en masse* later, show trials and then executions, exile, concentration camps, amnesty, and, as Franklin Roosevelt and Winston Churchill suggested for suspected atrocity perpetrators in World War II, castration.³ Further options will be discussed below. 59

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

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





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

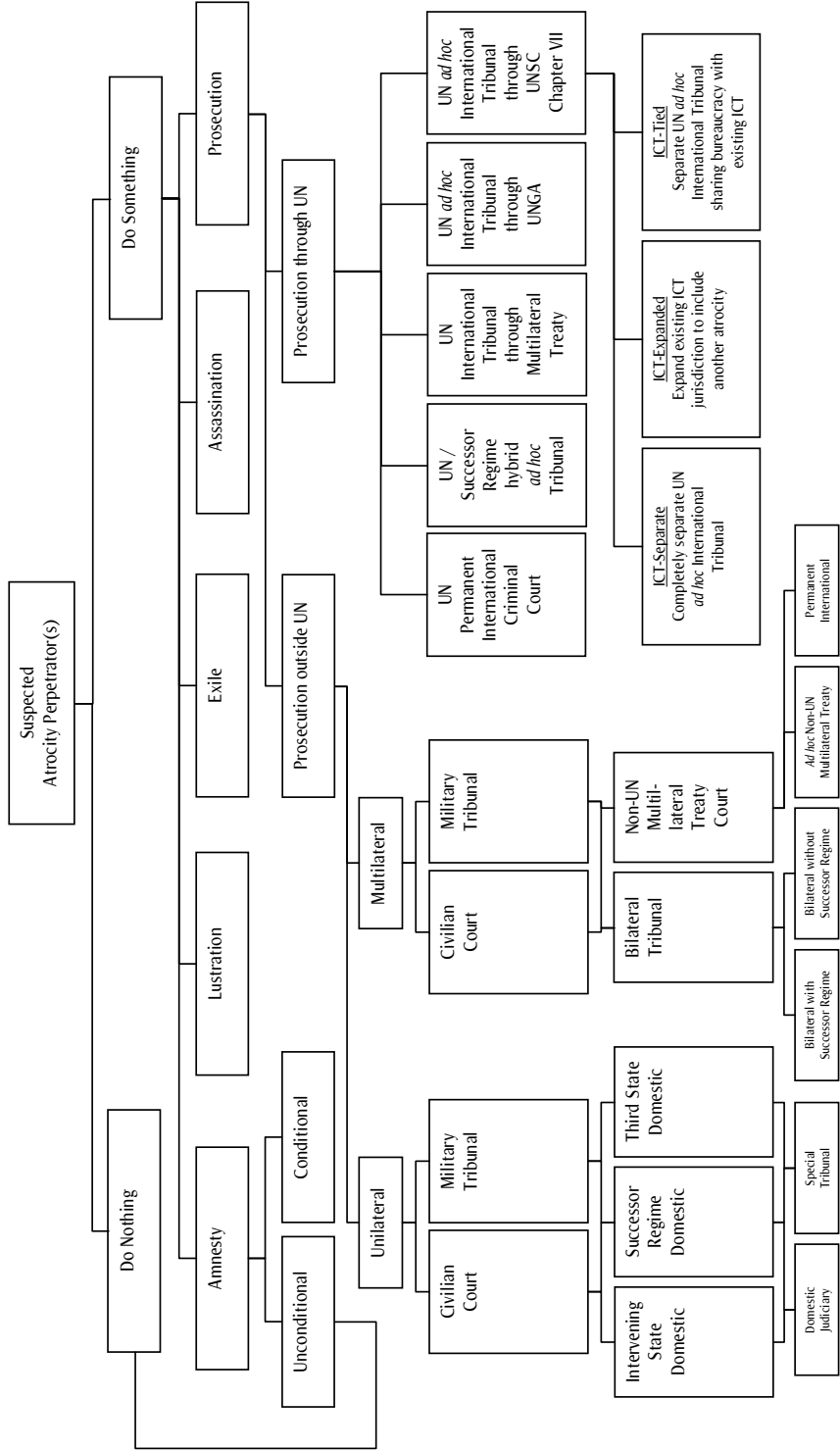
The aforementioned controversy over military tribunals reminds us that transitional justice options are sometimes chosen or judged based on two criteria: 1) what is just and 2) what is perceived to be just. The first criterion may be met if an option comports with international and/or domestic law.⁹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

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

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



Figure 1:
Transitional Justice Options Tree for Suspected Atrocity Perpetrators





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

II. Transitional Justice Options

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

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





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

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

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

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





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

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

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





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

A fourth alternative is assassination, an act of state-sponsored premeditated, extra-judicial, targeted killing. This option is arguably the most extreme, retributive, and morally dubious of all alternatives because it does not provide for due process, it exacts the death penalty without appeal, and it violates the principle of respect for human life.²⁰ For transitional justice as well as other purposes, governments have pursued assassinations throughout history because they are seen as relatively quick, inexpensive, and simple solutions for dealing with enemies, including individuals suspected of heinous crimes. Furthermore, murdered individuals cannot use an amnesty hearing, trial, or other public forum as a bully pulpit from which to further their cause, perhaps inciting even more atrocities. For example, the US government has attempted or accomplished assassinations (or has acquiesced to or supported assassinations attempted or accomplished by its allies, such as Israel) in which transitional justice may have been a motivating factor. As revealed by a 1975 US Congressional report, the US government has tried to or succeeded in assassinating several foreign leaders (who may or may not have been involved in atrocities), including: Cambodian Prince Norodom Sihanouk in 1959, Congolese Prime Minister Patrice Lumumba in 1961, Dominican President Rafael Trujillo in 1961, six attempts on Cuban President Fidel Castro from 1961-63, South Vietnamese President Ngo Dinh Diem in 1963, Chilean Commander-in-Chief of the Army General Rene Schneider in 1970, and Chilean President Salvador Allende in 1970-73. Others suggest that the US government was involved in even more assassinations, including that of Ernesto 'Che' Guevara in 1967.²¹ Even after President Gerald Ford signed a 1976 Executive Order prohibiting political assassinations,²² which was refined by President Jimmy Carter in 1978,²³ the US government has allegedly or admittedly continued to plan assassinations, including on Guyanese opposition leader Walter Rodney in 1980.²⁴ Furthermore, even after President Ronald Reagan's 1981 Executive Order,²⁵ which expanded the prohibition on political assassination to include all types, the US government, without issuing any superseding executive orders on the topic, has attempted several assassinations since 11 September 2001, including on Al-Qaeda leader Osama bin Laden²⁶ and former Iraqi President Saddam Hussein.²⁷





