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# BEYOND TRADITIONAL NOTIONS OF TRANSITIONAL JUSTICE: HOW TRIALS, TRUTH COMMISSIONS, AND OTHER TOOLS FOR ACCOUNTABILITY CAN AND SHOULD WORK TOGETHER

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**Abstract:** Civil conflicts marked by human rights violations leave devastated communities in their wake. The international community has an interest in assuring that justice is done, an interest which the recent establishment of the International Criminal Court (ICC) confirms. The authors argue the ICC should be augmented by additional mechanisms to bear the burden of doing justice and reconstructing communities after such civil conflicts. This Article explores the potential tensions among such mechanisms, including national human rights trials, truth commissions, and community-based *gacaca*, and emphasizes the importance of consulting victims in resolving these tensions. The authors conclude that the ICC should take the lead in coordinating the different mechanisms discussed in the Article as part of post-conflict reconstruction.

## INTRODUCTION

In the aftermath of civil conflict marked by widespread human rights violations, international criminal tribunals alone cannot bear the full burden of doing justice and stitching polities back together. They must be augmented by other mechanisms. Yet it is far from clear how to do this without each mechanism undercutting the effectiveness of the others.

The last thirty years have witnessed a great proliferation of approaches to doing justice and restoring community after civil conflict. To the International Criminal Court (ICC) and the three international

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tribunals for the former Yugoslavia, Rwanda, and Sierra Leone can be added roughly eleven national trials, thirty-one variations on official truth commissions, plus at least eight other panels of inquiry.<sup>1</sup> The sheer variety reflects the application of cumulative experience, and yet as one observer has noted, “[n]o architect of these institutions has proceeded by deduction from general principles.”<sup>2</sup> Even where they have drawn on prior experience, each of these mechanisms has been crafted by the fine art of political compromise. Yet once in place, each variation has also attracted its partisans and critics, sparking sometimes constructive, sometimes invidious, comparisons about which mechanism serves best.

Perhaps because the original ambitions for international tribunals were so expansive, both the record of tribunals and the initial aspirations for them have become targets of disappointment and even cynicism. This is unfortunate and requires a swift and thoughtful response, because we have no grounds for supposing that the need for international vigor in protecting against human rights abuses has abated. Moreover, it would be lamentable if the inauguration of a permanent International Criminal Tribunal occurred simultaneously with the collapse of confidence in, and international support for, tribunals generally. Fortunately, even critics of tribunals generally share the same aspirations as the advocates:

Seeking justice through the institutions of the law is the best means of determining responsibility for acts of genocide, war crimes, and other politically motivated violations of human rights. Criminal prosecutions of crimes of this magnitude not only punish the individual who committed them, demonstrating that impunity does not exist, but also help to restore dignity to their victims. They can provide a cathartic experience not only for individual victims, but also for society as a whole. By holding individuals responsible for their misdeeds, crimi-

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<sup>1</sup> One source lists twenty-one truth commissions, four “historical truth commissions,” and four alternate forms of official or semi-official inquiry into the past. PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS 305 (2001). Since 2001, at least ten more truth commissions have been formed. The U.S. State Department’s Annual Human Rights reports list eleven countries where national prosecutions for human rights abuses are on-going. *See generally* Bureau of Democracy, Human Rights, and Labor, U.S. Dep’t of State, 2005 Country Reports on Human Rights Practices, available at <http://www.state.gov/g/drl/rls/hrrpt/2005/>.

<sup>2</sup> Henry J. Steiner, Symposium Comments, *in* TRUTH COMMISSIONS: A COMPARATIVE ASSESSMENT 8 (Henry J. Steiner ed., 1997).

nal trials may also deter the commission of abuses in the future. Moreover, if conducted in strict accordance with legal due process, criminal prosecutions of war crimes can help to strengthen the rule of law and establish the truth about the past through accepted legal means.<sup>3</sup>

These are all worthy aspirations, yet it is improbable that all can be achieved by any single way of doing justice. The criteria and pacing of meticulous criminal prosecutions will be very different from the social-psychological requirements for community catharsis and restoration of individual dignity, or the scholarly requirements for an objective and thorough historical record. Among those who care about the success of criminal tribunals, there seems growing acknowledgement that tribunals *should* be meshed with other mechanisms in order to serve all these aspirations—and wide agreement that this has not yet been achieved. The challenge here should not be underestimated. The aspirations and claims made for both tribunals and other mechanisms extend across several disciplines, including law, politics, ethics, and social and individual psychology. For this reason, finding commonly intelligible language, common measures of effect, and common agreement on how to balance conflicting purposes against each other will not be easy. Nor should we expect a single moment of agreement and resolution; this will inevitably be a continuing conversation and debate.

This conversation must start with candor about the principal shortcoming of past and current international tribunals: the faint voice they grant to the actual communities torn by conflict.<sup>4</sup> For a tribunal to

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<sup>3</sup> Timothy Phillips & Mary Albon, *When Prosecution Is Not Possible: Alternative Means of Seeking Accountability for War Crimes*, in *WAR CRIMES: THE LEGACY OF NUREMBERG* 244, 244 (Belinda Cooper ed., 1999); see MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* 79, 88 (1998) (offering a summary of aspirations for truth commissions: “to overcome communal and official denial”; “to obtain the facts”; “to end and prevent violence”; “to forge the basis for a domestic democratic order”; “to support the legitimacy and stability of the new regime”; “to promote reconciliation”; “to promote psychological healing”; “to restore dignity to victims”; “to punish, exclude, shame, and diminish offenders”; “to express and seek to achieve the aspiration that ‘never again’”; “to build an international order to try to prevent . . . aggression, torture, and atrocities”; “to accomplish each of these goals in ways that are compatible with the other goals”); see also *id.* at 79 (describing Bryan Hehir’s observations on the function of truth commissions); Minna Schrag, *Lessons Learned from ICTY Experience*, 2 J. INT’L CRIM. JUST. 427, 428 (2004).

