

# DESIGNING BESPOKE TRANSITIONAL JUSTICE: A PLURALIST PROCESS APPROACH

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## INTRODUCTION

Although many scholars agree that contemporary transitional justice mechanisms<sup>1</sup> are flawed, a comprehensive and unified alternative approach to accountability for mass violence has yet to be propounded.<sup>2</sup> Like many international lawyers, transitional justice theorists have focused their assessment efforts on the successes and failures of established institutions.<sup>3</sup> This Article argues that before we can measure

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1. Scholars have taken different views on the meaning and emphasis of transitional justice. *See, e.g.*, RUTI G. TEITEL, *TRANSITIONAL JUSTICE* (2000) (defining transitional justice to include any period of political transition, and describing a limited set of mechanisms of transitional justice, namely criminal justice through trials, historical justice through truth commissions and reports, reparatory justice through various forms such as compensation and tribute, administrative justice through exclusion and lustration, and constitutional justice through constitutional change); RAMA MANI, *BEYOND RETRIBUTION: SEEKING JUSTICE IN THE SHADOWS OF WAR* 5–6 (2002) (emphasizing that, in order “[t]o restore justice after conflict,” peacebuilders must address legal justice, rectifying justice, and distributive justice); Naomi Roht-Arriaza, *The New Landscape of Transitional Justice*, in *TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE* 1, 2 (Naomi Roht-Arriaza & Javier Mariezcurrena eds., 2006) (defining transitional justice as “that set of practices, mechanisms and concerns that arise following a period of conflict, civil strife, or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law”). This Article defines transitional justice as any effort to respond to mass crimes and rebuild the afflicted society, incorporating the mechanisms described by Teitel and Roht-Arriaza, accepting Mani’s extension of the definition beyond harms directly traceable to violence, and including new approaches grounded in the local that have yet to be assessed or even imagined on the international stage.

2. JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, *CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS* 253 (2006) (“[M]ore systematic thinking and empirical research on the impact of accountability proceedings in specific post-conflict societies is a critical need and an increasingly important area of inquiry.”); Oskar N.T. Thoms, James Ron & Roland Paris, *Does Transitional Justice Work? Perspectives from Empirical Social Science* 9 (Oct. 19, 2008), available at <http://ssrn.com/abstract=1302084> (noting that “policymakers still tend to promote a standardized menu of [transitional justice] options”). *See, e.g.*, MARK A. DRUMBL, *ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW* 206 (2007) [hereinafter DRUMBL, *ATROCITY*] (criticizing the use of “modalities of ordinary liberal criminal law” in current transitional justice regimes); *TRANSITIONAL JUSTICE FROM BELOW: GRASSROOTS ACTIVISM AND THE STRUGGLE FOR CHANGE* (Kieran McEvoy & Lorna McGregor eds., 2008) (discussing how traditional transitional justice mechanisms often ignore the needs of those most affected by the crimes); Alison Des Forges & Timothy Longman, *Legal Responses to Genocide in Rwanda*, in *MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY* 49, 56 (Eric Stover & Harvey M. Weinstein eds., 2004) (concluding that the International Criminal Tribunal for Rwanda’s (ICTR) work following the 1994 Rwanda genocide did little to assist the reconciliation within Rwanda); Martti Koskeniemi, *Between Impunity and Show Trials*, 6 *MAX PLANCK Y.B. U.N. L.* 1 (2002) (explaining the difficulties of balancing punishment of international crimes with the need to avoid show trials).

3. *Cf.* Tom Ginsburg & Gregory Shaffer, *How Does International Law Work?: What Empirical Research Shows*, in *OXFORD HANDBOOK OF EMPIRICAL LEGAL STUDIES* (Peter Cane & Herbert Kritzer eds., forthcoming 2010) (manuscript at 22), available at [ssrn.com/abstract=1524385](http://ssrn.com/abstract=1524385) (noting that empirical studies of whether international law is effective are “plagued by problems of the counterfactual”).

whether transitional justice is working, we must begin with a theory of what it is trying to achieve. Once we have a coherent theory, we must use it *ex ante*, to *design* effective transitional justice mechanisms, not just to assess their effectiveness *ex post*. Drawing on several scholarly methods, I posit that effective transitional justice mechanisms are ones that successfully reconstruct social norms opposing mass violence. Because norm generation is an inherently communal and contingent social process, transitional justice ought to be primarily locally controlled and always precisely tailored to particular events and societies.<sup>4</sup> In a word, it must be *bespoke*. This Article seeks to replace a universalist vision of transitional justice—imposition of a uniform set of substantive values—with a pluralist approach to transitional justice—reconciliation of competing value frames through an inclusive process.<sup>5</sup>

Over the past two decades, societies recovering from mass crimes have pursued transitional justice in dramatically increasing numbers.<sup>6</sup> From the former Yugoslavia to Timor-Leste, most observers and scholars have viewed internationalized criminal courts as the gold standard for responding to these large-scale atrocities.<sup>7</sup> This assessment relies on a flawed universalist assumption that accountability mechanisms designed to address domestic crimes can and should be applied across dramatically varied cultures and contexts.<sup>8</sup> Because the social norms of the Western nations in which the relevant criminal standards were incubated are often strikingly different from those of the societies that transitional justice seeks to impact, these “universal” mechanisms have often been unresponsive to the needs of societies recovering from mass violence.

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4. STROMSETH ET AL., *supra* note 2, at 309 (“The needs and aspirations of the people who endured . . . atrocities must be appreciated more fully, and their goals must be given greater attention in designing accountability efforts.”).

5. See Paul Schiff Berman, *The New Legal Pluralism*, 5 ANN. REV. L. SOC. SCI. 225 (2009) [hereinafter Berman, *New Legal Pluralism*] (detailing the history of “global legal pluralism”); Carrie Menkel-Meadow, *Peace and Justice: Notes on the Evolution and Purposes of Legal Processes*, 94 GEO. L.J. 553, 555–56 (2006) (describing “process pluralism”).

6. Kathryn Sikkink & Carrie Booth Walling, *The Impact of Human Rights Trials in Latin America*, 44 J. PEACE RESOL. 427, 431 fig.1 (2007) (showing a steep increase in the total number of transitional justice mechanisms between 1987 and 2004).

7. See, e.g., Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT’L L. 7 (2001) (discussing the international tribunal successes in Yugoslavia and Rwanda); Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT’L L. 295 (2003) (discussing hybrid domestic-international courts); Lisa J. Laplante, *Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes*, 49 VA. J. INT’L L. 915, 932–35 (2009) (describing the move away from amnesty and toward international criminal justice); Theodor Meron, *From Nuremberg to the Hague*, 149 MIL. L. REV. 107 (1995) (explaining how the ad hoc criminal tribunals improved on the process laid out at Nuremberg).

8. Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1189–91 (2007) [hereinafter Berman, *Global Legal Pluralism*].

Drawing from several disciplines, this Article proposes that successful norm reconstruction requires that the local population perceive transitional justice institutions as legitimate and the values they propound as worthy of internalization. Transitional justice mechanisms carefully tailored to the society they serve will be perceived as significantly more legitimate than institutions drawn from a “universal” mold.

This Article offers the first comprehensive attempt to catalogue the perceptions and attitudes of local populations toward contemporary transitional justice mechanisms. It draws on empirical surveys and cultural studies to demonstrate legitimacy gaps, which have largely been caused by failures of international criminal courts to incorporate local perspectives and preferences. Other mechanisms have been more successful in garnering legitimacy, but these locally grounded accountability efforts have limitations of their own. The central lesson from these case studies is that the existing catalogue of transitional justice institutions should be viewed as a spectrum rather than a hierarchy of options.

In other words, rather than assuming that internationalized criminal courts are the best mechanism for resolving every dispute, the solution should be carefully tailored to the conflict and the needs and interests of the parties through an inclusive design process.<sup>9</sup> While others have presented similar critiques, few have offered concrete suggestions for crafting effective transitional justice mechanisms. In contrast, this Article presents design principles to increase the legitimacy of the source, procedure, and substance of transitional justice institutions, as well as evidence-based and locally grounded methods to implement these principles. This approach assumes that competing visions of substantive justice will exist within the affected society and the international community, and aims to incorporate, or at least respond to, a variety of perspectives. As a result, the pluralist process design promises to increase institutional legitimacy, which will lead to more successful norm reconstruction in societies afflicted by mass violence.

The pluralist process approach breaks new ground for the empirical study of public international law more generally. Rather than focusing on the question of whether international law is effective,<sup>10</sup> the Article takes

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9. Carrie Menkel-Meadow, *Introduction: What Will We Do When Adjudication Ends? A Brief Intellectual History of ADR*, 44 *UCLA L. REV.* 1613, 1619 (1997) [hereinafter Menkel-Meadow, *Introduction*] (explaining the values of the use of alternative dispute resolution mechanisms); Carrie Menkel-Meadow, *When Litigation Is Not the Only Way: Consensus-Building and Mediation as Public Interest Lawyering*, 10 *WASH. U. J.L. & POL'Y* 37, 42 (2002) [hereinafter Menkel-Meadow, *Consensus-Building*] (explaining how alternative dispute resolution mechanisms can be used to contribute to overall procedural fairness in adjudication).

10. Ginsburg & Shaffer, *supra* note 3, at 14–20. See also Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?*, 3 *ANN. REV. LAW SOC. SCI.* 10.1, 10.12–10.13

as a starting point the idea that effective legal processes are those that successfully reconstruct social norms. From that launching pad, a simpler and more productive question can be asked: how can we design international institutions to maximize their effectiveness? Rather than assessing after the fact whether international law changes behavior, we can design international law institutions in such a way that they will be more likely to alter social norms and thus increase compliance. By recognizing that public international law often acts on individuals who must internalize its proffered norms to render it effective, this prescriptive empiricism can transcend debates over whether international law matters and get working on making it matter.<sup>11</sup>

This Article proceeds in five parts. It begins by providing a brief explanation of the problems inherent in applying international criminal law to all transitional justice situations. The piece then lays out theories of legitimacy from several disciplines, suggesting that transitional justice mechanisms that are perceived as legitimate will be more effective in reconstructing social norms concerning mass violence. The Article next catalogues the performance of contemporary transitional justice mechanisms, focusing on the perceptions of the populations who suffered the mass violence that these courts, truth commissions, and other processes were created to address. This discussion of empirical surveys and cultural studies points to widespread local dissatisfaction with many of these institutions, which, as a result, may be rejected as illegitimate. The Article then offers general principles and concrete methods through which transitional justice mechanisms can be designed to increase their legitimacy and effectiveness in shifting social norms. Finally, the Article situates its proposals in current international law and dispute resolution

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(2007) [hereinafter Menkel-Meadow, *Restorative Justice*] (discussing empirical challenges in the context of restorative justice that are also applicable to transitional justice). Cf. Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002).

11. See Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 YALE J. INT'L L. 301, 322–23 (2007) [hereinafter Berman, *A Pluralist Approach*] (“A pluralist approach to the global legal system . . . extricates international law scholars from fruitless debates about whether international law is really law at all . . . .”); Lisa L. Martin & Beth A. Simmons, *Theories and Empirical Studies of International Institutions*, 52 INT'L ORG. 729, 743 (1998) (arguing that research should move beyond whether international law matters). See generally Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004) (offering the sociological conceptual framework of acculturation to assess design principles and political strategies used to increase international human rights law's influence over state behavior); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997) (defining effective supranational adjudication as a tribunal's ability to obtain compliance with its judgments, and offering a checklist to assess the effectiveness of supranational tribunals); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) (presenting norm internalization as the key to compliance with international law and offering transnational legal process as the method by which this internalization occurs).

literature that rejects universalist and adversarial legalist approaches in favor of process pluralism. It concludes by offering a vision of how process pluralism might play out in practice, applying this new frame to two of the case studies presented earlier in the Article.

## I. THE DESIGN FLAWS OF INTERNATIONAL CRIMINAL LAW

International criminal law, though noble in its aspirations, currently suffers from serious design flaws. Patterned after domestic Anglo-European criminal law, the rationales behind, and structures of, international criminal law are inadequate in addressing the collective nature of mass violence and bridging the differences between cultural contexts. Though efforts have been made to accommodate additional goals within the current framework of international criminal law, piecemeal solutions risk creating internal contradictions and other structural flaws.<sup>12</sup>

In its current incarnation, international criminal law's central goals are retribution and deterrence.<sup>13</sup> While domestic criminal laws might be able to achieve these goals,<sup>14</sup> international criminal law operates in a very different context. Domestic criminal law focuses on individual perpetrators of crimes that violate social norms established by a stable power structure. Crimes of mass violence, in contrast, are perpetrated by groups supported and often encouraged by social norms that have been manipulated by a renegade power structure.<sup>15</sup> As a result, the assumptions underlying the justifications for domestic criminal law do not hold true at the international level.<sup>16</sup>

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12. Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 LEIDEN J. INT'L L. 925 (2008) (identifying internal contradictions of international criminal law). See also David S. Koller, *The Faith of the International Criminal Lawyer*, 40 N.Y.U. J. INT'L L. & POL. 1019, 1024–32 (2008), at 1029–32 (finding flaws in the “effects” justification for international criminal law).

13. See, e.g., Mirjan Damaska, *What is the Point of International Criminal Justice?*, 83 CHI-KENT L. REV. 329, 331 (2008) (citing deterrence and retribution as goals of international criminal law); David S. Koller, *supra* note 12, at 1024–25; DIANE F. ORENTLICHER & OPEN SOC'Y JUSTICE INITIATIVE, *SHRINKING THE SPACE FOR DENIAL: THE IMPACT OF THE ICTY IN SERBIA* 38 (May 2008) (quoting International Criminal Tribunal for the Former Yugoslavia (ICTY) Judge Theodor Meron as saying that “the primary goal of an international tribunal is to do justice and punish atrocities”).

14. Social psychology studies question the effectiveness of deterrence as a method of ensuring compliance with the law even in the domestic context. See Tom R. Tyler & John M. Darley, *Building a Law-Abiding Society: Taking Public Views About Morality and the Legitimacy of Legal Authorities into Account When Formulating Substantive Law*, 28 HOFSTRA L. REV. 707, 712–13 (2000). See also Koller, *supra* note 12, at 1025–27.

15. Thanks to Diane Marie Amann for helping me to conceptualize this distinction. See also DRUMBL, *ATROCITY*, *supra* note 2, at 32.

16. See, e.g., Diane Marie Amann, *Group Mentality, Expressivism, and Genocide*, 2 INT'L CRIM. L. REV. 93, 116 (2002) [hereinafter Amann, *Group Mentality*] (arguing that, part-

International criminal law does not serve an adequate retributive function in the context of mass violence, as criminal sentences served for mass crimes before internationalized criminal courts differ little from those served for individual crimes.<sup>17</sup> In other words, criminal sanctions are inadequate to address the extraordinary nature of mass atrocities. The deterrence rationale is also questionable in the context of mass crimes. Although internationalized criminal courts might be able to perform specific deterrence in some cases—that is, they might stop a handful of perpetrators from repeating their actions—they do not have the capacity to try every individual who committed a crime in a situation of mass violence.<sup>18</sup> And when it comes to general deterrence, it is extremely difficult to prove theoretically or empirically that internationalized criminal courts prevent the commission of grave crimes elsewhere in the world.<sup>19</sup> Mass violence arises in unique societal and historical circumstances, led

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ly because international criminal courts rarely have the enforcement power to arrest defendants, “[i]nternational criminal law seldom has served either retribution or deterrence better than would a national counterpart”); Diane Marie Amann, *The Rights of the Accused in a Global Enforcement Arena*, 6 ILSA J. INT’L & COMP. L. 555, 558–60 (2000) (identifying structural and procedural problems of international criminal courts that rarely exist in domestic courts); Mark A. Drumbl, *Toward a Criminology of International Crime*, 19 OHIO ST. J. ON DISP. RESOL. 263, 270–71 (2003) [hereinafter Drumbl, *Criminology*] (arguing that neither deterrence nor retribution provide a complete justification for the international criminal justice system because international criminal prosecutions are selective rather than comprehensive and because deterrence assumes perpetrator rationality); Koller, *supra* note 12, at 1024–32 (discussing the failure of the retribution, deterrence, and effects rationales to justify “establishing or relying upon international criminal courts and tribunals”); Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?*, 84 WASH. U. L. REV. 777, 790 (2006) (“[T]here is almost no scholarship attempting to analyze whether, as an empirical matter, ICTs are likely to have, or actually have had, any deterrence effect on perpetrators of humanitarian atrocities.”); Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, INT’L SECURITY, Winter 2003/04, at 5, 13 (discussing issues that must be considered in order to effectively promote deterrence in the international criminal arena); Immi Tallgren, *The Sensibility and Sense of International Criminal Law*, 13 EUR. J. INT’L L. 561, 569–83 (2002) (identifying difficulties unique to the international criminal system in achieving deterrence); David Wippman, *Atrocities, Deterrence, and the Limits of International Law*, 23 FORDHAM INT’L L. J. 473, 474 (1999) (“Unfortunately, the connection between international prosecutions and the actual deterrence of future atrocities is at best a plausible but largely untested assumption.”).

17. *Id.* at 69; Koller, *supra* note 12, at 1025–26.

18. Diane Marie Amann, *Assessing International Criminal Adjudication of Human Rights Atrocities, 2000–2003* THIRD WORLD LEGAL STUD. 169, 173–74 (2003) [hereinafter Amann, *International Criminal Adjudication*]; Tallgren, *supra* note 16, at 584. The same critique could be raised for the incapacitation rationale of international criminal law.

19. Snyder and Vinjamuri argue that international criminal law’s focus on retroactive punishment may actually hinder the goal of deterrence, which “requires neutralizing potential spoilers, strengthening a coalition that supports norms of justice in the society, and improving the domestic administrative and legal institutions that are needed to implement justice predictably over the long run.” Snyder & Vinjamuri, *supra* note 16, at 13. Prosecutions may antagonize spoilers or members of a potential governing coalition, thus leading to a backlash that may result in lawlessness and further abuses. *Id.*

by psychologically unstable individuals. As a result, those who perpetrate it are unlikely to ponder the legal consequences before doing so.<sup>20</sup> The counterfactual problem renders empirical proof of the deterrent effect of international criminal courts nearly impossible.<sup>21</sup>

More recently, scholars have suggested that the expressive function of international criminal law is a more appropriate justification for its use in the context of mass violence.<sup>22</sup> However, in order for law to successfully shape societal meanings of right and wrong, the message understood, rather than the message intended, is crucial.<sup>23</sup> In cross-cultural settings, there is a significant risk that the message received will differ significantly from the message intended, particularly given that many messages will be at play, both among senders and receivers.<sup>24</sup> For legal institutions to successfully perform an expressive function, the community whose norms are at issue must trust those who aim to alter these norms, and individuals with authority in the message-receiving communities must participate in the process of clarifying and establishing new social norms.<sup>25</sup> As discussed further below, international criminal law has not been effective in ensuring that the message intended matches the message received, perhaps because of the absence of participation by members of affected societies.<sup>26</sup>

The first two justifications—deterrence and retribution—do not translate well from the domestic context to situations of mass violence. While the third justification, the expressive function, does a better job of

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20. See Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U. L. REV. 1221, 1254–55 (2000).

21. Ginsburg & Shaffer, *supra* note 3, at 22 (noting that empirical studies of whether international law is effective are “plagued by problems of the counterfactual—namely that we do not know how a world without international law would look”).

22. E.g., Amann, *International Criminal Adjudication*, *supra* note 18, at 178–80 (discussing the expressive power of criminal proceedings while acknowledging their limitations); Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT’L L. 39, 70 (2007); David Luban, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law* 9–10 (Geo. L. Fac. Working Papers, 2008), available at <http://ssrn.com/abstract=1154177>. Because punishment establishes an “authoritative schedule of moral values,” criminal law can be used to manage public discourse and establish social norms. Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 421 (1999). See also Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2030–31 (1996) (explaining the power of societal norms).

23. Amann, *Group Mentality*, *supra* note 16, at 118–20; Sunstein, *supra* note 22, at 2051.

24. See Amann, *Group Mentality*, *supra* note 16, at 117–31; Duncan Ivison, *Justifying Punishment in Intercultural Contexts: Whose Norms? Which Values?*, in PUNISHMENT AND POLITICAL THEORY 88, 100–07 (Matt Matravers ed., 1999); Sloane, *supra* note 22, at 81–88.

25. Sunstein, *supra* note 22, at 2049 (citing Nancy Reagan’s “Just Say No” policy as an example of the failure of norm management).

26. See *infra* Part III.

bridging the divide between individual and mass crimes, it fails on a different ground: it does not translate well across cultures. These problems also arise in the structural features of international criminal law—some do not function well in addressing mass, rather than individual, violence; other features do not work in different cultural contexts; still others fail on both counts.<sup>27</sup> This Section presents a few examples of each: the emphasis on individual accountability, the stringent procedural safeguards, and the limitations on the scope of factual findings.

While an emphasis on individual accountability may be effective in prosecuting crimes in the domestic context, it has serious drawbacks when applied to atrocities that are by their nature collective.<sup>28</sup> By centering blame on active perpetrators, often limited in number, international criminal law fails to address the actions of bystanders who failed to stop or even benefited from the atrocities.<sup>29</sup> Unlike domestic crimes, mass crimes require the complicity of large segments of society. As a result, accountability efforts must engage with these individuals if they are to reconstruct social norms opposing mass violence.<sup>30</sup>

The strict emphasis on procedural due process intrinsic to international criminal law, while not inherently inappropriate in addressing mass crimes, limits the ability to speak to local populations.<sup>31</sup> International criminal law has a very small menu of acceptable formats, all of which require strong procedural safeguards for defendants.<sup>32</sup> These stringent standards, drawn largely from Western domestic criminal law, may

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27. See, e.g., Laurel E. Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 HUM. RTS. Q. 573, 582–603 (2002).

28. See Robert M. Hayden, *Schindler's Fate: Genocide, Ethnic Cleansing, and Population Transfers*, 55 SLAVIC REV. 727, 742–43 (1996). Cf. Koskeniemi, *supra* note 2, at 3 (explaining that the purpose of trials for genocide and related crimes is not to punish the individual defendant but to publicize collective wrongdoing, and suggesting that a trial of the individual might undermine this objective).

29. DRUMBL, ATROCITY, *supra* note 2, at 26–28. See generally Laurel E. Fletcher, *From Indifference to Engagement: Bystanders and International Criminal Justice*, 26 MICH. J. INT'L L. 1013 (2005) (detailing the problem that complicit bystanders present to the achievement of justice through individual trials in the case of mass atrocities).

30. DRUMBL, ATROCITY, *supra* note 2, at 98–99; KARL JASPERS, *THE QUESTION OF GERMAN GUILT* 46–47 (E. B. Ashton trans., 2001).

31. Even within American society, judgments of fairness do not necessarily correspond to legal scholars' vision of due process—in one study, people rated plea bargaining to be fairer than a trial, and other studies have found that people rate mediation to be fairer than a trial. Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 319 (2003) [hereinafter Tyler, *Procedural Justice*].

32. Drumbl, *Criminology*, *supra* note 16, at 272–73 (arguing that international criminal law is more strongly influenced by common law than by civil law, as illustrated by the use of precedent and inductive reasoning in reaching decisions, adversarial process, availability of plea bargain, extensive cross-examination, role of defense counsel, and amici).

conflict with elements of accountability prioritized by local populations.<sup>33</sup> For example, the defendants' rights to confrontation and to a speedy trial may conflict with the victims' interest in telling their stories as witnesses; in some cultural contexts, the latter might be more important than the former.<sup>34</sup> While the structure of international criminal law offers some flexibility, there is little scope for restricting the rights of defendants.

International criminal law's embrace of only a narrow set of facts is problematic on both counts. First, it is not well suited to situations of mass violence where the "truth" is violently disputed.<sup>35</sup> This narrowness of scope may lead those who disagree with the context dictated by the trial-holder to reject the implementing mechanism.<sup>36</sup> In situations of mass violence, perpetrators comprise a large proportion of the population, and even those who did not themselves commit crimes may have signed on to the regime's depiction of reality—a depiction entirely at odds with the version of the facts on which international criminal law allows transitional justice institutions to rely.<sup>37</sup> International criminal law's failure to address this broader audience seriously limits its ability to account for mass atrocities.

Perhaps more importantly, because international criminal law focuses only on individual actors, it overlooks broader structural causes of mass atrocities and therefore fails to speak to local populations.<sup>38</sup> There are numerous factors—political, economic, historical, and colonial—that set the stage for mass violence.<sup>39</sup> Other states, which cannot be called as defendants before internationalized criminal courts, often bear signifi-

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33. DRUMBL, ATROCITY, *supra* note 2, at 7–8; Jenia Iontcheva Turner, *Defense Perspectives on Law and Politics in International Criminal Trials*, 48 VA. J. INT'L L. 529, 539 (2008) (arguing that shifting the focus of trials to peace and reconciliation can create tensions with the Western legal model's rigorous protections of due process).