66 The final option is prosecution, which arguably promotes stability, the rule of law, democracy, and deterrence of the commission of atrocities; ensures accountability; and appropriately punishes atrocity perpetrators. This option may, however, prove to be expensive and slow, and may also perpetuate a cycle of vengeance. Prosecution, which has the most variations of all transitional justice options, can be conducted either by or outside the United Nations (UN). Prosecution not under the aegis of the UN can be pursued either unilaterally or multilaterally. In either case, such prosecution can be conducted through the controversial assertion of 'universal jurisdiction,' in which it is claimed that some crimes are so heinous that they fall within the jurisdiction of any state or institution and, as such, their suspected perpetrators can be prosecuted at any time anywhere in the world.²⁸

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





perpetrator concerned crimes alleged to have been committed by the Bosnian-Serb leader Radovan Karadžić in the former Yugoslavia. 67

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

If prosecutions are conducted through the UN, there are at least five options: (1) a permanent international criminal court, (2) a hybrid UN/successor regime *ad hoc* tribunal, (3) an *ad hoc* ICT established through multilateral treaty, (4) an *ad hoc* ICT established through the UN General Assembly, and (5) an *ad hoc* ICT established through the Chapter VII powers of the UN Security Council. Only options two and five have been employed. Three existing examples of the second option are the Serious Crimes Panels of the District Court of Dili in East Timor, the 'Regulation 64' Panels in the Courts of Kosovo, and the Special Court for Sierra Leone (SCSL). The Extraordinary Chambers in the Courts of Cambodia, a fourth example of the second option³⁴, has recently been negotiated between the UN and the Cambodian government, and was unanimously ratified by the Cambodian National Assembly on 4 October 2004.³⁵ The UN International Criminal Tribunal for the former Yugoslavia (ICTY) and the UN International Criminal Tribunal for Rwanda (ICTR) are examples of option five. This fifth option has three variations. It could be: (1) a UN *ad hoc* ICT completely separate from any existing UN *ad hoc* ICT (as in the case of the ICTY when it was established), (2) an existing UN *ad hoc* ICT that could be expanded to include jurisdiction over another atrocity, or (3) a UN *ad hoc* ICT that shares some bureaucracy, such as an appeals chamber and/or chief prosecutor, with an existing UN *ad hoc* ICT (as in the cases of the ICTR³⁶ and the ICTY after the ICTR was established)





68 *III. Recent Developments in Transitional Justice*

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

Lustration: A wreck in Iraq?

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

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

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





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

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

Exile: Nigeria's Nullification?

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





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

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

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

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

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





ily suggest that other states would be less likely to offer suspected atrocity perpetrators asylum on their territory, but those individuals might be less likely to accept it, as the credibility of this arrangement would have been significantly weakened by Nigeria's broken promise effectively to extend amnesty to and to provide a secure exile for Taylor. In that case, other suspected atrocity perpetrators may be less willing to resign and leave a state voluntarily. The international community would then have to pursue alternative methods to facilitate a transfer of power, such as by forcibly violating a state's territorial integrity to apprehend an individual, such as a sitting Head of State, who has been indicted and for whom an arrest warrant has been issued. This process would likely cause more conflict, at least in the short-term, as a suspected atrocity perpetrator fought to retain his power and freedom, but, if successful, in the long-term, it would combat impunity, support reconciliation efforts, bolster efforts to deter atrocity perpetrators, stem regional conflict, and uphold international law. 71

The ICC: Do All Roads Lead to Rome?

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

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

Second, the ICC's own jurisdiction limits the number of cases it can try. The subject-matter jurisdiction of the ICC is limited to genocide, war crimes, crimes against humanity, and the still undefined crime of aggression.⁴⁵ The temporal jurisdiction is limited to crimes committed after the ICC came into force on 1 July 2002.⁴⁶ The personal and territorial jurisdiction is limited to crimes committed on the territory or by a national of a State Party to the Rome Statute.⁴⁷ Finally, the ICC may exercise jurisdiction through any of three ways: (1) a situation is referred to the ICC Chief Prosecutor by a State Party, (2) a situation is referred to the ICC Chief Prosecutor by the UN Security Council, or (3) the Chief Prosecutor himself initiates an investigation through his controversial *proprio motu* powers.⁴⁸ For crimes that fall outside the jurisdiction of the ICC, alternative transitional justice options may be used. Two examples are the IST and the Extraordinary Chambers in the Courts of Cambodia. As neither the US nor Iraq is a State Party to the Rome Statute, these two states used their prerogative on 10 December 2003 to cooperate in the establishment of a separate transitional justice option in the form of the IST, which is described above. As mentioned above, the UN and





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

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

Fourth, the number of perpetrators the ICC tries within the cases it does choose will also be limited by its own discretion. As the first Chief Prosecutor of the ICC, Luis Moreno Ocampo, has stated, the ICC will only try a dozen or so of the 'big fish' of an atrocity, such as in the Democratic Republic of Congo, a policy consistent with other war crimes tribunals.⁵⁰ This will leave all other suspected perpetrators of those atrocities to be dealt with through alternative means, if at all. In a situation like the Rwandan genocide, where more than 120,000 suspects⁵¹ were put in pre-trial detention after the genocide⁵² and will be processed through either local (*gacaca*⁵³) or national judicial systems, if something is to be done about those individuals, the transitional justice solution implemented will have to be outside the ICC.

