

ADDRESSING POST-ATROCITY CONFLICT: THE TENSION BETWEEN PEACE AND JUSTICE

By Kai Su*

I. INTRODUCTION: LESSONS FROM THE RWANDAN GENOCIDE

After the Rwandan genocide of 1994, Rwanda and the international community faced the challenge of how to proceed in the wake of the horrific events that transpired. Over the span of one hundred days, an estimated eight hundred thousand people from the Tutsi group and the politically moderate Hutu group were massacred.¹ Some five hundred thousand perpetrators carried out the genocide and genocide-related crimes.² The arduous, agonizing process of moving forward as a society in the aftermath of genocide demanded restoring justice to victims and re-forging community bonds in Rwanda—encouraging peace and reconciliation between the survivors and the perpetrators who reintegrated into society.³ However, following the genocide, only fifty lawyers and five judges remained in Rwanda.⁴ It would take an estimated 125 years to prosecute the accused who were held in custody.⁵

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1. KINGSLEY CHIEDU MOGHALU, *RWANDA'S GENOCIDE: THE POLITICS OF GLOBAL JUSTICE* 1 (2005).

2. Estimates of the amount of people involved in the genocide vary, but they amount to around five hundred thousand people. Erin Daly, *Between Punitive & Reconstructive Justice: The Gacaca Courts in Rwanda*, 34 N.Y.U. J. INT'L L. & POL. 355, 355 n.1 (2002). Some estimates say as many as one million people were killed. Mark. A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U. L. REV. 1221, 1250 (2000). Genocide-related crimes include assault, rape, and destruction of property, among other crimes. Christine M. Venter, *Eliminating Fear Through Recreating Community in Rwanda: The Role of the Gacaca Courts*, 13 TEX. WESLEYAN L. REV. 577, 578 (2007).

3. MOGHALU, *supra* note 1, at 2.

4. Venter, *supra* note 2, at 580.

5. *Id.*

A. The International Response to Rwanda

In the aftermath of the genocide, the international community responded by establishing the International Criminal Tribunal for Rwanda (ICTR) in 1994,⁶ also known as the “Arusha tribunal” (due to its location in Arusha, Tanzania).⁷ The United Nations (UN) Security Council implemented the ad hoc tribunal with the goal of prosecuting individuals who participated in the genocide and committed other violations of international humanitarian law.⁸ Rwanda’s response to the genocide has been the pursuit of its own form of localized justice, separate from the international community,⁹ while simultaneously pursuing the country’s strategic interests.¹⁰

Prosecutions via international criminal tribunals serve as a means of achieving retributive justice; however, the Arusha tribunal was intended to create more than simply a judicial outcome—the international community intended the tribunal to have a societal and political impact on Rwanda.¹¹ The complex (and usually competing) goals of international criminal tribunals beg the question: how effective are these tribunals in restoring justice to the communities devastated by atrocities?

The answer to this question depends on how a society defines “justice.” Obviously, societies may have differing conceptions of what justice means. Thus, the choice to utilize either an international tribunal or a non-prosecutorial alternative will depend on what a society aims to accomplish through its criminal justice system: retribution, deterrence, rehabilitation, incapacitation, compensation, restorative justice, social solidarity,

6. IAN BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 599–600 (2008). *See also* S.C. Res. 955, at 2 (Nov. 8, 1994), http://www.unmict.org/specials/ictr-remembers/docs/res955-1994_en.pdf (establishing an international tribunal for prosecuting people responsible for genocide and other serious violations of international humanitarian law).

7. MOGHALU, *supra* note 1, at 1.

8. *Id.*; *See also* 1996 U.N.Y.B., 1194–1201 (discussing the process for the tribunal’s development). Article 1 of the Statute of the Tribunal describes its competence as: “The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute.” BROWNIE, *supra* note 6, at 599–600.

9. *Infra* pt. IV (explaining Rwanda’s decision to implement a national, informal court system called Gacaca courts).

10. Namely, Rwanda’s strategic interest in preventing its own leaders from being prosecuted for war crimes in the Arusha tribunal. MOGHALU, *supra* note 1, at 3.

11. *Id.* at 2.

or some combination of these goals.¹² The reality is that international tribunals are not always equipped with adequate resources to prosecute hundreds or thousands of perpetrators after an atrocity. Further, aside from resources, there is the issue of the tremendous time required to prosecute the usually voluminous number of cases.

B. Tailored, Community-Based Approaches to Justice

This Article discusses the need for post-atrocity countries to implement tailored, community-based approaches to justice. I argue that these alternative approaches tend to have more longevity and are ultimately more effective than criminal prosecutions in international tribunals, which can be cumbersome, politically motivated, and ineffective in achieving long-term justice solutions.

Part II addresses the historical context behind prosecutions in international tribunals, how tribunals establish jurisdiction to prosecute international crimes such as atrocities, and the arguments supporting and opposing the administration of justice through prosecutions in international tribunals. Part III addresses the effect of localizing the administration of justice, distinguishes between international and national approaches to prosecuting international crimes, addresses the role of human rights in choosing the method of punishment, discusses the use of Restorative and Transitional Justice models in local approaches, and urges local judicial and political officials to incorporate access and visibility into their chosen approach to local justice. Part IV returns to Rwanda as an example of how the country came together and crafted its own system to more effectively administer justice following the genocide. Rwanda did this by establishing the Gacaca jurisdiction—a community-based, decentralized court system—which allowed the country to more efficiently prosecute perpetrators than was possible in the Arusha tribunal. Facing the unfortunate reality that post-atrocity societies may arise in the future, Part V concludes this Article by urging stakeholders in those societies to implement nuanced, localized justice solutions

12. *See generally* 1 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 1.5 (2d ed. 2003) (discussing the various objectives of the criminal justice system).

that do not solely rely on criminal prosecutions in international tribunals as a blanket solution to resolve conflict.

II. PROSECUTING PERPETRATORS

This Part provides an overview of international criminal tribunals—the history of their use, how the tribunals establish their jurisdiction, and the main arguments for their strengths and weaknesses. This overview serves to better frame the subsequent discussion about the ineffectiveness of international tribunals in administering long-term justice solutions to societies that are recovering from atrocities.

A. History of International Tribunals

After World War I, the League of Nations established the first international tribunal with general jurisdiction—called the Permanent Court of International Justice (PCIJ)—as part of the League’s mission to more peacefully resolve future political disputes.¹³ The PCIJ was active from 1922–1940, but it dissolved in 1946 due to declining activity and an eventual cease in activity after the outbreak of World War II (WWII).¹⁴ The PCIJ preceded the International Court of Justice (ICJ), which was the international community’s second attempt to establish an international tribunal with general jurisdiction. The UN established the ICJ after WWII¹⁵ and authorized the tribunal under Article 33 of the Charter of the United Nations.¹⁶ The ICJ handles two kinds of cases: (1) contentious cases, which are legal disputes between UN Member States that are submitted by the States; and (2) advisory proceedings, which are “requests for

13. *Permanent Court of International Justice*, INT’L CT. OF JUST., <http://www.icj-cij.org/en/pcij> (last visited Aug. 19, 2018).

Article 14 of the Covenant of the League of Nations gave the Council of the League responsibility for formulating plans for the establishment of a Permanent Court of International Justice (PCIJ), which would be competent not only to hear and determine any dispute of an international character submitted to it by the parties to the dispute, but also to give an advisory opinion upon any dispute or question referred to it by the Council or Assembly of the League of Nations.

History, INTERNATIONAL COURT OF JUSTICE, <http://www.icj-cij.org/en/history> (last visited Aug. 19, 2018).

14. *Permanent Court of International Justice*, *supra* note 13; *History*, *supra* note 13.

15. *History*, *supra* note 13.

16. *Id.*; Charter of the United Nations, art. 33, 1–2 [hereinafter UN Charter].

advisory opinions on legal questions referred to it by United Nations organs and specialized agencies.”¹⁷

In addition to the ICJ, the International Criminal Court (ICC) is another permanent international tribunal that prosecutes violations of international law. After the entry into force¹⁸ in July 2002¹⁹ of a multilateral treaty called the Rome Statute of the International Criminal Court (the Rome Statute),²⁰ the ICC was established. Headquartered in The Hague, Netherlands, the ICC specifically handles cases involving a variety of international crimes: genocide,²¹ war crimes, crimes against humanity²² (which include torture,²³ slavery,²⁴ and apartheid²⁵), and crimes of aggression.²⁶ Unlike the ICJ, which is a body of the UN, the ICC is

17. *How the Court Works*, INT’L CT. OF JUST., <http://www.icj-cij.org/en/how-the-court-works> (last visited Aug. 19, 2018). Contentious cases are within the scope of this Article; advisory proceedings, however, are beyond the scope of this Article.