34. Turner, *supra* note 33, at 539–41.

35. Mirjan Damaška, *What is the Point of International Criminal Justice?*, 83 CHI.-KENT L. REV. 329, 336–37 (2008). *E.g.*, Janine Natalya Clark, *The Limits of Retributive Justice: Findings of an Empirical Study in Bosnia and Herzegovina*, 7 J. INT'L. CRIM. JUST. 463, 476–77 (2009) [hereinafter Clark, *Retributive Justice*] (demonstrating that, even after the ICTY proceedings, the "truth" is still disputed in Bosnia and Herzegovina).

36. JASPERS, *supra* note 30, at 46–47; Damaška, *supra* note 35, at 345 (claiming that the public's perception of legitimacy depends on the court's procedures and decision).

37. Koskeniemi, *supra* note 2, at 12, 17. This is not to say that a transitional justice mechanism must accept the perpetrators' propaganda in order to speak to much of the afflicted society, but the mechanism could recognize a broader range of facts, thus rendering its findings more difficult to reject and more likely to be internalized.

38. *Id.* at 14.

39. DRUMBL, ATROCITY, *supra* note 2, at 84, 153, 172; Jose E. Alvarez, *Rush to Closure: Lessons of the Tadić Judgment*, 7 MICH. L. REV. 2031, 2054–56 (1998) [hereinafter Alvarez, *Rush to Closure*].

cant responsibility for mass atrocities.<sup>40</sup> Even those countries that did not play a part in instigating the violence may have failed to intervene successfully, and international criminal law's inability to recognize this may be viewed by locals as an attempt to deflect attention from such failures.<sup>41</sup> As a result, local populations may be skeptical of international criminal law processes and significantly less likely to accept them as legitimate.<sup>42</sup>

The assessment should not be surprising. Patterned after laws that address very different crimes, international criminal law is not well designed to account for mass violence.<sup>43</sup> Its goals and structure are flawed in at least two ways: they do not take into account differences between individual crimes and mass crimes, and they do not translate well across different cultural contexts. These problems, and the shortcomings of the mechanisms used to implement international criminal law, described in more detail in Part III, point to the need for a total reevaluation of our current approach to transitional justice.

## II. THEORIZING LEGITIMACY

The preceding Section describes the design flaws of international criminal law that limit its ability to address crimes of mass violence. Taking as a starting point that these shortcomings can and should be addressed through a more effective design process, this Section begins from first principles. What should transitional justice aim to achieve? How should it go about doing so? In order to transition from mass violence into a functional society, upended moral norms must be reestablished. Effective norm reconstruction requires that societal stakeholders, particularly afflicted populations, perpetrators, and political elites, view these new or revitalized norms against mass violence as *legitimate*. Norms perceived to be legitimate are significantly more likely to be

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40. DRUMBL, ATROCITY, *supra* note 2, at 84, 153. See Martti Koskeniemi, *Between Impunity and Show Trials*, 6 MAX PLANCK Y'BOOK U.N. LAW 1, 18-19 (2002).

41. Luban, *supra* note 22, at 13.

42. Clark, *Retributive Justice*, *supra* note 35, at 472-73 (reporting that those interviewed in Bosnia and Herzegovina "wanted a much broader responsibility to be addressed, and criminal trials do not do this").

43. CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, *DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS* (1996). Costantino and Merchant describe three criteria for evaluating dispute resolution systems: efficiency (comprised of change in cost and change in time), effectiveness (comprised of nature of outcome, durability of resolution, and effect on environment), and satisfaction (with process, relationship, and outcome). *Id.* See generally Robert Bordone, *Dispute System Design: An Introduction*, HARV. NEGOT. L. REV. 2008 SYMP. (Mar. 7, 2008), <http://blogs.law.harvard.edu/hnmcp/files/2008/03/dsdintroduction3-7-08.pdf> (describing considerations that should be taken into consideration in designing a dispute system).

internalized by the relevant players. This internalization will enable the norms laid out by the transitional justice mechanism to take root fully, recreating the moral fabric of a society recovering from mass violence.

### A. Defining Legitimacy

Legitimacy is a complex concept, with a rich literature describing and analyzing its various manifestations. This Article argues that transitional justice mechanisms should seek to maximize both sociological and legal dimensions of legitimacy.<sup>44</sup> Max Weber was perhaps the first scholar to put forward a sociological definition of legitimacy. In his treatise *Economy and Society*, first published in 1922, Weber describes an ethically normative belief as “one to which men attribute a certain type of value and which, by virtue of this belief, they treat as a valid norm governing their action.”<sup>45</sup> Such beliefs can be buttressed through legal, religious, or social guarantees, the latter constituting sociological legitimacy.<sup>46</sup> As Richard Fallon explains, while legal legitimacy assumes that that which is lawful is legitimate, an institution achieves sociological legitimacy when the “relevant public regards it as justified, appropriate, or otherwise deserving of support for reasons beyond fear of sanctions or mere hope for personal reward.”<sup>47</sup>

Sociological legitimacy is a subjective concept, defined by actors’ perceptions of institutions and rules.<sup>48</sup> When an institution is viewed as legitimate, actors internalize the social norms it promulgates, which means that the norms begin to define how an actor conceives of her interests. In graphical form:

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44. See generally Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1794–97 (2005) (describing three forms of legitimacy: legal, sociological, and moral).

45. MAX WEBER, *ECONOMY AND SOCIETY* 36 (Guenther Roth & Claus Wittich eds., 1978).

46. *Id.*

47. Fallon, *supra* note 44, at 1795. See also Daniel Bodansky, *Legitimacy*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 704, 707 (Daniel Bodansky et al. eds., 2007) [hereinafter Bodansky, *Legitimacy*] (“Legitimacy lies somewhere between rational persuasion and compulsion as a basis for action. In contrast to rational persuasion, legitimacy involves the notion of deference (or in the stronger case, obedience)—that is, performing an act not because one is convinced, on the merits, that the act is right but simply because another has directed it.”); Ian Hurd, *Legitimacy and Authority in International Politics*, 53 INT’L ORGS. 379, 381 (1999) [hereinafter Hurd, *Legitimacy and Authority*] (“[L]egitimacy . . . refers to the normative belief by an actor that a rule or institution ought to be obeyed.”).

48. Hurd, *Legitimacy and Authority*, *supra* note 47, at 381. Hurd uses the term “legitimacy” to reference the concept that this Article refers to as “sociological legitimacy.” *Id.*

## Legitimacy of transitional justice mechanism



## Internalization of norms promulgated by mechanism

When an actor's sense of her own interests is at least in part constituted by a community norm, we see internalization of that norm. The actor no longer perceives a conflict between her interests and the obligations imposed by the norm. Moreover, noncompliance with the norm will entail psychic costs to the actor.<sup>49</sup> Legitimate social institutions may be able to reconstruct social norms, thereby changing not only the behavior but also the belief system of relevant actors.

So why does sociological legitimacy matter for transitional justice mechanisms? Political scientists and legal scholars argue that legitimacy is a crucial component of a social institution's effectiveness; it "affects the decision calculus of actors with respect to compliance . . . and it is key to [a social institution] being recognized by actors as 'authoritative.'"<sup>50</sup> In other words, legitimacy is necessary for compliance, and a supranational tribunal's ability to compel compliance renders it effective.<sup>51</sup> If an institution is viewed as legitimate, actors will defer to its decisions even when they disagree with the substance of these decisions, and regardless of the threat of sanctions.<sup>52</sup> As a result, achieving legitimacy is of paramount importance to transitional justice mechanisms, because it enables these institutions to obtain compliance without the threat of sanction and to foster peace and reconciliation.<sup>53</sup>

In a similar vein, the social psychology literature suggests that in order to build a law-abiding society, internalized compliance, rather than externalized enforcement, is necessary.<sup>54</sup> Internalization is the most effective way to change individual incentives, particularly in post-atrocity societies in which enforcement mechanisms are likely to be weak.

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49. *Id.* at 388.

50. IAN HURD, *AFTER ANARCHY: LEGITIMACY & POWER IN THE UNITED NATIONS SECURITY COUNCIL 12* (2007). *See, e.g.*, Tallgren, *supra* note 16, at 570–71 (explaining that the internalization of moral values behind punishment is necessary for deterrence, and that a prerequisite to this internalization is that the punishing system enjoys legitimacy and the punishing organ enjoys authority).

51. Helfer & Slaughter, *supra* note 11, at 283, 290.

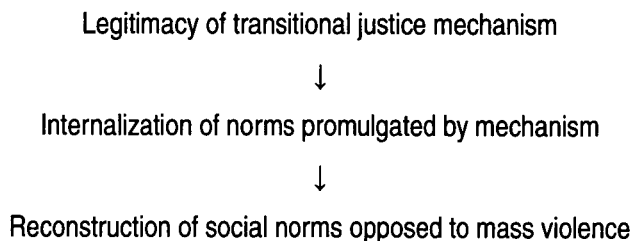
52. Daniel Bodansky, *The Concept of Legitimacy in International Law*, in *LEGITIMACY IN INTERNATIONAL LAW* 309, 310 (Rüdiger Wolfrum & Volker Röben eds., 2008) [hereinafter Bodansky, *Concept of Legitimacy*]; Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, in *LEGITIMACY IN INTERNATIONAL LAW*, *supra*, at 25, 31.

53. Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 97 (2005).

54. Tyler & Darley, *supra* note 19, at 714–17.

Instead of resting compliance on the notion that “law-breaking behavior is deterred by the risk of being caught and punished for wrongdoing,” it is more effective to create a society “in which people are motivated . . . by a desire to act in socially appropriate and ethical ways,” and thus self-regulate by internalizing the responsibility to follow the law.<sup>55</sup> This “[c]ooperation and consent” will enhance not only acceptance of an accountability mechanism’s decisions or outcomes in the short-term, but also long-term compliance with “decisions and directives of legal authorities.”<sup>56</sup>

Social psychologist Tom Tyler explains that legitimacy is necessary to ensure internalization. “[T]he ability to secure voluntary compliance with the law and legal decisions is linked to the attitudes of the population.”<sup>57</sup> Voluntary deference to the law requires members of society to believe “that the behaviors prohibited by law are also immoral” and that “legal authorities are entitled to be obeyed.”<sup>58</sup> Efforts to reconstruct societies that have suffered mass atrocities should, then, focus on the morality and legitimacy of transitional justice mechanisms and their findings in order to reconstitute ethical norms and ensure maximal compliance with decisions and outcomes.<sup>59</sup> In graphical form,



As described further below, the authority of internationalized criminal courts has rested primarily on legal legitimacy, which is insufficient in achieving the goals of transitional justice mechanisms.<sup>60</sup> Particularly

55. *Id.* at 707.

56. Tyler, *Procedural Justice*, *supra* note 31, at 286. Phillip Rapoza, *Hybrid Criminal Tribunals and the Concept of Ownership: Who Owns the Process?*, 21 AM. U. INT’L L. REV. 525, 526 (2006).

57. Tom R. Tyler, *Multiculturalism and the Willingness of Citizens to Defer to Law and to Legal Authorities*, 25 LAW & SOC. INQUIRY 983, 985 (2000) [hereinafter Tyler, *Multiculturalism*].

58. Tyler & Darley, *supra* note 19, at 707.

59. See Tyler, *Multiculturalism*, *supra* note 57, at 985.

60. See, e.g., Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and “The Rule of Law,”* 101 MICH. L. REV. 2275, 2322 (2003) (“[Rule-of-law promotion efforts] tend to confuse formal law with substantive normative commitments, assuming that the substantive values that are at the core of most western concepts of the rule of law will flow naturally from the creation of certain kinds of formal legal structures (modernized statutes,

with regard to international law, which cannot rely on effective enforcement mechanisms, it is not enough for law to be viewed as binding (legal legitimacy). It must also be perceived as fair and reasonable by those to whom its norms are addressed (sociological legitimacy).<sup>61</sup> Sociological legitimacy can effect legal transformation; “[i]f a legal rule is widely regarded as illegitimate by those to whom it is addressed, it is likely to be disregarded with increasing frequency, even if such violations continue to entail sanctions provided by law.”<sup>62</sup>

Legitimacy can be measured in at least two ways.<sup>63</sup> This Article seeks to assess the empirical dimensions of legitimacy, asking whether the authority of transitional justice institutions is accepted by those whom it purports to govern and serve. This subjective approach to legitimacy can be performed only by determining whether the actors whom the institution seeks to govern acknowledge its legitimacy.<sup>64</sup> This is a tall order; given that a transitional justice mechanism must appeal to strikingly different normative views, actors must accept that the institution will not live up to their normative ideal.<sup>65</sup> As discussed further below, this Article proposes that the effectiveness of transitional justice mechanisms be measured by perceptions of legitimacy on the part of relevant actors, and that this measurement take the form of rigorous empirical study.

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courts, etc.). In practice, these rule-of-law promotion efforts stumble when they come up against countervailing cultural commitments that are resistant to clumsy and formalistic efforts to change them.”).

61. See Hanspeter Neuhold, *Legitimacy: A Problem in International Law and for International Lawyers?*, in LEGITIMACY IN INTERNATIONAL LAW, *supra* note 52, at 335, 351 (“[A] legal order in which resort to coercion for the implementation of its norms is not the exception but the rule is neither politically desirable, nor likely to be durable . . .”).

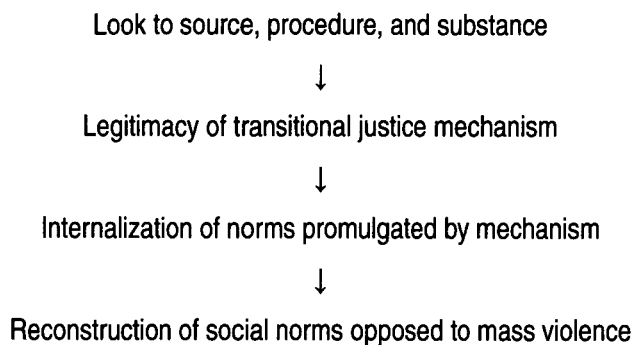
62. *Id.* at 337. See also THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 21 (1990) (“[The failure to follow international law may be caused by a] lack of legitimacy in rules and institutional processes by which they are made, interpreted and applied.”). Professor Franck’s book is part of an extensive literature, some of it deeply grounded in sociology, analyzing state compliance with international law. See, e.g., Goodman & Jinks, *supra* note 11, at 638–56 (describing the theory of “acculturation” as a means of influencing the behavior of a state); Ryan Goodman & Derek Jinks, *Incomplete Internalization and Compliance with Human Rights Law*, 19 EUR. J. INT’L L. 725 (2008) (responding to an objection to the theory of acculturation); Koh, *supra* note 11, at 2645–59 (describing the process by which a nation internalizes norms as legitimate); Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 633–42 (1998) (presenting different theories of why nations comply with international law). Because this Article focuses on individual compliance with international and national institutions, it does not draw extensively from this sociology-based literature.

63. Bodansky, *Legitimacy*, *supra* note 47, at 709 (“Legitimacy has two dimensions, one empirical and the other normative.”). This Article does not address the conceptually prior concern of whether an institution’s authority is normatively justified, but explores only whether the authority has sociological legitimacy.

64. HURD, *supra* note 50, at 31.

65. Buchanan & Keohane, *supra* note 52, at 30.

This legitimacy measure should be central to the design of transitional justice mechanisms.<sup>66</sup> How do we increase their legitimacy? Perceptions of legitimacy of a particular rule or institution may derive from the source from which it has been constituted, the procedure by which it has been adopted, or the substance of the rule itself.<sup>67</sup> In graphical form,



As discussed further below, transitional justice mechanisms could be better designed to strengthen legitimacy along each of these three dimensions. This is not an easy task in the transitional justice context as these bases of legitimacy are likely not only to vary, but to clash, across actors, societies, and cultures.<sup>68</sup> Factors that may legitimize an institution in the eyes of one transitional justice actor are likely to delegitimize it from the viewpoint of another.<sup>69</sup>

### B. *Legitimacy for Whom?*

As the case studies will illustrate, ensuring internalization of accountability proceedings by all affected parties is a tall order. Perhaps the closest we can come is to increase the perceived legitimacy of the transitional justice mechanism so that the relevant players will find it difficult to reasonably reject its decisions. Who are these players whose approval is needed to further the transitional justice project? There are at least three groups of players within the affected society: victims of the mass violence, perpetrators of the atrocities, and political elites. Moreover, to ensure that assistance is forthcoming, international justice proponents must also accept the mechanism's legitimacy. To be sure,

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66. Bodansky, *Concept of Legitimacy*, *supra* note 52, at 312 (emphasizing both normative and empirical legitimacy).

67. Hurd, *Legitimacy and Authority*, *supra* note 47, at 381; Bodansky, *Legitimacy*, *supra* note 47, at 710–11.

68. Bodansky, *Legitimacy*, *supra* note 47, at 711–12; Bodansky, *Concept of Legitimacy*, *supra* note 52, at 314.

69. Bodansky, *Concept of Legitimacy*, *supra* note 52, at 314.

these groups are not monolithic, and interests will differ within these groups, but this Article takes as a starting point that most of the time, divergences in interests relating to legitimacy within the groups will be smaller than divergences between the groups.

Assuming that transitional justice is a democratic enterprise, perceptions of legitimacy by non-elite members of the affected society should be the central marker of success. These individuals may be victims of the violence, perpetrators of the violence, or both. Some will have accepted the social norms that enabled the violence, and others will have rejected them entirely; a successful transition needs to speak to both groups. This crucial requirement has been consistently absent from accountability processes thus far,<sup>70</sup> resulting in many of the legitimacy concerns levied against international criminal courts. Both victims and perpetrators may also have concerns about the fairness of the process; victims will worry that the process may become corrupted or controlled by those responsible for mass violence, and perpetrators may worry that trials will not be fair as those charged will be assumed from the start to be guilty.

If transitional justice is to be successful in reconstructing social norms, the process must incorporate the perspective of the victims of the atrocities. Without such attention to the victims' interests, for reasons described above, transitional justice mechanisms risk being rejected as culturally irrelevant and failing to impact social norms. Of course, the interests of victims will vary within societies and are affected by factors including how directly they suffered violence and their socioeconomic position prior to the violence.<sup>71</sup> There is no transitional justice solution that will satisfy every individual who suffered mass atrocities, but there is still a great deal of room for improvement in aligning current models with the expressed interests of different victim groups.

One victim group that may be most frequently overlooked by contemporary transitional justice mechanisms is that of individuals who were both perpetrators and victims. In Sierra Leone and Timor-Leste, for example, many perpetrators viewed themselves also as victims.<sup>72</sup> In some

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70. DRUMBL, *ATROCITY*, *supra* note 2, at 63.

71. *See, e.g.*, JUDICIAL SYS. MONITORING PROGRAMME, UNFULFILLED EXPECTATIONS: COMMUNITY VIEWS ON CAVR'S COMMUNITY RECONCILIATION PROCESS 20 (2004) (presenting the views of one victim who was dissatisfied with community reconciliation procedures); Laura Arriaza & Naomi Roht-Arriaza, *Social Reconstruction as a Local Process*, 2 INT'L J. TRANSITIONAL JUST. 152, 154–57 (2008) (describing the difficulties of addressing the violence in Guatemala in the 1980s, particularly that caused by the diversity within the victim population).

72. JUDICIAL SYS. MONITORING PROGRAMME, *supra* note 71, at 16; POST-CONFLICT REINTEGRATION INITIATIVE FOR DEV. & EMPOWERMENT & THE INT'L CTR. FOR TRANSITIONAL JUSTICE, EX-COMBATANT VIEWS OF THE TRUTH AND RECONCILIATION COMMISSION AND THE SPECIAL COURT IN SIERRA LEONE 11 (2002), available at <http://www.ictj.org/images/content/09/090.pdf> [hereinafter PRIDE & ICTJ].

cases, this may reflect the nature of the violence—for example, in Sierra Leone, eighty-one percent of female combatants questioned in a survey reported that they had been forcibly conscripted.<sup>73</sup> Moreover, in most instances of mass violence, even in situations where one group was responsible for starting the atrocities or perpetrated more atrocities than other groups, members of each group fell victim to the violence.<sup>74</sup> The complexities of situations of mass violence often make it difficult to draw clear lines between perpetrators and victims. A successful transitional justice mechanism must recognize this challenge and approach accountability with an eye to incorporating the interests of all victims, not only those with clean hands.

To go a step further, it is important to design transitional justice mechanisms to draw in all perpetrators. Without the participation of perpetrators, any accountability effort will be incomplete and unstable.<sup>75</sup> This is a lofty goal that will be difficult, if not impossible, to achieve, as some perpetrators will always take issue with efforts to account for their crimes. Moreover, as discussed further below, the perspectives of victims and perpetrators are likely to conflict; this Article does not argue that the latter should override the former. Simply stated, a transitional justice mechanism that is viewed as legitimate by as many perpetrators as possible because it incorporates as many of their interests as possible will be more effective than one that ignores the interests of perpetrators entirely. It may be, for example, that atrocities were committed by more than one group in society or that outside forces, including foreign states, played a role in the conflict. By recognizing these realities, a transitional justice mechanism is more likely to draw perpetrators into the fold.

Perpetrators bring important cards to the table in any transitional justice effort. First of all, they have unique knowledge of the conflict; it will be difficult, if not impossible, to create an accurate historical record without participation of perpetrators in identifying those responsible and describing the planning and execution of atrocities. Second, and perhaps more importantly, if perpetrators entirely reject the legitimacy of a transitional justice mechanism, it will fail in its efforts to reconstruct social norms against mass violence. In such a situation, defendants may meet with some success in their efforts to be viewed as martyrs for their cause, further reinforcing divisions in society and eviscerating any societal pro-

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73. PRIDE & ICTJ, *supra* note 72, at 13.

74. See, e.g., Fletcher & Weinstein, *supra* note 27, at 602 (finding, in a study of the attitudes of judges and prosecutors in Bosnia to war crimes trials, that all participants identified their national group as a victim).

75. Janine Natalya Clark, *Genocide, War Crimes and the Conflict in Bosnia: Understanding the Perpetrators*, 11 J. GENOCIDE RES. 421 (2009) (explaining the need to understand the motivations of the perpetrator).

gress through accountability. Finally, in order to rebuild society, perpetrators must be reintegrated and participate in reconciliation efforts. Given that many perpetrators may not believe that they have done anything wrong—they were simply following the prevalent social norms—their belief in the legitimacy of the transitional justice mechanism is crucial.<sup>76</sup> In order to rebuild social norms, perpetrators must first understand that the prior norms that encouraged violence were inappropriate, and that their participation in the crimes was unacceptable. Such a change of perspective may never happen in some circumstances and may take many years to come about in others, but will be nearly impossible in any case without norm internalization by perpetrators.

It is also important to ensure that political elites in the affected society view the process as legitimate. Otherwise, political elites can use their not insubstantial power to stymie transitional justice efforts or simply reject them as illegitimate, thus impeding any beneficial impact on the local justice system and the rule of law. As further discussed below, political elites can use legitimacy critiques to capture transitional justice efforts for their own benefit. These political motives vary; elites may aim to prevent themselves and/or powerful allies from being tried or to gain political advantage over competitors or enemies.<sup>77</sup> This is where it begins to get tricky: a successful transitional justice mechanism needs to resonate sufficiently with the non-elite members of the affected society so that political elites cannot reject it with insincere legitimacy criticisms, but it also needs to prevent capture by the self-serving interests of political elites. This is another ambitious goal, and again, it may not be possible to achieve this outcome. However, without norm internalization by domestic political elites, any transitional justice project is likely to fail, so it is important that accountability mechanisms attempt to increase perceptions of legitimacy by these players.

International justice proponents are another important stakeholder in transitional justice efforts, as they often hold the purse strings and the ear of the media. By using the term “international justice proponents,” this Article aims to narrow the broad “international community” into a group that presents largely similar concerns about transitional justice and has great investment and participation in transitional justice mechanisms. This group is perhaps best exemplified by international non-governmental organizations such as Amnesty International and Human Rights Watch, but also includes United Nations staff and some officials

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76. For example, in Sierra Leone, only 15% of ex-combatants surveyed thought that they had done something wrong. PRIDE & ICTJ, *supra* note 72, at 12.

77. DRUMBL, ATROCITY, *supra* note 2, at 13; Ku & Nzelibe, *supra* note 16, at 817–19 (citing transitions to democracy literature from political science and noting the important role of elites in ensuring peace and stability).

from Western governments with authority in the international arena, as well as some scholars of international law and some domestic non-governmental organizations.<sup>78</sup> To be sure, there are those who would consider themselves supporters of international efforts to bring perpetrators of mass atrocity to justice who hold perspectives different than those laid out below, but this Article focuses on the group described above to represent a particular perspective on transitional justice.