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





Conflicting Developments in International Criminal Law: Which Precedent Takes Precedence? 73

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

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





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

Tribunals: Global Greater, Local Lesser?

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

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

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





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

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





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

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

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

IV. Conclusion

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

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





atrocities. Without definite collective action, such as through ICTs, which are sometimes problematically viewed by their advocates as necessarily superior to domestic transitional justice solutions in terms of their perceived fairness, legitimacy, and appropriateness, the likelihood that atrocities will be prevented or addressed in a predictable, coherent, and effective manner is dubious and may lead to the development of inconsistent international criminal jurisprudence, although the flexibility to employ alternative transitional justice options is not necessarily undesirable. 77

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

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

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

Notes

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

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

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

⁵ Scheffer, 1.

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

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

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

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

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

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

¹² Snyder and Vinjamuri, 18.

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

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

¹⁵ See Constantine Fitzgibbon, *Denazification* (London: Norton, 1969).

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





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

¹⁸ Tim Weiner and Lydia Polgreen, 'Under Pressure, Aristide Leaves Haiti,' *New York Times*, sec. A1, Feb. 29, 2004, final edition.

¹⁹ Somini Sengupta, 'Sierra Leone War Crimes Trial Opens Without Chief Suspect,' *New York Times*, sec. A4, June 4, 2004, final edition.

²⁰ See the extensive literature on assassinations.

²¹ Jonathan Fanton and Kenneth Roth, 'US Policy on Assassinations, CIA; Human Rights Watch Letter to United States President George W. Bush,' Human Rights Watch, Sept. 20, 2001, <http://www.hrw.org/press/2001/09/bushlet0920.htm> (accessed Jan. 31, 2005).

²² The White House, 'President Gerald R. Ford's Executive Order 11905: United States Foreign Intelligence Activities,' Feb. 18, 1976, in *Weekly Compilation of Presidential Documents* 12, no. 8, Feb. 23, 1976. Available at: <http://www.ford.utexas.edu/library/speeches/760110e.htm> (accessed Jan. 31, 2005).

²³ The White House, 'Executive Order 12036; United States Foreign Intelligence Activities,' Jan. 24, 1978. Available at: <http://www.fas.org/irp/offdocs/eo/eo-12036.htm> (accessed Jan. 31, 2005).

²⁴ United States Senate Select Committee on Intelligence (1984).

²⁵ The White House, 'Executive Order 12333; United States Foreign Intelligence Activities,' Dec. 4, 1981. Available at: <http://www.reagan.utexas.edu/resource/speeches/1981/120481d.htm> (accessed Jan. 31, 2005).

²⁶ *Chicago Tribune*, 'Bush Gives CIA License to Kill Terrorist Leaders,' sec. A19, Dec. 15, 2002.

²⁷ Bob Woodward, 'President Broadens Anti-Hussein Order; CIA Gets More Tools to Oust Iraqi Leader,' *Washington Post*, sec. A1, June 16, 2002, final edition.

²⁸ For more information on universal jurisdiction, see Christopher C. Joyner, 'Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability,' *Law and Contemporary Problems* 59, no. 4 (1996): 153-172.

²⁹ Neil A. Lewis, 'First War-Crimes Case Opens at Guantánamo Base,' *New York Times*, sec. A14, Aug. 25, 2004, final edition.

³⁰ The Statute of the Iraqi Special Tribunal, Section 3: Jurisdiction and Crimes. Available at: <http://www.cpa-iraq.org/human—rights/Statute.htm#> (accessed Jan. 31, 2005).

³¹ *Ibid*, Article 1, Paragraph a.

³² United States Code, Title 28, Part IV, Chapter 85, Section 1350.





- 80 ³³ United States House Resolution 2092 (1992), 102nd Congress of the United States.
- ³⁴ For more information on hybrid tribunals, see Laura A. Dickinson, 'The Promise of Hybrid Courts,' *American Journal of International Law* 97, no. 2 (2003): 295-310.
- ³⁵ Economist.com, 'Bringing the Khmer Rouges to Justice,' Oct. 7, 2004, <http://www.economist.com/World/asia/displayStory.cfm?story-id=3272569> (accessed Jan. 31, 2005).
- ³⁶ On August 28, 2003, the UN Security Council unanimously voted to divide the ICTY/ICTR chief prosecutor into two separate positions. See Aryeh Neier, 'Rwanda's War Crimes Tribunal: Effort to Oust Prosecutor is Misguided,' *International Herald Tribune*, Aug. 8, 2003, final edition.
- ³⁷ Eric Schmitt, 'US Generals Fault Ban on Hussein's Party,' *New York Times*, sec. A11, April 20, 2004, final edition.
- ³⁸ For example, see Jon Lee Anderson, 'Out on the Street,' *New Yorker*, Nov. 15, 2004, 72-9.
- ³⁹ Ayad Allawi, 'In Search of Justice, Not Vengeance,' *Washington Post*, sec. B7, Dec. 28, 2003, final edition.
- ⁴⁰ Jim Krane, 'Bremer Softens Baath Party Ban in Iraq,' *Guardian*, April 23, 2004, final edition.
- ⁴¹ The Special Court for Sierra Leone, 'Prosecutor against Charles Ghankay Taylor,' Indictment, Case No. SCSL-03-I, March 3, 2003. Available at: <http://www.sc-sl.org/taylorindictment.html> (accessed Jan. 31, 2005).
- ⁴² The Special Court for Sierra Leone, 'Prosecutor against Charles Chankay Taylor,' Appeals Chamber, Decision on Immunity from Jurisdiction, Case No. SCSL-2003-01-I, May 31, 2004, Paragraph 53. Available at: <http://www.sc-sl.org/SCSL-03-01-I-059.pdf> (accessed Jan. 31, 2005).
- ⁴³ *New York Times*, 'In \$87.5 Billion Bill, \$2 Million Bounty for Exiled Liberian,' sec. A11, Nov. 10, 2003, final edition.
- ⁴⁴ Somini Sengupta, 'Nigerian Says He May Return Liberia's Ex-Leader for Trial if Liberia Asks,' *New York Times*, sec. A10, Nov. 26, 2003, final edition.
- ⁴⁵ Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, Articles 5-8, entered into force July 1, 2002. Available at: <http://www.un.org/law/icc/statute/romefra.htm>.
- ⁴⁶ Ibid, Article 11.
- ⁴⁷ Ibid, Article 12.
- ⁴⁸ Ibid, Article 13.