<sup>4</sup> Neither tribunals nor truth and reconciliation committees (TRCs) have been especially effective in engaging local communities. See Hugh van der Merwe, *National and Community Reconciliation: Competing Agendas in the South African Truth and Reconciliation Commission*, in *BURYING THE PAST: MAKING PEACE AND DOING JUSTICE AFTER CIVIL CONFLICT* 85, 102–04 (Nigel Biggar ed., 2001). Neither have they served well in providing psychological

serve a community scorched by atrocity, that community and its victims must be consulted on any plans for societal reconstruction and must be heard in meaningful ways. The importance of asking victims cannot be stressed enough. This consultation has been the great strength of alternatives to tribunals that have emerged in the past thirty years; if a tribunal is to be *for* the victims, it also needs, at least in part, to be *by* them. There has been some imaginative tinkering with tribunals in this direction. For a while, the International Criminal Tribunal for the Former Yugoslavia (ICTY) used Rule 61 of its Rules of Procedures and Evidence in a manner akin to a truth commission.<sup>5</sup> In Rwanda, a community-based system of adjudication analogous to traditional *gacaca* has been appended to national tribunals to speed up the resolution of local disputes and foster community re-integration. The ICC has established a Victims and Witnesses Unit to provide “protective measures and security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses.”<sup>6</sup> Yet there are limits to what mere tinkering can accomplish; tinkering concedes the shortcomings without fully meeting them. As one critic notes, “[t]he tribunals cannot be ‘fixed’ to address what is missing; instead, additional avenues must be found.”<sup>7</sup> What is needed is a comprehensive set of mechanisms, operating in complementary ways with tribunals.

Two points must be made at the outset. First, those who care about the success of tribunals cannot simply protest that some tasks, such as

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support for victims and survivors. See Debra Kaminer et al., *The Truth and Reconciliation Commission in South Africa: Relation to Psychiatric Status and Forgiveness Among Survivors of Human Rights Abuses*, 178 BRIT. J. PSYCHIATRY 373, 373–76 (2001). They have not, in our judgment, been shaped by any well-established theory of, or experience with, what has been termed “political healing.”

<sup>5</sup> See Yael Tamir, Symposium Comments, in TRUTH COMMISSIONS, *supra* note 2, at 35; see also RACHEL KERR, THE INTERNATIONAL CRIMINAL TRIBUNAL OF THE FORMER YUGOSLAVIA: AN EXERCISE IN LAW, POLITICS, AND DIPLOMACY 100 (2004). Kerr notes that Richard Goldstone’s successor as prosecutor, Louise Arbour, abandoned this practice.

<sup>6</sup> Rome Statute of the International Criminal Court art. 43(6), July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute]. The Victims and Witnesses Unit helps witnesses obtain medical and psychological care, and its staff includes persons with expertise in trauma, including trauma related to crimes of sexual violence. The International Criminal Tribunal for Rwanda has a comparable unit to provide psychological care for victims/witnesses and to accompany witnesses when they testify before the court, ensuring that they are mentally as well as physically supported throughout the experience. The reach of these units, of course, extends only to the few who appear as witnesses. See Statute of International Criminal Tribunal for Rwanda art. 21, Nov. 8, 1994, 33 I.L.M. 1598 [hereinafter ICTR Statute].

<sup>7</sup> Julie Mertus, *Only a War Crimes Tribunal*, in WAR CRIMES, *supra* note 3, at 242.

individual or political “healing,” are not judicial responsibilities appropriate for a judicial institution. It would be cruel to suppose that communities devastated by civil conflict will always be able to handle the non-judicial tasks all on their own, and naïve to suppose that the international community will spontaneously step in to take up the burden. If these are important tasks in doing justice, then a proper international tribunal system should include multi-layered mechanisms able to achieve them. Second, the mechanisms for these tasks cannot simply be appended to tribunals in a thoughtless or casual fashion. There are fundamental tensions in missions and methods between tribunals and these other mechanisms that must be addressed. Unless they are integrated and coordinated in a careful way, each will wander off in response to its own organizational imperatives and enthusiasms. In the confusion and conflicts that result, tribunals will lose the cooperation and respect of states and publics that are vital to their success.

Consider, for instance, potential conflicts that arise from the complementary roles of international tribunals on the one hand, and national human rights trials, truth and reconciliation commissions (TRCs), and community-based *gacaca* systems on the other.<sup>8</sup> We take each of these cases in turn.

## I. INTERNATIONAL TRIBUNALS AND NATIONAL HUMAN RIGHTS TRIALS

The value of having international tribunals work in coordination with national human rights trials is that both the national and the international communities can have a role in determining accountability and restoring the state. When a country has the capacity, national trials have several advantages over international trials in adjudicating human rights cases. International criminal tribunals are limited by their mandate and generally only have jurisdiction over the gravest crimes.<sup>9</sup> As

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<sup>8</sup> We use the labels TRCs and *gacaca* in a generic sense here, not as specific references to the South African Truth and Reconciliation Commission or the Rwanda *gacaca* system. South Africa’s version of a truth and reconciliation commission is perhaps the best known, but it was not the first to use this label. Rwanda has adopted the traditional term *gacaca* for its community-based courts, but their structure is not distinctively Rwandan and could be adapted to other settings. See Stef Vandeginste, *Rwanda: Dealing with Genocide and Crimes Against Humanity in the Context of Armed Conflict and Failed Political Transition*, in *BURYING THE PAST*, *supra* note 4, at 223–53.