International justice proponents as defined above are likely to focus on procedural fairness concerns, some of which may overlap, and some of which may conflict, with domestic populations' criticisms. These critiques largely focus on values such as fairness, impartiality, transparency, and independence.<sup>79</sup> So, for example, both international justice proponents and victims of mass violence might be concerned with the continued employment of perpetrators of the mass violence in the justice system; or on the other end of the spectrum, international justice proponents and perpetrators might be concerned with the employment of only victims in the justice system. The international justice proponents also concern themselves with capacity,<sup>80</sup> often an issue in post-conflict societies as legal skills and infrastructure have been destroyed, as well as corruption, a problem that arises often with an influx of donor dollars to an impoverished state.<sup>81</sup> These procedural concerns may conflict with the

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78. DRUMBL, *ATROCITY*, *supra* note 2, at 9, 94.

79. See, e.g., HUMAN RIGHTS WATCH [HRW], *JUSTICE IN MOTION: THE TRIAL PHASE OF THE SPECIAL COURT FOR SIERRA LEONE* (2005), available at <http://www.hrw.org/en/reports/2005/11/02/justice-motion> (focusing on trial management, fair trial rights, and witness protection); HRW, *LAW AND REALITY: PROGRESS IN JUDICIAL REFORM IN RWANDA* 70 (2008), available at <http://www.hrw.org/en/reports/2008/07/24/law-and-reality-0> (noting that the Rwandan justice system does not assure "basic fair trial standards" including "the presumption of innocence, the right of equal access to justice, the right to present witnesses in one's own defense, . . . and the right to protection from double jeopardy," and "judicial authorities operate in a political context where the executive continues to dominate the judiciary and where there is an official antipathy to views diverging from those of the government and the dominant party . . ."); HRW, *SELLING JUSTICE SHORT: WHY ACCOUNTABILITY MATTERS FOR PEACE* § I (2009), available at <http://www.hrw.org/en/node/84262/section/2> (noting the importance of evidentiary rules in conferring legitimacy on factual findings of internationalized criminal courts); OPEN SOC'Y JUSTICE INITIATIVE, *POLITICAL INTERFERENCE AT THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA* (2010), available at [http://www.soros.org/initiatives/justice/focus/international\\_justice/articles\\_publications/publications/political-interference-report-20100706](http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/political-interference-report-20100706) (focusing on judicial independence at the Extraordinary Chambers in the Courts of Cambodia); *Other International and Internationalized Courts*, AMNESTY INT'L, <http://www.amnesty.org/en/international-justice/issues/other-courts> (last visited Oct. 10, 2010) (critiquing internationalized courts as having some "statutes and rules [that] are flawed and not consistent with the highest standards of international justice").

80. See, e.g., HRW, *MAKING KAMPALA COUNT: ADVANCING THE GLOBAL FIGHT AGAINST IMPUNITY AT THE ICC REVIEW CONFERENCE* § IV (2010), available at <http://www.hrw.org/en/reports/2010/05/10/making-kampala-count> (discussing capacity building).

81. See, e.g., OPEN SOC'Y JUSTICE INITIATIVE, *RECENT DEVELOPMENTS AT THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA: MARCH 2010, 11-12* (2010),

legitimacy concerns expressed by domestic groups, as methods of addressing conflict that resonate within a society may not meet the due process standards upheld by international justice proponents. In transitional justice mechanisms to date, the international justice proponents' concerns have generally been paramount, perhaps because they often provide much of the funding and technical support for transitional justice mechanisms in the developing world.

It is of course an impossible task to design a transitional justice mechanism that will achieve complete internalization by each of these groups of players. It is, however, possible to improve contemporary transitional justice mechanisms by considering all of these perspectives during the design process in order to increase perceptions of legitimacy by as many players as possible. Past efforts have often focused on the perspective of international justice proponents, who raise important concerns, to the exclusion of other equally important viewpoints and thus to the detriment of the legitimacy of transitional justice efforts. Moreover, accountability mechanisms designed without concern for the interests of all players may inadvertently privilege the position of political elites who can then manipulate the institution to serve their interests. By increasing perceptions of legitimacy by as many players as possible, transitional justice mechanisms can ensure greater internalization of their findings and judgments, thereby becoming more effective at reconstructing social norms against mass violence.

### *C. Limiting Domination*

This inclusive approach to transitional justice design raises the question of how to address preference conflicts, particularly where an expressed preference leads to oppression. That is, if a transitional justice mechanism is to include as many voices as possible, how do we prioritize among competing preferences? How do we ensure that the prioritized preferences do not repeat patterns of domination? In other words, in the quest for legitimacy through inclusiveness, how do we ensure that we do not act illegitimately by excluding less dominant voices?<sup>82</sup> Three different academic disciplines—moral philosophy, political science, and social psychology—provide guidance in resolving this complex and challenging issue.

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available at [http://www.soros.org/initiatives/justice/focus/international\\_justice/articles\\_publications/publications/cambodia-20100324/cambodia-court-20100324.pdf](http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/cambodia-20100324/cambodia-court-20100324.pdf) [hereinafter OPEN SOC'Y JUSTICE INITIATIVE, RECENT DEVELOPMENTS] (discussing anticorruption measures in Cambodia).

82. Thanks to Jerry Vildostegui for consistently raising and helping me to frame this query.

We can start with the assumption that conflict between voices is inevitable in the creation of a transitional justice mechanism, as substantial conceptions of justice will always vary.<sup>83</sup> If we take as a given that conflict is a normal state, moral philosopher Stuart Hampshire suggests that societies should focus on creating institutions and procedures to resolve these conflicts fairly rather than asserting universal truths.<sup>84</sup> Beyond limited procedural requirements of reasonable regulation of conflict,<sup>85</sup> Hampshire argues that any outcome must be morally acceptable.<sup>86</sup> However, this laissez-faire approach to conflict resolution must be limited in two ways. First, efforts to impose a substantial conception of justice through force or domination are unacceptable.<sup>87</sup> Second, “primary evils” such as massacre and torture are to be prevented at all costs.<sup>88</sup> While this theoretical approach offers some helpful guidance in addressing differing viewpoints in transitional justice mechanism process design, the concrete details, such as the definition of force and domination and the scope of “primary evils,” are less easily resolved.

From the discipline of political science, we can draw on democratic justice theory, which focuses on process design as a way to resolve disputes over substantive conceptions of the good in a pluralist society. Similar to the moral philosophy approach laid out above, this theory accepts a broad range of beliefs but not of behaviors, arguing that domination should be limited as far as possible.<sup>89</sup> Helpfully, it also offers a definition of domination, which arises only from the illegitimate exercise of power but includes “shaping agendas, constraining options, and, in the limiting case, influencing people’s preferences and desires.”<sup>90</sup> Societies can limit domination by structuring institutions to maximize

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83. STUART HAMPSHIRE, *JUSTICE IS CONFLICT* 4–5 (2000).

84. *Id.* at 40.

85. Hampshire suggests two: a “universal rational requirement of two-sidedness and respect for locally established and familiar rules of procedure.” *Id.* at 97–98. Legal scholar Carrie Menkel-Meadow challenges the binary dialectic of Hampshire’s proposed procedures. See Carrie Menkel-Meadow, *The Lawyer’s Role(s) in Deliberative Democracy*, 5 *NEV. L.J.* 347, 358 (2004–2005) (“Disagreements may exist along a spectrum of views . . . with multiple challenges and forms of resolution, especially when multiple parties are involved.”).

86. See HAMPSHIRE, *supra* note 83, at 40–41.

87. *Id.* at 41.

88. *Id.* at 43 (“[T]hese primary evils stay constant and undeniable as evils to be at all costs averted, or almost all costs.”).

89. IAN SHAPIRO, *DEMOCRATIC JUSTICE* 234 (1999) [hereinafter SHAPIRO, *DEMOCRATIC JUSTICE*]; IAN SHAPIRO, *THE STATE OF DEMOCRATIC THEORY* 3, 102–03 (2003) [hereinafter SHAPIRO, *THEORY*]; Ian Shapiro, *Group Aspirations and Democratic Politics*, in *DEMOCRACY’S EDGES* 210, 220 (Ian Shapiro & Casiano Hacker-Cordón eds., 1999) [hereinafter Shapiro, *Group Aspirations*].

90. SHAPIRO, *THEORY*, *supra* note 89, at 4.

inclusive participation;<sup>91</sup> the theory suggests that “everyone affected by the operation of a particular domain of civil society should be presumed to have a say in its governance.”<sup>92</sup> In particular, a “right to demand increased deliberation [should be awarded] to those who are vulnerable in a given situation because their basic interests are at stake.”<sup>93</sup> However, efforts must also be made to enfranchise the opposition by offering different avenues to pursue their goals.<sup>94</sup> In this way, a society can create “systems that give aspiring political leaders active incentives to avoid mobilizing forms of identity that exacerbate cultural competition and to devise, instead, ideologies that can appeal across the divisions of such groups.”<sup>95</sup>

Finally, social psychology scholars offer suggestions for preventing factions from resorting to the use of force to promote their perspective. The theory posits that members of opposing factions will become more collectively oriented and cooperative if common group membership is made salient.<sup>96</sup> People who identify more with their faction than with the society as a whole are likely to be more concerned with outcomes than with process, and thus less likely to compromise in ways that are necessary to rebuild a society devastated by mass violence.<sup>97</sup> If dispute resolution processes can be designed to encourage engagement, people will be less likely to resort to other—perhaps violent—strategies for resolving disputes.<sup>98</sup> In short, an inclusive process itself helps to prevent domination and violence, but specific protections should be designed to

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91. Shapiro, *Group Aspirations*, *supra* note 89, at 220 (“The challenge . . . is to devise mechanisms that increase the likelihood that people will live in conditions of inclusive participation and non-domination.”).

92. SHAPIRO, *DEMOCRATIC JUSTICE*, *supra* note 89, at 37. Shapiro does offer the caveat that there may be compelling reasons to distribute governing authority unequally, and in some circumstances, to disenfranchise some participants. *Id.*

93. SHAPIRO, *THEORY*, *supra* note 89, at 36. Basic interests are defined as “obvious essentials that [people] need to develop into and survive as independent agents in the world as it is likely to exist for their lifetimes.” *Id.* at 45.

94. *Id.* at 90.

95. Shapiro, *Group Aspirations*, *supra* note 89, at 219.

96. Tyler, *Multiculturalism*, *supra* note 57, at 1005.

97. *See id.* at 1016. Like the moral philosophy and political science literature discussed above, the social psychology literature does not address the specific issues confronted by a society recovering from mass violence, but offers more generally applicable suggestions on encouraging factions to identify with the society as a whole. Tyler presents two strategies toward this goal: demonstrating that members of different factions are “valued and worthy of respect” and including them in the authority structure of the society. *Id.* at 1014–15.

98. David L. Markell & Tom R. Tyler, *Using Empirical Research to Design Government Citizen Participation Processes: A Case Study of Citizens’ Roles in Environmental Compliance and Enforcement*, 57 U. KAN. L. REV. 1, 33 (2008).

ensure that the voices of particularly vulnerable groups are heard and prioritized.<sup>99</sup>

### III. ASSESSING THE PERFORMANCE OF CONTEMPORARY TRANSITIONAL JUSTICE MECHANISMS

Using perceptions of legitimacy as the measure, this Section assesses the performance of contemporary transitional justice mechanisms. As discussed above, international criminal law's design flaws have inhibited its ability to address mass crimes, particularly in different cultural contexts. As a result, its implementing mechanisms—namely, internationalized criminal courts—have not fared well in the eyes of local populations. The ad hoc tribunals' failure to incorporate local preferences into their design process led to widespread rejection of these courts by members of the affected societies. In theory, hybrid courts were designed to harness the benefits of both national and international criminal courts, ensuring the support of local populations and international justice proponents alike, but in practice they have failed to adequately incorporate local preferences into their design processes. At the same time, the first five years of the International Criminal Court's existence have been marked by serious criticism on the part of societies the court seeks to serve. In some cases, the preference disconnect has enabled political elites to capture these institutions and utilize them for their own political purposes, which are most often at odds with goals of transitional justice.<sup>100</sup> On the other side of the spectrum, deeply incorporating local preferences but presenting other design flaws, lie truth and reconciliation commissions and locally grounded accountability processes.<sup>101</sup> This Section catalogues the

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99. See, e.g., DRUMBL, *ATROCITY*, *supra* note 2, at 204 (“Victims should be entitled to constitute themselves as they see fit for the purpose of filing claims and should be given qualified deference if not every individual member of the group meets exacting standing rules.”).

100. William W. Burke-White, *A Community of Courts: Toward a System of International Criminal Law Enforcement*, 24 MICH. J. INT'L L. 1, 41 (2002) [hereinafter Burke-White, *Community of Courts*] (“The international community must be on guard against strengthening the hand of a regime or particular politician in the name of international justice.”).

101. This Article does not discuss national courts as a mechanism of transitional justice; the pros and cons of these courts will be similar to those of hybrid courts. Other scholars, though, have argued that the future of international criminal law may lie in national courts. See, e.g., Elena Baylis, *Reassessing the Role of International Criminal Law: Rebuilding National Courts Through Transnational Networks*, 50 B.C. L. REV. 1, 81 (2009) [hereinafter Baylis, *Reassessing*]; Burke-White, *Community of Courts*, *supra* note 100, at 13; Jenia Iontcheva Turner, *Nationalizing International Criminal Law*, 41 STAN. J. INT'L L. 1, 5–6 (2005) [hereinafter Turner, *Criminal Law*]. While the application of international criminal law in a domestic court within the country that suffered mass violence may provide the most appropriate transitional justice mechanism in some situations, such an approach must be carefully

promise and pitfalls of each mechanism from the perspective of local populations, arguing that these must be carefully assessed if we are to craft transitional justice mechanisms appropriate for each society recovering from mass violence.

### A. *The Ad Hoc Tribunals*

The International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) were widely hailed as the first post-Nuremburg attempt to prosecute on an international level perpetrators of mass violence.<sup>102</sup> Though their goals may be noble, these courts have struggled to maintain legitimacy in the eyes of the societies they seek to serve.<sup>103</sup> Local populations were not adequately invested in the ad hoc tribunals from the start, and, as a result, have often rejected the courts' findings.<sup>104</sup>

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tailored to the country in question. Moreover, though it might be appropriate in limited circumstances, the exercise of universal jurisdiction by the courts of a country that did not suffer mass violence in order to prosecute such crimes will often face insurmountable legitimacy concerns. Such courts lack a link to the situs and victims of the crime and also face practical challenges extraditing and obtaining custody over defendants. Burke-White, *Community of Courts*, *supra* note 100, at 20.

102. Laurel E. Fletcher & Harvey M. Weinstein, *A World Unto Itself? The Application of International Justice in the Former Yugoslavia*, in *MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY*, *supra* note 2, at 29, 31–32 [hereinafter Fletcher & Weinstein, *World*]. The U.N. Security Council established the International Criminal Tribunal for the former Yugoslavia in 1993 to prosecute persons responsible for those serious violations of international humanitarian law committed in the former Yugoslavia after 1991. S.C. Res. 808, ¶ 1, U.N. Doc. S/RES/808 (Feb. 22, 1993). The conflict centered on an attempt to forcibly remove a majority of the Croat, Muslim, and other non-Serb populations from the Republic of Croatia and large parts of Bosnia and Herzegovina, in order to create a Serb-dominated state. Press Release, ICTY, Vojislav Seselj Indicted by the ICTY for Crimes Against Humanity and War Crimes, CC/P.I.S/728e (Feb. 14, 2003). The International Criminal Tribunal for Rwanda was established to prosecute the acts of genocide and other serious violations of international humanitarian law committed in Rwanda and by Rwandan citizens in neighboring states between January 1, 1994 and December 31, 1994. Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, Annex, art. 1, U.N. Doc. S/RES/955 (Nov. 8, 1994). These violations were committed as part of a plan to exterminate the ethnic Tutsi population of Rwanda as well as moderate Hutus. Prosecutor v. Jean De Dieu Kamuhanda, Case No. ICTR-95-54A-T, ¶ 15 (Jan. 22, 2004).

103. While legitimacy critiques have been made from the perspective of international justice proponents as well, the bulk of the criticisms come from local populations. See, e.g., Alvarez, *Rush to Closure*, *supra* note 39, at 2063 (citing due process concerns with ad hoc tribunals); Burke-White, *Community of Courts*, *supra* note 100, at 12 (noting the great expense of ad hoc tribunals, another factor that guaranteed the extinction of this breed of transitional justice mechanisms); Danner & Martinez, *supra* note 53, at 97–100 (critiquing procedural fairness in internationalized criminal courts).

104. See generally Jose E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 *YALE J. INT'L L.* 365 (1999); Des Forges & Longman, *supra* note 2; Fletcher & Weinstein, *World*, *supra* note 102; John Hagan & Sanja Kutnjak Ivkovic, *War Crimes, Democracy, and the Rule of Law in Belgrade, the Former Yugoslavia, and Beyond*, 605 *ANNALS AM. ACAD. POL. & SOC. SCI.* 130, 131 (2006); The Human Rights Ctr. and the Int'l Human Rights

Local perceptions of the ICTY have been notoriously negative,<sup>105</sup> and recent studies show that they have worsened over time.<sup>106</sup> The only geographically comprehensive opinion survey to date was conducted in early 2002;<sup>107</sup> over 7,000 respondents in seven of eight nations that comprised the former Yugoslavia revealed high awareness of, but low levels of trust in, the ICTY.<sup>108</sup> Serbian perceptions of the ICTY have been particularly negative and appear to be worsening; while fifty-eight percent of respondents to a July 2003 survey held negative views of the court, just over five years later, in the late spring of 2009, this figure increased

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L. Clinic, Univ. of Cal., Berkeley & The Ctr. for Human Rights, Univ. of Sarajevo, *Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors*, 18 BERKELEY J. INT'L L. 102 (2000).

105. In the words of then-ICTY President Gabrielle Kirk McDonald in 1999, "The Tribunal is viewed negatively by large segments of the population of the former Yugoslavia. Its work is frequently politicized and used for propaganda purposes by its opponents, who portray the Tribunal as persecuting one or other ethnic groups and mistreating persons detained under its authority." President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, *6th Annual Rep. of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, transmitted by Note of the Secretary-General*, ¶ 148, U.N. Doc. A/54/187-S/1999/846 (Aug. 25, 1999) [hereinafter UNGA, *Former Yugoslavia*]. This assessment, to be fair, was the impetus to establish an Outreach Program at the ICTY. See also Akhavan, *supra* note 7, at 22 (describing a survey conducted in August 2000 in Croatia in which 60% of those polled believed that the ICTY was "unfair"); Charles G. Boyd, *Making Bosnia Work*, 77 FOREIGN AFF. 42, 51 (1998) (discussing, without attribution, a U.S. Information Agency poll finding that no more than 6% of members of any ethnic group—Croats, Muslims, and Serbs—regarded bringing war criminals to justice as important).

106. Sanja Kutnjak Ivkovic & John Hagan, *The ICTY, Its Constituency, and the Politics: The Battle for Hearts and Minds* 37 (Aug. 2, 2009) (unpublished manuscript), available at <http://ssrn.com/abstract=1442907>.

107. Int'l Inst. for Democracy and Electoral Assistance, *South Eastern Europe: New Means for Regional Analysis*, [http://archive.idea.int/balkans/survey\\_detailed.cfm](http://archive.idea.int/balkans/survey_detailed.cfm) (last visited Oct. 10, 2010).

108. Pollsters from the South Eastern Europe Democracy Support network stated: "I will read you a list of international institutions from our country. For each of them, please tell me how much you trust them." The pollsters proceeded to list nine institutions: the International Monetary Fund, the ICTY, the World Trade Organization, the Organization for Security and Cooperation in Europe, the United Nations, the World Bank, the European Union, the North Atlantic Treaty Organization, and the Stability Pact for South Eastern Europe. Of the 610 Bosnians surveyed, 50.5% trusted the ICTY very much or a fair amount (the highest of the nine institutions), as did 20.5% of the 1,010 Croats surveyed (ranking it 6 of 9 institutions); 83.3% of 1,017 Kosovars (rank 2 of 9); 21.9% of 1,031 Macedonians (rank 8 of 9); 24.1% of 1,012 Montenegrans (rank 8 of 9); 7.6% of 1,523 Serbians (rank 8 of 9); and 3.6% of 1,034 residents of the Republica Srpska (rank 9 of 9). The survey instrument does not describe the question(s) asked about awareness. Poll results found under the title "International Institutions Awareness" show the ICTY scoring high across all countries: Bosnia 92.8% (the highest of the nine institutions listed above); Croatia 93.1% (tied for rank 2 of 9); Kosovo 97.4% (rank 4 of 9); Macedonia 97.8% (rank 5 of 9); Montenegro 92.7% (rank 1 of 9); Serbia 94.7% (rank 1 of 9); and Republika Srpska 95.7% (1 of 9). *Id.*

to seventy-two percent.<sup>109</sup> Similarly, a set of seven surveys conducted throughout the former Yugoslavia from 1997 through 2005 found that perceptions of fairness of the ICTY decreased over that time period, even among Bosnian and Croatian respondents.<sup>110</sup>

Though not as strikingly critical as local views of the ICTY, Rwandan perceptions of the International Criminal Tribunal for Rwanda have been lackluster at best. In a February 2002 survey of 2,000 Rwandans concerning attitudes toward justice initiatives, a plurality (forty-seven percent) of respondents had a neutral attitude toward the ICTR, though Tutsi perceptions were primarily negative.<sup>111</sup> The most surprising result from that survey, however, was that most respondents stated that they were not well informed (fifty-six percent) or not informed at all (thirty-one percent) about the ICTR.<sup>112</sup> Qualitative research performed by Rwandan genocide expert Alison Des Forges also revealed that those

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109. Compare BELGRADE CTR. FOR HUMAN RIGHTS, PUBLIC OPINION IN SERBIA: ATTITUDES TOWARDS THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (ICTY) 28 (2003), available at [http://english.bgcentar.org.rs/index.php?option=com\\_phocadownload&view=category&id=7](http://english.bgcentar.org.rs/index.php?option=com_phocadownload&view=category&id=7) (summarizing face-to-face poll of 1545 respondents) with Belgrade Ctr. for Human Rights & Org. for Sec. and Cooperation in Europe – Mission to Serb., *Public Perception in Serbia of the ICTY and the National Courts Dealing with War Crimes* 7 (2009), [http://www.english.bgcentar.org.rs/images/stories/Datoteke/public\\_perception\\_of\\_icty\\_and\\_the\\_national\\_courts\\_dealing\\_with\\_war\\_crimes\\_Serbia\\_2009.ppt](http://www.english.bgcentar.org.rs/images/stories/Datoteke/public_perception_of_icty_and_the_national_courts_dealing_with_war_crimes_Serbia_2009.ppt) (summarizing face-to-face poll of 1400 respondents). 71% of those surveyed thought that the ICTY did not contribute to reconciliation in the region. *Id.* at 27.

110. Participants were asked, “Do you think that the International Tribunal conducts the trials correctly and fairly and makes just decisions?” as part of surveys conducted in: Bosnia and Herzegovina (85.9% of 289 respondents in 2000 and 41.9% of 471 respondents in 2003 thought the ICTY was fair); Croatia (87.4% of 249 respondents in 1997 and 53.6% of 498 respondents in 2004 viewed the ICTY as fair); Kosovo (88.1% of 493 respondents in 2004 saw the ICTY as fair); and, Serbia (22.9% of 492 respondents in 2004 and 28.3% of 501 respondents in 2005 found the ICTY to be fair). Ivkovic & Hagan, *supra* note 106, at 45, 53. The authors of this study linked decreasing perceptions of fairness with views that the ICTY is politicized, as well as preferences for domestic war crimes courts. *Id.* at 38.

111. These attitudes contrast starkly with overwhelmingly positive attitudes toward the gacaca process, described further below, though of course that initiative was barely off the ground at the time of this survey. Timothy Longman, Phuong Pham & Harvey M. Weinstein, *Connecting Justice to Human Experience: Attitudes Toward Accountability and Reconciliation in Rwanda*, in MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY, *supra* note 2, at 206, 207, 215 (face-to-face structured survey of 2,091 Rwandans from four communes in February 2002, using multi-stage cluster sampling). For further methodological information, see *id.* at 207–09.