⁴⁹ Ibid, Part 5: Investigation and Prosecution.

⁵⁰ Luis Moreno-Ocampo, 'Remembering Rwanda: Justice for War Criminals and the Role of the International Criminal Court,' Paper at University of Oxford, UK, June 27, 2004.

⁵¹ It is estimated by some Rwandan government officials that a total number of people several times that figure participated in the genocide.

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

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

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

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

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

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

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

⁵⁹ Rome Statute, Article 17: Issue of Admissibility, Paragraph 3.

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

⁶¹ The author wishes to thank David Fidler for this point.

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





The Role of IR Theory and the Doctrine of Pre-Emption¹

An Interview with Walter Mattli

Understanding the role of international cooperation in the contemporary context is both a theoretical and empirical question. In the inaugural STAIR interview, Dr Walter Mattli of the University of Oxford reflects upon the contributions and limitations of the dominant international relations (IR) theory perspectives on cooperation. He then moves on to discuss the empirical issue of the prospects for cooperation in the context of the Bush Administration's so-called 'doctrine of pre-emption'. He argues that to fully understand the current juncture, it is necessary to go beyond the purely state-centric neo-realist approaches that dominate the academy in his own country of origin, the United States.

On International Relations Theory

Question: *Which international relations theories do you believe offer the most significant contributions to understanding contemporary cooperation? Does theory have any heuristic value in explaining or predicting future prospects within issue-areas?*

Walter Mattli: This is a complex question. All I can say is that each theory (constructivism, realism, neo-functionalism, critical theory, etc) has its own *raison d'être* and has the potential to shed light on various aspects of international cooperation. How useful they are depends largely on the sorts of question we are asking. For some 'big-picture' questions, variants of realism—clearly highly parsimonious analytical frameworks—may do a fine job. But as soon as we take a closer look at the picture and focus on particular segments of the canvass, we are bound to discover textures that may capture surprisingly rich and fascinating new realities. To understand such new realities we may need to work with a different analytical tool-kit, one with finer instruments. Clearly, for some questions of international relations it is individuals operating in particular cultures or institutional settings that we need to understand to make sense of a particular reality. Issues of preference formation, for example, will be much more salient in such a context. Here realism is at a loss and constructivism in its element. In short, there is no one theory of international relations but many; and the proper analytical perspective will depend on the chosen question and issue-area.





Q. Do you see limitations in the way theory currently addresses questions of international cooperation? 83

W.M.: Well, we haven't tried very hard to come up with good conceptual understandings of cooperation dynamics that just elude any state-centric realist framework. People are saying, 'well, it's hard to go beyond what we've had and so let's not spend too much time intellectually on these other ventures'. People just haven't tried very hard. I think to actually do a good job, not only do you have to have the will, not only do you have to be risk-taking, but you just need to have the sorts of tools and the sorts of background that most of us just don't have. Going back to the first point, most of the things are not taught in graduate school, so it's almost that we are blind to these issues. We recognise them, we feel them. But we don't have the tools, we don't have the languages, we don't have the expertise to tackle them properly. And without comprehending it empirically, we can't actually engage in theorising.

One of the weaknesses I see in the IR theory literature is the dominance of the US. For the most part, IR literature is dominated by US scholars and the problem I see here is that most of these IR big shots that have been theorising in the past really don't know much about what they're talking about. In a sense, they don't know much about the world, they don't speak languages, they don't travel and so what they revert to is fairly sterile debates, that in some way worked fairly well and intelligently in the 1970s, but I think that the world has changed so much that the debates have really been quite poor in the sense of trying to capture what is going on. Part of the reason is that you have some of these gatekeepers who don't value field research, who don't value the fact of knowing languages.

The success of Waltz's neo-realist approach offers a case in point. The worry is that it *has* been so successful. Firstly, it *does* explain important facts about war and peace I suppose. But more importantly, that success may be related to that fact that it doesn't require you to do much research. I mean, the state is a black box etc., so if you buy into these premises naturally you're blinded to the sorts of research that I think ought to be done to comprehend what is going on, and then to try and engage in very different theorising. It is necessary to speak languages, to travel widely, to go beyond the *New York Times* and the *Washington Post*. My colleagues at Columbia University didn't speak languages, they didn't travel, all they did was read the *New York Times*. They thought that it was a good way to teach IR, I thought it was a scandal.