18. Entry into force is the date on which the treaty becomes effective. The treaty may specify a date; if no date is specified, the treaty is presumed to enter into force after “all the negotiating states have consented to be bound by the treaty.” *Glossary*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/overview.aspx?path=overview/glossary/page1_en.xml (last visited Aug. 19, 2018).

19. *About*, INT’L CRIM. CT., <https://www.icc-cpi.int/about> (last visited Aug. 19, 2018).

20. Rome Statute of the International Criminal Court, July 17, 1998, 2189 U.N.T.S. 3, 37 I.L.M. 999 (entered into force July 1, 2002) [hereinafter Rome Statute].

21. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951), available at <http://hrlibrary.umn.edu/instree/x1cpcpg.htm>.

22. David J. Scheffer, *The Future of Atrocity Law*, 25 SUFFOLK TRANSNAT’L L. REV. 389, 395–96 (2002). Crimes against humanity include the crimes of torture, slavery, and apartheid. *Id.*

23. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, 23 I.L.M. 1027 (1984), as modified by 24 I.L.M. 535 (1985) (entered into force June 26, 1987), available at <http://hrlibrary.umn.edu/instree/h2catoc.htm>.

24. Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926 (Slavery Convention of 1926), Sept. 25, 1926, T.S. No. 778, 60 L.N.T.S. 253 (entered into force March 9, 1927), available at <http://www1.umn.edu/humanrts/instree/flsc.htm>.

25. International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 243 (entered into force July 18, 1976), available at www.un.org/genocideprevention/documents/atrocities-crimes/Doc.10_International%20Convention%20on%20the%20Suppression%20and%20Punishment%20of%20the%20Crime%20of%20Apartheid.pdf.

26. *About*, supra note 19; Rome Statute, art. 5, July 17, 1998, 2187 U.N.T.S. 3, 37 I.L.M. 999; U.N. Secretary-General, *Amendments to the Rome Statute of the International Criminal Court: Adoption of Amendments on the Crime of Aggression*, U.N. Doc. C.N.651.2010.TREATIES-8 (June 11, 2010).

an independent organ, but it does work with the UN in some capacities.²⁷

In addition to a permanent international tribunal, the UN has the power to establish ad hoc criminal tribunals through a vote by the Security Council.²⁸ Examples of ad hoc criminal tribunals include the ICTR and the International Criminal Tribunal for the former Yugoslavia (ICTY).²⁹

To summarize the avenues for prosecution for violations of international humanitarian and human rights law, five options are available to the international community, should it choose to prosecute the alleged perpetrators: (1) establish an ad hoc tribunal; (2) create “mixed” international criminal tribunals, which would share certain attributes with the ad hoc tribunals; (3) allow national authorities to prosecute perpetrators, “provided . . . domestic courts are functioning and able to conduct such trials”; (4) if a country’s domestic courts are not equipped to handle cases, “international resources could be made available to assist with the prosecution of alleged offenders in domestic courts”; and (5) “the international community could simply do nothing in the face of alleged violations.”³⁰ A sixth option is to prosecute in the ICC, but this option is only available if the alleged violation occurred after the Rome Statute’s entry into force.

B. Establishing Jurisdiction of a Tribunal

1. Crimes Under International Law

A novel legal concept, which emerged after the first international tribunals were established for the Nuremberg Trials and Tokyo Trials,³¹ is that individuals are subjects of a body of

27. UN Documentation: *International Law*, DAG HAMMARSKJOLD LIBRARY, <http://research.un.org/en/docs/law/courts> (last visited Aug. 14, 2018). For example, the UN Security Council, in accordance with Rome Statute Article 13(b) and UN Charter Chapter VII, can refer some situations to the ICC Prosecutor.

28. See generally *id.* (providing examples of the various ad hoc tribunals established by the UN Security Council).

29. *Id.*

30. Daryl A. Mundis, *New Mechanisms for the Enforcement of International Humanitarian Law*, 95 AM. J. INTL. L. 934, 934 (2001).

31. The Tokyo Trial is formally referred to as the International Military Tribunal for the Far East (IMTFE). MADOKA FUTAMURA, WAR CRIMES TRIBUNALS & TRANSITIONAL JUSTICE: THE TOKYO TRIAL AND THE NUREMBERG LEGACY 52 (2008).

international law.³² Accordingly, individuals can be held responsible under international law for certain criminal offenses.³³ Before the existence of international criminal tribunals, the domestic courts within countries handled these prosecutions.³⁴ Today, under the modern international legal system, countries can criminalize certain acts through the creation of treaties that outline these crimes; the countries that are parties to such treaties must first sign and ratify them before they can be enforced.³⁵ The proliferation of treaties has resulted in a body of international human rights law and humanitarian law defining crimes such as genocide, crimes against humanity, and violations of the Geneva Conventions.³⁶

International criminal tribunals do not have automatic or compulsory jurisdiction over *all* international disputes that are ready for adjudication.³⁷ The parties to a dispute must grant a

32. BROWNIE, *supra* note 6, at 587–88.

The International Military Tribunals at Nuremberg and Tokyo functioned on the basis of Charters which required the punishment of individuals for war crimes, crimes against humanity and crimes against peace. In Resolution 95(I) adopted unanimously on 11 December 1946, the General Assembly affirmed “the principles of international law recognized by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal.”

Id.

33. Mark D. Kielsgard, *War on the International Criminal Court*, 8 N.Y.C. L. REV. 1, 4 (2005). *See also* Formulation of the Nuremberg Principles, [1950] 2 Y.B. Int'l L. Comm'n 374–78, U.N. DOC. A/CN.4/SER.A/1950 (including the International Law Commission's formulation of “crimes under international law,” which the Commission was directed to formulate by the General Assembly).

34. Kielsgard, *supra* note 33, at 4.

35. *Id.* “Since Nuremberg and Tokyo, there have been 274 multilateral treaties ratified that require states to criminalize certain conduct. However, for many years after Nuremberg, military tribunals and domestic courts continued to conduct criminal trials of international scope.” *Id.*

36. BROWNIE, *supra* note 6, at 597. *See also* Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field [Geneva Convention I], Aug. 12, 1949, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950) (declaring procedures for caring for the wounded and sick); Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea [Geneva Convention II], Aug. 12, 1949, 75 U.N.T.S. 85 (entered into force Oct. 21, 1950) (declaring that the wounded, sick, and shipwrecked be collected and cared for); Geneva Convention Relative to the Treatment of Prisoners of War [Geneva Convention III], Aug. 12, 1949, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950) (discussing the protocol for treatment of prisoners of war); Geneva Convention Relative to the Protection of Civilian Persons in Time of War [Geneva Convention IV], Aug. 12, 1949, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950) (outlining protections for civilian persons in time of war).

37. THOMAS BUERGENTHAL & SEAN D. MURPHY, PUBLIC INTERNATIONAL LAW IN A NUTSHELL 11 (5th ed. 2013).

tribunal the authority to hear a dispute, thereby granting it jurisdiction.³⁸ If one party to a dispute has not accepted jurisdiction, that court cannot adjudicate the dispute.³⁹ Other methods—such as negotiation, mediation, or arbitration—exist for resolving (usually non-criminal) international legal disputes.⁴⁰

In the case of the UN, after a Member State has ratified a treaty criminalizing certain conduct, its citizens are subject to the ICJ's jurisdiction.⁴¹ Similarly, after a country has ratified the Rome Statute and submitted it to the Secretary-General of the UN, its citizens are then subject to the ICC's jurisdiction if they commit any of the crimes outlined in the Rome Statute.⁴² As of 2018, 193 countries are UN Member States⁴³ and 123 are Rome Statute State Parties.⁴⁴

2. *Ad Hoc Criminal Tribunals*

The UN Security Council can implement ad hoc criminal tribunals through a vote by the Security Council, which acts under UN Charter Chapter VII, the enforcement chapter.⁴⁵ If the Security Council passes a resolution, it grants these tribunals jurisdiction to hear certain cases.⁴⁶ These tribunals are typically

38. *Id.*

39. *Id.*

40. *Id.* Political, quasi-judicial, and diplomatic methods/organizations also exist to resolve conflicts and create solutions for societal problems. *Id.* (Those methods are beyond the scope of this Article.)