112. These were responses to the question, “How well informed do you feel about the Arusha Tribunal?” *Id.* at 213. In response to the question of whether the Rwandan tribunals had functioned well, only 14.3% of respondents stated that they were not informed (as opposed to 37.7% of responses to the question of whether the ICTR had functioned well). In response to the question of whether they had confidence in the gacaca process, only 1.2% of respondents said they were not informed. *Id.* at 214.

with knowledge of the tribunal felt that its work had little connection to their daily lives.<sup>113</sup>

This lack of knowledge about, and inclusion in the work of, the tribunals has led to negative perceptions of the ICTY and ICTR. Because both tribunals were located far from where the mass violence occurred and did not make sufficient efforts to bridge that distance, local populations did not participate in, attend, and in some cases even know about the proceedings.<sup>114</sup> A qualitative survey of Bosnians conducted during the summer of 2008 found that a widespread lack of knowledge about the ICTY “tended to manifest itself in extremely critical views of this institution.”<sup>115</sup> The ICTY not only failed to seek the input of local judges in the design phase but excluded nationals from holding positions on the tribunal. These missteps led to perceptions by Croats and Serbs that the court did not take their perspectives into account and contributed to a lack of cultural understanding between the court and local populations.<sup>116</sup> As a result, even those who might have been natural supporters of the court, such as Croat legal professionals and Bosnian Muslims, have found fault with the tribunal.<sup>117</sup> In the case of the ICTR, the adversarial legal approach of that tribunal is simply alien to the Rwandan cultural context and has contributed to local discontent with the court, including the popular perception that witnesses before it were treated disrespectfully.<sup>118</sup> The ad hoc tribunals’ failure to engage with members of the affected societies and to adapt to the local cultural context created a disconnect that has often led locals to dismiss the courts’ findings.<sup>119</sup>

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113. Des Forges & Longman, *supra* note 2, at 56. The chapter does not describe when and where in Rwanda this research was performed, though it may have been in conjunction with the February 2002 survey described by Longman et al., *supra* note 111.

114. In the words of Gabrielle Kirk McDonald, then-President of the ICTY, in 1999, “[T]he gap . . . between justice and its beneficiaries—victims of the conflict—is exacerbated by the Tribunal’s physical location far from the former Yugoslavia.” UNGA, *Former Yugoslavia*, *supra* note 105, ¶ 147. See also STROMSETH ET AL., *supra* note 2, at 264–65, 269, 271–72; Des Forges & Longman, *supra* note 2, at 56; Fletcher & Weinstein, *World*, *supra* note 102, at 33.

115. Clark, *Retributive Justice*, *supra* note 35, at 467 (describing 171 semi-structured interviews in 25 different locations throughout Bosnia and Herzegovina).

116. Fletcher & Weinstein, *World*, *supra* note 102, at 32; Turner, *Criminal Law*, *supra* note 101, at 25–29.

117. Fletcher & Weinstein, *World*, *supra* note 102, at 40–41; William W. Burke-White, *The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina*, 46 COLUM. J. TRANSNAT’L L. 279, 288, 288 n.28 (2008) (noting the Bosnian judiciary’s objection to “legal colonialism” by the Office of the High Representative in implementing procedural reforms to move courts from a civil law to an adversarial system).

118. Des Forges & Longman, *supra* note 2, at 56.

119. See ORENTLICHER & OPEN SOC’Y JUSTICE INITIATIVE, *supra* note 13, at 91 (“[S]urvey results are consistent with the proposition that Serbian citizens’ views are in general more likely to be shaped by local leaders’ attitudes than by judgments of the ICTY.”).

The dearth of support among local populations has enabled local elites to leverage these courts for their own political purposes.<sup>120</sup> The Tutsi-dominated Rwandan government, for example, was able to prevent the tribunal from investigating crimes perpetrated by the Rwandan Patriotic Front (the Tutsi-led military force).<sup>121</sup> This has led to further concerns on the part of Hutus that the ICTR is a biased institution that has chosen to support the interests of the Tutsis.<sup>122</sup> In the former Yugoslavia, nationalist politicians have capitalized on the disconnect between the ICTY and local populations to reject the tribunal as victor's justice and to spread false propaganda about its work, thereby increasing their power base.<sup>123</sup>

Both courts have learned lessons from their failures, as have subsequent internationalized criminal courts, and have engaged in outreach efforts to educate and engage local populations.<sup>124</sup> Yet even these adaptations have not been sufficient to overcome negative perceptions and resist manipulation by political elites. It may be that an entirely different process would have been more successful at reconstructing social norms. Serbia's former foreign minister, for example, suggested that the point of the tribunal should be to help Serbians to discuss the crimes rather than

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120. In the words of then-ICTY President Gabrielle Kirk McDonald's annual report to the UN General Assembly:

Throughout the region, the [ICTY] is often viewed as remote and disconnected from the population and there is little information available about it. Such views are exploited by authorities that do not recognize or cooperate with the tribunal, thereby damaging efforts to foster reconciliation and impeding the work of the [tribunal].

UNGA, *Former Yugoslavia*, *supra* note 105, ¶ 148.

121. Des Forges & Longman, *supra* note 2, at 55. The Rwandan government objected to the ICTR from its inception; while it favored an international court (to reduce the perception of victor's justice), it was dissatisfied with the temporal jurisdiction (wanting the tribunal, which focused on crimes committed between January 1 and December 31, 1994, to include crimes from at least 1990); lack of capital punishment; insufficient resources (due in part to sharing of human resources with the ICTY); and the failure to choose Rwanda as the seat of the trial chamber. U.N. SCOR, 49th Sess., 3453d mtg. at 14–16, U.N. Doc. S/PV.3453 (Nov. 8, 1994). During the Security Council's vote to establish the ICTR, the Rwandan government representative noted that, because of these flaws, the tribunal "would only appease the conscience of the international community rather than respond to the expectations of the Rwandese people and of the victims of genocide in particular." *Id.* at 15.

122. Luc Reydam, *The ICTR 10 Years On: Back to the Nuremburg Paradigm?*, 3 J. INT'L CRIM. JUST. 977, 977 (2005).

123. ORENTLICHER & OPEN SOC'Y JUSTICE INITIATIVE, *supra* note 13, at 66. See Snyder & Vinjamuri, *supra* note 16, at 21 (discussing survey results regarding the trust that various groups in the former Yugoslavia have for the ICTY). See also Fletcher & Weinstein, *World*, *supra* note 102, at 40.

124. DIANE F. ORENTLICHER, THAT SOMEONE GUILTY BE PUNISHED 102–05 (Open Soc'y Justice Initiative ed., 2010) (describing "Bridging the Gap" and other outreach efforts of the ICTY); David Cohen, "Hybrid" Justice in East Timor, Sierra Leone, and Cambodia: "Lessons Learned" and Prospects for the Future, 43 STAN. J. INT'L L. 1, 4–5 (2007).

simply jailing defendants.<sup>125</sup> As noted by the former senior outreach officer for the ICTY in Belgrade, workshops specifically tailored to young Serbians have been extremely successful in altering perceptions of the war, and have a “ripple effect” extending far beyond the participants in the programs.<sup>126</sup> Such dialogue may play a far more crucial role in attitudinal change than trials, and should have been a part of the design process of the ICTY from the start. Because of their serious shortcomings, including those laid out above, the ad hoc tribunals are soon to be an extinct breed, succeeded by hybrid courts and the International Criminal Court.<sup>127</sup> The tribunals nonetheless offer important lessons for the design of future transitional justice mechanisms.

### B. Hybrid Courts

The label “hybrid courts” sweeps in a variety of institutions, sharing the common feature of mixed national and international elements, including mixed legal frameworks and staff. These tribunals, located in the country in which the mass violence occurred, include the War Crimes Chamber in the Court of Bosnia and Herzegovina, the Extraordinary Chambers in the Courts of Cambodia, the Serious Crimes Panels in East Timor, the Regulation 64 Panels in the Courts of Kosovo, the Special Tribunal for Lebanon, and the Special Court for Sierra Leone.<sup>128</sup> In the words of one observer, “The aim is to marry the best of two worlds—the expertise of the international community with the legitimacy of local actors; but the risk is to intermix the worst of both—the externality of international actors with the weakness of local institutions that produced

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125. ORENTLICHER & OPEN SOC’Y JUSTICE INITIATIVE, *supra* note 13, at 39 (citing interview with Goran Svilanovic).

126. *Id.* at 68.

127. James Cockayne, *The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals*, 28 *FORDHAM INT’L L.J.* 616, 616–17 (2005).

128. James Cockayne, *Hybrids or Mongrels? Internationalized War Crimes Trials as Unsuccessful Degradation Ceremonies*, 4 *J. HUM. RTS.* 455, 455 (2005) [hereinafter Cockayne, *Hybrid or Mongrels*]; Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, 23 *ARIZ. J. INT’L & COMP. L.* 347, 353–54 (2006) (describing the Supreme Iraqi Criminal Tribunal as a “partial hybrid”); Sarah Nouwen, “Hybrid Courts”: *The Hybrid Category of a New Type of International Crimes Courts*, 2 *UTRECHT L. REV.* 190, 192 (2006). Because no quantitative or qualitative studies of population preferences relating to the War Crimes Chamber in the Court of Bosnia and Herzegovina or the Special Tribunal for Lebanon have been conducted to date, this Article does not discuss those tribunals. For discussions of local reactions to these courts, see generally BOGDAN IVANISEVIC, *INT’L CTR. FOR TRANSITIONAL JUSTICE, THE WAR CRIMES CHAMBER IN BOSNIA AND HERZEGOVINA: FROM HYBRID TO DOMESTIC COURT* (2008), <http://www.ictj.org/images/content/1/0/1088.pdf>; Marieke Wierda, Habib Nassar & Lynn Maalouf, *Early Reflections on Local Perceptions, Legitimacy, and Legacy of the Special Tribunal for Lebanon*, 5 *J. INT’L CRIM. JUST.* 1065 (2007).

the violence in question.”<sup>129</sup> In practice, hybrid courts have often faced serious criticism from local populations.<sup>130</sup>

The quantitative and qualitative surveys relating to hybrid courts present concerns common to these tribunals. Local populations have negative perceptions of hybrid courts for several reasons: they have not been included in the process of creating the court; local moral authorities are either explicitly excluded or omitted from the decisionmaking of the court; the complex legal concepts and structures are inaccessible to the vast majority of the population; and locals are disappointed with the scope and pace of the court processes. Those creating the courts have failed to bring even natural allies, such as lawyers and some elites, into the fold by excluding them from the process of creating and staffing the courts. As a result, like the ad hoc tribunals, hybrid courts are subject to capture by political elites who can, and often do, play these courts to their advantage.<sup>131</sup> This turn of events further damages perceptions of impartiality of hybrid courts. This is not to say that local populations entirely reject hybrid courts; the case studies below lay out the positive aspects of these courts alongside the criticisms. However, this investigation of hybrid courts in practice reveals serious design flaws in this form of transitional justice.<sup>132</sup>

### 1. Timor-Leste

The Special Panels for Serious Crimes in the Dili Courts and the Serious Crimes Unit in Timor-Leste present perhaps the most spectacular example of the failures of hybrid courts from the perspective of local populations.<sup>133</sup> The Serious Crimes process was established in

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129. Cockayne, *supra* note 127, at 619. See also Suzannah Linton, *New Approaches to International Justice in Cambodia and East Timor*, 84 INT’L REV. RED CROSS 93, 113–19 (2002) (discussing “lessons learned” from hybrid tribunals in Cambodia and Timor-Leste).

130. Arriaza & Roht-Arriaza, *supra* note 71, at 159; Baylis, *Reassessing*, *supra* note 101, at 19; Higonnet, *supra* note 128, at 410.

131. Ku & Nzelibe, *supra* note 16, at 827–31.

132. William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT’L L.J. 53, 66–67 (2008) [hereinafter Burke-White, *Proactive Complementarity*].

133. The origins of these courts can be seen in the U.N. Transitional Admin. in East Timor, Regulation No. 2000/11 on the Organization of Courts in East Timor, U.N. Doc. UNTAET/REG/2000/11 (Mar. 6, 2000), available at <http://www.un.org/peace/etimor/untaetR/Reg11.pdf> (establishing the courts effective June 2000); U.N. Transitional Admin. in East Timor, Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, U.N. Doc. UNTAET/REG/2000/15 (June 6, 2000), available at <http://www.un.org/peace/etimor/untaetR/Reg0015E.pdf>. Although the Special Crimes Unit was separate from the Special Panels, preference surveys often discuss the two processes together. See, e.g., CAITLIN REIGER & MARIEKE WIERDA, INT’L CTR. FOR TRANSITIONAL JUSTICE, THE SERIOUS CRIMES PROCESS IN TIMOR-LESTE: IN RETROSPECT 13 (2006),

2000 to account for the violent acts committed by advocates of integration with Indonesia during East Timor's transition to independence in 1999.<sup>134</sup> The Timorese people had serious concerns relating to the scope and mandate of the court, expressing frustration with its focus on low-level perpetrators<sup>135</sup> and its failure to prosecute crimes committed before 1999.<sup>136</sup> Perhaps more importantly, one of the key concerns of the victims—the need to locate missing persons—was not addressed by the court.<sup>137</sup> These shortfalls were compounded by the court's failures in performing adequate outreach to affected communities.<sup>138</sup>

At least some of those who had survived the atrocities would have preferred that the Serious Crimes process incorporate local dispute resolution traditions.<sup>139</sup> According to a qualitative survey, most Timorese respondents generally accepted the authority of traditional leaders, in part because they believed that these leaders had performed well.<sup>140</sup> Many of those interviewed thought that traditional leaders and customary law should be included in the justice system.<sup>141</sup> Moreover, the processes offered by the court did not speak to approaches traditionally favored by the Timorese. For example, public apology is extremely important in resolving disputes in Timor-Leste; this step would have been simple to include in the court process but was not.<sup>142</sup>

Interviewees offered the idea that, in accord with Timorese culture and traditions, the victim should decide how the reconciliation process should proceed.<sup>143</sup> So, for example, one interviewee suggested that instead of being fed and housed in prison—an outcome that led to some

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<http://www.ictj.org/static/Prosecutions/Timor.study.pdf>. Therefore, this Article refers to both with the term "Serious Crimes process."

134. U.N., *East Timor-UNTAET Background*, <http://www.un.org/en/peacekeeping/missions/past/etimor/UntaetB.htm> (last visited Oct. 10, 2010).

135. PIERS PIGOU, INT'L CTR. FOR TRANSITIONAL JUSTICE, *CRYING WITHOUT TEARS: IN PURSUIT OF JUSTICE AND RECONCILIATION IN TIMOR-LESTE—COMMUNITY PERSPECTIVES AND EXPECTATIONS* 34 (Paul Seils ed., 2003), <http://www.ictj.org/images/content/0/9/096.pdf> (reporting on an interviewee who noted the importance of reinforcing the principle that the law applies to everyone); REIGER & WIERDA, *supra* note 133, at 32; Rapoza, *supra* note 56, at 528.

136. REIGER & WIERDA, *supra* note 133, at 32.

137. *Id.*

138. *Id.* at 31.

139. PIGOU, *supra* note 135, at v, 35 (recounting responses from twelve focus group discussions "involving eighty-two people in six of the country's thirteen districts" and noting many participants felt "Timorese culture and traditions" should form a basis for restorative justice).

140. *Id.* at 31–32.

141. *Id.* at 30–32 (reporting that interviewees believed that only issues that could not be handled by traditional leaders could then be referred to the formal justice system).

142. *Id.* at 36.

143. *Id.* (arguing that compensation should depend on the victim's family's needs).

resentment on the part of victims who struggled to meet these basic needs—convicted perpetrators should have to grow food for victims or rebuild houses they had burned down.<sup>144</sup> Rather than the abstract idea of punishing perpetrators on behalf of the entire community, interviewees expected a more direct exchange between perpetrators and victims, with the perpetrator telling victims and families what they knew about the atrocities, and providing compensation in the form of a feast with victims' families and the public so that the perpetrator could be accepted back into the community.<sup>145</sup>

Local desires to see high-level perpetrators brought to justice were also frustrated by the government's prioritization of political considerations.<sup>146</sup> Because the Timorese authorities viewed better relations with Indonesia as an important political goal, they preferred not to seek formal justice for the atrocities of 1999, as such efforts might alienate the Indonesian government.<sup>147</sup> As a result, Timor-Leste's leadership began to obstruct the Serious Crimes process.<sup>148</sup> In a striking illustration of this phenomenon, just over a year after the Special Panels indicted Indonesian General Wiranto, Timorese President Gusmão met publicly with Wiranto, demonstrating his lack of support for prosecutions of senior Indonesian officials.<sup>149</sup> While such political obstacles may be difficult for any transitional justice mechanism to overcome, a better-designed institution might have prevented the Timorese government from directing the process away from the preferences of local populations.

In short, the Serious Crimes process was plagued by design flaws, leading to frustration and disillusionment on the part of local populations. To be fair, the serious funding and resource constraints faced by the court undoubtedly contributed to its institutional weakness.<sup>150</sup> However, a transitional justice mechanism more carefully tailored to the preferences of the Timorese populace might have been more successful in achieving legitimacy despite these obstacles.

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144. *Id.* at 35.

145. *Id.*

146. Rapoza, *supra* note 56, at 530.

147. MEGAN HIRST & HOWARD VARNEY, INT'L CTR. FOR TRANSITIONAL JUSTICE, JUSTICE ABANDONED? AN ASSESSMENT OF THE SERIOUS CRIMES PROCESS IN EAST TIMOR 25–26 (2005), <http://www.ictj.org/images/content/1/2/121.pdf> (noting that the absence of political support from the United Nations also played a role in undermining the Serious Crimes process); REIGER & WIERDA, *supra* note 133, at 32.

148. REIGER & WIERDA, *supra* note 133, at 33.

149. *Id.* at 32–33.

150. *Id.* at 26–30.

## 2. Kosovo

In 2000, the United Nations Interim Administration Mission in Kosovo (UNMIK) created the Regulation 64 Panels in the Kosovar court system to respond to Kosovar Serb criticisms of bias and lack of independence of the judiciary responsible for trying war crimes.<sup>151</sup> Under Regulation 64, a majority panel of international judges may be assigned to a war crimes case at the request of the prosecutor, defense counsel, or UNMIK's Department of Judicial Affairs. Since their inception, the Panels have heard more than two dozen war crimes cases.<sup>152</sup> Similar to Timor-Leste's Serious Crimes process, the Regulation 64 Panels have suffered from a serious resource deficit.<sup>153</sup> As a result of UNMIK's haphazard approach to justice, the Panels demonstrate serious design flaws.

UNMIK's failure to involve the affected population in its decision to create the Panels led to negative perceptions on the part of the general populace and the political elites.<sup>154</sup> Even before the creation of the Regulation 64 Panels, UNMIK made a serious misstep by applying Serbian criminal codes from the Federal Republic of Yugoslavia to the legal system in Kosovo. Kosovar Albanians viewed this as the imposition of enemy law and objected vociferously.<sup>155</sup> While this problem was resolved prior to the enactment of Regulation 64,<sup>156</sup> lingering resentment toward UNMIK on the part of the local judiciary remained.<sup>157</sup> With this negative

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151. U.N. Interim Admin. Mission in Kosovo, Regulation No. 2000/64 on Assignment of International Judges/Prosecutors and/or Change of Venue, U.N. Doc. UNMIK/REG/2000/64 (Dec. 15, 2000), available at <http://www.unmikonline.org/regulations/2000/reg64-00.htm>.

152. INTEGRATED REG'L INFO. NETWORKS, IN-DEPTH: JUSTICE FOR A LAWLESS WORLD? RIGHTS AND RECONCILIATION IN A NEW ERA OF INTERNATIONAL LAW (PART II) 41 (2006), <http://www.irinnews.org/pdf/in-depth/RightsAndReconciliationPart2.pdf>.

153. For a thorough discussion of the complexities and challenges of Kosovo's courts, see Elena A. Baylis, *Parallel Courts in Post-Conflict Kosovo*, 32 YALE J. INT'L L. 1 (2007).

154. Wendy S. Betts, Scott N. Carlson & Gregory Gisvold, *The Post-Conflict Transitional Administration of Kosovo and the Lessons Learned in Efforts to Establish a Judiciary and the Rule of Law*, 22 MICH. J. INT'L L. 371, 372 (2001) (citing a lack of legitimacy and local involvement).

155. Brooks, *supra* note 60, at 2291–92.

156. U.S. DEP'T OF STATE, KOSOVO JUDICIAL ASSESSMENT MISSION REPORT 6–7 (2000), available at [http://pdf.usaid.gov/pdf\\_docs/PCAAB112.pdf](http://pdf.usaid.gov/pdf_docs/PCAAB112.pdf) (describing how the United Nations Interim Administration Mission in Kosovo (UNMIK) initially regulated to continue application of Serbian criminal codes, generating “widespread opposition” from leaders and judges, a regulation it later repealed).

157. See Brooks, *supra* note 60, at 2292–93 (describing the initial insult to Kosovars and the rejection by judges and prosecutors to apply “Serb law” as regulated by UNMIK, a regulation which had consequences, even following its repeal); Int'l Crisis Grp. Balkans, *Starting From Scratch in Kosovo: The Honeymoon Is Over*, at 11–13, I.C.G. Balkans Rep. No. 83 (Dec. 10, 1999), available at <http://www.crisisgroup.org/~media/Files/europe/Kosovo%2016.ashx> (noting that rampant cynicism regarding UNMIK's “involvement in and commitment to establishing a viable legal system for Kosovo” can be traced back to a series of

backdrop, UNMIK then failed to explain to local judges, politicians, or the general public the rationale behind Regulation 64 before it was promulgated.<sup>158</sup> As a result, the ethnic Albanian community rejected UNMIK's proposal to create the court. Local judges refused to be recruited for the Regulation 64 Panels.<sup>159</sup> The Kosovo Supreme Court went so far as to send a letter to the United Nations stating that Regulation 64 was a violation of international law.<sup>160</sup> All of these pitfalls might have been avoided had the design process included representatives of the local population.

It is perhaps unsurprising that these poorly designed panels were not able to overcome substantial local resistance to war crimes trials for members of the Kosovo Liberation Army (KLA). Many Albanians perceived members of the KLA as heroes carrying out a "just war."<sup>161</sup> According to a survey on perceptions of transitional justice conducted in the spring of 2007, seventy-eight percent of Kosovar Albanians denied that members of their ethnicity were responsible for war crimes.<sup>162</sup> As a result, locals viewed the Regulation 64 Panels as biased, arguing that they did not prosecute all Serbs and handed down light sentences to those prosecuted, while convicting and awarding severe punishments to Albanians.<sup>163</sup> These perceptions extended even to some Albanian judges, who became angry and rebellious when the Panels' retrials of genocide and war crimes cases against Serbs led to acquittals.<sup>164</sup> This situation exemplifies the complexity of norm reconstruction; as discussed above, a group that views itself as victims may include perpetrators but may be unwilling to acknowledge that fact. The Regulation 64 Panels undoubtedly faced a difficult audience, but a better-designed process might have been more successful in persuading Albanians to accept that the KLA committed war crimes. Apart from including local populations in the

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necessary "ad hoc decisions" by UNMIK in attempt to address a post-conflict legal situation for Kosovo).

158. David Marshall & Shelley Inglis, *The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo*, 16 HARV. HUM. RTS. J. 95, 130 (2003).

159. *Id.*

160. *Id.*

161. Int'l Crisis Grp. Balkans, *Finding the Balance: The Scales of Justice in Kosovo*, at 21–22, I.C.G. Balkans Rep. No. 134 (Sept. 12, 2002), available at <http://www.crisisgroup.org/~media/Files/europe/Kosovo%2032.ashx>.

162. U. N. DEV. PROGRAMME, PUBLIC PERCEPTIONS ON TRANSITIONAL JUSTICE 16 (2007), available at [http://www.kosovo.undp.org/repository/docs/transitional\\_justice\\_eng.pdf](http://www.kosovo.undp.org/repository/docs/transitional_justice_eng.pdf) (reporting on a survey of a demographic, geographic, and ethnically representative random sample of 1250 Kosovars in 61 locations between April and May 2007).

163. TOM PERRIELLO & MARIEKE WIERDA, INT'L CTR. FOR TRANSITIONAL JUSTICE, LESSONS FROM THE DEPLOYMENT OF INTERNATIONAL JUDGES AND PROSECUTORS IN KOSOVO 31 (2006), <http://www.ictj.org/static/Prosecutions/Kosovo.study.pdf> [hereinafter PERRIELLO & WIERDA, LESSONS FROM DEPLOYMENT].

164. See Int'l Crisis Grp. Balkans, *supra* note 161, at 20–21.

design of the court, UNMIK could have performed more substantial outreach to the local populations.<sup>165</sup> The outreach failures with respect to the Regulation 64 Panels were so severe that as late as 2007, fifty percent of Kosovars surveyed in the poll described above did not have knowledge of the Panels' work.<sup>166</sup>

Like the Special Crimes process in Timor-Leste, the Regulation 64 Panels faced serious human resource and infrastructure constraints. While these obstacles account for some of the failures of these hybrid courts, a more carefully crafted mechanism might have overcome many of the problems described above. Efforts to include locals and their viewpoints in the creation of the court might have ameliorated negative perceptions, particularly on the part of natural allies such as Albanian judges. A more locally grounded court might have been more successful at convincing both sides to the conflict to accept responsibility for war crimes, thereby making more long-lasting contributions to peace.

### 3. Sierra Leone

The Special Court for Sierra Leone (Special Court), responsible for investigating atrocities committed in the course of that country's civil war, has been hailed as a model for other hybrid courts to emulate.<sup>167</sup> These positive impressions stem largely from its successes in the arena of procedural fairness.<sup>168</sup> However, the court has been criticized as a "spaceship phenomenon," i.e., a court that is perceived as a curiosity and an anomaly with little impact on citizens' everyday lives."<sup>169</sup> Sierra Leoneans' negative views of the Special Court might have been amelio-

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165. PERRIELLO & WIERDA, LESSONS FROM DEPLOYMENT, *supra* note 163, at 30.

