THE INTERNATIONAL NORMATIVE STRUCTURE
OF TRANSITIONAL JUSTICE

by

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ABSTRACT

Transitional justice is a field of research that has benefited from an array of scholarship on accountability for atrocities, such as genocide, crimes against humanity, and war crimes. But the emphasis on varieties of institutional design, such as trials and truth commissions, and the primacy of pragmatic and context-specific variables have obscured the fact that transitional justice is increasingly a norm-driven practice. The field, however, lacks a theoretical framework from which to assess the international norms that consistently have causal effects in diverse contexts and over the past decades in which the normative structure has evolved.

I argue that the international normative structure of transitional justice is defined by four interrelated norms: a hierarchical division of criminality, accountability, localization, and reconciliation. The primary contribution of this dissertation is to explain the effects of this structure with a comparative analysis of each norm’s salience and implementation. I therefore juxtapose what is expected in principle to what is possible in practice.

Measures of salience go beyond establishing if norms exist and determine how norms matter, as is shown by their role in shaping discourse, institutions and policies. Subsequently I contend that it is important to distinguish between implementation challenges that are institutional failures, such as a lack of capacity or politicization of the process, and those which are normative contestation, such as reinterpretations and challenges over how and whether a norm should be implemented in a certain context. While both can affect the legitimacy of transitional justice institutions, contestation in particular carries with it the possibility for change in the normative structure.

The empirical focus analyzes the causal effects of the international normative structure, with the above measures, in Rwanda, East Timor, and the International Criminal Court. Individually, the case studies provide rich contextual detail on how the various norms shaped decision-making and institutions. The diversity in the transitional justice institutions is thus juxtaposed to the consistency in which the norms are salient across the cases and in their implementation challenges, lending credence to the influential effects of the international normative structure of transitional justice.
PREFACE