41. Mundis, *supra* note 30, at 934.

42. *Id.*

43. *Overview*, UNITED NATIONS, <http://www.un.org/en/sections/about-un/overview/index.html> (last visited Oct. 1, 2018).

44. *The State Parties to the Rome Statute*, INT'L CRIM. CT., https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Aug. 14, 2018). Of the State Parties to the Rome Statute, "33 are African States, 19 are Asia-Pacific States, 18 are from Eastern Europe, 28 are from Latin American and Caribbean States, and 25 are from Western Europe and other States"; however, the United States has signed but not ratified the Rome Statute. *Id.*

45. See BROWNLEE, *supra* note 6, at 599–600 (discussing international criminal justice and criminal tribunals established by the Security Council).

46. *Functions and Powers of the Security Council*, REPERTOIRE OF THE PRAC. OF THE SECURITY COUNCIL, http://www.un.org/en/sc/repertoire/functions_and_powers.shtml#rel1 (last visited Aug. 14, 2018). Under Article 24(1) of the Charter of the United Nations, the Security Council has the "primary responsibility for the maintenance of international peace and security." *Id.*

subject to temporal,⁴⁷ geographic,⁴⁸ and subject-matter limitations⁴⁹ that restrict the cases heard by the tribunal.

C. Strengths and Weaknesses of International Tribunals

The effectiveness or ineffectiveness of criminal tribunals will depend on what a society is attempting to accomplish through their implementation. This Article focuses specifically on the ineffectiveness of international criminal tribunals in administering long-term justice solutions to post-atrocity societies. The following Sections outline the main arguments in support of and opposition to administering justice via prosecutions in international tribunals.

1. *Strengths*

The primary strengths of criminal prosecutions in international tribunals are: (1) they satisfy certain objectives of criminal accountability—namely retribution, deterrence, victim-centered justice, and peace and reconciliation; and (2) judgments against perpetrators help fortify an international legal order by signaling to the world that perpetrators will be punished through the international criminal justice system for the crimes they commit.

47. E.g., the IMTFE, which was created to try Japanese war criminals after WWII, operated from 1946–1947. FUTAMURA, *supra* note 31, at 52–54. When prosecuting international crimes, “it may be necessary for a court to determine what the scope of an international crime was at the time of the offence, and also whether an offence included in an indictment or request for extradition was recognized as a crime at a particular date.” BROWNLIE, *supra* note 6, at 592. “The temporal limits of the jurisdiction of international criminal courts are set by their constituent instruments.” *Id.* at 594. In the case of the Tokyo Trial, the Charter of the IMTFE was the constituent instrument. FUTAMURA, *supra* note 31, at 53.

48. E.g., the ICTY was established “to prosecute those responsible for serious violations of international humanitarian law committed during the war in the former Yugoslavia from 1991 onwards.” FUTAMURA, *supra* note 31, at 1–2. Except in regard to rights and obligations *erga omnes* (Latin for “toward everyone”), in which case territorial restrictions on jurisdiction do not apply. BROWNLIE, *supra* note 6, at 596.

49. E.g., the ICC is limited to hearing cases involving genocide, war crimes, crimes against humanity, and crimes of aggression. *See supra* pt. II.A. 0 (discussing the history and types of cases heard by the international tribunal).

a. Satisfying the Goals of Criminal Accountability

i. *Retribution*

The primary strength of prosecutions via international criminal tribunals is the retributive nature of the process.⁵⁰ Retribution is a moral justification of criminal accountability, which posits that perpetrators should receive their “just desserts” because victims desire retribution through the punishment of the individuals who injured them; some societies also desire the punishment of individuals who violate societal norms.⁵¹ Thus, criminal prosecutions are a means for victims, as well as the international community, to exact retribution on perpetrators. This process of punishing perpetrators brings closure not only to victims but to the international community as a whole, which has also been impacted by the atrocity.⁵²

ii. *Deterrence*

Deterrence is another goal of international criminal tribunals. Prosecutions serve the utilitarian goal of preventing further crimes from being committed, either by perpetrators (specific deterrence)

50. STERLING JOHNSON, PEACE WITHOUT JUSTICE: HEGEMONIC INSTABILITY OR INTERNATIONAL CRIMINAL LAW? 38–39 (2003). Critics of conciliatory approaches to justice, such as Truth Commissions—see *infra* pt. III (discussing the use of truth commissions)—say they lack the retributive effect that prosecutions bring to victims.

51. Allen S. Weiner, *Ending Wars, Doing Justice: Colombia, Transitional Justice, & the International Criminal Court*, 52 STAN. J. INTL. L. 211, 214 (2016).

52. See Susanne Karstedt, *The Nuremberg Tribunal & German Society: International Justice & Local Judgment in Post-Conflict Reconstruction*, in THE LEGACY OF NUREMBERG: CIVILISING INFLUENCE OR INSTITUTIONALISED VENGEANCE? 13, 13–14 (David A. Blumenthal & Timothy L.H. McCormack eds., 2007) (discussing the success of Western Europe—and Germany specifically—after World War II in rebuilding its economy and restoring peaceful relations with its former enemies).

None of the contemporaries who witnessed the end of World War Two, and saw the sheer scale of European calamity, would have dared to predict that only a decade later Western European economies would be thriving, and a union amongst the former enemies would have been forged in the Western parts of the continent. If anything else, this unique European experience demonstrates that peace and reconciliation *are* possible, even after the most horrific atrocities and unspeakable injustices, and even after two wars that had cost the lives of millions of European citizens within the lifetime of one generation, leaving nearly no family unaffected. . . . Germany’s post-war history epitomises this success story in many ways.

Id. at 13.

or by other individuals (general deterrence).⁵³ However, there are doubts as to whether the goal of deterrence is achieved in cases of mass atrocities, such as genocide.⁵⁴ “[T]he connection between international prosecutions and the actual deterrence of future atrocities is at best a plausible but largely untested assumption,” according to law professor David Wippman.⁵⁵ Looking at deterrence efforts at the Nuremberg and Tokyo Trials where “the Allies made the prosecution of German and Japanese leaders a major war aim,” Professor Wippman suggests the results are not very encouraging or conclusive in how effective the trials were in deterring atrocities.⁵⁶ During WWII, the United Kingdom and United States issued repeated warnings that people who violated the laws of war would be punished and “superior orders would not be accepted as a defense.”⁵⁷ The Allies issued similar warnings to the German population.⁵⁸ Further, the UN Security Council and some individual states warned combatants in the former Yugoslavia about prosecution for committing atrocities.⁵⁹ Yet, looking at these examples, “there is no empirical evidence of effective deterrence in either case.”⁶⁰

iii. Victim-Centered Justice

Supporters of international criminal prosecutions argue that victim-centered justice is another strength. Victim-centered justice, which is the desire to address the needs of victims, is a psychological justification that suggests prosecutions can have a therapeutic or cathartic effect on victims.⁶¹ This effect is accomplished because tribunals compel acknowledgment of injuries victims have suffered and produce official judgments against perpetrators.⁶² Further, international criminal

53. Weiner, *supra* note 51, at 214.

54. *Id.*

55. David Wippman, *Atrocities, Deterrence, & the Limits of International Justice*, 23 *FORDHAM INTL. L.J.* 473, 474 (1999).

56. *Id.* (pointing to Germany, Japan, the United States, the United Kingdom, and the former Yugoslavia as examples of countries that publicized prosecution warnings for committing atrocities, yet there is a lack of evidence that these warnings were effective in deterring atrocities).

57. *Id.*

58. *Id.*

59. *Id.*

60. Theodor Meron, *From Nuremberg to the Hague*, 149 *MIL. L. REV.* 107, 110 (1995).

61. Weiner, *supra* note 51, at 215.

62. *Id.*

prosecutions serve to de-legitimize the political leaders and members of rebel groups who were indicted as war criminals.⁶³ This can also have a therapeutic effect on victims and bring a sense of closure.⁶⁴

iv. Peace and Reconciliation

The concept of peace and reconciliation is an aspirational claim made for criminal tribunals, but it is recognized as a potential effect. The argument is that: (1) prosecutions can remove from society those individuals who are most likely to promote violence to achieve political objectives; (2) trials allow us to identify individual perpetrators, which individualizes guilt and enables reconciliation between groups of former adversaries; and (3) victims demand justice and are more likely to respond with vigilante justice if perpetrators are not punished through the criminal justice process, which is a psycho-social claim.⁶⁵

63. Wippman, *supra* note 55, at 474 (citing the “de-legitimation of indicted war criminals as political leaders” as one of the reasons people support international criminal prosecutions).