<sup>9</sup> See Statute of the International Criminal Tribunal for the Former Yugoslavia arts. 1–9, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993); Rome Statute, *supra* note 6, arts. 4–13; ICTR Statute, *supra* note 6, arts. 1–8; see also Brian Concannon, Jr., *Beyond Complementarity: The International Criminal Court and National Prosecutions, A View from Haiti*, 32 COLUM. HUM. RTS. L. REV. 201, 225 (2000).

such, they cannot try the vast number of cases left after the oppressors have been displaced from authority. National trials, however, are not so limited and can thus adjudicate many more cases.<sup>10</sup> In situations where the number of cases is too numerous for any one court system, national and international tribunals can share the caseload to prevent undue delay.

Trials in the state where the atrocities occurred also help the state reestablish itself with its new and presumably more democratic government. Having the capacity to try perpetrators is evidence of a functioning judiciary and helps introduce the rule of law,<sup>11</sup> and it may help prevent revenge killings.<sup>12</sup> If the public views the trials as fair and just, the trials may also have the effect of increasing public confidence in the new government.<sup>13</sup> Thus, national trials have the potential to show the citizens of the state, as well as the international community, that the government is able to function and embodies a new distribution of political power. The empowering nature of national trials for victims can be significant for political reconstruction:

Victims of mass human rights violations are usually the least powerful in their own countries, and their countries are themselves often among the least powerful globally. Their victimization is only part of a larger context of disempowerment. As a result, any remedy to the victim's problems must, as much as possible, empower them by involving them in all aspects. . . . In many countries the formerly oppressed would be punishing their former oppressors for the first time, through the medium of a justice system that was traditionally itself an instrument of oppression.<sup>14</sup>

National trials offer the new government, its citizenry, and the wider international community benefits that international tribunals simply cannot, either because of their mandate or because of their location.

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<sup>10</sup> See Concannon, *supra* note 9, at 225.

<sup>11</sup> Stephan Landsman, *Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions*, 59 LAW & CONTEMP. PROBS. 81, 83 (1996).

<sup>12</sup> Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7, 23 (2001) (explaining that "[t]he detention and trial of tens of thousands of *génocidaires* before Rwandese courts may be viewed as an alternative to mass expulsions or widespread extrajudicial executions and private revenge killings"); see Landsman, *supra* note 11, at 83–84.

<sup>13</sup> See Concannon, *supra* note 9, at 229.

<sup>14</sup> *Id.* at 228–29.

National and international trials can and should complement each other. Indeed, the Rome Statute establishing the ICC anticipates that states will hold domestic trials concurrently with the ICC's trials.<sup>15</sup> Article 17 of the Rome Statute provides for complementarity, meaning that the ICC gives primacy to the nation-state for adjudicating cases and that an international tribunal will only interfere where national courts are unwilling or unable to prosecute cases.<sup>16</sup> This doctrine of complementarity recognizes the sovereignty of states and their desire to hold domestic trials, but also provides for the possibility that some states may be "unwilling or unable" to do so and that in those instances the international community has a legitimate interest in seeing justice done.<sup>17</sup> Complementarity serves the needs of the country rebuilding after atrocity by giving it the option to hold trials. It also serves the needs of the international community by allowing it to have a role in the adjudication of these heinous crimes. States and the ICC alike can even reap the benefits of concurrent trials, as has happened in Rwanda:

The initial distrust and tensions between the [International Criminal Tribunal for Rwanda (ICTR)] and Rwanda have been replaced by increasing cooperation and understanding. The ICTR Office of the Prosecutor has had greater contact with Rwandese magistrates in various communes and cooperated in investigations. More and more Rwandese officials—including lawyers from the court of appeals and the Supreme Court—have been attending ICTR proceedings in Arusha. The Rwandese government has appointed an official representative to the ICTR to expedite the investigative access needed for effective prosecutions. Thus, the symbiosis between international and national trials has become increasingly apparent.<sup>18</sup>

As long as the nation-state and the international community work together, it is possible to have concurrent trials that aid in the restoration of the rule of law in a country reeling from mass violence.<sup>19</sup>

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<sup>15</sup> See Rome Statute, *supra* note 6, art. 17.

<sup>16</sup> See *id.* However, "[u]njustified delays in proceedings as well as proceedings which are merely intended to shield persons from criminal responsibility will not render a case inadmissible before the ICC." ICC Criminal Court, Jurisdiction, <http://www.icc-cpi.int/about/atagance/jurisdiction.html> (last visited Nov. 13, 2006).

<sup>17</sup> See Rome Statute, *supra* note 6, art. 17.

<sup>18</sup> Akhavan, *supra* note 12, at 26.

<sup>19</sup> It is worth noting that attorney Brian Concannon Jr., who has been working in Haiti for over ten years, proposes that the ICC employ attorneys and judges from countries who

Despite their complementary potential, international tribunals and national trials can undermine each other, unless they act in coordination. Even if it is a party to the Rome Statute, for instance, any government that wishes to impede the effectiveness of the ICC has ample latitude to do so within the treaty's terms.<sup>20</sup> However, the worrisome case is not where a government acts in bad faith with the deliberate intent of using national trials to thwart an international tribunal, but where its own well-intentioned, but independent, action has the same effect. A state may make a political judgment that prosecutions for human rights abuses committed during a recently ended conflict might reignite the conflict or impede "national healing," so it may grant wide amnesty to perpetrators.<sup>21</sup> Such amnesties may not technically prevent an international tribunal from its own prosecutions, yet they may shift political sentiment within the state in a way that makes witnesses less willing to cooperate and the government less willing to pursue or surrender defendants.<sup>22</sup> A state may judge that it

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are soon to be in need of the ICC's assistance. His idea is that these attorneys and judges would then be able to go back to their countries and assist in national trials. *See* Concanon, *supra* note 9, at 230.