- 84 *Q. How are we to understand the concept of 'power' if we move beyond a purely state-centric or realist perspective?*

W.M.: I do think that even after accepting this notion that power is central, we ought to have more refined understandings of power. Power is not just, as realists claim, something that can be traced back to military capabilities, economic power. But there is also, almost a sort of an accidental or almost unintended aspect of power. Institutionally derived power, I mean, some institutions now, for many years have been dormant and irrelevant in international relations, have grown as a result of globalisation. They have to be reckoned with now and some states just have problems accepting these as full blown equal players. They are being constrained by these institutions which some states control better than others. The US may have ignored some of these institutions because they didn't think they were relevant. The US could say they could do things unilaterally very successfully, didn't have to engage in multilateralism in certain issue areas. Now they're being confronted with these increasingly important institutions. They [the institutions] have power, but almost for accidental reasons, they got sort of empowered because of globalisation. So my point is that a more nuanced understanding of power is necessary and to grasp these forms of power we have to move away from theories that are a) state-centric, b) focused on traditional public bodies, as opposed to frameworks that embrace the importance of private-sector actors and transnational networks, regulatory networks that have escaped the public sphere.

On The Doctrine of Pre-emption

Q. How long will it take to develop a new international consensus on what pre-emption is and when it can be used?

W.M.: I don't think such consensus is possible. The ideological chasm between the current US administration and most of Europe (and much of the rest of the world) is simply too wide.

Q. How do you see the role of the UN in this context?

W.M.: The UN has always been a forum where competing views are displayed, where they clash and where the big guys seek to recruit through persuasion, and much more frequently, through side-payments of various sorts. Is there a chance of a convergence of views? Clearly not. Will the US shop for new forums when it gets tired of the UN. Certainly. The US has practiced 'forum shopping' in a wide range of issue areas. It has the means to do that; and since the present administration is ideologically not the least bit attached to principles of multilateralism, a US threat to move elsewhere or to create some rival 'coalition' may appear quite credible. Whether such a move can be effective is altogether a different story. Given the member-





ship and structure of the UN, it will never be possible for the UN to reach consensus on pre-emption, though. 85

Q. Have the failings of the invasion of Iraq radically altered or undermined the 'Bush Doctrine' of pre-emption?

W.M. No. And the reason is that Bush does not see Iraq as a failure. Disorder is simply a transitional nuisance he thinks; yes, he thought things would be easier. But he is convinced that he will prevail and the world will be a better place as a result and very thankful to visionary Bush. Simple-minded people think simple-minded thoughts.

Notes

¹ This piece is based on two separate interviews with Dr Walter Mattli. The two have been merged and selectively edited. Some of the questions have been adapted to more coherently reflect the responses.





Book Reviews

Robert Cooper, *The Breaking of Nations: Order and Chaos in the Twenty-First Century*

(London: Atlantic, 2003, £14.99 (hbk), ISBN 1843542307)

Michael Mann, *Incoherent Empire*

(London: Verso, 2003, £15.00 (hbk), ISBN 1859845827)

Reviewed by Chris Bickerton (St John's College, Oxford)

One might have been forgiven for thinking that in the case of empire, the Owl of Minerva had taken flight some time ago. Indeed, Hannah Arendt wrote in her preface to part two of *Origins of Totalitarianism*, 'Rarely could the beginnings of a historical period be dated with such precision and seldom were the chances for contemporary observers to witness its definite end so good as in the case of the imperialist era,' and this was in 1967.¹ Yet recently, the term empire has come back into vogue, with publications on the topic coming from across the political spectrum.²

Two recent publications, ostensibly written from opposing political standpoints, are Robert Cooper's *The Breaking of Nations* and Michael Mann's *Incoherent Empire*. Cooper is often treated as everyone's—or at least Ten Downing Street's—favourite liberal imperialist, whilst Mann sets out to debunk what he sees as a neo-conservative myth of American empire exporting democracy to the world. Cooper ends his book with a hubristic call for a *Pax Globalis*: the coming together of Europe and America with peace, rather than war, their instrument of policy. Mann, on the other hand, predicts gloomily that American imperialism can only end in tears—'those who live by the sword...'³. These oppositions in fact belie a number of common assumptions shared by both writers. Whilst Cooper is far closer to the mainstream than some of his critics would admit, Mann is not as radical as some would perhaps like to think. This review will draw out the common ground between the authors, whilst critically appraising the arguments made by each on their own terms.

Cooper's book is divided into three parts: the first part outlines his vision of international politics in the twenty-first century, the second is a set of recommendations for what 'post-modern diplomacy' might look like, and the third sets out what Europe's role should be in this new dispensation. Cooper's argument has already been widely publicised and discussed⁴. His idea of the world as divided into pre-modern, modern





and post-modern orders, with it incumbent upon the latter to intervene in the pre-modern zones of chaos, has served Western policymakers well in their quest for 'ethical' foreign policies.

However, whether Cooper's argument amounts to anything more than this is open to question. For instance, when he is forced to go beyond merely describing the contours of the contemporary world, his analysis is weak. In a particularly deterministic passage, he argues that 'it is possible to identify (loosely) the three stages of state development with three types of economy: agricultural in the pre-modern, industrial mass production in the modern; and the post-industrial service and information economy in the post-modern state'⁵. He then goes on to argue that the hallmark of the modern state is the separation of domestic and foreign policy—a separation deriving from the principles of state sovereignty, self-determination and non-intervention⁶. Yet these principles were universalised only in the process of decolonisation, and there was no fixed correspondence with levels of economic development: Vietnam and Algeria were far from being industrialised modern states as Cooper defines them, yet they fought and won their independence in the name of modern anti-imperialist principles. In the light of this, Cooper's attempt to bring back imperialism under the guise of post-modernism comes across not as a historically grounded argument, but as an attempt to infuse the West, and in particular the European Union, with a new moral mission for twenty-first century. To do so, he takes advantage of the retreat from sovereign equality which has been a feature of the post-Cold War interregnum, and argues that intervention today should no longer be about negotiating with sovereign states. Instead, the goal should be to intervene more directly, so as to transform the very identities of the pre-modern states and thus bring them into the pacific post-modern community.