64. For a brief discussion of the psychological benefits of international criminal prosecutions, see Brian Concannon, Jr., *Beyond Complementarity: The International Criminal Court & National Prosecutions, a View from Haiti*, 32 COLUM. HUM. RTS. L. REV. 201, 228–29 (2000) (arguing that national trials, rather than international trials, are more likely to offer victims the psychological benefits of criminal prosecutions).

Victims of massive human rights violations are usually the least powerful in their own countries, and their countries are themselves often among the least powerful globally. Their victimization is only part of a larger context of disempowerment. As a result, any remedy to the victim’s problems must, as much as possible, empower them by involving them in all aspects. This includes decisions such as choosing whom to arrest and prosecute, what information to use, and trial strategy. Involving the victims would be much easier to do with a national prosecution: more victims could testify and therefore have the opportunity to tell their stories in public. . . . Most importantly, a successful national trial would be evidence of a structural change in the society, usually the type of change that the repression was implemented to stop in the first place. In many countries the formerly oppressed would be punishing their former oppressors for the first time, through the medium of a justice system that was traditionally itself an instrument of oppression.

Id.

65. Weiner, *supra* note 51, at 215–16. The third argument is more of a psycho-social argument, rather than a legal argument. *Id.*

b. Protection of an International Legal Order

Judgments against perpetrators of atrocities convey a moral message to the world. For example, the judgments from the Nuremberg Trials after the Holocaust were said to “g[i]ve rise to a new vision of moral responsibility,”⁶⁶ which is a powerful notion.

Most people would have accepted summary executions as a legally permissible and morally sustainable resolution to a gruesome episode in world history. But the spirit of Nuremberg prevailed instead. The exact opposite impulses, fueled by equally compelling moral imperatives, won the day. Nuremberg was slow and time consuming, inconvenient and resource-expending. It wasn’t even local. The victors had to get on a plane and judge their enemies on the road, among the rubble of a bombed-out nation. And yet the moral argument that Nuremberg represented changed the way the world forever regarded justice and judgment, and gave rise to a new vision of moral responsibility among nations and the broadening of the range of that responsibility.⁶⁷

Trials such as those in Nuremberg and Tokyo helped shape the future of international tribunals and responses to heinous violations of human rights and humanitarian law.⁶⁸ Further, the international criminal tribunals in Rwanda and the former Yugoslavia have had a “slow but steady normative impact on international relations by reinforcing a norm of accountability for serious violations of international humanitarian law and the principle of ‘universal jurisdiction’ over such crimes.”⁶⁹

International tribunals help develop international norms through promulgating judgments that the international community will (ideally) follow.⁷⁰ By condemning those who contributed to genocide or other atrocities, the international justice system signals that such offenses are grave crimes that endanger

66. Thane Rosenbaum, *The Romance of Nuremberg & the Tease of Moral Justice Legacy*, 27 CARDOZO L. REV. 1731, 1733 (2006).

67. *Id.*

68. Michael G. Karnavas, Association President, Ass’n of Def. Counsel ICTY Practicing Before the Int’l Criminal Tribunal for the Former Yugoslavia, Nuremberg — 60 Years After: The Beginning and Development of International Criminal Justice (Nov. 11, 2006), (transcript at http://www.michaelgkarnavas.net/files/Nuremberg_speech_MGKarnavas_10Nov2006.pdf).

69. FUTAMURA, *supra* note 31, at 2.

70. Kielsingard, *supra* note 33, at 4.

the “peace, security and well-being of the world.”⁷¹ Additionally, by bringing judgments against perpetrators who have been found guilty of violating international law, the international justice system upholds the Rule of Law.⁷² The Rule of Law is defined by four universal principles: (1) accountability of government and private actors; (2) “clear, publicized, stable, and just” laws that are evenly applied; (3) an open government that is “accessible, fair, and efficient”; and (4) “accessible and impartial dispute resolution” mechanisms that facilitate the timely delivery of justice.⁷³

Further, each country’s *national* legal order requires the additional protection of an *international* legal order to deter susceptible state governments from abusing their power.⁷⁴ By holding perpetrators criminally liable for committing atrocities, the international community “makes clear that attacks by states on their own populations cannot be considered merely internal affairs, but invoke the concern of the international community as a whole.”⁷⁵

71. Otto Triffterer, *Preamble — Paragraph 3: Recognition of Protected Values*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 1, 9 (Otto Triffterer ed., 1999).

72. William Maley, *The Atmospherics of the Nuremberg Trial*, in THE LEGACY OF NUREMBERG: CIVILISING INFLUENCE OR INSTITUTIONALISED VENGEANCE? 1, 10 (David A. Blumenthal & Timothy L.H. McCormack eds., 2008). Although the Nuremberg Trials have been heavily criticized for a variety of reasons, there is evidence that at least some of the presiding judges were committed to upholding the law, while other judges may have come to their conclusions based more on instinct:

Oddly enough, those who have looked at the notes that were kept by one of the judges during the private deliberations on guilt and sentencing have come to the conclusion that despite what one might have expected, the two Soviet judges, I.T. Nikitchenko and A.F. Volchkov, made a greater effort than their French counterparts actually to link their conclusions to specific evidence and specific principles of law. It was said of the principal French judge that he had a romantic commitment to convict everyone but not to execute anyone, and that working around this was rather difficult for those who actually had to produce coherent penalties. . . . [T]he French approach was essentially instinctive whereas the others’ was evidence-based.

Id.

73. Juan Carlos Botero, *The Rule of Law Index: A Tool to Assess Adherence to the Rule of Law Worldwide*, N.Y. ST. B. ASS’N J., Jan. 2018, at 30, 31. The World Justice Project developed this working definition “in accordance with internationally accepted standards and norms.” *Id.*

74. Triffterer, *supra* note 71, at 9.

75. Morten Bergsmo & Philippa Webb, *Some Lessons for the International Criminal Court from the International Judicial Response to the Rwandan Genocide*, in AFTER GENOCIDE: TRANSITIONAL JUSTICE, POST-CONFLICT RECONSTRUCTION & RECONCILIATION IN RWANDA AND BEYOND 351, 353 (Phil Clark & Zachary D. Kaufman eds., 2009).

2. Weaknesses

a. Political and Experimental

While international tribunals have their merits in fulfilling some goals of criminal accountability, they also face heavy criticism directed mostly at their political nature. Prominent international scholar Ian Brownlie comments on the paradoxical nature of international criminal justice in his book *Principles of Public International Law*:

On the face of things the Rule of Law has been strengthened by a proliferation of international criminal tribunals, including the International Criminal Court, whose Judges were elected by the General Assembly in 2003. But the picture includes negative elements. In some situations the creation of a Tribunal has appeared to be a substitute for more effective preventative action by the international community, as in the case of the genocide in Rwanda. Moreover, in the case of the ICTY the creation of the Tribunal was associated with a specialized political campaign to destabilize the multi-ethnic State of Yugoslavia, with the ultimate aim of bringing about 'regime change' in Serbia. The Tribunal formed part of a coercive order created by the Security Council, and some observers have raised questions about the independence of the prosecution process from external influences. In the case of the Rwanda Tribunal the trial process is very slow and thousands of prisoners await trial. . . . Political considerations, power, and patronage will continue to determine who is to be tried for international crimes and who not.⁷⁶

While disheartening, the reasons international tribunals are created are often complex. The motivation may be merely to "serve the experimental intellectual urges of an international legal and diplomatic elite, rather than being configured to address the real needs of conflict-ridden societies."⁷⁷ While this contention is quite powerful (and perhaps extreme), there is some element of truth. The important point to note is that solely relying on international criminal tribunals as a means of administering justice can be a setup for failure to deliver tangible justice.