<sup>20</sup> Notwithstanding its general obligations to cooperate found in Part 9 of the Treaty, a State Party to the Rome Statute that wishes to forestall or entangle action by the ICC can do at least the following: seek a Security Council resolution that defers an investigation or prosecution (Article 16); pre-empt ICC action by undertaking an investigation or prosecution of its own (Article 17.1.a and Article 18.2); undertake an investigation of its own and reach a decision not to prosecute (Article 17.1.b); challenge the jurisdiction of the ICC or the admissibility of the specific case (Article 19.2.b and c); generally drag its feet with respect to required cooperation under the Statute, e.g., in providing information about the status of its own investigation or prosecution (Article 18.5), in arresting and/or surrendering persons sought by the ICC (Articles 19, 59, and 89), in aiding in the preservation and submission of evidence (Article 18.6 and Article 69.3), or in withholding information on grounds of national security concerns (Article 72). Rome Statute, *supra* note 6.

<sup>21</sup> *See* MINOW, *supra* note 3, at 127:

Leading participants in the South African Truth and Reconciliation Commission differ over the relationship between its work and prosecutions. Justice Minister Dullah Omar, who helped design the TRC, emphasizes that its work is not inconsistent with domestically conducted criminal prosecutions and instead can build the factual bases for them. Archbishop Desmond Tutu, who heads the commission, in contrast writes that "the purpose of finding out the truth is not in order for people to be prosecuted. It is so that we can use the truth as part of the process of healing our nation."

*Id.* *But see* Juan Méndez, *Accountability for Past Abuses*, 19 HUM. RTS. Q. 255, 255–82 (1997) (presenting a spirited rebuttal of such views).

<sup>22</sup> The drafters of the Rome Statute were unable to reach consensus regarding the treatment of national amnesties, so the Statute lacks any specific reference to them. Of the treaty negotiations, Darryl Robinson says that:

must move swiftly with national trials to convict and exclude human rights abusers from political office or authority and to consolidate a shift in political power.<sup>23</sup> To achieve this objective, it may settle for lesser charges and more lenient sentences in order to clear cases as quickly as possible, with the paradoxical effect of tying its own hands politically when an international tribunal later seeks to press more serious charges.

The greatest potential for friction between international tribunals and national trials, however, may stem simply from the weakness of national judiciaries following civil conflict. In order for national trials to be effective, there must be a functioning and independent judiciary. Such independence is not always possible, especially in situations where the incoming government does not purge the former judiciary of unskilled, biased, or corrupt judges and lawyers.<sup>24</sup> Where there has been

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First of all, agreement would likely have been impossible, given the sharply clashing views on the matter. Second, even if there were agreement in principle, it would have been unwise to attempt to codify a comprehensive test to distinguish between acceptable and unacceptable reconciliation measures and to lock such a test into the Statute. Thus, the drafters turned to the faithful and familiar friend of diplomats, *ambiguity*, leaving a few small avenues open to the Court and allowing the Court to develop an appropriate approach when faced with concrete situations.

Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 14 EUR. J. INT'L L. 481, 483 (2003).

<sup>23</sup> Roland Paris argues that both national and international actors have an interest in resurrecting national court systems promptly after civil conflict, as a way of regulating who may compete for public office:

Although international peace-building agencies have assisted in the drafting and oversight of electoral laws in war-shattered states, they have generally been reluctant to become directly involved in regulating the activities of political parties. In only one mission—Bosnia—did international officials prohibit certain individuals from contesting public office: namely, individuals indicted for war crimes. . . . Holding elections soon after the termination of hostilities is still treated as a top priority that trumps virtually all others, including the question of whether peace can survive the pressures of electoral mobilization, given the character of the political parties that are likely to contest the election. If local parties preach intolerance and hatred toward their rivals, or display little commitment to sustaining democracy once in power, there is little to be gained by proceeding with elections. Instead, peace-builders should use the period leading up to elections to promote moderation within existing parties, to foster the growth of new democratic and moderate parties, and if necessary, prevent the most intolerant individuals and parties from running for public office.

ROLAND PARIS, *AT WAR'S END: BUILDING PEACE AFTER CIVIL CONFLICT* 190 (2004).

<sup>24</sup> See Landsman, *supra* note 11, at 84–85.

wholesale regime change, the new government must have established laws to prosecute cases, which implies a functioning parliament. It also must have the necessary human resources: judges, prosecutors, police investigators, and defense counsel. Security concerns in a post-conflict state can also impede national trials. Unless judges, lawyers, and victims can be protected from retaliation, they are not likely to participate in trials where their former oppressors are the defendants, especially if the defendants still wield some power.<sup>25</sup> Rwanda demonstrates both the challenges and the possibilities. Rwanda was party to the 1948 Genocide Convention prior to 1994, but it had not incorporated the Convention into domestic law and thus had no law against genocide. The ranks of attorneys were depleted by those who had been killed, had fled, were implicated in the genocide, or had lost family and property and were unwilling to defend perpetrators.<sup>26</sup> Despite these setbacks, Rwanda enacted laws covering the genocide, made imaginative use of national and international resources to form a cadre of attorneys, and now stands as an example of how concurrent national and international trials can be conducted.