166. U. N. DEV. PROGRAMME, *supra* note 162, at 17.

167. Established in January 2002 through an agreement between the United Nations and the Sierra Leone Government, the Special Court for Sierra Leone (Special Court) focuses on crimes committed after November 30, 1996. U.N. Secretary-General, Letter dated Mar. 6, 2002 from the Secretary-General addressed to the President of the Security Council, app. II, U.N. Doc. S/2002/246 (Mar. 8, 2002). *See also* Special Court Agreement, 2002 (Ratification) Act, CXXXIII SIERRA LEONE GAZETTE SUPPLEMENT No. 22, available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=BcKTbFltxZk%3d&tabid=176>; U.N. Sec. Council, Statute of the Special Court for Sierra Leone (Jan. 16, 2002), available at <http://www.unhcr.org/refworld/docid/3dda29f94.html>.

168. ANTONIO CASSESE, REPORT ON THE SPECIAL COURT FOR SIERRA LEONE 65 (2006), available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=VTDHyrHasLc=&tabid=176> ("[The court] is dispensing fair justice in a manner visible to the local population."); TOM PERRIELLO & MARIEKE WIERDA, INT'L CTR. FOR TRANSITIONAL JUSTICE, THE SPECIAL COURT FOR SIERRA LEONE UNDER SCRUTINY 2 (2006), <http://www.ictj.org/static/Prosecutions/Sierra.study.pdf> [hereinafter PERRIELLO & WIERDA, UNDER SCRUTINY] ("[T]rials are generally considered to meet international standards . . . . The same is true for conditions of detention.").

169. PERRIELLO & WIERDA, UNDER SCRUTINY, *supra* note 168, at 2.

rated had it incorporated local perspectives and cultural traditions in its design process.

Although ninety-six percent of respondents in a 2007 survey of local perceptions indicated their awareness of the Special Court, depth of understanding was poor—ninety-three percent reported that they knew only a little about the court.<sup>170</sup> This should perhaps come as no surprise in a country with a relatively low literacy rate,<sup>171</sup> particularly given complaints about the lack of access to information about the court.<sup>172</sup> While most of those surveyed who knew of the Special Court had positive perceptions of it (sixty-eight percent) and believed in its ability to bring justice (seventy-six percent), the lack of knowledge about the court puts the validity of these findings into question.<sup>173</sup>

A qualitative study performed in 2007 uncovered significantly more negative perceptions of the Special Court.<sup>174</sup> Many Sierra Leoneans interviewed felt “disconnected with the Court,” because it “had not included them from the beginning and [the people] did not feel a part of the process.”<sup>175</sup> Therefore, they were “not interested in working with [the Court] at this late stage.”<sup>176</sup> “What’s so special about the Special Court?” was a common refrain.<sup>177</sup> Some individuals criticized the Special Court as existing to try “big men” using “white man’s law,”<sup>178</sup> while victims were more focused on satisfying basic needs such as housing, food, jobs, education, and health.<sup>179</sup> Indeed, many locals were resentful that defendants before the court were held in jails that provided free food, shelter, and security, while victims struggled to eke out a subsistence wage.<sup>180</sup> There was also hostility to the great cost of the Special Court, which led to

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170. BBC WORLD SERV. TRUST AND SEARCH FOR COMMON GROUND, BUILDING A BETTER TOMORROW: A SURVEY OF KNOWLEDGE AND ATTITUDES TOWARD TRANSITIONAL JUSTICE IN SIERRA LEONE 19–20 (2008) (surveying a random sample of 1,717 adults across nine districts in Sierra Leone in June and July 2007).

171. Cent. Intelligence Agency, *Sierra Leone: People*, THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/sl.html> (last updated Aug. 19, 2010) (reporting that Sierra Leone had an estimated 65% illiteracy rate in 2004).

172. RACHEL KERR & JESSICA LINCOLN, WAR CRIMES RESEARCH GRP., KING’S COLL. DEP’T OF WAR STUDIES, THE SPECIAL COURT FOR SIERRA LEONE: OUTREACH, LEGACY AND IMPACT, FINAL REPORT 15 (2008), available at <http://www.kcl.ac.uk/content/1/c6/04/95/60/SCSLOutreachLegacyandImpactFinalReport.pdf>.

173. BBC WORLD SERV. TRUST AND SEARCH FOR COMMON GROUND, *supra* note 170, at 20.

174. KERR & LINCOLN, *supra* note 172, at 7 (describing focus groups and semi-structured interviews with court staff, representatives of civil society groups, and key stakeholders in six locations in Sierra Leone).

175. *Id.* at 20.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 15, 23.

180. *See id.* at 23.

a feeling of exclusion for ordinary people—a feeling that the court was not for them.<sup>181</sup> In addition to these concerns, Sierra Leoneans voiced discontent with the small number of individuals tried, as well as impatience with the length of trials, in that those seen as most responsible for the mass violence had died or gone missing by the time of the trials.<sup>182</sup>

Because of its failure to include Sierra Leoneans in the design process, the Special Court failed to win support even among natural allies. The legal community, for example, had expected that half of the court's jobs would go to nationals and were sorely disappointed when they did not.<sup>183</sup> In addition, many Sierra Leonean lawyers would have preferred that the massive funds expended on the court be channeled into rebuilding the domestic legal system.<sup>184</sup> Moreover, the Special Court's failures of outreach to counter misinformation led to largely hostile domestic media coverage, which reported unfair trials and ill-treatment of detainees.<sup>185</sup> These stories may have been fueled by the view of some Sierra Leoneans that some defendants (the CDF, or Civil Defense Forces) were liberators and war heroes who deserved to be celebrated, not indicted.<sup>186</sup> Capitalizing on, and further contributing to, the Special Court's failure to respond to local preferences, defendants boycotted their trials in protest.<sup>187</sup>

The Special Court also failed to incorporate or even respect local moral authorities. For example, *juju*, a form of sorcery, plays a continued role in dispute resolution in Sierra Leone.<sup>188</sup> This traditional practice figured largely in the trials of the Civil Defense Forces, a government militia whose structures and practices were strongly influenced by *juju*. The prosecution explicitly repudiated these traditions, describing them as “cultish”—a move that risked alienating the local community, who might, as a result, reject the court's narrative.<sup>189</sup> A more sophisticated approach would have accepted the legitimacy of these traditions while criticizing aspects that violate fundamental human rights.<sup>190</sup>

While an initial assessment of the available data might view the Special Court as well-respected among locals, the qualitative study reveals

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181. See *id.* at 21. These feelings of marginalization improved with the creation of a dedicated outreach system staffed solely by Sierra Leoneans, though this section was isolated from the rest of the court for that reason. *Id.*

182. *Id.* at 20; STROMSETH ET AL., *supra* note 2, at 294 (noting that many Sierra Leoneans have expressed frustration that lower-level offenders are not being held accountable).

183. PERRIELLO & WIERDA, *UNDER SCRUTINY*, *supra* note 168, at 38.

184. *Id.*

185. See KERR & LINCOLN, *supra* note 172, at 15, 17.

186. PERRIELLO & WIERDA, *UNDER SCRUTINY*, *supra* note 168, at 38.

187. See Cockayne, *Hybrids or Mongrels*, *supra* note 128, at 467.

188. *Id.* at 464–65.

189. See *id.*

190. See *id.*

significantly negative attitudes toward the court. The serious critiques of the court raised by all of the local stakeholders give rise to the concern that its accountability efforts may not take root in the society it was created to serve. A transitional justice mechanism that took the preferences and traditions of Sierra Leoneans into account from the start might have contributed to a more deeply internalized sense of justice and a longer-lasting peace.

#### 4. Cambodia

The Extraordinary Chambers in the Courts of Cambodia (ECCC) were created in 2003 through an agreement between the Cambodian Government and the United Nations<sup>191</sup> and began its work in 2006.<sup>192</sup> The ECCC seeks justice for serious crimes committed by the Khmer Rouge regime between 1975 and 1979, during which time an estimated 1.7 million Cambodians are said to have perished.<sup>193</sup> While initial perceptions of the ECCC have been positive, Cambodians' lack of knowledge about the court suggests that the foundation of these impressions may be shaky.<sup>194</sup> The tribunal does not comport with Cambodian preferences in important ways, a state of affairs that opens the door to legitimacy problems.

The first scientifically representative comprehensive population-based survey of Cambodians' attitudes toward accountability for the Khmer Rouge was performed in 2008, two years after the ECCC began

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191. Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, June 6, 2003, 2329 U.N.T.S. 117; Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, Oct. 27, 2004, *as amended* (Cambodia), Reach Kram No. NS/RKM/1004/006, available at <http://www.cambodia.gov.kh/krt/pdfs/KR Law as amended 27 Oct 2004 Eng.pdf> [hereinafter Law on the ECCC] (unofficial translation by the Council of Jurists and the Secretariat of the Task Force, revised Aug. 26, 2007).

192. Extraordinary Chambers in the Courts of Cambodia, *News: National and International Co-Prosecutors begin their work at ECCC* (July 10, 2006), [http://www.eccc.gov.kh/english/news.view.aspx?doc\\_id=20](http://www.eccc.gov.kh/english/news.view.aspx?doc_id=20).

193. Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, Oct. 27, 2004; U.N. Group of Experts on Cambodia, Rep., transmitted by identical letters dated Mar. 15, 1999 from the U.N. Secretary-General concerning the Group of Experts for Cambodia established pursuant to resolution 52/135 (1997) addressed to the President of the General Assembly and the President of the Security Council, ¶ 35, U.N. Docs. A/53/850, S/1999/231 (Mar. 16, 1999).

194. A poll conducted in the summer of 2009 found that 70% of Cambodians believed that the trial of Khmer Rouge leaders was providing justice. INT'L REPUBLICAN INST. & USAID, SURVEY OF CAMBODIAN PUBLIC OPINION: JULY 31 - AUGUST 26, 2009, at 2, 34 (2010) (analyzing face-to-face interviews of a representative sample of 1,600 Cambodian adults).

functioning and nearly thirty years after the Khmer Rouge left power.<sup>195</sup> The results of the survey highlight the challenges inherent in determining the accountability preferences of populations with little exposure to the rule of law or the idea of a court.<sup>196</sup> While eighty-seven percent of respondents thought that the ECCC should “be involved in responding to what happened during the Khmer Rouge regime[.]” eighty-five percent of respondents had no or limited knowledge of the ECCC.<sup>197</sup> Even assuming that all of the fifteen percent of respondents who had more than limited knowledge of the ECCC were part of the former group of respondents (those who thought the ECCC should be involved in accountability), eighty-three percent of those who expressed a preference for the ECCC had little understanding of what the court actually does. Nearly half of those surveyed (forty-nine percent) said that the Khmer Rouge perpetrators should be put on trial, yet forty-three percent defined justice as establishing the truth—and only fourteen percent thought trials

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195. PHUONG PHAM ET AL., HUMAN RIGHTS CTR., UNIV. OF CAL. BERKELEY, *SO WE WILL NEVER FORGET: A POPULATION-BASED SURVEY ON ATTITUDES ABOUT SOCIAL RECONSTRUCTION AND THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA* 9–11 (2009), available at <http://hrc.berkeley.edu/pdfs/So-We-Will-Never-Forget.pdf> [hereinafter PHAM ET AL., NEVER FORGET] (describing the face-to-face structured survey of a random sample of 1,000 Cambodian adults, drawn through a “four-stage cluster sampling strategy” to ensure representativeness, from September 9 through October 1, 2008). For earlier non-scientifically representative surveys, see William W. Burke-White, *Preferences Matter: Conversations with Cambodians on the Prosecution of the Khmer Rouge Leadership*, in BRINGING THE KHMER ROUGE TO JUSTICE: PROSECUTING MASS VIOLENCE BEFORE THE CAMBODIAN COURTS 97 (Jaya Ramji & Beth Van Schaack eds., 2005) (describing a qualitative survey); SUZANNAH LINTON, RECONCILIATION IN CAMBODIA (Documentation Ctr. of Cambodia 2004) (describing a survey of readers of *Searching for the Truth* magazine); Jaya Ramji, *Reclaiming Cambodian History: The Case for a Truth Commission*, 24 FLETCHER F. WORLD AFF. 137 (2000) (describing a qualitative survey); Khmer Inst. of Democracy, *Survey on the Khmer Rouge Regime and the Khmer Rouge Tribunal 2004*, <http://www.bigpond.com.kh/users/kid/KRG-Tribunal.htm> (last visited Oct. 10, 2010) (describing a survey of Khmer Rouge survivors). See also VICTIM AND WITNESS PROJECT, KHMER INST. FOR DEMOCRACY, OUTREACH SURVEY ON KNOWLEDGE AND INTEREST IN THE ECCC (2008) (summarizing a survey of participants in project outreach sessions); Laura McGrew, *Transitional Justice Approaches in Cambodia*, JUST. INITIATIVES, Spring 2006, at 139, 142, available at [http://www.soros.org/initiatives/justice/focus/international\\_justice/articles\\_publications/publications/justice\\_20060421/jinitatives\\_200604.pdf](http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/justice_20060421/jinitatives_200604.pdf) (analyzing existing studies and surveys related to justice in Cambodia).

196. Memorandum from Tara Urs, Open Soc’y Justice Initiative, on Outreach Strategies for the Extraordinary Chambers in the Courts of Cambodia 21 (Nov. 2006) (on file with author) [hereinafter Urs, *Memorandum*].

197. PHAM ET AL., NEVER FORGET, *supra* note 195, at 36–37, 39. 83% of interviewees thought that the economy, jobs, and poverty were their top priorities. See *id.* at 45. The 87% figure comports with a survey conducted earlier that year which found that 69% of respondents very much agreed with a trial for top Khmer Rouge leaders and 17% somewhat agreed. INT’L REPUBLICAN INST. & USAID, SURVEY OF CAMBODIAN PUBLIC OPINION: JANUARY 27–FEBRUARY 26, 2008, at 44.

would be an appropriate mechanism to establish the truth.<sup>198</sup> These findings might point to the need for a truth commission alongside a tribunal, but in any case suggest that trials alone may not respond to the preferences of Cambodians and may lead to disappointment with the ECCC process.<sup>199</sup>

The survey results point to further problems inherent in applying Western-style criminal justice in Cambodia. Interviewees viewed the Cambodian court system as corrupt and, as a result, may have been more likely to seek conflict resolution through their village chief or commune council.<sup>200</sup> These dispute resolution processes resemble mediation more than litigation and often contain religious elements.<sup>201</sup> In addition, many respondents believed that justice is largely about revealing the truth, a task that the ECCC may not perform effectively.<sup>202</sup> While the tribunal may establish certain narrow legal facts, Cambodians have repeatedly stated their interest in knowing facts beyond the legal record, such as the role of other nations and foreigners in perpetrating or supporting the atrocities.<sup>203</sup> Finally, the structure of the tribunal is complicated and its proceedings and opinions hard to understand for a population that is neither highly literate nor well-versed in Western-style criminal proceedings.<sup>204</sup>

A deeper problem is the distance between Cambodian moral authorities and the legal proceedings before the ECCC. Ninety-four percent of those surveyed considered themselves Buddhists.<sup>205</sup> According to experts on Theravada Buddhism as well as Cambodian Buddhist monks, it is important to Cambodians to have a culturally relevant source of reconciliation.<sup>206</sup> Law may not fit this bill because it is widely viewed as too

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198. PHAM ET AL., NEVER FORGET, *supra* note 195, at 27, 32–33. 45% of interviewees said that they did not know which mechanisms would be appropriate to establish the truth. *Id.* at 27.

199. See Ramji, *supra* note 195, at 137 (arguing for a trial of top leaders and a truth commission for other Khmer Rouge cadre).

200. PHAM ET AL., NEVER FORGET, *supra* note 195, at 33–34.

201. Tara Urs, *Imagining Locally-Motivated Accountability for Mass Atrocities: Voices from Cambodia*, 7 SUR - INT'L J. ON HUM. RTS. 61, 67 (2007) [hereinafter Urs, *Accountability*]; Urs, *Memorandum*, *supra* note 196, at 36–39.

202. PHAM ET AL., NEVER FORGET, *supra* note 195, at 33.

203. Urs, *Accountability*, *supra* note 201, at 73–75. See Ramji, *supra* note 195, at 145.

204. Urs, *Accountability*, *supra* note 201, at 69–70.

205. PHAM ET AL., NEVER FORGET, *supra* note 195, at 29.

206. Ian Harris, "Onslaught on Beings": A Theravada Buddhist Perspective on Accountability for Crimes Committed in the Democratic Kampuchea Period, in BRINGING THE KHMER ROUGE TO JUSTICE: PROSECUTING MASS VIOLENCE BEFORE THE CAMBODIAN COURTS, *supra* note 195, at 59, 80–82. See The Venerable Yos Huot Khemacaro, *Buddha's Teachings and a Tribunal for the Khmer Rouge*, 13 ON THE RECORD, Aug. 1, 2000, at <http://www.advocacy.net.org/resource/421>; Heng Monychenda, *Buddhism, Justice, and Reconciliation*, 13 ON THE RECORD, Aug. 1, 2000, <http://www.advocacy.net.org/resource/421>.

closely tied to politics.<sup>207</sup> Moreover, Buddhist conceptions of justice seek to harmonize the parties, thereby rectifying the relationship between the individual and the Dhamma, or cosmic law of existence.<sup>208</sup> Viewing individual conscience as central, the Buddhist approach emphasizes the education and rehabilitation of offenders.<sup>209</sup> In concrete terms, Buddhism might ask that the perpetrators confess their crimes and take responsibility for their actions.<sup>210</sup> From a Buddhist perspective, it might even be important to punish dead perpetrators, given Theravada Buddhist beliefs that “punishments and consequences can carry over between lives [and] that spirits take a corporal form and can be encountered roaming the earth.”<sup>211</sup> It is not hard to see why many Cambodians might not view the proceedings before the ECCC as relevant to their lives.

The failure to ground the ECCC in Cambodian culture has enabled the Cambodian government to play the court to its political advantage.<sup>212</sup> Beginning even before the ECCC was created, the process has been plagued by ongoing and repeated accusations of corruption and political interference.<sup>213</sup> While efforts have been made recently to address these concerns, it will be difficult to resuscitate entirely the court’s credibil-

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207. See Harris, *supra* note 206. See also Monychenda, *supra* note 206 (criticizing apologies made by Khmer Rouge leaders as too political and not sufficiently Buddhist in approach).

208. Harris, *supra* note 206, at 81, 85. See Khemacaro, *supra* note 206; Monychenda, *supra* note 206.

209. Harris, *supra* note 206, at 70. See Khemacaro, *supra* note 206; Monychenda, *supra* note 206.

210. Harris, *supra* note 206, at 86.

211. Urs, *Accountability*, *supra* note 201, at 72–73 (recounting interviews that suggested how to undertake such punishments, such as “digging up the bodies of the dead perpetrators, putting chains around their bones, and re-burying them . . . [,] hanging their pictures in a jail[,] or building a statue of the leaders with their hands cuffed to display in a public place. For some, [these actions] would require that the spirit remain in a kind of purgatory creating an equivalent to punishment in this life.”).

212. Burke-White, *Community of Courts*, *supra* note 100, at 36 (“[B]oth the efforts toward and delays in creating a Khmer Rouge tribunal play directly into the hands of the Cambodian government.”).

213. Int’l Ctr. for Transitional Justice, Cambodia: Submission to the Universal Periodic Review of the U.N. Human Rights Council, 6th Session: Nov. 30–Dec. 11, 2009, at 2–3 (Apr. 14, 2009); OPEN SOC’Y JUSTICE INITIATIVE, PROGRESS AND CHALLENGES AT THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA 7–10 (2007); OPEN SOC’Y JUSTICE INITIATIVE, RECENT DEVELOPMENTS, *supra* note 81 at 2; Jaya Ramji-Nogales, *Corruption in the Khmer Rouge Tribunal*, INTLAWGRRLS (Feb. 23, 2007, 1:40 PM), <http://intlawgrrls.blogspot.com/2007/02/corruption-in-khmer-rouge-tribunal.html>. See Dinah PoKempner, *The Khmer Rouge Tribunal: Criticisms and Concerns*, JUST. INITIATIVES, Spring 2006, at 32, 34–35, available at [http://www.soros.org/initiatives/justice/focus/international\\_justice/articles\\_publications/publications/justice\\_20060421/jinitatives\\_200604.pdf](http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/justice_20060421/jinitatives_200604.pdf); Jaya Ramji-Nogales, *A Hybrid Mess in Cambodia*, INTLAWGRRLS, (June 11, 2010, 5:16 AM), available at <http://intlawgrrls.blogspot.com/2010/06/hybrid-mess-in-cambodia.html>.

ity.<sup>214</sup> Again, a bespoke process might have overcome some of these obstacles. For example, a transitional justice mechanism that looked to Cambodia's Buddhist monkhood for its moral authority rather than to its government might have resonated more deeply with the local population and been better able to withstand corrupting influences. As it stands, defendants before the court have presented concerns of corruption and political influence to openly question the authority of the ECCC.<sup>215</sup>

The ECCC does offer one design innovation worth mentioning. It is the first internationalized criminal court to allow victims to participate as civil parties, which may increase the responsiveness of this mechanism to local preferences.<sup>216</sup> However, the ECCC could have had a more significant impact on the Cambodian populace and may have been better able to withstand political meddling had it incorporated local preferences into the design process from the beginning.

### C. The International Criminal Court

The International Criminal Court (ICC) was created by the Rome Statute in July 2002.<sup>217</sup> Despite great expectations of ending impunity for international crimes, the ICC's limited jurisdiction and resources mean that in practice its reach will be far more modest.<sup>218</sup> The majority of states negotiating the Rome Statute did not favor a powerful court with unlimited reach; instead, they wanted to retain power to prosecute crimes committed on their own territory or by their own nationals.<sup>219</sup> As a result, several scholars have suggested that the main purpose of the court will be to spur and complement national prosecutions of grave crimes.<sup>220</sup>

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214. OPEN SOC'Y JUSTICE INITIATIVE, RECENT DEVELOPMENTS, *supra* note 81, at 2.

215. See, e.g., *French Lawyer Warned by Cambodia's Court*, MACAU DAILY TIMES, May 22, 2009, available at [http://www.macaudailytimesnews.com/index.php?option=com\\_content&task=view&id=27683&Itemid=32](http://www.macaudailytimesnews.com/index.php?option=com_content&task=view&id=27683&Itemid=32).

216. Int'l Ctr. for Transitional Justice, *supra* note 213 at 4; Susana SaCouto, *The Role of Victims in Bringing Former Khmer Rouge Leaders to Justice in Cambodia*, JUST. INITIATIVES, Spring 2006, at 60, 62, available at [http://www.soros.org/initiatives/justice/focus/international\\_justice/articles\\_publications/justice\\_20060421/jinitatives\\_200604.pdf](http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/justice_20060421/jinitatives_200604.pdf).

217. Rome Statute of the International Criminal Court arts. 1, 3, July 17, 1998, 2187 U.N.T.S. 3 (entered into force July 1, 2002).

218. Burke-White, *Community of Courts*, *supra* note 100, at 5–11; Burke-White, *Proactive Complementarity*, *supra* note 132, at 66–77; Turner, *Criminal Law*, *supra* note 101, at 3–9, 12–13.

219. Turner, *Criminal Law*, *supra* note 101, at 5–6.

220. *Id.* at 3–9, 12–13; Burke-White, *Proactive Complementarity*, *supra* note 132; Baylis, *Reassessing*, *supra* note 101.

Thus far, the court has issued indictments relating to four conflicts:<sup>221</sup> the Central African Republic,<sup>222</sup> the Democratic Republic of Congo,<sup>223</sup> Darfur,<sup>224</sup> and Northern Uganda.<sup>225</sup> Local populations have registered discontent with various aspects of the court's approach to justice, including perceived political bias and lack of responsiveness to local preferences.<sup>226</sup> While some of these concerns might be alleviated by a more careful prosecutorial strategy, they point again to a serious design flaw—the institution is designed to favor prosecution over approaches that might be more precisely tailored to address the unique cultural context of each situation.

The great discretion awarded to the prosecutor in deciding which cases to pursue might itself be viewed as a design flaw. Affected populations, including political elites, have charged the ICC with political bias due to its selective prosecution strategy. Although three of the current cases were self-referred (by the respective countries' governments) to the ICC,<sup>227</sup> there are widespread complaints that the court has focused only

221. In March 2010, the court authorized the prosecutor to investigate the communal violence in Kenya following the December 2007 elections. Int'l Criminal Court [ICC], Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Case No. ICC-01/09, ICC Pre-Trial Chamber II (Mar. 31, 2010), available at <http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf>. At the time of this writing, no indictments had been issued relating to this situation, and a comprehensive survey of Kenyan perceptions of the investigation had not been conducted. As a result, this Article does not discuss the Kenya situation. Also at the time of this writing, the Office of the Prosecutor had publicly announced that it was conducting a preliminary analysis of six additional situations: Afghanistan, Colombia, Cote d'Ivoire, Georgia, Guinea, and Palestine. Rep. of the ICC, U.N. Doc. A/64/356; GAOR, 64th Sess. (Sept. 17, 2009) [hereinafter 2009 ICC Report]; Press Release, Office of the Prosecutor, ICC, OTP Delegation to Visit Guinea, U.N. Press Release ICC-OTP-20100518-PR525 (May 18, 2010). Because no decision had been taken as to whether to open an investigation in those situations, this Article does not discuss these situations.