On this issue of interests and identities, there is little that separates Cooper and Mann. When discussing the military power of the US, Mann argues that raw military capability is no longer the most efficacious way of dealing with contemporary threats. In the case of terrorism, he argues that 'the crucial struggles is over the hearts and minds of the civilian population from whom terrorists are drawn'⁷. For this reason, the US should use its economic, political and ideological resources, rather than rely upon military might alone. Another point of agreement is on 'muscled multilateralism'. Cooper criticises the EU for being multilateralist without recognising the importance of enforcement of rules and norms,⁸ and Mann wishes the reverse for the US: that it would exercise its power more often through multilateral institutions, rather than exhausting its ideological resources by acting alone. Ideally for Mann, the US should combine its leadership with international institutions, a desire which is not far from Cooper's own wish for a *Pax Globalis* which would bring the US, the EU and the UN closer together.

Mann's objection is therefore not with the projection of American power abroad *per se*, but with what he sees as a tendency towards





88 militarism, driven by an imbalance between military and other sources of power. Mann accounts for this incoherence by characterising the US as unable to lead economically ('a back-seat driver'), constantly fluctuating between multilateralism and unilateralism ('political schizophrenic'), and prone to using up its ideological resources by promoting democracy abroad by force of arms, rather than through what Cooper would call 'persuasion'.

In fact, when taking into account Cooper's argument, and the chord it has struck in the corridors of power, it would seem that Mann is confusing a materially rooted incoherence with a far more generalised loss of coherence within the Western alliance itself. On this reading we can understand Cooper as trying to galvanise the West by urging it to embark upon benevolent imperialism as the only means of pacifying the pre-modern chaos. Instead of Mann's account of incoherence, we are seeing something far more contingent, which is a response to, in Zaki Lāidi's words, a separation between power and purpose which was the fall-out of the end of the Cold War⁹. Cooper attempts to reunite power and purpose in a resurrected imperial project for the twenty-first century, whilst Mann is left painting a picture of American militarism unable to give itself any political or ideological purchase.

What are we to conclude from this? That perhaps, for all the talk of empire, the Owl of Minerva really has flown on imperialism after all. And that, from now on, 'it cannot be rejuvenated, but only recognised'¹⁰.

Notes

¹ Hannah Arendt, *The Origins of Totalitarianism* (London: Harcourt, 1976), xvii.

² See Michael Hardt and Antonio Negri, *Empire* (Cambridge, MA: Harvard University Press, 2000), and Niall Ferguson, *Colossus: The Rise and Fall of the American Empire* (London: Penguin, 2004).

³ Michael Mann, *Incoherent Empire* (London: Verso, 2003), 16.

⁴ See Robert Cooper, *The Postmodern State and the World Order* (London: Demos, 1996).

⁵ Robert Cooper, *The Breaking of Nations: Order and Chaos in the Twenty-first Century* (London: Atlantic, 2003), 51.

⁶ *Ibid*, 110.

⁷ Michael Mann, *Incoherent Empire* (London: Verso, 2003), 145.

⁸ Cooper, *Breaking of Nations*, 153-172.

⁹ See Zaki Lāidi, *Un Monde Privé de Sens* (Paris: Hachette, 2001).

¹⁰ Georg Wilhelm Friedrich Hegel, 'Preface to the Philosophy of Right' in *The Hegel Reader*, ed. Stephen Houlgate (Oxford: Blackwell, 1998), 327.





**Patrick Karl O'Brien and Armand Clesse (eds.),
*Two Hegemonies: Britain 1846-1914 and the United
States 1941-2001***

(Aldershot: Ashgate, 2002, £50 (hbk), ISBN 0754608573)

Reviewed by Miriam Prys (St Antony's College, Oxford)

Observers of the current world scene reach strikingly divergent conclusions when characterising today's world order and the role of the United States within it. Some perceive the United States as 'the New Rome,' others see a hegemon in decline, while a few identify a multitude of power centres. Normatively, the unmatched power of the US is either regarded as a threat to world peace, or described as the decisive factor in the order and stability of the international system. These opposing ideas are not only a matter of differing views on what is the case or what is desirable; they are also a result of the essentially contested character of hegemony and related concepts in international relations.

The essays in *Two Hegemonies* give a historical account of the parameters and conditions behind the rise and decline of American hegemony by comparing it with the British Empire.

The key question as formulated by one of the editors, Patrick O'Brien, is 'whether or not [...] 'hegemony' might be an illuminating way of representing and analysing the nature of international relations before the assumption of the prototype hegemonic role by the [...] United States in the second half of the twentieth century'¹. In other words: Is the theory of hegemony in fact a theory of American hegemony not applicable to other cases?

A variety of answers are offered to this question. Many of the book's authors adhere to some variant of the Theory of Hegemonic Stability assuming that a hegemon must possess, firstly, a sufficient power base in terms of economic and military preponderance, and secondly, the ability and willingness to project this power through the provision of public goods. Those authors conclude that Britain was not as hegemonic as the US has been and still is. O'Brien goes even further in saying that contrasting Britain and the US conflates 'hegemony' with mere economic and geopolitical significance. Britain was in a leading position, but 'neither aspired to nor exercised hegemonic power'. The US, in contrast, decided to take on the task of providing the public goods of peace and stability, 'primarily for its own capitalists, but by extension for the rest of the world as well'².