Nonetheless, there is substantial risk. If a government proceeds with trials even though the national court system is neither stable, independent, nor secure, the trials may end up backfiring, undercutting the ability of the government to cooperate with subsequent international tribunal prosecutions. Greater collaboration from the outset between international tribunals and national authorities would diminish these risks; widespread and continuing consultation with the population will be indispensable in giving legitimacy to this collaboration.<sup>27</sup>

## II. INTERNATIONAL TRIBUNALS AND TRUTH COMMISSIONS

The value of having international tribunals work in coordination with truth commissions lies in the latitude available to TRCs for sketching a larger picture of the extent of atrocity and responsibility than might be feasible with the more focused indictments and prosecutions of tribunals or national trials. This latitude in turn may help clarify the

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<sup>25</sup> In Rwanda, between 1994 and 1997, over three hundred survivors scheduled to testify as witnesses were murdered. Jennifer Widner, *Courts and Democracy in Post-Conflict Transitions: A Social Scientist's Perspective on the African Case*, 95 AM. J. INT'L L. 64, 67–8 (2001).

<sup>26</sup> See Vandeginste, *supra* note 8, at 23–34; see also Widner, *supra* note 25, at 65, 69.

<sup>27</sup> The Nuremberg prosecutions after WWII were not especially effective in earning legitimacy from the German population, not even among those who felt betrayed by their own leaders, apparently because the Allies failed to grasp how the public perceived their efforts. See Jörg Friedrich, *Nuremberg and the Germans*, in WAR CRIMES, *supra* note 3, at 87–106.

historical record, counteract communal and official denials, and perhaps grant to victims the dignity of formal acknowledgment of their suffering, even if they personally do not appear as witnesses.<sup>28</sup> Moreover, precisely because TRCs are not judicial bodies with complex rules of procedure and evidence, they may be able to set about their work more swiftly than tribunals, with greater participation of the community in setting the focus of inquiry, and with fewer resources. This may be true even where TRCs are given a quasi-judicial power to grant amnesty in exchange for testimony. TRCs may also aid political reconstruction by signaling and adding momentum to a shift in political power away from perpetrators and toward victims and human rights defenders.<sup>29</sup> To the extent that TRCs are seen by the community as connected to tribunals, they can lend legitimacy to, and encourage cooperation with, the tribunals' actions.

On the other hand, in the absence of coordination, the fact that TRCs can move more swiftly can complicate or undermine the effectiveness of international tribunals. Whether responding to a legislative mandate, community expectations, or its own organizational dynamic in shaping its inquiries, a TRC will generate a version of "truth" and of appropriate "justice" to which any subsequent tribunal will be compelled to respond if it values its own legitimacy, even though the TRC may have radically departed from judicial rules and procedures that a tribunal must follow. Victims who pour out their souls before a TRC have expectations that punishments will follow and therefore will ex-

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<sup>28</sup> We are skeptical that TRCs in fact do much, in themselves, to bring about communal reconciliation, and even more skeptical that they promote psychological healing for individuals or communities. As Hayner notes, "The Trauma Centre for Victims of Violence and Torture in Cape Town has estimated, judging from the hundreds of victims they've worked with, that 50 to 60 percent of those who gave testimony to the commission suffered difficulties after testifying, or expressed regret for having taken part . . ." HAYNER, *supra* note 1, at 144. Nonetheless, properly employed, TRCs can be a valuable tool in the transitional justice process.

<sup>29</sup> Elizabeth Kiss commented on the Chilean National Commission on Truth and Reconciliation:

I also want to address the question of how political the process of truth-telling really is. . . . The first level involves the commission's official imprimatur. It is not just that someone is interested in listening to the experience, but that the listener has official status. Chileans who came to tell their story to the truth commission were moved by the Chilean flag that was prominently displayed on the table.

Elizabeth Kiss, Symposium Comments, *in* TRUTH COMMISSIONS, *supra* note 2, at 25.

pect a tribunal to take note of their agonies.<sup>30</sup> If a TRC offers amnesty to perpetrators in exchange for testimony, or alerts perpetrators to their vulnerability and sends them into hiding, it can impede the tribunal's subsequent ability to gain their custody as defendants or their cooperation as material witnesses.<sup>31</sup> If the TRC performs its tasks badly—due to political constraints, insufficient resources, or errors in judgment—it can generate disillusionment among victims and survivors and increase their sense of vulnerability, undercutting the tribunal's ability to gain their cooperation as well.<sup>32</sup>

Unless closely coordinated with other institutions, TRCs may be subject to their own organizational dynamics in ways that send them off on unanticipated paths. The South African TRC, for instance, was conceived by some as a complement to national and international prosecutions for deeds committed (on either side) during the apartheid era. Indeed, if there had been no possibility of such prosecutions, then the TRC's offer of amnesty in exchange for testimony might not have had much appeal to perpetrators. Along the way, however:

The commission's objectives shifted as different actors and constituencies became involved in the process. Although amnesty to the perpetrators was initially the central objective, at later stages, the victims became the focal point. As religious leaders and churches became increasingly involved in the commission's work, the influence of religious style and symbolism supplanted political and human rights concerns.<sup>33</sup>

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<sup>30</sup> See Rachel Sieder, *War, Peace, and the Politics of Memory in Guatemala*, in *BURYING THE PAST*, *supra* note 4, at 191–93.

<sup>31</sup> When Louise Arbour replaced Richard Goldstone as Chief Prosecutor with the ICTY, she dropped Goldstone's use of public hearings under Rule 61 in a fashion analogous to TRCs and shifted to secret indictments instead, on the reasoning that open hearings complicated the task of arresting suspects. See KERR, *supra* note 5, at 100, 159, 183.

<sup>32</sup> See van der Merwe, *supra* note 4, at 86.