222. Rep. of the ICC, ¶ 44, U.N. Doc. A/63/323; GAOR, 63d Sess. (Aug. 22, 2008) [hereinafter 2008 ICC Report].

223. ICC, Situations and Cases: Situation in Democratic Republic of the Congo, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0104> (last visited Oct. 10, 2010); 2008 ICC Report, *supra* note 222, ¶ 7.

224. 2008 ICC Report, *supra* note 222, ¶ 33; S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

225. 2008 ICC Report, *supra* note 222, ¶ 23.

226. This Article does not discuss the Central African Republic indictment because there is no publicly available survey of the preferences of the local population. It is not a good sign that the ICC's outreach efforts began five months after the investigation was opened, and the court's first survey of the perceptions of local populations was not scheduled for another year. See HRW, COURTING HISTORY: THE LANDMARK INTERNATIONAL CRIMINAL COURT'S FIRST FIVE YEARS 127–30 (2008), available at [http://www.hrw.org/sites/default/files/reports/icc0708\\_1.pdf](http://www.hrw.org/sites/default/files/reports/icc0708_1.pdf) [hereinafter HRW, COURTING HISTORY].

227. Press Release, Office of the Prosecutor, ICC, Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo, U.N. Press Release ICC-OTP-20040419-50 (Apr. 19, 2004); Press Release, Office of the Prosecutor, ICC, Prosecutor Receives Referral

on African defendants.<sup>228</sup> Some suggest that the ICC has been designed to impose Western justice and rights norms on African perpetrators because African countries are believed to be politically and economically weak.<sup>229</sup> This criticism has even seeped into the courtroom, with defense lawyers such as Jacques Verges taking great delight in pointing out that genocides perpetrated by European nations are not prosecuted, while African leaders are consistently in the dock at the ICC.<sup>230</sup> Whether or not these criticisms are supported by the facts, they must be taken seriously, as the potential damage to perceptions of the court could be severe.

### 1. Darfur

The Darfur case is an investigation of serious crimes committed by the Sudanese Armed Forces and the Janjaweed Militia against civilians in northern Sudan between August 2003 and March 2004.<sup>231</sup> In Darfur, both the local population and the political elites have criticized the ICC's approach to justice. Among the local population, anecdotal evidence suggests that widespread misperceptions about the ICC's mandate, including beliefs that the court would bring peacekeepers to Darfur, led to deep disappointment.<sup>232</sup> The dampened expectations of those who held those beliefs have surely contributed to negative attitudes about the court. These concerns might have been alleviated through a more inclusive design process or a more thorough outreach strategy.<sup>233</sup>

The court has also stepped on the feet of local and regional political elites, as exemplified by the diplomatic kerfuffle over the arrest warrant

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Concerning Central African Republic, U.N. Press Release ICC-OTP-20050107-86 (Jan. 7, 2005); Press Release, Office of the Prosecutor, ICC, President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC, U.N. Press Release ICC-CPI-20040129-43 (Jan. 29, 2004).

228. Robert Marquand, *African Backlash Against International Court Rises*, CHRISTIAN SCIENCE MONITOR GLOBAL NEWS BLOG (Oct. 6, 2009), <http://www.csmonitor.com/World/Global-News/2009/1006/african-backlash-against-international-courts-rises> ("African lawyers, scholars, and human rights advocates at an international bar association meeting here in Madrid say that concerns of anti-African bias, are rising.")

229. HRW, *COURTING HISTORY*, *supra* note 226, at 44; *Q&A: The ICC and Sudan*, INT'L CTR. FOR TRANSITIONAL JUSTICE (July 14, 2008), <http://www.ictj.org/en/news/features/1848.html>.

230. Koskeniemi, *supra* note 2, at 31.

231. Prosecutor v. Ahmad Harun and Ali Kushayb, Case No. ICC-02/05-01/07, Warrant of Arrest for Ali Kushayb, at 4 (Apr. 27, 2007).

232. HRW, *COURTING HISTORY*, *supra* note 226, at 128–29.

233. It may be unclear to the reader what a more inclusive design project would look like in the case of the ICC. In this case, the inclusion of local preferences in the prosecution and outreach strategy might have led to more realistic beliefs about the capabilities of the court. Alternatively, as described further in Section V, below, a more inclusive design process might have resulted in the use of an entirely different accountability mechanism to address atrocities in Darfur.

issued for Sudanese President Omar Al-Bashir. When the ICC prosecutor applied to the Pre-Trial Chamber to issue an arrest warrant for Al-Bashir in July 2008,<sup>234</sup> the African Union made a request to the U.N. Security Council, in accordance with Article 16 of the Rome Statute, to defer the ICC process to prevent jeopardizing the peace process in Darfur.<sup>235</sup> That same month, the African Union's Peace and Security Council requested the creation of a High-Level Panel of experts to investigate the situation in Darfur and submit recommendations on accountability and peace.<sup>236</sup> The Pre-Trial chamber issued an arrest warrant for Al-Bashir in March 2009,<sup>237</sup> two weeks before the African Union Panel was inaugurated.<sup>238</sup> The African Union responded by issuing a formal decision that its member states would not cooperate with the execution of Al-Bashir's arrest warrant.<sup>239</sup> It has since rejected the ICC's request to open a liaison office to the African Union in Ethiopia.<sup>240</sup> Whether or not there were unsavory political motives behind these refusals, the ICC's failure to incorporate the views of a major international organization involved in the peace process seems a serious diplomatic error.

The African Union High-Level Panel on Darfur issued its report in October 2009, providing anecdotal evidence that Darfurians and other Sudanese prized peace above other goals and shared a preference for an inclusive and localized peace process.<sup>241</sup> The Panel found "polarized opinions" on the ICC, with some Sudanese repudiating it as an illegitimate intervention, and others, particularly those displaced in Darfur, welcoming the prosecutions.<sup>242</sup> In response to these mixed preferences,

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234. Press Release, ICC, ICC Prosecutor Presents Case Against Sudanese President, Hassan Ahmad Al Bashir, for Genocide, Crimes Against Humanity and War Crimes in Darfur, U.N. Press Release ICC-OTP-20080714-PR341 (July 14, 2008).

235. African Union, *Report of the Chairperson of the Commission on the Situation in Darfur*, ¶ 4, A.U. Doc. PSC/PR/2(CXCVIII) (July 21, 2009) [hereinafter A.U., *Rep. on Darfur*].

236. *Id.* ¶ 16.

237. Press Release, ICC, ICC Issues a Warrant of Arrest for Omar Al Bashir, President of Sudan, U.N. Press Release ICC-CPI-20090304-PR394 (Mar. 4, 2009).

238. A.U., *Rep. on Darfur*, *supra* note 235, ¶ 17.

239. African Union, *Decisions on the Meeting of African States Parties to the Rome Statute of the International Criminal Court*, ¶ 10, A.U. Doc. Assembly/AU/13(XIII) (July 3, 2009).

240. Press Release, African Union, Decisions of the 15th AU Summit, A.U. Press Release 104 (July 29, 2010).

241. African Union, Peace and Sec. Council, *Report of the African Union High-Level Panel on Darfur (AUPD)*, ¶¶ 1, 128–29, 136(vii), 137, A.U. Doc. PSC/AHG/2(CCVII) (Oct. 29, 2009) [hereinafter *AUPD Report*] (making findings based on meetings with 2,700 people in Darfur and 400 people in Khartoum).

242. *Id.* ¶ 240. The second part of this finding is confirmed by a randomized survey of 2,152 Darfurian refugees in eastern Chad, 98% of whom thought that President Bashir should be tried before the ICC. 24 HOURS FOR DARFUR, DARFURIAN VOICES: DOCUMENTING DARFU-

the Panel recommended the creation of a hybrid court constituted by the African Union to prosecute the most serious crimes, strengthen the domestic institutions created to deal with crimes committed in Darfur, and establish a truth, justice, and reconciliation commission.<sup>243</sup> Though it does not thoroughly assess the preferences of the Sudanese people, the Panel's suggestion of a transitional justice approach crafted inclusively around local interests might have presented a more effective route to accountability for Darfur.

## 2. The Democratic Republic of Congo

The Democratic Republic of Congo (DRC) case centers largely on the use of child soldiers in the country's civil war.<sup>244</sup> Empirical data point to serious problems with the prosecutorial approach in this case.<sup>245</sup> Local perceptions of the ICC in the DRC range from lack of knowledge of the court to serious objections raised by those who are aware of its existence. It is an understatement to say that the court is not well known among the population it purports to serve; in 2007, only twenty-seven percent of those surveyed in the Eastern part of the DRC had heard of the ICC.<sup>246</sup> Locals familiar with the court have expressed a preference for a locally based accountability mechanism and objected to the ICC's perceived political bias.

The ICC's decision to indict Congolese leaders was not responsive to local preferences concerning accountability. A population survey conducted in the Eastern DRC in 2007 revealed that forty-four percent of respondents selected peace, and twenty-eight percent chose security as their highest priority, while only three percent viewed justice for those responsible for mass crimes as of paramount importance.<sup>247</sup> Of those surveyed in the Eastern DRC, over eighty percent thought the local government could bring durable peace to the region, while fewer than a quarter thought the international community could.<sup>248</sup> Though a large majority of those interviewed (eighty-five percent) wanted to see

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RIAN REFUGEES' VIEWS ON ISSUES OF PEACE, JUSTICE, AND RECONCILIATION 29 (2010), available at <http://darfuriannoices.org>.

243. *AUPD Report*, *supra* note 241, ¶ 25.

244. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶¶ 1, 64 (Jan. 29, 2007).

245. PATRICK VINCK ET AL., LIVING WITH FEAR: A POPULATION-BASED SURVEY ON ATTITUDES ABOUT PEACE, JUSTICE, AND SOCIAL RECONSTRUCTION IN EASTERN DEMOCRATIC REPUBLIC OF CONGO 15–18 (2008), available at <http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1002&context=hrc> (reporting on a cross-sectional structured face-to-face survey of 2,620 people in Eastern DRC and 1,133 people in Kinshasa and Kisangani, which are removed from the conflict).

246. *Id.* at 47.

247. *Id.* at 23–24.

248. *Id.* at 23–24.

accountability to secure the peace, nearly as many (eighty percent) viewed this as a job for the national government.<sup>249</sup> Over half wanted trials to be conducted by national courts, while just more than a quarter favored trials held by the ICC.<sup>250</sup> Even more strikingly, eighty-five percent of those surveyed wanted trials—whether national or internationalized—to be held in the DRC.<sup>251</sup> Though the DRC cases were referred to the court by President Joseph Kabila, the ICC should have considered local preferences before proceeding with its indictment.

With this backdrop, it is perhaps unsurprising that the court's selective prosecution strategy has been criticized by local populations in the DRC. The prosecutor's decision to indict very few defendants with select charges has led to perceptions of political interference.<sup>252</sup> For example, the ICC's decision to indict Thomas Lubanga for using child soldiers was popularly viewed as a "highly selective prosecution of a single mid-level defendant for a crime . . . that virtually all participants in the conflict committed and that many view as relatively minor in the face of other extensive and widespread atrocities."<sup>253</sup> This led to speculation and rumors that only Lubanga was arrested because he killed white people (United Nations peacekeepers).<sup>254</sup> Again, the failure to include local preferences in the design process (in this case, prosecutorial strategy) risks local rejection of the entire enterprise.

The *Lubanga* case also offers anecdotal evidence about the difference between legal and social legitimacy, and the impact of focusing on the former rather than the latter in designing transitional justice mechanisms. When the ICC investigation opened, there were reports that some militant groups warned their troops not to attack civilians or commit human rights violations.<sup>255</sup> After Lubanga's transfer to the Hague, other militia leaders expressed fear of arrest and said that they did not want to end up like Lubanga.<sup>256</sup> While a first read of this story might support the prosecutor's strategy, further details lead to doubts as to whether the norms promulgated by the ICC were internalized. After Lubanga was

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249. *Id.* at 40–42.

250. *Id.* at 45.

251. *Id.* at 46.

252. Baylis, *Reassessing*, *supra* note 101, at 50–51. These perceptions of unfairness may not be too far off the mark; the ICC prosecutor has been criticized for his failure to disclose potentially exculpatory evidence in the *Lubanga* case. 2008 ICC Report, *supra* note 222, ¶ 9. See also Yvonne McDermott, *Abuse of Process & The ICC Trial in Lubanga*, INTLAWGRRLS (Aug. 4, 2010, 4:59 AM), <http://intlawgrrls.blogspot.com/2010/08/abuse-of-process-icc-trial-in-lubanga.html>.

253. Baylis, *Reassessing*, *supra* note 101, at 21.

254. HRW, *COURTING HISTORY*, *supra* note 226, at 127–28.

255. *Id.* at 67.

256. LAURA DAVIS & PRISCILLA HAYNER, *DIFFICULT PEACE, LIMITED JUSTICE: TEN YEARS OF PEACEMAKING IN THE DRC* 30–32 (Int'l Ctr. for Transitional Justice 2009).

charged, militia leaders who used to admit the number of children in their ranks and hand them over to the United Nations as part of the demobilization process denied having any child soldiers, hiding some and abandoning others; another tactic was to brief child soldiers to claim that they were older than they actually were.<sup>257</sup> In addition, child protection workers reported threats by armed group leaders following Lubanga's arrest.<sup>258</sup>

### 3. Northern Uganda

The Northern Uganda case concerns serious crimes, including forcible recruitment of child soldiers, committed by the Lord's Resistance Army (LRA) against the government of Uganda, the Ugandan Army, and Ugandan civilians since as early as 1987.<sup>259</sup> The ICC has faced hostility in Uganda due to its failure to respond to the preferences of local populations.<sup>260</sup> According to a population survey conducted in 2007, while seventy-one percent of those who were familiar with the ICC thought that it had helped to reduce violence by bringing the LRA into peace talks, most (seventy-six percent) thought that the pursuit of trials now could endanger the peace process.<sup>261</sup> And although nearly sixty percent of the Ugandans surveyed wanted trials for leaders of the LRA (presumably at a later date), a similar number thought traditional mechanisms were needed to deal with the situation in Northern Uganda.<sup>262</sup> Acholi leaders in particular preferred traditional measures of reconciliation and worried that indictments could threaten the peace process.<sup>263</sup> Local NGOs and international humanitarian organizations in northern Uganda also promoted

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257. *Id.*

258. HRW, *COURTING HISTORY*, *supra* note 226, at 68–69.

259. Prosecutor v. Joseph Kony, Case No. ICC-02/04-01/05, Indictment, ¶ 5 (Sep. 27, 2005), available at <http://www.icc-cpi.int/iccdocs/doc/doc97185.pdf>.

260. HRW, *COURTING HISTORY*, *supra* note 226, at 127.

261. PHUONG PHAM ET AL., *WHEN THE WAR ENDS: A POPULATION-BASED SURVEY ON ATTITUDES ABOUT PEACE, JUSTICE, AND SOCIAL RECONSTRUCTION IN NORTHERN UGANDA* 5, 10–13 (2007), <http://www.ictj.org/images/content/8/8/884.pdf> [hereinafter PHAM ET AL., *WHEN THE WAR ENDS*] (reporting on a face-to-face structured survey of 2,875 individuals in thirty-eight locations from April to June 2007). Moreover, the Lord's Resistance Army (LRA) has said that it will not sign a final peace agreement unless warrants are withdrawn. Alexander K.A. Greenawalt, *Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court*, 50 VA. J. INT'L L. 107, 117 (2009).

262. PHAM ET AL., *WHEN THE WAR ENDS*, *supra* note 261, at 34–35, 40–41 (reporting that 59% of those surveyed wanted trials for the LRA leaders). However, when asked which mechanisms would be the most appropriate to deal with the LRA and the Uganda People's Defense Force responsible for human rights violations, only 3% mentioned traditional justice—perhaps because it was viewed as a process rather than a mechanism. *Id.* at 34.

263. LYDIAH BOSIRE, INT'L CTR. FOR TRANSITIONAL JUSTICE, *OVERPROMISED, UNDERDELIVERED: TRANSITIONAL JUSTICE IN SUB-SAHARAN AFRICA* 12 (2006), <http://www.ictj.org/static/Africa/Subsahara/AfricaTJ3.pdf>.

localized, non-punitive solutions such as the Mato Oput (“bitter root”) ceremony.<sup>264</sup> Moreover, while the idea of trials was popular, over half of those surveyed believed that the focus should be on forgiveness and reconciliation for leaders of the LRA, and nearly eighty percent wanted to forgive and reintegrate rank-and-file LRA members.<sup>265</sup> In addition, Ugandans surveyed demonstrated a very high emphasis on understanding the cause of conflict (ninety-three percent) and establishing a written historical record (ninety-five percent), two tasks that trials are not well-suited to perform.<sup>266</sup> These survey results reveal a serious disjuncture between the ICC’s indictment and the Ugandan cultural context. This gap, which may lead to local rejection of the court’s decision, could have been avoided by a transitional justice mechanism that paid greater heed to the preferences of local populations.

#### D. Truth and Reconciliation Commissions

When seeking an alternative or a complement to internationalized criminal courts, scholars most commonly turn toward truth and reconciliation commissions (TRCs) as the preferred transitional justice mechanism.<sup>267</sup> Truth commissions are temporary, officially sanctioned bodies that investigate a pattern of past abuses over time.<sup>268</sup> Approximately thirty truth commissions have been convened to date. These transitional justice mechanisms have become so prevalent that “it is difficult to conjure an example of a political or post-conflict transition (since the 1990s) in which the idea of establishing a truth commission has been overlooked.”<sup>269</sup> While there are many situations of mass violence for which a truth com-

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264. To be fair, others expressed concerns that traditional leaders lack legitimacy, that traditional ceremonies fall short of human rights standards, and that these approaches may perpetuate the exclusion of women and youth. PHAM ET AL., *WHEN THE WAR ENDS*, *supra* note 261, at 17.

265. *Id.* at 34–35.

266. *Id.* at 31–32.

267. MARK FREEMAN, *TRUTH COMMISSIONS AND PROCEDURAL FAIRNESS* 11 (2006) (“[T]he truth commission has become a preferred fixture of international law and politics alongside international and hybrid criminal tribunals.”); PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY* 14 (2001) (“It is partly due to the limited reach of the courts, and partly out of a recognition that even successful prosecutions do not resolve the conflict and pain associated with abuses, that transitional authorities have increasingly turned to official truth-seeking as a central component in their strategy to respond to past atrocities.”); MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* 57, 65 (1998) (“[L]imitations in our knowledge of societal healing make [the question of whether truth commissions are preferable to prosecutions] a line of future inquiry rather than a current conclusion.”).

268. HAYNER, *supra* note 267, at 14–15.

269. FREEMAN, *supra* note 267, at 11, 318–25.

mission may be an appropriate option,<sup>270</sup> the proliferation of this form of transitional justice in recent years gives rise to at least two concerns. First, whereas truth commissions are viewed as more responsive to local preferences than internationalized criminal courts, this impression may not always bear out in practice.<sup>271</sup> Moreover, a thorough investigation of the past may not be culturally or otherwise appropriate for a society recovering from mass violence.

The South African TRC, held out by many as a model of the form, has been criticized by participants for its narrow and stripped-down view of the “truth.”<sup>272</sup> Victims who had been deposed for the TRC reported that they could not say everything they wanted to say and were not allowed to formulate their own request for reparations.<sup>273</sup> The TRC’s statement forms and data processing did not provide space for victims to discuss relationships and other subjectivities that might have given greater meaning, from their perspective, to their personal histories.<sup>274</sup> Even within a society, “truth” does not have a shared meaning. While overall perceptions of the TRC were positive,<sup>275</sup> a process that included as many visions of the truth as possible might have been more successful in reconstructing social norms.

Sierra Leone’s TRC highlights concerns about the universal appropriateness of truth commissions.<sup>276</sup> A 2006 survey of residents of the capital of Sierra Leone found that while nearly sixty percent of respondents thought the TRC facilitated reconciliation, only forty-four percent of respondents believed that people had a positive attitude toward the

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270. See generally, HAYNER, *supra* note 267, at 24–31 (focusing on the truth commission’s goals and purposes).

271. For a critique of some truth commissions’ failure to uncover the entire truth, see Gregory L. Smith, *Immune to Truth? Latin American Truth Commissions and U.S. Support for Abusive Regimes*, 33 COLUM. HUM. RTS. L. REV. 241 (2001).

272. RICHARD A. WILSON, *THE POLITICS OF TRUTH AND RECONCILIATION IN SOUTH AFRICA: LEGITIMIZING THE POST-APARTHEID STATE* 48–49 (2001) (basing conclusions on ethnographies of over fifty victims of political violence in townships south of Johannesburg between 1995 and 1998).

273. *Id.* at 49 (using the example of a mother who wanted to see the police cell where her son allegedly hanged himself while detained for his political activities).

274. *Id.* at 49–50, 60.

275. Gunnar Theissen, *Object of Trust and Hatred: Public Attitudes Toward the TRC*, in *TRUTH AND RECONCILIATION IN SOUTH AFRICA: DID THE TRC DELIVER?* 191, 197 (Audrey R. Chapman & Hugo Van Der Merwe eds., 2008) (citing a 1998 Human Science Research Council Poll that found a positive response from 57% of those surveyed in response to the question of whether they think that the truth and reconciliation commission (TRC) has been a good or a bad thing for the country).

276. The Truth Commission was established in July 2002 by the authority of the Lome Peace Agreement and The Truth and Reconciliation Act of 2000. SIERRA LEONE TRUTH & RECONCILIATION COMM’N, *WITNESS TO TRUTH: REPORT OF THE SIERRA LEONE TRUTH AND RECONCILIATION COMMISSION (VOL. 1)* 24 (2004), available at [http://reliefweb.int/fw/rwb.nsf/db900sid/EVOD-73HJHY/\\$File/full\\_report.pdf](http://reliefweb.int/fw/rwb.nsf/db900sid/EVOD-73HJHY/$File/full_report.pdf).

TRC.<sup>277</sup> Half believed that the procedures adopted by the TRC were not satisfactory.<sup>278</sup> All of these respondents were concerned that only those in big towns had the opportunity to view the proceedings, and some believed that the perpetrators should have been made to apologize to the victims.<sup>279</sup> These numbers do not describe a completely ineffective transitional justice mechanism, but they do give rise to questions of whether and how truth commission design processes could be improved.<sup>280</sup>

Truth telling related to mass violence may have been inappropriate in the Sierra Leonean cultural context. Sierra Leoneans have a long history of “reintegrating combatants, reworking relationships, and rebuilding moral communities,” and practice social forgetting as a mechanism used to “cool the heart” and reestablish the community.<sup>281</sup> Sierra Leoneans thus refuse to reproduce the violence by discussing it publicly, except during a process of containing and “unmaking” the past through ritual confessions.<sup>282</sup> Although chiefs and ritual leaders are allowed to present oral memory of atrocities, they do so only after they invoke the protection of ancestors.<sup>283</sup> Instead of discussing the violence, people turn to social and ritual practices, including sacrifices, prayer, and ritual healing. The TRC may have disrupted these local reconciliation practices in its quest for universal truth telling.<sup>284</sup> Even if it did not harm local accountability efforts, the TRC may not have been responsive to the preferences of the many Sierra Leoneans who prioritized peace and rebuilding over truth telling.<sup>285</sup> A more carefully tailored design process might have recognized these potential obstacles in advance, enabling the creation of a transitional justice mechanism that fit the local cultural context more neatly.

Truth commissions are particularly dependent on the voluntary participation of perpetrators. If those responsible for mass violence do not

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277. AMADU SESAY, DOES ONE SIZE FIT ALL? THE SIERRA LEONE TRUTH AND RECONCILIATION COMMISSION REVISITED 8, 37, 42 (2007) (reporting on a semi-structured survey of a random sample of residents of Freetown, Sierra Leone, from January to February 2006, supplemented by focus group discussions).

278. *Id.* at 36.

279. *Id.* at 37.

280. *Id.*

281. Rosalind Shaw, *Rethinking Truth and Reconciliation Commissions: Lessons From Sierra Leone*, SPECIAL REP. FOR THE U.S. INST. OF PEACE, Feb. 2005, at 9, available at <http://www.usip.org/resources/rethinking-truth-and-reconciliation-commissions-lessons-sierra-leone> [hereinafter Shaw, *Rethinking TRC*].