76. BROWNLIE, *supra* note 6, at 604.

77. MOGHALU, *supra* note 1, at 76.

Further, due to the novel and impermanent nature of ad hoc tribunals, these tribunals may suffer from procedural flaws that undermine the integrity of their proceedings. For example, widespread criticisms of the Nuremberg Trials were that the court operated without precedent, ignored the crimes of the Allied Powers who won WWII, and hindered the ability of the accused to assess and investigate the evidence.⁷⁸ As a result, the trials were commonly viewed as an illegitimate form of “victor’s justice.”⁷⁹ Senior legal experts on the Allied Forces side even “doubted the legality of the whole process.”⁸⁰

b. Limited Resources and Lack of Enforcement Mechanisms

Criminal prosecutions in international tribunals—especially when there are multiple perpetrators to try—can be slow, inconvenient, and expensive.⁸¹ Further, the international community lacks a police force to ensure judgments are enforced; coupled with the jurisdictional challenges explained above,⁸² this lack of an enforcement mechanism necessarily weakens expectations of compliance with judgments.⁸³

c. Falling Short of the Goals of Criminal Accountability

In discussing the effectiveness of international criminal prosecutions as a means of satisfying the goals of criminal accountability,⁸⁴ it is important to note that there are two sides to the coin. Regarding victim-centered justice as a goal of criminal accountability,⁸⁵ criminal tribunals can be a poor vehicle for

78. MARTHA MINOW, BETWEEN VENGEANCE & FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 29–31 (1998).

79. Richard Overy, *Making Justice at Nuremberg, 1945–1946*, BBC, http://www.bbc.co.uk/history/worldwars/wwtwo/war_crimes_trials_01.shtml (last updated Feb. 17, 2011). Hermann Goering, the most senior National Socialist who was captured by the Allies following WWII, wrote on the margins of his indictment for war crimes and crimes against humanity: “The victor will always be the judge and the vanquished the accused.” *Id.*

80. *Id.* “The four victorious Allies themselves argued for months over the vexed question of who to put on trial and on what charges.” *Id.*

81. Rosenbaum, *supra* note 66, at 1733.

82. *Supra* pt. II. B. 2.

83. BUERGENTHAL & MURPHY, *supra* note 37, at 12–13. Note that non-complying governments risk retaliation by other governments, but even strong states have an interest in adhering to international obligations and avoiding resort to force. *Id.*

84. *Supra* pt. II. C. 1. a.

85. *Supra* pt. II. C. 1. a. iii.

addressing the future needs of victims, who must continue with their lives in a post-atrocity society after a trial ends. Judgments from international tribunals, while they send an important moral message, sometimes produce more symbolic than concrete results.⁸⁶ Punishing perpetrators is of less value to victims when societal fractures—which likely created the conditions that facilitated the atrocities in the first place—are not adequately addressed and resolved. Regarding peace and reconciliation,⁸⁷ the logic underlying this argument is perhaps more tenuous. While it is true that trials allow communities to identify perpetrators and individualize guilt, this will not be achieved when the criminal proceedings take place in a location other than where the atrocity was originally committed, as was the case with the Arusha tribunal.⁸⁸ Moreover, the argument that international criminal prosecutions prevent victims from resorting to vigilante justice if perpetrators are not punished is not always true, as victims and perpetrators have been able to coexist and rebuild society in the aftermath of atrocities in the past.⁸⁹

Thus, because criminal prosecutions in international tribunals often fall short of the goals of criminal accountability (with the exception of retribution), post-atrocity societies must be willing to explore local, non-prosecutorial alternatives in order to ensure long-term justice solutions.

III. LOCALIZING THE ADMINISTRATION OF JUSTICE

This Part outlines the various alternatives available to post-atrocity societies, uses historical examples from countries that have implemented these methods in the past, and argues that post-atrocity societies deciding how to administer justice and collectively move forward should consider alternatives—namely, decentralized, local forms of justice—and avoid relying solely on international criminal prosecutions to address or resolve all

86. *E.g.*, the Japanese as a nation understood the symbolic impact of the Tokyo Trial, but the trial created complicated side effects, which were exacerbated by the nation's "anger toward wartime leaders." FUTAMURA, *supra* note 31, at 119.

87. *Supra* pt. II. C. 1. a. iv.

88. *Supra* pt. I. A.

89. *E.g.*, East Germany after the Holocaust and the fall of its dictatorial regime. Maryam Kamali, *Accountability for Human Rights Violations: A Comparison of Transitional Justice in East Germany & South Africa*, 40 COLUM. J. TRANSNAT'L L. 89, 103 (2001).

conflict. I conclude that the common denominator underlying the most successful methods is a localized, community-based approach that accounts for the particular needs and resources of the given society.

Philosopher John Rawls said a notion of justice is not justified by “being true to an order antecedent to and given to us,” but instead by an alignment with “our deeper understanding of ourselves and our aspirations, and our realization that, given our history and the traditions embedded in our public life, it is the most reasonable doctrine for us.”⁹⁰ Rawls’ view of justice, while lofty and philosophical, reaffirms the argument that state governments or the international community need not follow a predetermined path of justice simply because it has been done before. Instead, government officials and international actors should work cooperatively to implement the most reasonable method of justice for the particular post-atrocity society.

This argument assumes state governments are held to some degree of accountability and are not completely tainted by corruption; if government officials continue abusing their power or resort to corrupt practices, the framework will inevitably collapse, and the society will be susceptible to future atrocities.⁹¹ It is crucial that new governments can be held accountable and adhere to the Rule of Law because these criteria, at a minimum, must be met to ensure the integrity of any internal proceedings.⁹²

A. Distinguishing Between International and National Approaches

In order to better explain the need for localizing the administration of justice, it is necessary to first distinguish between the various actors. The political leaders of national governments may decide to utilize national courts to prosecute suspected perpetrators,⁹³ or they may decide to refer cases to a

90. John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515, 519 (1980).

91. E.g., years after El Salvador’s amnesty law of 1993, the society is still struggling to overcome the challenges posed by corrupt government and institutions. Alexandra Grayner, Comment, *Escaping Forced Gang Recruitment: Establishing Eligibility for Asylum After Matter of S-E-G*, 63 HASTINGS L.J. 1417, 1417 (2012).

92. Ian McDougal, *Foreword*, in LUZ ESTELLA NAGLE, UNDERSTANDING HUMAN TRAFFICKING, CORRUPTION, & THE OPTICS OF MISCONDUCT IN THE PUBLIC, PRIVATE, AND NGO SECTORS: CAUSES, ACTORS, AND SOLUTIONS xi, xiv (2017).

93. BROWNLIE, *supra* note 6, at 593. “It is increasingly recognized that the principle of universal jurisdiction is an attribute of the existence of crimes under international law.” *Id.*

permanent international criminal tribunal (or to an ad hoc tribunal implemented by the Security Council). However, the preamble of the Statute of the International Criminal Court emphasizes the role of national courts first and foremost.⁹⁴

1. *Tension Between Punishment and Human Rights*

Some countries have resorted to the use of informal “township courts” to administer their own justice, such as in post-apartheid South Africa before the new political order implemented the Truth and Reconciliation Commission (TRC).⁹⁵ This method, although based on the will of the African people, was fraught with human rights abuses. Politically progressive human rights and religious organizations opposed the use of these courts because they implemented outdated, barbaric forms of punishment, such as public floggings by whip.⁹⁶ These organizations viewed the TRC as a more humane, civilized form of restorative justice. However, Africans, who supported the punishment of individuals involved in apartheid, equated the human rights arguments “with weakness on issues of social order, as soft on criminals and apartheid-era murderers, and as pro-bail and pro-amnesty for perpetrators.”⁹⁷

The lesson to be learned here is, although a society may subscribe to the *lex talionis*⁹⁸ view of law, a modern view of human rights and the Rule of Law should be respected. If victims in a post-atrocity society disregard these principles, they risk engaging in conduct that perpetuates the same violence for which they seek retribution, which could lead to a vicious, never-ending cycle.

However, “[t]he role played by national courts and military tribunals has been . . . far from consistent. The reluctance of governments to prosecute their own nationals inevitably provides a part of the policy basis for the establishment of international criminal courts.” *Id.* at 594.

94. The preamble states that the ICC “shall be complementary to national criminal jurisdictions.” *Id.*

95. RICHARD A. WILSON, *THE POLITICS OF TRUTH & RECONCILIATION IN SOUTH AFRICA: LEGITIMIZING THE POST-APARTHEID STATE* 208–09 (2001).

96. *Id.* at 209.