<sup>33</sup> Andre du Toit, Symposium Comments, in *TRUTH COMMISSIONS*, *supra* note 2, at 20. du Toit also notes:

Archbishop Tutu, as well as many other commission members, interprets the truth commission's role in terms of justice, truth, and reconciliation. When I participated in the earlier preparations for the commission, we discussed reconciliation in a more political sense. A religious terminology has become more prevalent. Reconciliation now means something akin to forgiveness. While criminal prosecution is clearly an alternative to political reconciliation, it is not so clearly related to spiritual forgiveness. The religious framework has resulted in a shifting of the alternatives. Some observers have commented that this new framework is useful. People must be able to open their wounds,

In turn, as the TRC redefined its objectives, it moved increasingly away from judicial methods:

Criminal prosecutions involve an adversarial system. Consider, for example, whether cross-examination of witnesses, including victims, is appropriate in the context of a truth commission. Trials focus on the perpetrators, whereas truth commissions may choose to focus on victims. Perhaps we assume in trials that the focus on the perpetrator is compatible with the victim's interests. We assume, then, that the victim desires punishment of the perpetrator. If that means the victim must be cross-examined, he is willing to accept it. I do not believe all victims think this way. Many are more interested in the restoration of their human and civic dignity. This may be difficult to attain in the adversarial context of trials.<sup>34</sup>

Such changes in motive and method may serve worthy purposes, yet they clearly put TRCs in tension with the judicial and adversarial method of establishing truth and dispensing justice.

### III. INTERNATIONAL TRIBUNALS AND COMMUNITY-BASED *GACACA*

The value of having international tribunals work in coordination with community-based adjudication systems lies in the direct contact that *gacaca* can establish with the local communities that must ultimately grant legitimacy and stability to national and international tribunals—an intimacy of contact that even truth commissions cannot provide.<sup>35</sup> Trials are an important tool in doing justice and restoring

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yet accept the fact that this will not result in punishment of the perpetrators. The religious theme of forgiveness helps people make sense of this situation.

*See id.* at 53.

<sup>34</sup> du Toit, *supra* note 33, at 36.

<sup>35</sup> van der Merwe notes:

The [South African Truth and Reconciliation] Commission's consultations with local communities in preparation for the hearing were usually very limited. It often only consulted significantly with the local town council, who in turn were expected to communicate with other parties. Stakeholders not represented in this formal structure often felt left out. This was particularly the case with groups explicitly representing victims' concerns. . . . In many communities, the hearings were often only one day in length, covering only ten or eleven cases of victimization. Less than ten percent of the victims who made statements [to the TRC staff] had the opportunity to testify in public. Many more victims wanted the opportunity to tell their stories, and felt angered that the TRC seemingly did not see their experiences as sufficiently sig-

political community, yet the “assumption that holding individuals accountable for atrocities alleviates despair, provides closure, assists in creating and strengthening democratic institutions, and promotes community rebuilding overstates the results that trials can achieve.”<sup>36</sup> Tribunals are too remote from the people to accomplish all that has been expected of them.

At the most basic level, international tribunals are geographically remote. The ICC and the ICTY sit in The Hague. The seat of the ICTR is in Arusha, Tanzania, and even television broadcasts of the trials in Rwanda cannot bring them close to the vast majority of Rwandans who lack access to televisions.<sup>37</sup> Tribunals are also procedurally remote from all but the smallest fraction of victims and survivors. In a trial system, the focus is on the offenders—determining their guilt or innocence—while the victims are essentially treated as tools in the prosecutors’ case, confined in their testimony to only those fragments of their experience that meet the legal standard of relevant evidence. Tribunals may also be culturally remote, designed and conducted in the main from a European perspective. As one critic notes:

[W]e occasionally come dangerously close to determining from a long distance what societies torn by violence actually require, and we do not stop to consider the views of the people who have to live with the legacy of the abuse and also with the consequences of a policy to deal with that legacy.<sup>38</sup>

Finally, tribunals are remote from the daily life of communities where victims and perpetrators confront each other. Where the violence of civil conflict was widespread, eventually partisans from both sides are going to return to communities and often will have to live alongside the

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nificant. . . . The selection of cases to be heard at the hearings was done by the TRC independently of community input. . . . Community members were also suspicious about the selection of cases. They wondered why certain cases that they saw as particularly significant were left out. There was even speculation among some communities that this was due to secret deals between local political leaders and TRC officials, aimed at covering up the involvement of party officials.

van der Merwe, *supra* note 4, at 93–94.

<sup>36</sup> Laurel E. Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 *HUM. RTS. Q.* 573, 601 (2002).

<sup>37</sup> Neil J. Kritz, *War Crimes Trials: Who Should Conduct Them—and How*, in *WAR CRIMES*, *supra* note 3, at 168, 171.

<sup>38</sup> Juan E. Méndez, *National Reconciliation, Transnational Justice, and the International Criminal Court*, 15 *ETHICS & INT’L AFF.* 25, 44 (2001).

people they once considered enemies. Even where a human rights abuser has been punished by the court, this does not assure that in the eyes of the community, justice has been done and all debts paid.<sup>39</sup> Other mechanisms for accountability at the community level must supplement trials.

*Gacaca*, the community adjudication system in Rwanda, is part court, part truth commission, and part community council. The hope was that *gacaca* would help resolve the massive number of grievances of neighbor against neighbor, restore communities, reintegrate perpetrators who had served their time back into their villages, and provide victims with a sense of justice.<sup>40</sup> In the process, they can also signal at the community level that a shift in political power has put an end to the rule of human-rights abusers.