282. *Id.* at 9; Rosalind Shaw, *Memory Frictions: Localizing the Truth and Reconciliation Commission in Sierra Leone*, 1 INT'L J. TRANSITIONAL JUSTICE 183, 195 (2007) [hereinafter Shaw, *Memory Frictions*].

283. Shaw, *Memory Frictions*, *supra* note 282, at 195 n.49.

284. Shaw, *Rethinking TRC*, *supra* note 281, at 7–9.

285. See Shaw, *Memory Frictions*, *supra* note 282, at 202.

take the truth commission process seriously, it will be difficult to paint a full picture of the atrocities and their causes. Perhaps more importantly, without acknowledgement of the past by perpetrators, it will be significantly more difficult for societies to move forward toward reconciliation.<sup>286</sup> The South African TRC addressed this problem by incorporating the threat of prosecution against those who failed to tell all they knew about the past, and providing amnesty for those who did speak the full truth.<sup>287</sup> After criminal investigations were commenced, numerous perpetrators came forward and spoke to the TRC.<sup>288</sup> In contrast, key war actors before Liberia's TRC repeatedly denied knowledge of, and responsibility for, atrocities committed during the country's civil war.<sup>289</sup> The Liberian perpetrators did not take the process seriously, perhaps in part because the threat of prosecution was not imminent and in part because the truth commission was not culturally relevant.<sup>290</sup> As discussed further below, an accountability mechanism grounded in local moral authority might have held greater sway over perpetrators, rendering denials of their actions more difficult.<sup>291</sup>

Truth commissions, like other transitional justice mechanisms, have flaws and strengths that make them appropriate for some societies recovering from mass violence and inappropriate for others.<sup>292</sup> This Article seeks to encourage thoughtful design of transitional justice mechanisms. Rather than assuming that truth commissions are always beneficial or should always be accompanied by prosecutions, accountability for mass violence should be bespoke.

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286. HAYNER, *supra* note 267, at 163–64.

287. JAMES L. GIBSON, *OVERCOMING APARTHEID: CAN TRUTH RECONCILE A DIVIDED NATION?* 6 (2006); HAYNER, *supra* note 267, at 98–99; WILSON, *supra* note 272, at 23.

288. HAYNER, *supra* note 267, at 99–100.

289. Press Release, Truth and Reconciliation Comm'n of Liberia, Roland Duo Joins Chorus of Denials . . . Denies Allegations of Murders, Rapes, and Tortures (Dec. 8, 2008), available at <https://www.trcofliberia.org/news-1/press-releases/roland-duo-joins-chorus-of-denials-denies-allegations-of-murders-rapes-and-tortures>.

290. The TRC shall grant immunity to all persons or groups of persons, organizations, or institutions from prosecution or tort actions on account of statements made or evidence given before the TRC in advancement of the public interest objective inherent in the functions and objects of the TRC and pursuant to the successful execution of its mandate, and which therefore shall not be used in any court of law against the person making the statement. Truth and Reconciliation Comm'n of Liberia, Mandate, § 30 (2005), <https://www.trcofliberia.org/about/trc-mandate>. See also Jaya Ramji-Nogales, *Truth Without Teeth*, INTLAWGRRLS BLOG (Dec. 19, 2008, 7:00 AM), <http://intlwgrrls.blogspot.com/2008/12/truth-without-teeth.html>.

291. Of course, lack of cooperation by the accused is a common problem in domestic trials as well, and a certain level of perpetrator denial is to be expected. This Article does not argue that this problem can be eliminated, only that it can be minimized through more thoughtful transitional justice mechanism design.

292. Arriaza & Roht-Arriaza, *supra* note 71, at 157–58 (discussing the limitations of truth commissions).

### E. Locally Grounded Accountability Processes

Moving one step closer to the preferences of the affected population, locally grounded accountability processes rely on traditional dispute resolution mechanisms to address extraordinary crimes. As a general rule, these transitional justice efforts tend to meet with great support within local populations, who find the processes familiar and relevant. These mechanisms are far from perfect, however. Concerns have been raised primarily over local mechanisms' due process gaps and risks of replicating broader social inequality.<sup>293</sup> Moreover, these local accountability efforts may pose risks of political capture similar or greater to those faced by hybrid courts.<sup>294</sup>

#### 1. Rwanda

The gacaca courts in Rwanda are perhaps the best-known and most controversial example of a locally grounded accountability mechanism used to address mass violence. Gacaca is an informal civil dispute resolution process for resolving property, inheritance, personal injury, and marital relations claims between family or neighbors.<sup>295</sup> The gacaca process is closer to mediation than litigation and begins with all parties to a dispute meeting with witnesses and local leadership to discuss the problem. A solution is then proposed by the group; if it is not acceptable to the parties, they can then take their dispute to court.<sup>296</sup> After holding a series of meetings with leaders to discuss the political transition,<sup>297</sup> the Rwandan government decided to formalize gacaca as a transitional justice mechanism, extending its jurisdiction to address crimes committed

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293. *Id.* at 161; Fionnuala Ni Aolain & Michael Hamilton, *Gender and the Rule of Law in Transitional Societies*, 18 MINN. J. INT'L L. 380, 392–94 (2009); Patricia Lundy & Mark McGovern, *The Role of Community in Participatory Transitional Justice*, in TRANSITIONAL JUSTICE FROM BELOW: GRASSROOTS ACTIVISM AND THE STRUGGLE FOR CHANGE, *supra* note 2, at 99, 112 (discussing mechanisms generally, not simply local mechanisms); Ellen Lutz, *Transitional Justice: Lessons Learned and the Road Ahead*, in TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE, *supra* note 1, at 325, 335; Menkel-Meadow, *Restorative Justice*, *supra* note 10, at 171; Elizabeth Stanley, *The Political Economy of Transitional Justice in Timor-Leste*, in TRANSITIONAL JUSTICE FROM BELOW: GRASSROOTS ACTIVISM AND THE STRUGGLE FOR CHANGE, *supra* note 2, at 167, 185.

294. Lars Waldorf, *Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice*, 79 TEMPLE L. REV. 1, 6 (2006) (“[W]hat passes for harmonious, indigenous customs are more often than not ‘invented traditions’ designed to promote social control and political ideologies.”).

295. Urusaro Alice Karekezi, Alphonse Nshimiyimana & Beth Mutamba, *Localizing Justice: Gacaca Courts in Post-Genocide Rwanda*, in MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY, *supra* note 2, at 69, 73; Timothy Longman, *Justice at the Grassroots? Gacaca Trials in Rwanda*, in TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE, *supra* note 1, at 206, 209.

296. Karekezi et al., *supra* note 295, at 73.

297. Longman, *supra* note 295, at 210.

before and during the genocide (though serious crimes such as genocide and rape are dealt with by regular courts).<sup>298</sup> The process remains locally grounded and retains its emphasis on social reconciliation.<sup>299</sup> Although some observers decry the transformation of gacaca into a transitional justice mechanism, labeling it a top-down imposition by an authoritarian regime,<sup>300</sup> others are more generous, lauding gacaca's innovative judicial syncretism and plural objectives while noting that they may give rise to stubborn clashes between formal and informal justice.<sup>301</sup>

Initially, this locally grounded accountability process was wildly popular with the Rwandan population. According to a survey performed in February 2002, before the gacaca trials began, over eighty percent of the population had a positive attitude toward gacaca.<sup>302</sup> Once implementation began, however, observers noted that the participation of perpetrators and bystanders was much lower than expected.<sup>303</sup> This was in part because many Rwandans were so desperate to meet their subsistence needs in a devastated society that they did not have time to attend hearings.<sup>304</sup> One observer notes anecdotally that survivors were generally not happy with gacaca, describing the pain of watching perpetrators either stonewall or confess without remorse, but could not imagine a better solution.<sup>305</sup> In the words of Rwandan President Paul Kagame, "[N]obody will tell you he is happy with the gacaca," neither victims nor perpetrators, but it gives Rwanda "something to build on."<sup>306</sup>

The gacaca process has faced far more serious critiques related to the competence of gacaca judges, the impartiality and independence of the courts, and perhaps most strongly, the procedural due process rights

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298. The gacaca courts were created by Rwanda's Transitional National Assembly on October 12, 2000. *Organic Law No. 40/2000 of 26/01/2001 Setting Up Gacaca Jurisdictions and Organizing Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Between October 1, 1990 and December 31, 1994*, available at <http://www.inkiko-gacaca.gov.rw/pdf/Law.pdf>.

299. Karekezi et al., *supra* note 295, at 74.

300. Waldorf, *supra* note 294, at 65.

301. Karekezi et al., *supra* note 295, at 293.

302. Longman et al., *supra* note 111, at 215–17 (reporting the results of a structured face-to-face survey of 2,091 representative Rwandans selected through a cluster sample in four communes in February 2002).

303. See Karekezi et al., *supra* note 295, at 79, 82 (reporting on an observational study of gacaca in the Gishamvu Sector from October 2001 through June 2002).

304. Lars Waldorf, "Like Jews Waiting for Jesus": *Posthumous Justice in Post-Genocide Rwanda*, in LOCALIZING TRANSITIONAL JUSTICE: INTERVENTIONS AND PRIORITIES AFTER MASS VIOLENCE 183, 190, 190 n.24 (Rosalind Shaw & Lars Waldorf with Pierre Hazan eds., 2010).

305. Philip Gourevitch, *The Life After: Fifteen Years After the Genocide in Rwanda, the Reconciliation Defies Expectations*, THE NEW YORKER, May 4, 2009, at 37, 42.

306. *Id.* at 43.

of defendants.<sup>307</sup> Although some of these criticisms may themselves be critiqued for being excessively tied to a narrow conception of procedural justice, anecdotal reports of corrupt judges and intimidated witnesses are far more troubling and more difficult to dismiss.<sup>308</sup> In short, gacaca paints a picture of the potential strengths and pitfalls of locally grounded accountability. It provides a reminder not to fetishize local justice as a perfect transitional justice mechanism—as with every other form of accountability detailed above, this approach has its shortcomings—while encouraging flexibility in definitions of due process.<sup>309</sup>

## 2. Timor-Leste

In contrast with the gacaca courts, Timor-Leste's Community Reconciliation Process (CRP) was viewed as a great success by Timorese society for its role in maintaining peace in communities and settling past conflicts.<sup>310</sup> Between thirty thousand and forty thousand community members attended or participated in CRP hearings, far exceeding original expectations and indicating great community support for the process.<sup>311</sup> As with all transitional justice mechanisms, the CRP had multiple shortcomings, but it also offers an example of the value of surveying the preferences of local populations and of thorough integration of traditional systems of justice into an accountability effort.

The process of creating the CRP began in 2000, when a committee composed of representatives of Timorese groups, assisted by the United Nations, undertook consultations with communities in each of East Timor's thirteen districts.<sup>312</sup> These surveys found that the population wanted to see trials for those most responsible for atrocities but commu-

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307. AMNESTY INT'L, INDEX NO. AFR 47/007/2002, RWANDA: GACACA: A QUESTION OF JUSTICE 34–40 (2002), available at <http://www.amnesty.org/en/library/info/AFR47/007/2002/en>; Longman, *supra* note 295, at 213–19.

308. See Lucy Hovil, *A Dangerous Impasse: Rwandan Refugees in Uganda* 29–31 (Int'l Refugee Rights Initiative, Refugee Law Project & Soc. Sci. Research Council, Working Paper No. 4, 2010), available at [http://www.refugeelawproject.org/others/10\\_06\\_28\\_A\\_Dangerous\\_Impasse,Rwandan\\_Refugees\\_in\\_Uganda.pdf](http://www.refugeelawproject.org/others/10_06_28_A_Dangerous_Impasse,Rwandan_Refugees_in_Uganda.pdf); Gourevitch, *supra* note 305, at 39 (reporting on a 2005 trial run of the gacacas).

309. See Longman, *supra* note 295, at 223; Lundy & McGovern, *supra* note 293, at 112.

310. Comm'n for Reception, Truth, and Reconciliation in East Timor, *Chega! Final Report of the Commission for Reception, Truth, and Reconciliation in East Timor (Part 9)*, EAST TIMOR & INDONESIA ACTION NETWORK, Oct. 31, 2005, at 3, 33–34, available at <http://www.etan.org/news/2006/cavr.htm> [hereinafter *Chega!*] (noting that 96% of 156 the Community Reconciliation Process (CRP) participants, including deponents, victims, and community members, surveyed said that the CRP had achieved its primary goal of promoting reconciliation in their community). See Patrick Burgess, *A New Approach to Restorative Justice—East Timor's Community Reconciliation Processes*, in TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE, *supra* note 1, at 176, 186–87.

311. Burgess, *supra* note 310, at 187.

312. *Id.* at 182–83.

nity justice for those involved in less serious crimes. It was important to the Timorese that the transitional justice process include traditional systems of justice.<sup>313</sup> From this mandate, the CRP was created along with other transitional justice mechanisms, including the Serious Crimes process described above.<sup>314</sup>

The CRP's focus on the needs of victims was a central reason for its success.<sup>315</sup> One aspect of this victim centeredness was the informality of the process.<sup>316</sup> Victims were not limited by the formal requirements of court testimony; in contrast, they were allowed to express their feelings openly, which enabled greater emotional catharsis. Victims could also more directly participate in the hearings and impact the fate of perpetrators.<sup>317</sup> Unlike in the courtroom, victims in CRP hearings were "afforded a place of honour" and did not have to endure the process alone.<sup>318</sup> Instead, the CRP allowed them to be accompanied by family, friends, or support staff from the truth commission.<sup>319</sup> Many participants commented on the importance of the location of the CRP hearings.<sup>320</sup> Because these hearings were held in their home community, victims and community members were able to participate fully in the hearings and did not confront the "economic, logistical, and psychological obstacles" faced in accessing the courtroom.<sup>321</sup>

The CRP also involved traditional leaders and customary law. Because the Timorese viewed the criminal justice system as corrupt and

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313. *Id.* at 183; PIGOU, *supra* note 135, at 30–31.

314. The CRP was created as part of the Commission for Reception, Truth, and Reconciliation of East Timor. U. N. Transitional Admin. in East Timor, Regulation No. 2001/10 on the Establishment of a Commission for Reception, Truth, and Reconciliation for East Timor, U.N. Doc. UNTAET/REG/2001/10 (July 13, 2001), available at <http://www.un.org/peace/etimor/untaetR/Reg10e.pdf>.

315. See *Chega!*, *supra* note 310, at 44. Several groups surveyed by the International Center for Transitional Justice emphasized the importance of a victim-centered consultative process. PIGOU, *supra* note 135, at 38.

316. The CRP proceeded as follows: perpetrators voluntarily came forward to make statements concerning their participation in crimes; these statements were forwarded to the Office of General Prosecutor, which decided whether to send each perpetrator to the CRP or to prosecute them; perpetrators sent to the CRP were to admit their wrongs before their community at a public hearing into which traditional practices were incorporated; the community then decided what the perpetrator needed to do to be accepted back into the fold; if the perpetrator fulfilled this duty, he would be granted immunity from prosecution. Burgess, *supra* note 310, at 184. At this time, a Community Reconciliation Agreement would be registered with the appropriate District Court. JUDICIAL SYS. MONITORING PROGRAMME, *supra* note 71, at 11.

317. See *Chega!*, *supra* note 310, at 44.

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.*

controlled by politics,<sup>322</sup> the CRP drew on other sources of moral authority, such as local traditions, grassroots leadership, national leaders, and the Catholic Church.<sup>323</sup> The CRP incorporated East Timorese customary dispute resolution practices, which include a process of meeting and discussion in order to seek consensus between opposing parties.<sup>324</sup> At the end of these meetings, the CRP assisted in holding reconciliation ceremonies “drawing on customary East Timorese law and practice.” This often involved chewing of betel nut, sacrificing a chicken or pig, a rolling up of the *biti* (mat), and a celebratory feast.<sup>325</sup> Many Timorese could not afford to perform these traditions in the wake of the war, and felt indebted to the CRP for providing the necessary funds.<sup>326</sup> This deep grounding in Timorese culture and moral authority likely contributed to the highly positive local perceptions of the CRP.

Even some of those who participated in the CRP as defendants reported that the process positively impacted their lives.<sup>327</sup> Many of those responsible for crimes wanted to be involved in the CRP, because they were worried about future discrimination against their children and did not want community problems to be “passed down to future generations.”<sup>328</sup> After testifying about their crimes, defendants said that they felt “freer” when they walked around the community because others were no longer suspicious of them.<sup>329</sup> These examples come with the caveat that not all perpetrators participated, and that many victims believed that the CRP was appropriate only for those responsible for lesser crimes.<sup>330</sup> Still, it provides a reminder of the complexities of situations of mass violence, and the position of many perpetrators who may have committed crimes under duress and even view themselves as victims. It is crucial to incorporate these defendants into reconciliation processes in a way that maximizes their participation and belief in the system.

As with all transitional justice mechanisms, the CRP program was not without its flaws. The informal nature of the institution led to due

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322. Burgess, *supra* note 310, at 189 (referring to the corruption and political control of the justice system under the Portuguese colonial administration and Indonesian military occupation).

323. *Id.* at 202–03.

324. JUDICIAL SYS. MONITORING PROGRAMME, *supra* note 71, at 5–7, 9 (reporting on semi-structured interviews of ninety participants, deponents, and victims in CRP hearings conducted in five of East Timor’s fourteen districts between February and May 2004).

325. *Id.* at 11.

326. See, e.g., *id.* at 13 (providing one individual’s story that the CRP provided the necessary funds for a traditional dispute resolution ceremony).

327. *Id.* at 12.

328. *Id.* at 12–13.

329. *Id.* at 12.

330. *Id.* at 40.

process concerns related to the statements made by defendants.<sup>331</sup> Despite successes in engaging victims and perpetrators, problems of participation and closure persisted. Both victims and deponents expressed concerns with the failure of those most responsible at the village level to participate in the CRP.<sup>332</sup> Many Timorese were satisfied with the process only to the “extent that it was matched by a serious crimes process.”<sup>333</sup> In other words, many victims could accept the fact that low-level offenders would be immune from prosecution only because those who had perpetrated serious crimes, such as murder or rape, would be prosecuted and sentenced to prison.<sup>334</sup> In addition, some deponents felt that closure had not been achieved; their communities were still suspicious of their involvement in crimes that they claim not to have committed, or failed to reintegrate them after their participation in the CRP.<sup>335</sup> Some victims who had suffered serious crimes also had concerns about closure, as they did not feel that their harms had been fully addressed.<sup>336</sup> Finally, though the participation of female commissioners and Panel members may have helped to promote gender equality,<sup>337</sup> the CRP hearings still tended to be dominated by men, a situation that may have reinforced existing gender inequalities.<sup>338</sup>

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The case studies above highlight shared flaws of the internationalized criminal courts: a failure to engage sufficiently with local populations, ranging from exclusion of locals from the process of creating the court to exclusion of local legal experts in the court staff; a failure to adapt to the local cultural context, particularly by excluding local moral authorities; a failure to respond to local preferences about

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331. Burgess, *supra* note 310, at 194–96.

332. *Id.* at 196–97. See JUDICIAL SYS. MONITORING PROGRAMME, *supra* note 71, at 15–16.

333. HIRST & VARNEY, *supra* note 147, at 15. See JUDICIAL SYS. MONITORING PROGRAMME, *supra* note 71, at 21–22.

334. HIRST & VARNEY, *supra* note 147, at 15. See JUDICIAL SYS. MONITORING PROGRAMME, *supra* note 71, at 21–22.

335. JUDICIAL SYS. MONITORING PROGRAMME, *supra* note 71, at 14.

336. *Id.* at 20 (referring to victims of multiple crimes or crimes involving multiple perpetrators, not necessarily victims of serious crimes).

337. *Id.* at 37–38.

338. *Id.* at 38–39. In addition, Kevin Jon Heller notes that *lisan*, the traditional legal system on which the CRP relied, has troubling gender dimensions, as it often requires that a rapist marry his victim. Heller argues that the use of CRP strengthened this traditional system and increased the likelihood of harm to women; however, it is also likely that the incorporation of women into the CRP process might enable their future participation in dismantling gender-subordinating aspects of *lisan*. Kevin Jon Heller, *Deconstructing International Criminal Law*, 106 MICH. L. REV. 975, 987–88 (2008).

the importance of accountability as compared to other reconstruction goals; insufficient outreach to locals, leading to a lack of knowledge of the courts, unrealistic expectations, and perceived political bias; and cultural and geographic inaccessibility of the institution. A combination of several of these factors has enabled political capture of several of these courts by those who use the court to their political advantage, an outcome often at odds with institutional goals. On the other end of the spectrum, truth commissions have also at times failed to incorporate local culture, and their lack of enforcement capability may make them undesirable in certain situations. Locally grounded accountability processes have at times faced serious procedural fairness and equality concerns, as well as limited participation because of financial and emotional constraints. Some populations expressed support for local processes only when matched with trials for those most responsible for mass violence.

The existing toolkit of transitional justice mechanisms offers a spectrum of choices for societies seeking to overcome mass violence, and undoubtedly many more innovative approaches can be imagined.<sup>339</sup> Each option carries benefits and pitfalls. Some are more adept at meeting fairness concerns, while others step away from narrower conceptions of procedural justice and speak more eloquently to local populations. These mechanisms may be used in conjunction with one another, each offering solutions that respond to different population preferences.<sup>340</sup> Some have suggested that the Bosnian public might become more engaged in the work of the ICTY through a truth commission.<sup>341</sup> But multiple mechanisms have pitfalls of their own, as their roles can be confused or even at odds with each other. For example, in Sierra Leone, some interviewees suggested that perpetrators before the TRC did not tell the truth because they feared prosecution by the Special Court, which was simultaneously in existence.<sup>342</sup> In short, the options must be thought through carefully and rigorously in designing a transitional justice mechanism appropriately tailored to the societies they seek to serve.<sup>343</sup>

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339. See Eric Stover & Harvey M. Weinstein, *Conclusion: A Common Objective, a Universe of Alternatives*, in *MY NEIGHBOR, MY ENEMY: JUSTICE AND THE AFTERMATH OF MASS ATROCITY*, *supra* note 2, at 323, 323–41. See, e.g., MANI, *supra* note 1, at 87–125.

340. See STROMSETH ET AL., *supra* note 2, at 256.

341. See ORENTLICHER, *supra* note 124, at 102–05 (describing “Bridging the Gap” and other outreach efforts).

342. SESAY, *supra* note 277, at 38.

343. Thoms et al., *supra* note 2, at 9 (noting that policymakers tend to promote a standardized menu of transitional justice options).

#### IV. CRAFTING LEGITIMACY

Future transitional justice mechanisms should be crafted with a focus on increasing perceptions of legitimacy so that their findings are widely internalized.<sup>344</sup> As discussed above, perceptions of legitimacy of a rule or institution may derive from the source from which it has been constituted, the procedure by which it has been adopted, or the substance of the rule itself.<sup>345</sup> This Section suggests three principles to increase legitimacy along each of these axes and then offers methods that can be used to structure responsive transitional justice mechanisms.

##### A. Principles

Contemporary transitional justice mechanisms can increase legitimacy across three axes: the source of their authority, the procedure by which they are created, and the substance of the norms they promulgate. In order to strengthen the legitimacy of the *source* of their authority, these institutions should affirm norms opposing mass violence that are endogenous rather than exogenous to the affected society. This reliance on indigenous authority will help to “reconnect offenders to an awareness of their own social values and to their stake in maintaining social relationships.”<sup>346</sup> A mechanism grounded in the local source is much more likely to be effective at reconstructing social norms than one that relies on external sources of authority. Legitimacy exists when the procedures of authority systems accord with cultural values; systems that fail to conform to cultural values will likely face serious obstacles to compliance and deference.<sup>347</sup> Moreover, people are more likely to accept judgments from authorities who represent a society with which they identify, a finding that points to the importance of incorporating local moral authorities into transitional justice mechanisms.<sup>348</sup>

In order to increase the legitimacy of their *constitutive procedure*, the design processes for these mechanisms should be participatory and inclusive. This procedural approach will be the most likely to increase

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344. This is not to say that the aims of general deterrence and retribution disappear entirely; in fact, a transitional justice mechanism that is perceived as legitimate by both victims and perpetrators will likely meet these goals as well, as discussed below.

345. See *supra* note 67 and accompanying text.

346. Tyler, *Procedural Justice*, *supra* note 31, at 346 (discussing the goals of domestic community policing in the United States).