97. *Id.*

98. Latin for “law of retaliation” or “eye for an eye.” *Lex Talonis*, BLACK’S LAW DICTIONARY (10th ed. 2014).

2. *Different Valuations of History, Suffering as Justice, and Equality*

Preference toward township courts or human rights commissions, again referring to post-apartheid South Africa as an example, comes down to a difference in values between the individuals of a society; human rights advocates value “a future of rehabilitation, redemption and reconciliation,” whereas retribution advocates “in the townships look back at the past and still feel the burden of a crime that has not been canceled by punishment.”⁹⁹ The side of the debate on which an individual falls depends on their construction of history, the role of suffering in justice, and equality.¹⁰⁰ Human rights advocates tend to be forward-looking in their approach to justice, with nation-building being the priority; their definition of justice does not automatically include suffering on the part of perpetrators. They believe in “equality of rights and moral worth.”¹⁰¹ On the other hand, retribution advocates are backward-looking in their approach to justice, placing less emphasis on nation-building and reconciliation; they believe that “physical suffering can only be repaid with commensurate physical suffering, or with symbolic suffering in the form of a monetary compensation which stands for physical suffering”; and they reject the principle of equality of rights.¹⁰²

At a minimum, all members of a post-atrocity society must uphold the Rule of Law, whether they deem a retributive, conciliatory, or other approach to justice is most appropriate. If the government decides to prosecute perpetrators in national courts, these courts should adhere to minimum procedural standards to ensure fair trials and should not utilize outdated, barbaric forms of punishment. Otherwise we must ask ourselves: How much forward progress is the society actually making?

99. WILSON, *supra* note 95, at 209.

100. *Id.*

101. *Id.*

102. *Id.*

B. Restorative and Transitional Models of Justice

1. *The Role of Restorative Justice in Rebuilding Victims and Communities*

Restorative justice is a concept that cuts across more than just the legal discipline.¹⁰³ This model merits discussion because it emphasizes the centrality of victims and the community in creating effective, sustainable justice solutions.¹⁰⁴ Many prominent figures have spoken about restorative justice's emphasis on the victim and community. Archbishop Desmond Tutu beautifully defined the central concern of restorative justice as not retribution or punishment, "but the healing of breaches, the redressing of imbalances, the restoration of broken relationships and a seeking to rehabilitate both the victim and the perpetrator, who should be given the opportunity to be reintegrated into the community he has injured by his offense."¹⁰⁵ The Honorable Myron T. Steele, former Chief Justice of the Delaware Supreme Court, defined justice as "more than punishment" and discussed the importance of restorative justice (also known as community justice) in legal systems.¹⁰⁶

Post-WWII Germany serves as a historical example of how a country implemented restorative justice, including measures such as victim compensation, to successfully rebuild its society after one of the most horrific atrocities in human history:

Germany succeeded in becoming a stable democracy, and today, the overwhelming majority of its population embraces its democratic institutions and democratic values just like in other European countries. Germany has achieved reconciliation with those peoples who had been the victims of German aggressive warfare, war crimes and genocide. Since the beginning of the 1950s successive German governments started a long and

103. Shailly Agnihotri & Cassie Veach, Comment, *Reclaiming Restorative Justice: An Alternate Paradigm for Justice*, 20 CUNY L. REV. 323, 324 (2017). For example, the term "restorative justice" also appears in the conversation surrounding discipline reform in schools to reduce school violence. Sascha Brodsky, *Is Discipline Reform Really Helping Decrease School Violence?*, THE ATLANTIC (June 28, 2016), <https://www.theatlantic.com/education/archive/2016/06/school-violence-restorative-justice/488945/>.

104. Agnihotri & Veach, *supra* note 103, at 349–50.

105. Desmond Tutu, *No Future Without Forgiveness*, NEW PERSPECTIVES Q., Fall 1999, at 29, 29 (interview).

106. Honorable Myron T. Steele & Thomas J. Quinn, *Trends Toward Community Justice*, 12 DEL. LAW. 15, 16 (1994).

drawn-out process to compensate the victims of genocide, war crimes and mass atrocities that is still going on. At the end of the 1950s, a more systematic prosecution of war criminals and perpetrators of genocide was resumed by the Federal Republic of Germany that is now coming to an end. Since the 1990s, German governments and industry have started a process of compensating for forced labour in Germany during the war, and also a process of restitution of stolen and looted artwork to the families of the owners.¹⁰⁷

The process of restorative justice often uses the perpetrator as the instrument to make the victim whole.¹⁰⁸ This practice can be traced back to ancient cultures, where crime was a personal event.¹⁰⁹ Crimes were considered a violation against the victim. Thus, perpetrators and their families were held responsible for settling affairs with the victims.¹¹⁰ In taking this approach, “[j]ustice aimed to restore relationships.”¹¹¹

Alternative, non-prosecutorial methods can overcome the reality that prosecutions only restore justice to those select few who participate in the proceedings. A unique example of how France took an alternative, creative approach to restorative justice is embodied in H el ene Cixous’s play, *The Perjured City: Or, the Awakening of the Furies*.¹¹² Cixous wrote the play in response to the 1985 Blood Scandal, a French case in which half the hemophiliacs in Paris were infected with HIV by transfusion.¹¹³ The director head scientist of a Paris blood center caused hundreds of hemophiliac deaths because the center delayed screening donors and ignored warnings to use heat technology that would kill the viruses in donated blood.¹¹⁴ In the early 1990s, the hemophiliac plaintiffs sued the State for failing to prohibit the distribution of unheated products, and they received significant judgments from

107. Karstedt, *supra* note 52, at 13–14.

108. Steele & Quinn, *supra* note 106, at 16.

109. This is exemplified by statutes from ancient cultures, such as the Babylonian Code of Hammurabi (1700 B.C.) and the Laws of Ethelbert (c. A.D. 600). *Id.* at 15.

110. *Id.* The current justice system, however, focuses on upholding the state’s power rather than the victim’s power. *Id.* at 16.

111. *Id.* at 15.

112. H EL ENE CIXOUS, *The Perjured City: Or, the Awakening of the Furies*, in *SELECTED PLAYS OF H EL ENE CIXOUS* 89 (Eric Prenowitz ed. & Bernadette Fort trans., 2004).

113. Susan Ayres, *H el ene Cixous’s the Perjured City: Nonprosecution Alternatives to Collective Violence*, 9 N.Y.C. L. REV. 1, 3 (2005).

114. *Id.* at 4.

two thousand civil suits.¹¹⁵ Cixous's play depicts "a ceremony of confession and forgiveness," which is cathartic for victims and prompts us to consider the non-prosecutorial alternatives to justice.¹¹⁶

A creative, community-based approach is especially crucial in post-atrocity societies where the bonds of relationships have been destroyed—survivors must forge neighborly relations with the perpetrators who re-enter society, citizens must rebuild trust in local government institutions, and political leaders must rebuild the nation into a new political order. These tasks will be even more challenging and less likely to succeed if the victims are not "made whole" again.

2. *The Role of Transitional Justice in Building Trust in New Institutions*

The goal of transitional justice is to build trust and confidence in public life and the newly established democracy or political order. This is accomplished by showing perpetrators of atrocities that, unlike before, they can no longer commit such crimes with impunity.¹¹⁷ In this way, transitional justice lays the foundation for peace, security, and functioning political institutions under the new democracy.¹¹⁸ East Germany is an example of how a transitional justice approach was used to successfully transition from "more than forty years of communist rule" under the German Democratic Republic to a stable democracy under the new Federal Republic of Germany.¹¹⁹

Yet, society in transition must come to terms with its past; the German term for such a process is *Vergangenheitsbewältigung*, which literally means "reckoning with the past." Without some form of reckoning with the past for all members of society, including the bystanders who simply acquiesced to the

115. *Id.* at 6.

116. *Id.* at 8–10.

117. Edward Newman, *'Transitional Justice': The Impact of Transnational Norms & the UN*, in RECOVERING FROM CIVIL CONFLICT: RECONCILIATION, PEACE & DEVELOPMENT 31, 34 (Edward Newman & Albrecht Schnabel eds., 2002).

118. *Id.* at 34–35.

119. Kamali, *supra* note 89, at 103.

atrocities of the previous regime, a society may not be able to put its past injustices behind it to rebuild its future.¹²⁰

Transitional justice is characterized by its goal of building trust and stabilizing society, which can be achieved through various measures such as conditional amnesties, truth commissions, and reparations programs for victims.¹²¹ These transitional justice alternatives can serve post-atrocity societies better than international criminal prosecutions because they signal to victims that the new democracy is serious about righting the wrongs that were committed and creating a new legacy.