*Gacaca* is a local tradition in Rwanda that has historically been used to resolve local community conflicts.<sup>41</sup> In the typical *gacaca* setting, members of the community come together and resolve conflicts in a participatory way: “members of local communities settle interpersonal differences through the election of sages and leaders who endeavor to

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<sup>39</sup> It is important to note that re-integration does not necessarily mean forgiveness. Often, the most one can hope for is that those on opposites cease to hate one another. BBC journalist Robert Walker observed this in a Rwandan *gacaca* session:

Mr. Gasana lost everyone in the genocide—his mother and father, wife and children, brothers and sisters. Now some of those involved in the killings have come back to the village. Mr. Gasana and his neighbours, sitting in a *gacaca*—a village-based court—must decide who was responsible. Who killed, raped or looted during the three months of genocide when about 800,000 people, mainly Tutsis, were slaughtered across Rwanda. Nearby, I meet Jean de Dieu Cyiza. He is one of those who has confessed to participating in the genocide. Mr. Cyiza tells me he killed five Tutsi children. “The government soldiers told me to kill them. To save myself I decided to do it. I killed them with a machete,” he says. Gasana listens to the conversation. Mr. Cyiza killed his brother’s children. Mr. Gasana’s face betrays him a little, he nods at certain points, as if to confirm what Mr. Cyiza is saying. “Cyiza did very wrong things,” Mr. Gasana says afterwards. But today, since Mr. Cyiza’s release from prison, the two men live as neighbours once again.

Robert Walker, *Rwanda Still Searching for Justice*, BBC NEWS, Mar. 30, 2004, <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/africa/3557753.stm>.

<sup>40</sup> One estimate is that at the end of the genocide, over 130,000 people were in prison for allegedly committing acts of genocide. See Alana Erin Tiemessen, *After Arusha: Gacaca Justice in Post-Conflict Rwanda*, 8 AFR. STUD. Q. 57, 57 (2004). Another estimate puts the number at around 122,000. See Vandeginste, *supra* note 8, at 234. By either count, at the rate the national courts were resolving cases, it would have taken over two hundred years to try all those being held. See *id.*

<sup>41</sup> Mark A. Drumbl, *Law and Atrocity: Settling Accounts in Rwanda*, 31 OHIO N. U. L. REV. 41, 55 (2005) [hereinafter Drumbl, *Law and Atrocity*].

bring the disputants together in the pursuit of communal justice.”<sup>42</sup> In these public hearings, wrongdoers may receive sentences other than jail time: community service, public shaming, obligations to make reparations or apologies, or other alternative forms of punishment.<sup>43</sup>

The *gacaca* system fashioned by the Rwandan government in October 2000 is a mutated version of the traditional *gacaca*, and as such, it could be broadly adopted elsewhere. Crimes connected with the genocide were divided into categories of severity.<sup>44</sup> Several levels of *gacaca* courts were established, and each successive level handles crimes of higher severity as well as hearing appeals from the judgments of lower *gacaca*.<sup>45</sup> The *gacaca* were given jurisdiction over crimes committed between October 1, 1990 and December 31, 1994,<sup>46</sup> and only over intentional and unintentional homicides, property crimes, and assaults.<sup>47</sup> They do not, however, have jurisdiction over crimes relating to inciting or organizing the genocide, nor do they have jurisdiction over crimes of sexual violence.<sup>48</sup> *Gacaca* judges apply the same law as the national

<sup>42</sup> Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U. L. REV. 1221, 1264 (2000) [hereinafter Drumbl, *Punishment, Postgenocide*].

<sup>43</sup> *See id.*

<sup>44</sup> *See id.* at 1264–65.

<sup>45</sup> *See* Vandeginste, *supra* note 8, at 234; *see also* Drumbl, *Law and Atrocity*, *supra* note 41, at 58–59 (discussing how *gacaca* now also have such powers as the ability to summon witnesses and issue search warrants).

<sup>46</sup> *See* Tiemessen, *supra* note 40, at 61. This jurisdiction period is, however, longer than that of the ICTR, which is January 1, 1994 through December 31, 1994. *See* ICTR Statute, *supra* note 6, art. 7. The temporal jurisdiction of the *gacaca* has been criticized for having the effect of focusing on the crimes of the Hutu and ignoring the long prior history of human rights abuses by the Tutsi as well. *See* Sarah L. Wells, *Gender, Sexual Violence and Prospects for Justice at the Gacaca Courts in Rwanda*, 14 S. CAL. REV. L. & WOMEN'S STUD. 167, 179 (2004).

<sup>47</sup> The International Criminal Tribunal for Rwanda and the national courts deal with the most serious crimes, with the ICTR having primacy. Although the maximum penalty at the ICTR is life in prison, the national courts can impose the death penalty. This difference resulted in the leaders of the genocide tried at the ICTR being able to escape the death penalty, while lower-level offenders tried in Rwandan courts were sentenced to death. *See* Madeline Morris, *Justice in the Wake of Genocide: Rwanda*, in *WAR CRIMES*, *supra* note 3, at 213–14. A survey done in 1996, before the *gacaca* system was established, found that Rwandans wanted the state and not the *gacaca* to deal with the genocide. Respondents also stated that when perpetrators were found guilty, they (or a member of their family) should be killed, thus “enable[ing] forgetting and forgiveness and lead[ing] to a reconciliation of the families involved.” Vandeginste, *supra* note 8, at 239.