347. Tom R. Tyler et al., *Cultural Values and Authority Relations*, *PSYCHOL., PUB. POL'Y, & L.* 1138, 1153 (2000).

348. Tyler, *Multiculturalism*, *supra* note 57, at 983 (relating only to compliance with the law, which may not be the optimal transitional justice medium in all societies).

legitimacy by offering all players a stake in the institution.<sup>349</sup> Victims of the atrocities should play a role in designing the transitional justice mechanism to increase its legitimacy in their eyes and to enable victims to reclaim their place in society.<sup>350</sup> While the victims' preferences should be paramount, perpetrators should not be marginalized from the process and should perceive that their perspective is taken into account as far as possible. So, for example, an accountability mechanism might examine the broader and more complex political, historical, and economic factors that set the stage for the atrocities, and delve into atrocities committed by all parties, not only the perpetrators who lost the conflict.<sup>351</sup> The viewpoint of political elites within a society should also be valued in designing a transitional justice mechanism and incorporated where possible. Ideally, a transitional justice mechanism would indicate that preferences of each of the players, including differences in perspective within those groups, were considered and taken into account in its design and procedures.<sup>352</sup>

One step that a normative framework for transitional justice could take is enabling the recognition that actors on all sides of the conflict may have performed immoral deeds. This would of course require looking beyond the narrow facts admissible in, and the two-party focus of, international criminal law, but such a move might significantly increase the legitimacy of the implementing institutions. So, for example, if the normative framework addressing the war in the former Yugoslavia had enabled the relevant transitional justice mechanism to investigate the NATO bombings of Serbia in 1999, the ultimate findings might have had more resonance with local populations; at worst, these findings would have been harder to dismiss.

Finally, transitional justice mechanisms could improve the legitimacy of the *substance* of the norms they present by offering realistic goals to the populations they seek to serve. Societal recovery from mass

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349. Social psychology studies have found a preference for participatory processes that allow individuals to state their views to an authority who then considers those views. Tyler, *Procedural Justice*, *supra* note 31, at 300.

350. See Koskenniemi, *supra* note 2, at 9–10. See also Tom R. Tyler & Hulda Thorisdottir, *A Psychological Perspective on Compensation for Harm: Examining the September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 355, 380–82 (2003) (noting that, in the context of the September 11th Victim Compensation Fund, procedural fairness in compensation for harm includes four elements: voice or participation, neutrality, trustworthiness of authorities, and treatment with dignity and respect).

351. Koskenniemi, *supra* note 2, at 16–19 (using the example of the ICTY to illustrate the importance of understanding that “the context is always a part of the dispute itself,” and explaining the need for the West to accept assessment of its own responsibility for the conflict in the former Yugoslavia if the ICTY is to be more than show trials). Teitel describes truth commissions in El Salvador and South Africa as presenting the role of both sides to the conflict in perpetrating human rights abuses. TEITEL, *supra* note 1, at 86.

352. See Tyler & Thorisdottir, *supra* note 350, at 382–84.

violence is an extremely difficult process that may take generations to complete.<sup>353</sup> Institutions that seek to assist in this process should be clear that they offer only that—assistance in creating the conditions for future reconciliation—and not a magic bullet that will immediately erase complex and long-standing societal dysfunctions.<sup>354</sup> Raising expectations beyond this point will serve only to diminish the legitimacy of transitional justice mechanisms, rendering them even less effective. Moreover, participation by local actors and incorporation of local cultural values may not always be sufficient, as transitional justice mechanisms may still be misunderstood by local populations. Where this is the case, educational campaigns designed to clear up such misunderstandings may be used to enhance legitimacy or to create support for decisions or outcomes.<sup>355</sup>

These principles—affirming morals, providing a participatory and inclusive process, and presenting realistic goals—suggest concrete structural guidelines for transitional justice institutions. They favor the adoption of accountability mechanisms tailored to the local population in order to increase legitimacy.

### B. *Methods*

In order to further the first two principles—affirming community norms and offering an inclusive design process—transitional justice mechanisms must improve their capacity to recognize and support local moral authority. Simply discerning relevant norms and the interests of the different stakeholders is no small task, and requires a multipronged strategy to optimize the chances of success. This Article suggests three approaches to discern local preferences in the process of transitional justice mechanism design: empirical studies of the perceptions of local populations, surveys of local moral traditions, and participation of local moral leaders.

Transitional justice mechanism design should begin with what dispute system design scholar Robert Bordone calls a “stakeholder assessment” in the form of empirical studies of the preferences of local

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353. See Brooks, *supra* note 60, at 2338–39 (suggesting that those attempting to alter norms “recognize that true cultural change is generally incremental”). See also Gourevitch, *supra* note 305, at 42–44 (describing *gacaca* as extremely difficult for both victims and perpetrators, and noting slight improvement in the mood of the country); SESAY, *supra* note 277, at 14–15 (noting that official statements from political figures in Sierra Leone contributed to expectations that the TRC would perform “almost ‘magical’ functions”).

354. See Rajeev Bhargava, *Restoring Decency to Barbaric Societies*, in TRUTH V. JUSTICE 45, 45 (Robert I. Rotberg & Dennis Thompson eds., 2000).

355. Tyler & Darley, *supra* note 19, at 726, 729.

populations with regard to accountability.<sup>356</sup> These studies might take the form of qualitative interviews, ethnographies, focus groups, or population-based surveys.<sup>357</sup> Empirical studies of population preferences should be conducted at least three times during the lifetime of a given transitional justice effort—once during the design phase, once during the functioning phase, and once after the mechanism has completed its work.<sup>358</sup> The initial survey is perhaps the most important, as it enables the incorporation of local populations' preferences into the transitional justice mechanism design. When creating hybrid courts, the United Nations has consistently sent teams to investigate legal violations and plan the creation of these bodies.<sup>359</sup> In the future, these efforts should include a scientific study of the preferences of local populations. The East Timor CRP provides an example of the benefits of such an approach.<sup>360</sup> It is also important to confirm through data, during the lifespan of the transitional

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356. See Bordone, *supra* note 43, at 8. See also Brooks, *supra* note 60, at 2328–29 (suggesting that it “will involve serious empirical work” to find how norms can be changed effectively and how conditions can be created to ensure that law matters); Drumbl, *Criminology*, *supra* note 16, at 278–79 (noting that ignoring the need for empirical work, such as systematic research on societies in conflict, could further the disconnect between societies and international criminal justice); Stover & Weinstein, *supra* note 339, at 325–26 (“[T]o work effectively (and democratically), social reconstruction must be informed, where appropriate, by population-based data that reflects the opinions, attitudes, and needs of all sectors of a society.”); Thoms et al., *supra* note 2, at 56 (linking population-based surveys to ethical requirements of informed consent, noting that it will be the local populations paying the price if the transitional justice effort goes awry).

357. Thoms et al., *supra* note 2, at 56.

358. See Phuong Pham & Patrick Vinck, *Empirical Research and the Development and Assessment of Transitional Justice Mechanisms*, 1 INT’L. J. TRANSITIONAL JUST. 231, 236 (2007). See also Bordone, *supra* note 43, at 8.

359. For example, in Cambodia, a United Nations Group of Experts evaluated existing evidence to determine the nature of crimes committed, the feasibility of apprehending perpetrators, and the legal options for justice before a national or international tribunal. U.N. Secretary General, Identical Letters dated 15 Mar. 15, 1999 from the Secretary-General addressed to the President of the General Assembly and the President of the Security Council, U.N. Docs. A/53/850, S/1999/231, at 1–2 (Mar. 16, 1999). In Timor-Leste, the United Nations “established an international commission of inquiry in order to gather and compile systematically information on possible violations of human rights and acts which might constitute breaches of international humanitarian law committed in East Timor since January 1999.” U.N. Secretary-General, Identical Letters dated Jan. 31, 2000 from the Secretary-General addressed to the President of the General Assembly, the President of the Security Council and the Chairperson of the Commission on Human Rights, U.N. Docs. S/2000/59, A/54/726, at 1 (Jan. 31, 2000). Three Special Rapporteurs were also sent on a joint mission to East Timor to investigate legal violations. Special Rapporteurs of the Commission on Human Rights, *Situation of Human Rights in East Timor*, U.N. Doc. A/54/660 (Dec. 10, 1999). In Sierra Leone, the United Nations sent a planning commission to meet with government, NGOs, and other groups, to arrange for the creation of the Special Court, including its premises, structure, function, staffing, and relationship with the TRC. U.N. Secretary-General, Letter dated Mar. 6, 2002 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2002/246 (Mar. 8, 2002).

360. See *supra* notes 312–314 and accompanying text.

justice mechanism, that it has appropriately translated the population's preferences into its design. Finally, an evidence-based study conducted after the institution has completed its work will provide feedback on structures and processes, which can be useful to future transitional justice efforts.

Of course, as the case studies illustrate, population surveys are no panacea. They must be designed not only with appropriate scientific methodology, but with a deep understanding of local culture; these tasks are not easily completed separately, let alone in tandem. Without the former, results may not be reliable or representative. Without (and even sometimes with!) the latter, surveyors may draw erroneous conclusions because they do not understand the responses in their cultural context or because those surveyed do not understand the questions fully. Survey returns, such as those described in the Cambodia case study above, might indicate conflicting responses and fail to convey the complexities of opinions held by respondents. Such surveys must be accompanied by additional strategies for locating the preferences of local populations to ensure their reliability.<sup>361</sup>

While population surveys are a good starting point in exploring local preferences, deep cultural knowledge is vitally important in designing accountability mechanisms.<sup>362</sup> "Without understanding the cultural values held by subordinates, it is not possible to understand the basis on which authorities can function effectively."<sup>363</sup> Particularly, if population surveys reveal a preference for the incorporation of local traditions and customary law, careful and thorough research should explore domestic and indigenous norms and laws that might be used to address mass violence.<sup>364</sup> Although such traditions may not map precisely onto contemporary problems, as a society may not have addressed such grave crimes in its past, it is likely that they offer principles and/or practices that can be drawn into a transitional justice mechanism.<sup>365</sup> Moreover, a full understanding of the cultural context

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361. See Thoms et al., *supra* note 2, at 62 ("To avoid simplistic or mistaken conclusions, surveys should always be supplemented with other research methods, including interviews and focus groups with key stakeholders and special interest groups.")

362. See *id.*; Brooks, *supra* note 60, at 2334–36 ("Would-be norm entrepreneurs need to take seriously myths and stories, customs and rituals, habits and assumptions, and patterns of interaction."); Tyler et al., *supra* note 347, at 1154 ("It cannot be assumed that a single form of legal authority will be equally desirable or effective within all societies. Instead, it is important to take into consideration the cultural values of the population.")

363. Tyler et al., *supra* note 347, at 1153 (concluding the basis for subordinates' evaluation of authorities "differs depending on subordinates' social value orientations").

364. See Brooks, *supra* note 60, at 2335–37.

365. See Harris, *supra* note 206, at 85–87. For example, Harris suggests that a "formal truth act . . . witnessed by persons of proven merit and genuine saintliness, such as senior members of the [Theravāda Buddhist] ecclesiastical hierarchy, and presided over by the king,

can also uncover aspects of accountability efforts that may conflict with local norms.<sup>366</sup> Of course, this is a task that must be undertaken with some care, as local traditions may reinforce patterns of domination within a society.<sup>367</sup> As discussed above, this does not mean that local traditions and customary law should be rejected out of hand; like all norms, these are subject to different interpretations as well as dynamic change. Instead, effort should be made to include as many perspectives as possible in defining these traditions and laws, with special protection of the viewpoints of those most vulnerable to domination.

Where appropriate, traditional leaders who hold moral authority should be included in the process of crafting a transitional justice mechanism for their nation. Again, the selection and inclusion of these authorities should depend on the preferences of local populations. In societies recovering from mass violence, the judicial system may be viewed as politicized and/or corrupt, and moral authority may reside elsewhere.<sup>368</sup> Rather than assuming that the court system holds the same moral authority that it does in many Western nations,<sup>369</sup> those responsible for designing transitional justice mechanisms should seek local input concerning the legitimacy of courts and alternative sources of moral authority. Again, in selecting moral authorities, concerns of domination should be aired, and efforts should be made to include sources of moral authority that might be excluded if traditional structures of dominance are replicated.

The incorporation of local perspectives through population surveys, studies of traditions, and participation of moral authorities should increase the legitimacy of the source from, and process through, which transitional justice mechanisms are created. This cultural knowledge will also be useful in crafting outreach campaigns, thus increasing the

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could be a symbolically potent focus for national reconciliation." *Id.* at 86–87. See also Terence S. Coonan, *Rescuing History: Legal and Theological Reflections on the Task of Making Former Torturers Accountable*, 20 *FORDHAM INT'L L.J.* 512, 543–48 (1996) (assessing post-torture regimes in Latin America from the perspective of the Catholic notion of sacramentality, which would prioritize making the truth fully known).

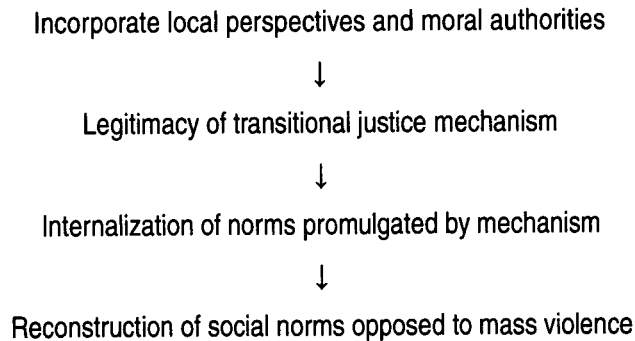
366. Shaw, *Memory Frictions*, *supra* note 282, at 195 (demonstrating how the truth telling celebrated by Sierra Leone's TRC may have been inappropriate in Sierra Leonean society where survivors preferred to "forget" rather than verbally recall violent events).

367. Heller, *supra* note 338, at 988. See MANI, *supra* note 1, at 81.

368. PHAM ET AL., *NEVER FORGET*, *supra* note 195, at 33–34 (noting that Cambodian interviewees viewed the court system as corrupt and often referred problems to moral authorities outside the justice system); Burgess, *supra* note 310, at 189 (noting that the Timorese viewed the court system as corrupt and politicized, and looked to traditional leaders for justice).

369. Koller, *supra* note 12, at 1041–43.

legitimacy of the substance of the norms promulgated by transitional justice mechanisms. In graphical form,



Hand in hand with this increased legitimacy come concerns about domination, corruption, and capacity. Efforts to minimize domination, no matter how carefully theorized, are likely to face significant hurdles in their implementation. Decisions as to which perspectives to prioritize and protect are likely to be highly contested, no matter how thoughtfully they are made. Even the fundamental choice to combat domination could be rejected as a cultural imposition.<sup>370</sup> Corruption and lack of capacity are also serious concerns with allowing local control of transitional justice mechanisms. In the wake of mass violence, there may be very few trustworthy leaders left in the afflicted society, not to mention the society's physical infrastructure, which may have been completely destroyed. In such situations, those who come forward seeking to work on transitional justice projects may have financial motives or seek revenge against perpetrators of the violence. These concerns suggest that an important role remains for international law in supporting and guiding transitional justice mechanisms to ensure procedural fairness.

## V. TRANSITIONAL JUSTICE AS A PLURALIST PROCESS

This new approach to transitional justice presents a challenge to traditional visions of international law. It redefines international as pluralist (rather than universalist) and law as process (rather than substance). Both of these moves make transitional justice more effective. Universalism assumes that one size fits all; pluralism recognizes and responds to different normative visions of justice. A process-based approach to dispute resolution is required to implement this framework. Rather than

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370. Urs, *Accountability*, *supra* note 201, at 66 (explaining that the Western principle of equality does not necessarily resonate in Cambodian culture).

assuming that there is one transcendental legal standard and one preferred legal mechanism for performing transitional justice, we must start with an inclusive process that asks what form accountability should take in order to increase legitimacy within a particular society. By shifting the frame we use to define international and broadening the boundaries of what we mean by law, we can design more effective international legal institutions and a more effective system of international law.

The failures of contemporary transitional justice described above highlight the problems with a universalist approach to international law.<sup>371</sup> Legal rules and institutions imposed in the ostensible pursuit of uniformity that do not incorporate or respond to competing normative preferences cannot succeed in their quest. In other words, rather than attempting “universalist harmonization” to “eliminate hybridity altogether by imagining that disputes can and should be made susceptible to a single governing normative authority,” we should develop “procedural mechanisms, institutions, and practices” that aim to reconcile competing norms by creating space for plural voices.<sup>372</sup> Exactly because agreement on substantive norms is so difficult, this pluralist approach is normatively and practically preferable to universalism because it allows the expression of less powerful voices, preserves innovation arising from diverse local settings, and acts as a model for daily life in its mediation of diversity.<sup>373</sup> Moreover, it is simply not realistic to imagine that the cacophony of extant perspectives will ever harmonize; so many different viewpoints will be unified only extremely slowly, if at all.<sup>374</sup> Of course, a pluralist approach is unlikely to fully satisfy any actor, and more likely to offer messy than tidy solutions.<sup>375</sup> However, it also offers the hope of inculcating tolerant ideals and, in the case of transitional justice, reviving local social norms that encourage tolerance. A pluralist approach to transitional justice and to international law more generally is likely to increase perceptions of legitimacy by as many actors as possible, thus increasing the likelihood that it will actually be internalized and effectively shift norms.

How do we attain this pluralist ideal in practice? This Article posits that international law, and transitional justice in particular, should take an expansive view of law—a view that is amply supported in domestic law. Like procedural rules in our domestic legal system, international law should set the process to be used in crafting transitional justice

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371. See *supra* Part III.B.

372. Berman, *Global Legal Pluralism*, *supra* note 8, at 1159, 1164–66.

373. *Id.* at 1190–91. For a detailed intellectual history of the field of global legal pluralism, see Berman, *New Legal Pluralism*, *supra* note 5, at 225.

374. Berman, *Global Legal Pluralism*, *supra* note 8, at 1165, 1191.

375. *Id.* at 1235–37.

mechanisms rather than mandating their form or content.<sup>376</sup> This approach could prioritize flexibility over predictability in substance in order to resolve disputes effectively across dramatically different cultural contexts. Instead of offering a preset menu of options to every society seeking to recover from mass violence, international law could prescribe a process of mechanism creation that includes surveys of local populations, reliance on domestic moral traditions, and participation of moral leaders.<sup>377</sup>

Recognizing that flexibility in institutional form may be important, international law could borrow from theories of alternative dispute resolution, which aim to provide higher quality justice through specific processes that offer “more tailor-made solutions” to conflicts.<sup>378</sup> The alternative dispute resolution approach begins with “process pluralism,” the idea that “one size does not fit all” and that different conflicts must be approached in different ways.<sup>379</sup> It aims to increase “participation in decision-making by the parties most affected by those decisions.”<sup>380</sup> Alternative dispute resolution recognizes that there may be more than two such parties and that disputes often involve several sides whose interests should be taken into account in crafting a sustainable outcome.<sup>381</sup> Moreover, parties can select “different procedural rules,” “different rules of decision,” and “different and morally differentiated modes of appeal, argument, and justification” to “deal with different kinds of conflicts.”<sup>382</sup> Alternative dispute resolution also looks for ways to increase available resources or to find common ground, before coming to a final decision.<sup>383</sup> Just as alternative dispute resolution does not aim to end adjudication but instead to ask when we should use adjudication as opposed to a different form of dispute resolution,<sup>384</sup> a locally grounded transitional justice approach does not seek to eliminate international criminal trials but to place them within a toolkit of different options that may or may not be appropriate for specific societies responding to mass violence.

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376. Carrie Menkel-Meadow, *Correspondences and Contradictions in International and Domestic Conflict Resolution: Lessons from General Theory and Varied Contexts*, 2003 J. DISP. RESOL. 319, 341 (2003) (“[T]houghtless transposition of different processes to different cultures is not good, either for the processes themselves or the people affected by them.”).

377. See Berman, *A Pluralist Approach*, *supra* note 11, at 323.

378. Menkel-Meadow, *Introduction*, *supra* note 9, at 1616.

379. *Id.* at 1619; Menkel-Meadow, *Consensus-Building*, *supra* note 9, at 42.

380. Khalil Z. Shariff, *Designing Institutions to Manage Conflict: Principles for the Problem Solving Organization*, 8 HARV. NEGOT. L. REV. 133, 143–45 (2003); Carrie Menkel-Meadow, *Deliberative Democracy and Conflict Resolution*, DISP. RESOL. MAG., Winter 2006, at 18.

381. Menkel-Meadow, *Consensus-Building*, *supra* note 9, at 40.

382. *Id.* at 44.

383. See Menkel-Meadow, *Introduction*, *supra* note 9, at 1619.

384. *Id.* at 1623.

What would a pluralist process approach to transitional justice look like in practice? The first answer has to be that, without extensive and rigorous empirical and cultural research, we cannot determine the exact form that transitional justice will take. This response may not provide comfort or even satisfaction to those engaged in transitional justice projects, but past failures have taught us that complex and varied cultures cannot be distilled into one normative frame. With that important caveat firmly in mind, we can begin to sketch out how a pluralist process approach might interact with existing transitional justice mechanisms, and think about how some of the case studies described above might have come out differently under a pluralist process approach.

One avenue to creating a pluralist process would seek to adapt current institutional structures. For example, the Office of the Prosecutor at the ICC might undertake empirical surveys of local preferences and engage scholars with a deep knowledge of local cultures, as well as local moral authorities, in its initial investigation of a potential case. Under this model, the prosecutor would issue an indictment only if the population expresses a preference for international prosecutions in a distant location; otherwise, the court might support other approaches, ranging from locally grounded accountability processes to national prosecutions.<sup>385</sup> While there is some appeal in retaining current structures, there are numerous problems with this “prosecutorial discretion” approach.<sup>386</sup> Apart from the obvious conflict of interest given the prosecutor’s mandate to try cases, the ICC was not designed to consider and assess alternative transitional justice approaches. As a result, it is not likely to offer the most effective route to a pluralist process.

Alternatively, the United Nations might create a new body responsible for formulating transitional justice processes. While this path might be more difficult to navigate politically and practically than an adaptation of the ICC, a body designed specifically to craft transitional justice mechanisms is significantly more likely to be successful in the long run. Relying on the principles laid out above, this new body would undertake thorough and rigorous empirical and cultural research before determining the form of transitional justice mechanism appropriate for a given post-conflict society. Institutional expenses might be defrayed through reliance on academic and nonprofit organizations willing to design and

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385. Several scholars have suggested that the ICC’s future may lie in playing a supportive role with respect to domestic prosecutions. *See, e.g.,* Baylis, *Reassessing*, *supra* note 101, at 81; Burke-White, *Community of Courts*, *supra* note 100, at 13; Turner, *Criminal Law*, *supra* note 101, at 5–6.

386. For further discussion of the potential implications of such an approach, see Greenawalt, *supra* note 261, at 125–32; Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 14 *EUR. J. INT’L L.* 481 (2003).

implement empirical surveys and cultural studies. Such a body could also perform the important function of collecting institutional knowledge of transitional justice mechanisms. While maintaining awareness that each situation of mass violence is different, the body could draw lessons from past mistakes and successes.<sup>387</sup> Most importantly, apart from enforcing the baseline principle of preventing domination, this body would not dictate the form or content of transitional justice mechanisms but instead draw on its knowledge of the afflicted society to design bespoke institutions.

As explained above, it is impossible to determine, without knowledge of local population preferences and a deep understanding of local cultures, which transitional mechanisms might be appropriate in different situations. However, this framework can help us think about how some of the case studies described above might have come out differently under a pluralist process approach. In East Timor, the population's preference to see trials for those most responsible might have pointed to ICC prosecution of higher-level officials, given the lack of political will to try Indonesian officials before the Serious Crimes Panels.<sup>388</sup> The sentences for these officials might have included public apologies or reparations to locate missing persons. At the same time, the successes of the CRPs suggest that these approaches might have been pursued simultaneously. In any case, a more inclusive design process might have ensured a victim-directed reconciliation process. In Cambodia, similarly, the hybrid tribunal might have incorporated local moral authority, such as Buddhist principles, into its design. Perhaps this would have led to a mechanism more akin to mediation than litigation, or to simplified and more accessible structures and proceedings. Sentencing might have included public confession and apology. It is also possible that a pluralist process approach would have pointed to transitional justice mechanisms entirely outside the current menu of options.

## CONCLUSION

There is no easy transitional justice solution; an effective approach requires an inclusive and carefully structured design process. We might call this process "law" and this inclusiveness "international," suggesting a new way forward not only for transitional justice but also for international law more generally.<sup>389</sup> Prescriptive empiricism can be used to

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387. Andrea Kupfer Schneider, *The Intersection of Dispute Systems Design and Transitional Justice*, 14 HARV. NEGOT. L. REV. 289, 304–06 (2009).

388. See *supra* notes 147, 333 and accompanying text.

389. See Berman, *A Pluralist Approach*, *supra* note 11, at 323–24.

design international institutions in many fields, increasing their effectiveness in achieving their goals. This Article has argued that the goal of transitional justice, previously poorly conceptualized and undertheorized, should be to reconstruct social norms relating to mass violence. In order to be most effective at altering human behavior, the norms presented by transitional justice institutions must be internalized by local populations. This internalization requires that an affected society view the relevant accountability mechanism as legitimate. To attain this legitimacy, transitional justice mechanisms must be carefully tailored to meet the needs of particular societies recovering from mass violence. Much like democracy, a pluralist process will be messy and complex, but in return offers the promise of effectiveness—a bargain well worth the cost.