Alternatives such as truth commissions are effective because they encourage forgiveness and closure—survivors have the opportunity to face perpetrators and hear them publicly acknowledge, confess, or apologize for their actions.¹²² Psychological studies show that survivors “who give public testimony about their experiences suffer lower rates of post-traumatic stress disorder (PTSD) and depression than those who do not.”¹²³ This is important for the peace-building and nation-building that must happen after an atrocity; the fewer individuals who suffer from trauma or depression, the easier it will be for the community to collectively move forward and rebuild its nation on a strong foundation.

Truth commissions have been criticized as being overly weak on perpetrators (by focusing too heavily on human rights and on the equality of rights between victims and perpetrators),¹²⁴ which

120. *Id.*

121. The World Bank, *World Development Report 2011: Conflict, Security, & Development*, THE WORLD BANK 1, 125, https://siteresources.worldbank.org/INTWDRS/Resources/WDR2011_Full_Text.pdf (last visited Aug. 13, 2018). Brazil is an example of a country that has used reparations programs. The government “provided early economic compensation to some victims of political violence during the country’s military dictatorship,” which prompted “a process of truth-telling and public discussion of past crimes.” *Id.* at 125–26.

122. Weiner, *supra* note 51, at 215.

123. *Id.* at 215 n.9. See Debra Kaminer et al., *The Truth and Reconciliation Commission in South Africa: Relation to Psychiatric Status and Forgiveness Among Survivors of Human Rights Abuses*, 178 BRIT. J. PSYCHIATRY 373, 375 (2001) (showing lower levels of PTSD among persons who gave public testimony before the South African TRC (23.8%) than among those who provided only written statements (47.5%) or gave no testimony at all (41.9%)); see also Stevan M. Weine et al., *Testimony Psychotherapy in Bosnian Refugees: A Pilot Study*, 155 AM. J. PSYCHIATRY 1720, 1722 (1998) (showing lower levels of PTSD and depression among those who experienced “testimony psychotherapy”).

124. See *supra* pt. III. A. 1 (describing the tension between human rights and punishment).

was a criticism of South Africa's TRC. However, this perceived weakness can be remedied if the new democracy can link "local understandings of justice to the national transformation of the criminal justice system."¹²⁵ By harmonizing local and national concepts of justice, local efforts are likely to result in more successful outcomes. This emphasizes the point yet again that it is crucial for community and local government leaders to select the justice approach that most appropriately addresses the conflict and needs of their society. To further illustrate this point, post-apartheid South Africa "could have found more success in connecting with local values, creating greater legitimacy for middle-level courts and shifting legal practices in the townships further along the continuum from revenge to retribution" if it had not solely focused "on the popular appeal of 'just desserts' for offenders as the basis of human rights talk."¹²⁶ By learning from the lessons of South Africa's TRC, truth commissions established in the future can be more effective by tailoring their discussions to the particular needs of the community.

Non-prosecutorial, transitional justice approaches are intended to facilitate the process of reconciliation, which is not the case with criminal prosecutions in international tribunals (or any tribunals). Prosecutions are primarily concerned with retribution and deterrence—but they do not encourage reconciliation, which is necessary for peace-building and state-building in post-atrocity societies. Reconciliation also encourages forgiveness, which is not a goal associated with criminal prosecutions. Because transitional justice is forward-looking—with reconciliation and reforging community ties as the end goal—it facilitates more sustainable, long-term justice solutions. Colombia's peace deal of 2015 is an illustrative example of the forward-looking nature of transitional justice.¹²⁷ The Joint Communiqué negotiated between the Colombian government and the FARC (Fuerzas Armadas Revolucionarias de Colombia) included "the establishment of a truth commission ('Commission of the Elucidation of Truth, Coexistence and Non-Repetition') as well as a special judicial

125. WILSON, *supra* note 95, at 211. Wilson argues this could have been achieved in post-apartheid South Africa "if human rights talk emphasized how justice could be achieved through fair procedure and due process and requiring an appropriate and proportional punishment." *Id.*

126. *Id.*

127. Weiner, *supra* note 51, at 231.

mechanism (composed of ‘Chambers of Justice’ and a ‘Tribunal for Peace’) to adjudicate and sentence persons responsible for ‘grave crimes’ committed during the civil war.”¹²⁸

a. Potential for Bias in Peace Negotiations Involving
Amnesties

There are criticisms of using amnesty as a transitional justice alternative to criminal prosecutions. Critics say amnesty is overly lenient on perpetrators: first, full (“blanket”) amnesties relieve perpetrators of punishment;¹²⁹ second, by allowing perpetrators to receive less harsh punishment if they agree to certain conditions, conditional amnesties fail to bring justice to survivors.¹³⁰ Because the parties to peace negotiations have an interest in ensuring their members are not imprisoned, when settling their internal affairs they are obviously motivated to avoid using criminal tribunals to address the atrocities that were committed.¹³¹ Because of the bias that often taints the integrity of peace negotiations (which are sometimes conducted by the perpetrators themselves), the use of amnesties as an alternative method of transitional justice is often criticized.

Argentina and Chile granted blanket amnesties in the 1970s and 1980s following the end of their authoritarian regimes, which had committed widespread atrocities.¹³² More recently, El Salvador enacted amnesty laws in 1993 following the end of its civil war, which “precluded criminal prosecution of anyone for acts connected to the armed conflict.”¹³³ These amnesty laws “granted human rights abusers immunity from legal consequences for their war crimes.”¹³⁴ This impunity of human rights abusers has resulted in “weak and often corrupt institutional structure, which

128. *Id.* The Joint Communiqué granted “the broadest possible amnesty” . . . for crimes related to the conflict but, on the other hand, specifically notes that amnesty will not be granted for genocide, crimes against humanity, and grave war crimes, along with certain other serious offenses.” *Id.*

129. *Id.* at 212. Argentina, Chile, and El Salvador adopted full amnesties “as a transitional justice alternative to prosecution.” *Id.*

130. *Id.* at 231. Colombia implemented a conditional amnesty as a transitional justice arrangement which contemplated “differential treatment for fighters who acknowledge their responsibility for crimes compared to those who do not.” *Id.*

131. *Id.* at 212.

132. *Id.*

133. *Id.*

134. Grayner, *supra* note 91, at 1421.

essentially sanctions the violence and lawlessness” that persists in public life in El Salvador.¹³⁵

Colombia’s 2016 peace agreement has taken a step toward eliminating blanket amnesties in favor of conditional amnesties. At the conclusion of Colombia’s fifty-year-long civil war,¹³⁶ state leaders opted to adopt a conditional amnesty for individuals accused of committing crimes during armed conflict.¹³⁷ Under the 2016 peace agreement,¹³⁸ perpetrators who do not confess their crimes face up to twenty years in prison; those who confess and end their criminal activities face only up to eight years of “effective restrictions on liberty,” and they must pay or make reparations toward victims and the state, such as removing land mines.¹³⁹ However, until this most recent peace agreement, “peace settlements in Latin America routinely included blanket amnesty for both guerillas and state actors.”¹⁴⁰ While some critics still find the agreement overly lenient, the agreement signals a step in the right direction.

b. Ensuring the Integrity of Peace Negotiations

Methods of ensuring the integrity of peace negotiations involving amnesties do exist. One method, which has been tested in South Africa, is a hybrid truth commission and conditional amnesty. South Africa’s TRC incorporated a conditional amnesty mechanism under which individuals were granted amnesty if they appeared before the TRC and gave a full confession.¹⁴¹ By incorporating this mechanism, South Africa prioritized truth over criminal accountability,¹⁴² emphasizing the value of truth in its reconciliation process. Those individuals who failed to make what

135. *Id.* at 1422.

136. Weiner, *supra* note 51, at 212. Colombia’s civil war is often described as the world’s longest-running civil war, with estimates of over two hundred thousand people killed and millions displaced over the course of the conflict. *Id.*

137. *See generally* Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace, Nov. 24, 2016, <http://www.altocomisionadoparalapaz.gov.co/Prensa/documentos-y-publicaciones/Documents/Acuerdo-Final-ing-web.pdf> (last visited Sept. 3, 2018) (outlining conditional amnesty and other terms of the final peace agreement).