<sup>48</sup> Erin Daly, *Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda*, 34 N.Y.U. J. INT'L L. & POL. 355, 371 (2002); *see also* Drumbl, *Law and Atrocity*, *supra* note 41, at 55–56.

courts, but they can hand down remedies aimed at restoring community, such as reparations or community service.<sup>49</sup>

The *gacaca* system does have shortcomings. Reliance on community courts can be problematic if the sense of “community” has been destroyed by civil conflict.<sup>50</sup> In Rwanda, for instance, post-genocide reconstruction has involved setting up new villages, often peopled by some of the 3.2 million refugees who returned to Rwanda between 1993 and 2002.<sup>51</sup> Some of these refugees had been living outside Rwanda for fifty years or more and had doubtful ties to the country, let alone to a community.<sup>52</sup> Rwanda also demonstrates that the collapse of civil order and effective police forces may make it difficult to protect *gacaca* participants from intimidation.<sup>53</sup> The fact that the vast majority of *gacaca* have yet to initiate proceedings raises questions about whether this extension of the state court system down to the local level has been accepted as legitimate by communities.<sup>54</sup> Finally, the use of these informal courts brings up issues of fairness and due process. Defendants at *gacaca* are not represented by legal counsel,<sup>55</sup> and they have limited rights to appeal.<sup>56</sup> *Gacaca* judges receive little training, which has given rise to challenges of bias.<sup>57</sup> Furthermore, the judges’ ability to reduce sentences in favor of community service may have the effect of encouraging false confessions, especially for

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<sup>49</sup> The community service might include building schools, roads, and community buildings, first aid or educational initiatives, or cultivating crops. See Maya Goldstein-Bolocan, *Rwandan Gacaca: An Experiment in Transitional Justice*, 2004 J. DISP. RESOL. 355, 394–95; see also Drumbl, *Law and Atrocity*, *supra* note 41, at 56; Drumbl, *Punishment, Post-genocide*, *supra* note 42, at 1265.

<sup>50</sup> See Wells, *supra* note 46, at 177–78.

<sup>51</sup> See UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, VOLUNTARY REPATRIATION IN AFRICA: LEVELS AND TRENDS 1993–2002, at 4 (2004), <http://www.unhcr.org/cgi-bin/texis/vtx/events/opendoc.pdf?tbl=EVENTS&id=404886df4>.

<sup>52</sup> See Daly, *supra* note 48, at 380.

<sup>53</sup> In March 2004, for example, fourteen people were sentenced to death for killing survivors of the genocide who were expected to testify in the *gacaca*. See Goldstein-Bolocan, *supra* note 49, at 392.

<sup>54</sup> As of December 2004, only 750 of over 10,000 *gacaca* were actively involved in trials. See Wells, *supra* note 46, at 174. Nonetheless, by the end of 2005, 1,521 trials had been completed by *gacaca*. Fawzia Sheikh, *Trial and Error: Community Courts*, NEW INTERNATIONALIST, Dec. 2005, No. 385, at 17.

<sup>55</sup> See Daly, *supra* note 48, at 382.

<sup>56</sup> See Drumbl, *Law and Atrocity*, *supra* note 41, at 58.

<sup>57</sup> See Goldstein-Bolocan, *supra* note 49, at 386.

those alleged perpetrators who have already been in prison for years.<sup>58</sup>

Although the *gacaca* courts have met with mixed success, they can provide a useful complement to national or international courts, truth commissions, and other mechanisms of justice. Moreover, at least in the configuration adopted in Rwanda, the *gacaca* system poses rather minor complications for the operation of international tribunals. In principle, *gacaca* might complicate the work of tribunals in the same ways that national trials and TRCs can—by shaping public perceptions of truth, making witnesses or defendants less willing to cooperate, etc. In practice, *gacaca* handle low-level crimes and disputes that may be vital to political reconstruction at the community level and yet are of little bearing on tribunal prosecutions. The greater risk is that a poorly-managed and poorly-staffed *gacaca* system will erode community confidence in judicial action generally—whether national or international—as the proper way to do justice after civil conflict. For this reason, international tribunals have an interest in seeing that *gacaca* mechanisms are wisely constructed and adequately supported.

#### CONCLUSION

Civil conflicts marked by mass human rights violations leave devastated societies in their wake. Increasingly these conflicts involve genocide, mutilation, rape, abduction and coerced conscription of children, destruction of villages, forced migration, and other horrors. The international community has an interest and a stake in assuring that justice is done, in the broadest sense, in the resolution of these conflicts. The recent establishment of the ICC affirms this, and arguably, the ICC now stands at the pinnacle of international obligations to see that justice is served. It is therefore reasonable that the ICC should take the lead in coordinating the array of mechanisms needed in any post-conflict reconstruction. Such coordination would yield greater effect than if each entity just fumbles along on its own. Coordination certainly would help the ICC mitigate the clashes of method and purpose that have been discussed in this paper.

We can anticipate an objection that if the ICC (or any other international tribunal) were to take on this coordinating task, it may mean delaying its own proceedings while it gets all the other mechanisms ar-

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<sup>58</sup> See Daly, *supra* note 48, at 382. Some 30,000 prisoners in Rwanda “have confessed to participating in the genocide with a view to facing *gacaca* proceedings instead of the national court system.” Drumbl, *Law and Atrocity*, *supra* note 41, at 54.

rayed in proper sequence. On this point, we are persuaded by the argument of Louise Arbour, former Chief Prosecutor with the ICTY: Human rights trials are an important contribution to peace and reconciliation.

[T]hey should be conducted solemnly and with gravitas. There is an international interest, as well as the interest of the victims, which should be set above the rights of accused to a speedy trial . . . in assessing where the correct balance lies between the rights of the accused and the international interest, the Tribunal should err on the side of the international interest, which is concomitant with the interest of the victims . . . .<sup>59</sup>

Justice demands no less.

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<sup>59</sup> KERR, *supra* note 5, at 98 (quoting from an interview with Arbour).