This is illustrated by the British role in both the establishment of a liberal trade order and the provision of a stable international currency. The adherence to the British model of the gold standard and the diffusion of a free trade regime by other great powers was therefore not a matter





- 90 of exercise of hegemonic power, but rather an unintentional process of diffusion. While a majority of the authors in the volume regard this as proof of Britain's non-hegemonic character, other understandings of hegemony imply that it is precisely this subtlety and non-intentionality that make a state hegemonic.

The alternative view, emphasising cultural and structural power, is under-represented in *Two Hegemonies*. It appears in Peter Taylor's chapter, and the fourth part of the book covering Notions and Theories of Hegemony. Here hegemonic power is contained in processes of emulation and 'a reaction to the economic and, [...] political successes of the hegemon relative to all rivals'³. In this view the absence of a formal or coercive exercise of power does not automatically imply the absence of hegemony.

However, in over-emphasising trade and monetary issues, the Theory of Hegemonic Stability, on which most of the book is based, omits cultural dimensions of hegemony. This leads to the conclusion that the United States is 'the sole example of geopolitical hegemony since the fall of Rome,' which in consequence implies that that we—due to a lack of empirical cases—might have to reject even the few general ideas on hegemony that we have.

This is problematic, because it greatly narrows the potential scope of the concept. Even if hegemony today is an American concept, its Greek roots and the interpretation of various modern authors from different theoretical backgrounds (such as Charles Kindleberger, Immanuel Wallerstein, or Heinrich Triepel) suggest that hegemony is a more general phenomenon referring to inter-state relationships based on power asymmetry; a combination of consensus and coercion and aspects of soft power.

Hence, if one looks to this book for a better theoretical and conceptual understanding of hegemony, one might be disappointed. However, it does offer a good historical account with some excellent empirical studies of the background of rise and decline, stability and instability of both British and American hegemony.

Notes

¹ Patrick Karl O'Brien and Armand Clesse, eds., *Two Hegemonies: Britain 1846-1914 and the United States 1941-2001* (Aldershot: Ashgate, 2002), 4.

² Ibid, 37.

³ Ibid, 287.





Francis Fukuyama, *State Building: Governance and World Order in the 21st Century*

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(London: Profile Books, 2004, £15.99, ISBN 1861977816)

Reviewed by Miles B. Tendi (St Antony's College, Oxford)

Francis Fukuyama will long be remembered for his *End of History*, written over a decade ago. Fukuyama's *End of History* proclaimed that the collapse of Communism signalled the final triumph of liberal democracy and free market-led global capitalism. Fukuyama's new book *State Building: Governance and world order in the 21st century*, similarly represents a reflection on a historical juncture of change and uncertainty. In this case, that juncture is the 9/11 era and the context of the 'War on Terror'. At the root of the pathology of 'terrorism,' Fukuyama identifies the weak or failed state. His 'solution' is a call for the return of strong state governance.

Fukuyama attempts to offer pragmatic solutions to the question of state building. He reflects upon how self-sustaining state institutions, particularly in the developing world, can be built and fortified. The author makes a robust case for a strong but restrained state that does not try to do more than it is capable of. He argues against the excessive neo-liberal privatisation measures of the 1990s that were inherent to the 'Washington Consensus' and through structural adjustment weakened state governance.

For Fukuyama, free markets are still important in economic development, but economic progress cannot be divorced from the effectiveness of the state in fostering development. Furthermore, he acknowledges the role of historical and cultural contingencies in state building: "The institutional quality of post-war economic planning agencies in Japan, Korea and Taiwan did not emerge out of a technocratic how to manual; it had its roots in a mandarin bureaucratic tradition specific to each country that stretched back many centuries". For this reason, these institutional structures cannot be taxidermically applied to Latin America and sub-Saharan Africa, which have long-standing traditions of clientelism. State-specific solutions are therefore required.

The case for the necessity of state building in the post-9/11 period, and the resultant global consequences should state building be ignored, is well made. However, Fukuyama's belief that failed states are probably 'the single most important problem for international order' is perhaps overstated. None of his analysis about the role of the state in economic and social development is particularly new.

New Institutional Economics and even World Bank policy since the early 1990s have acknowledged the need for institutions fostering property rights and human development. Fukuyama's additional insight is simply





- 92 to couple the concept of the strong state with the threat to international security posed by the weak state. Yet, this by itself is a rather simplistic reading of the roots of terrorism, an endogenous view of its sources, that divorces instability from the US's own external policies and internal security measures. In that sense, it may be read as a rallying call for both internal and external securitisation.

John Phillips, Macedonia: Warlords and Rebels in the Balkans

(London: I.B. Tauris, 2004, £17.95 (hbk), ISBN 186064841X)

Reviewed by Dimitar Bechev (St Antony's College, Oxford)

The conflict pitting Macedonia's government against the ethnic Albanian guerrillas of the National Liberation Army in 2001 remains a matter of controversy in this Balkan republic. While Slav Macedonians blame it on Albanian radicalism spilling over from neighbouring Kosovo, their Albanian compatriots invoke the decades of marginalisation within Yugoslavia and the Republic of Macedonia, independent since 1991. Albanian figures, whom the average Macedonian considers terrorists and drug traffickers using nationalism to conceal their utilitarian agendas, are freedom fighters in the minds of their own kin. Now that former guerrilla leaders head ministries in Skopje, and Macedonia is slowly but steadily becoming a polity of two nations, the question of what actually happened in the months leading to the compromise Ohrid agreement of August 2001 is as salient as ever.