138. *Id.*

139. Juan Manuel Santos, *The Promises of Peace in Colombia*, N.Y. TIMES (May 18, 2017), <http://www.nytimes.com/2017/05/18/opinion/colombia-peace-process.html>.

140. *Id.*

141. Weiner, *supra* note 51, at 212–13.

142. *Id.*

the TRC considered a full confession or who committed crimes unrelated to the apartheid were subject to criminal prosecution.¹⁴³

As illustrated by the countries that have taken a transitional justice approach after an atrocity, the conflict that exists is often a tension between peace and justice.¹⁴⁴ Striking a balance between these (at times competing) interests depends on what the society values most. For example, post-atrocity societies can implement non-prosecutorial alternatives, such as truth commissions or conditional amnesties, if they value peace more than justice, or they can implement criminal tribunals if they value retributive justice more than peace. However, because the aim of transitional justice is to stabilize and build trust in society,¹⁴⁵ this is logically impossible without peace. Thus, post-atrocity societies must address and resolve conflict before they can make meaningful progress. Sole reliance on criminal prosecutions in international tribunals will not achieve the peace-building and nation-building goals of transitional justice.

C. Access and Visibility Facilitate Just Outcomes

After an atrocity, societies are faced with the task of re forging community bonds and collectively moving forward. In order to prevent the return of violence and hostilities, victims must have a chance to express their grievances and receive retribution for the atrocities that were committed.¹⁴⁶ Once victims are provided an opportunity to do so, they are more likely to be amenable to reconciliation because they “know that perpetrators have paid for their crimes.”¹⁴⁷ In post-atrocity countries where thousands or

143. *Id.* But, unfortunately, almost no apartheid crimes have been prosecuted in South Africa. *Id.* See Susan Farbstein, *New Revelations of Political Interference in Prosecution of Apartheid-Era Crimes*, HUMAN RIGHTS @ HARVARD LAW: THE ONLINE HOME OF THE HUMAN RIGHTS PROGRAM (Aug. 10, 2015), <http://hrp.law.harvard.edu/south-africa/new-revelations-of-political-interference-in-prosecution-of-apartheid-era-crimes-2> (discussing a case filed in the Pretoria High Court that alleged “South Africa’s ruling ANC government sought to protect apartheid-era security forces from prosecution, in order to protect itself,” which resulted in very few prosecutions for apartheid-era crimes).

144. Weiner, *supra* note 51, at 213–14.

145. See *supra* pt. III.B.2 (discussing the goals of transitional justice).

146. Paul van Zyl, *Promoting Transitional Justice in Post-Conflict Societies*, in SECURITY GOVERNANCE IN POST-CONFLICT PEACEBUILDING 209, 217 (Alan Bryden & Heiner Häggi eds., 2d ed. 2005).

147. Weiner, *supra* note 51, at 216. See Neil J. Kritz, *Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, 59 LAW &

hundreds of thousands of people have been killed, only a fraction of survivors might be able to participate in court proceedings.¹⁴⁸ And of course, only those individuals who participate in the proceedings can experience the potential rehabilitative or psychological benefits they offer. However, retributive justice can take many forms beyond just criminal prosecutions. Regardless of the chosen form of alternative justice, access to and visibility of the proceedings helps guarantee the integrity of the process and allows more people to share the rehabilitative and psychological benefits.¹⁴⁹

IV. RWANDA'S GACACA COURTS

The state-run Gacaca¹⁵⁰ courts in Rwanda are an example of how a post-genocidal country took justice into its own hands when the international community's response was inadequate. Rwanda crafted a solution that aimed to restore justice to victims, taking into account the glacial progress of the ICTR and Rwanda's own minimal resources to prosecute and defend the accused.¹⁵¹

A. Shortcomings of the Arusha Tribunal

More than twelve years after the genocide, the Arusha tribunal in Tanzania had given a mere thirty-one judgments and taken sixty-two people into custody—only a tiny fraction of the estimated five hundred thousand perpetrators who participated in the genocide.¹⁵² Further, because ICTR judgments were being administered by the international community rather than Rwandans, many Rwandans viewed the tribunal as extraneous

CONTEMP. PROBS. 127, 128 (1996) (explaining how criminal accountability helps enable long-term reconciliation).

148. *Id.* at 215.

149. *Id.* However, this can be challenging in the context of mass atrocities, in which case “only a small subset of victims will be able to appear in court proceedings. It is unclear whether the participation of a small number of victim witnesses can serve as a proxy for others in terms of producing psychological or rehabilitative benefits.” *Id.*

150. *Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts*, HUMAN RIGHTS WATCH (May 2011), <https://www.hrw.org/sites/default/files/reports/rwanda0511webwcover.pdf>. Gacaca is the Kinyarwanda word for “grass,” symbolic of the place where people gathered to resolve disputes. *Id.* Rwandan President Paul Kagame called the Gacaca courts an “African solution to African problems.” *Id.*

151. Maya Goldstein Bolocan, *Rwandan Gacaca: An Experiment in Transitional Justice*, 2004 J. DIS. RES. 355, 355 (2004).

152. Venter, *supra* note 2, at 579.

and actually opposed the tribunal's creation.¹⁵³ And because the ICTR was located outside of the country, it was difficult for Rwandans to access information about its operations. Prosecuting perpetrators in Rwanda's national courts was also challenging, as the country had limited jail space, lawyers, courthouses, and law enforcement to investigate crimes and protect witnesses.¹⁵⁴ The government refused to consider a blanket amnesty, making it necessary for Rwanda to come up with a different, specialized approach if justice was ever to become a reality.¹⁵⁵

B. Creation of the Gacaca Jurisdictions

In 2000,¹⁵⁶ six years after the genocide, the transitional government passed a law creating the Gacaca jurisdictions to try thousands of suspects through a community-based, decentralized court system.¹⁵⁷ This law, in response to "the overburdened criminal justice system," was a bold and original experiment in the field of transitional justice.¹⁵⁸ Instead of prosecuting perpetrators in an international criminal tribunal located outside of Rwanda, the Gacaca courts used an informal, participatory approach that focused on restoring harmony within the community.

The Gacaca courts—because of their accessible, open, and participatory nature—represented a mixed retributive and restorative approach to justice.¹⁵⁹ The Gacaca courts were an inventive solution to Rwanda's situation because they blended the retributive aspect of ICTR prosecutions with the restorative aspects of local, conciliatory forums, such as the truth commissions of post-apartheid South Africa. Because they were a grassroots effort, the Gacaca courts evidenced Rwanda's desire to recraft society from bottom-up rather than the top-down.¹⁶⁰ Rwanda

153. *Id.* at 579 n.11. Although the Rwandan government initially supported the ICTR, it actually cast the sole vote in the United Nations against creation of the tribunal. *Id.*

154. *Id.* at 578.

155. *Id.* at 579.

156. Organic Law No. 16/2004 of 19/6/2004, Establishing the Organisation, Competence and Functioning of Gacaca Courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide and Other Crimes Against Humanity, Committed Between October 1, 1990 and December 31, 1994, <https://repositories.lib.utexas.edu/bitstream/handle/2152/4582/3677.pdf?sequence=1>.

157. Goldstein Bolocan, *supra* note 151, at 355.

158. *Id.* at 355–56.

159. *Id.* at 356.

160. Venter, *supra* note 2, at 580.

serves as a hopeful example of a post-genocidal society that was able to listen to the needs of the community and craft an innovative response, which brings us back to the Rawlsian concept of justice as “the most reasonable doctrine for us.”¹⁶¹

V. CONCLUSION

In the wake of an atrocity, a society’s decision to utilize international tribunals or to take a less conventional approach to justice will depend on the society’s conception of justice. However, no matter what a society intends to achieve through its administration of justice, it is imperative that the new democracy’s leaders are attuned to the unique circumstances their society faces. Leaders should respond by implementing localized, community-based approaches to justice—incorporating elements of restorative and transitional models of justice, maintaining access and visibility, and not solely relying on prosecutions via international criminal tribunals to resolve all conflict, as these tribunals often fall short in their aim to administer justice. The chosen alternative justice approach—in order to address the immediate gravity of the atrocities, while simultaneously laying the foundation for a new democracy—must strike an appropriate balance between justice and peace.

161. *See supra* pt. III (explaining philosopher John Rawls’ notion that justice is the most reasonable doctrine given our history and traditions in public life).