John Phillips, a Belgrade-based correspondent for *The Times*, provides an account of Macedonia's most recent history, including the 2001 conflict and its aftermath. The book devotes two of the three introductory chapters to (geographic) Macedonia's turbulent past. However, a great number of mistakes concerning facts and the misspelling of names begs the question of whether concentrating on the post-independence period would have been a better way to handle the narrative. The closer one gets to the 2001 events, the more interesting and well-informed the book gets. Still, there is precious little on the Macedonian Albanians' socio-economic plight and political activities during the 1990s. Phillips examines in much greater length the regional repercussions of Macedonia's independence, notably the squabbles with Greece over the state's name and national symbols. Thus, the question of why ethnic Albanians shifted in 2001 from participation in the political institutions to armed struggle remains largely unanswered.





However, it is the chapters that deal specifically with the 2001 clashes which add value to the study of Macedonia. Unfortunately, Phillips allocates to the conflict itself a mere twenty or so pages. We learn the key facts and get an idea about some factors determining the course of events, notably the inadequacy of the Macedonian government and armed forces. At the same time, the narrative is very impressionistic, reflecting the author's own experiences during the tense spring and summer of 2001 more than anything else.

A large proportion of the book looks at the peace deal struck by Albanian and Macedonian politicians with crucial input from US and EU mediators. Phillips is sceptical that the power-sharing arrangements will be easily implemented or that it will bring progress in the short run. He laments the outside world's neglect, and warns that Macedonia remains volatile, calling for continued Western security involvement and economic assistance to avoid the emergence of a 'Balkan Colombia' controlled by nationalist paramilitaries and criminal clans¹. Though the author might have a point, one is left puzzled as to who the local actors are, with whom the West should work in a land populated, in Phillips' view, by rebels and warlords. The book ends with the February 2004 plane crash that killed Macedonia's President Boris Trajkovski, one of the key proponents of the Ohrid agreement. Phillips observes that peacemakers do not last long in the Balkans².

Notes

¹ John Phillips, *Macedonia: Warlords and Rebels in the Balkans* (London: I.B. Tauris, 2004), 176.

² *Ibid*, 200.





94 **Maria Todorova (ed.), *Balkan Identities: Nation and Memory***

(London: Hurst & Company, 2004, £17.50 (pbk), ISBN 1850657157)

Reviewed by Matthew Tejada (St Antony's College, Oxford)

Specialists in Southeast European studies are normally led to believe that a book including the word 'Balkan' would indeed focus on the Balkans. In the case of *Balkan Identities*, edited by Maria Todorova, such a specialist might be rather disappointed. To its credit, the book does devote at least one chapter to each of the states that are inarguably geographically situated in the Southeast European peninsula, including the oft-overlooked Albania. However, the book is not so much about these states as it is about how theories on memory, identity, history and representation can be applied to the nations and states of South-east Europe.

This is the greatest criticism of the book. In order to understand the analysis contained in each chapter, and the supposed 'dialogue' that is carried on between the chapters, a Balkan scholar would also have to be a specialist in sociology, anthropology, psychology, philosophy, politics and history. This is not to excuse the reader from actively reading and trying to understand the arguments contained in the book. But throughout, with very few exceptions, the divide between theorising and the application of those theories in order to analyse particular aspects of the Balkans is not successfully accomplished. And regrettably, especially for a book about the usually over-generalised and misunderstood Balkans, more pages are taken up with explanations of these theories than with an attempt to apply them to the states in question.

If the theories are not enough to inhibit the reader's ability and desire to understand the arguments, the actual language of the book will more than likely finish the job. From chapter to chapter the writing oscillates from a needlessly dense and overwritten scholarly language to a language that is simply overcome by an attempt to theorise and analyse in a non-native tongue. This is not to criticise the choice of contributors. In fact, applause should be given to the fact that the book is primarily composed of native scholars writing about their home countries and not Western experts who rarely leave their air-conditioned libraries. But this does not excuse the fact that the book's language obstructs the reader's understanding of the arguments instead of easing us along towards some sort of comprehension. Again, this is not to say that the scholars involved are incapable or unworthy of undertaking such a project, but maybe that more assistance with translation and clearer editorial guidance would have made great improvements in the overall and internal arguments of the book.

Several of the chapters, however, do stand out in their analysis, material and style. Maybe the best chapter in the book is Anastasia Kara-





kasidou's piece on the Greek hero Pavlos Melas. Not only does Karakasidou present a clear, interesting and well-argued chapter, but it is one of if not the only instance where the accompanying theories are clearly explained and connected to the analysis and information. And she manages to do this in a very readable and even entertaining style. Maria Todorova's chapter on Bulgarian conversions to Islam also has some extremely interesting information and historical analysis. Again, however, there is an unsatisfactory divide between the dense theorising and the actual analysis, and the last two sections of the chapter seem to be more self-indulgent than scholarly. Maria Bucur's chapter on Romanian war-memorials and heroes likewise has some very interesting information that is unfortunately interrupted by yet more incomprehensibly dense theory sections. The chapters on Serbian and Romanian textbooks by Dubravka Stojanović and Mirela-Lumini a Murgescu, respectively, are both well-presented and deserving subjects. Regrettably, the subsequent chapter dealing with Bulgarian textbooks is not nearly as successful.

Overall, for Southeast European scholars, the book does have some interesting information and analysis that deserves attention, if the information can be found through the mire of theory and academic jargon. Which begs the questions: what is the book really investigating and what is it trying to achieve? Does it, in the end, actually lead to a serious discussion of the Balkans, whether inside the chapters or between them? Or does it simply take a large sample of theories from various academic fields and haphazardly apply them during a meandering stroll through the history of Southeast Europe? The loaded title *Balkan Identities* is misleading, as this is more a work for scholars concerned with identity and memory theories and how those theories can be applied to a specific region of the world; the book is less concerned with refining or exploring our understanding of the region by introducing and explaining various theoretical lenses that Balkan specialists have likely not encountered in an analysis of Southeast Europe.





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