Interviews and observations conducted as field research in Rwanda in January and February, 2006 were approved by the University of British Columbia’s Behavioural Research Ethics Board (BREB) on November 22, 2005 (B05-0952).
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<tbody>
<tr>
<td>AI</td>
<td>Amnesty International</td>
</tr>
<tr>
<td>ARLPI</td>
<td>Acholi Religious Leaders Peace Initiative</td>
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<td>ASP</td>
<td>Assembly of States Parties</td>
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<td>AU</td>
<td>African Union</td>
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<td>AUPD</td>
<td>African Union Panel on Darfur</td>
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<td>AVEGA</td>
<td>Association des Veuves due Génocide</td>
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<tr>
<td>CAR</td>
<td>Central African Republic</td>
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<tr>
<td>CAVR</td>
<td>Commission for Reception, Truth and Reconciliation</td>
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<tr>
<td>CICC</td>
<td>Coalition for the International Criminal Court</td>
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<tr>
<td>CRA</td>
<td>Community Reconciliation Agreement</td>
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<td>CRP</td>
<td>Community Reconciliation Process</td>
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<tr>
<td>CTF</td>
<td>Commission of Truth and Friendship</td>
</tr>
<tr>
<td>ECCC</td>
<td>Extraordinary Chambers in the Courts of Cambodia</td>
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<tr>
<td>DRC</td>
<td>Democratic Republic of Congo</td>
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<tr>
<td>FAR</td>
<td>Forces Armées Rwandaise</td>
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<tr>
<td>FARG</td>
<td>Fonds d'Assistance aux Rescapés du Génocide</td>
</tr>
<tr>
<td>FDLR</td>
<td>Forces Démocratiques de Libération du Rwanda</td>
</tr>
<tr>
<td>FRETILIN</td>
<td>Frente Revolucionaria de Timor-Leste Independente</td>
</tr>
<tr>
<td>GOR</td>
<td>Government of Rwanda</td>
</tr>
<tr>
<td>HRW</td>
<td>Human Rights Watch</td>
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<tr>
<td>ICC</td>
<td>International Criminal Court</td>
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<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICTJ</td>
<td>International Center for Transitional Justice</td>
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<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for the Former Yugoslavia</td>
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<tr>
<td>IDP</td>
<td>Internally Displaced Person</td>
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<tr>
<td>ILC</td>
<td>International Law Commission</td>
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<tr>
<td>IMT</td>
<td>International Military Tribunal</td>
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<tr>
<td>INTERFET</td>
<td>Intervention Force in East Timor</td>
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<tr>
<td>JSMP</td>
<td>Judicial System Monitoring Programme</td>
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<tr>
<td>Komnas HAM</td>
<td>Indonesian National Human Rights Commission</td>
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<tr>
<td>KPP HAM</td>
<td>Indonesian Commission Investigating Human Rights in East Timor</td>
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<tr>
<td>LRA</td>
<td>Lord’s Resistance Army</td>
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<tr>
<td>MDR</td>
<td>Mouvement Démocratique Républicain</td>
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<tr>
<td>MLC</td>
<td>Movement for Congolese Liberation</td>
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<tr>
<td>NGO</td>
<td>Non-Governmental Organization</td>
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<tr>
<td>NURC</td>
<td>National Unity and Reconciliation Commission</td>
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<tr>
<td>OHCHR</td>
<td>Office of the High Commissioner for Human Rights</td>
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<tr>
<td>OGP</td>
<td>Office of the General Prosecutor</td>
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<tr>
<td>ORINFOR</td>
<td>Office Rwandaise de l’Information</td>
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<tr>
<td>OTP</td>
<td>Office of the Prosecutor</td>
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<tr>
<td>P5</td>
<td>Permanent Five</td>
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<tr>
<td>Prep Com</td>
<td>Preparatory Commission</td>
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<tr>
<td>PRI</td>
<td>Penal Reform International</td>
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<tr>
<td>PTC</td>
<td>Pre-Trial Chamber</td>
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<tr>
<td>RPA</td>
<td>Rwandan Patriotic Army</td>
</tr>
<tr>
<td>RPE</td>
<td>Rules of Procedure and Evidence</td>
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<tr>
<td>RPF</td>
<td>Rwandan Patriotic Front</td>
</tr>
<tr>
<td>RTLM</td>
<td>Radio-Télévision Libres des Milles Collines</td>
</tr>
<tr>
<td>SCSL</td>
<td>Special Court for Sierra Leone</td>
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<tr>
<td>SCU</td>
<td>Serious Crimes Unit</td>
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<td>Abbreviation</td>
<td>Full Form</td>
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<tr>
<td>TFV</td>
<td>Trust Fund for Victims</td>
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<tr>
<td>TNI</td>
<td>Indonesian Armed Forces</td>
</tr>
<tr>
<td>TRC</td>
<td>Truth and Reconciliation Commission (South Africa)</td>
</tr>
<tr>
<td>UK</td>
<td>United Kingdom</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
<tr>
<td>UNAMET</td>
<td>United Nations Mission in East Timor</td>
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<tr>
<td>UNAMIR</td>
<td>United Nations Assistance Mission in Rwanda</td>
</tr>
<tr>
<td>UNHCHR</td>
<td>United Nations High Commissioner for Human Rights</td>
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<tr>
<td>UNHCR</td>
<td>United Nations Human Rights Council</td>
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<tr>
<td>UNMISET</td>
<td>United Nations Mission in Support of East Timor</td>
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<tr>
<td>UNSC</td>
<td>United Nations Security Council</td>
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<tr>
<td>UNTAET</td>
<td>United Nations Transitional Administration in East Timor</td>
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<tr>
<td>UPC</td>
<td>Union of Patriotic Congolese</td>
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<tr>
<td>UPDF</td>
<td>Uganda People’s Defence Force</td>
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<tr>
<td>US</td>
<td>United States</td>
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<tr>
<td>VWU</td>
<td>Victims and Witnesses Unit</td>
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CHAPTER ONE

THE INTERNATIONAL NORMATIVE STRUCTURE 
OF TRANSITIONAL JUSTICE

Transitional justice is a field of research that has benefited from extensive empirical analysis of accountability for the atrocities of genocide, crimes against humanity, and war crimes. Specifically, international relations scholars have taken notice of the increasing institutionalization of international humanitarian law through ad hoc and hybrid tribunals and the International Criminal Court (ICC), the mutual demands of justice and peace, and the role that human rights norms and norm entrepreneurs have played in prescribing justice policies for deeply divided societies. The literature in this field reflects geographic diversity, has incorporated insights from a variety of social science disciplines, and often divides itself by the variety of institutional designs, including international and domestic tribunals, truth commissions and amnesties. While this represents a healthy variety of scholarship, the field lacks an analytical framework from which to assess the salience of and normative contestation over principles that consistently shape transitional justice decision-making, institutions, and discourses in different contexts.

The practice of transitional justice does not represent a series of unrelated cases and institutions that are solely the product of domestic contexts and actors. The emphasis on varieties of institutional design and the primacy of pragmatic and context-specific variables has obscured the fact that transitional justice decision-making is increasingly a norm-driven practice. However, it is also problematic to assume that this practice is driven by a single meta-norm of transitional justice, or anti-impunity, which obscures the significance of institutional challenges and contestation when putting various norms into practice. I argue that we can theorize about the principles and practices of transitional justice as constituting an international normative structure: a systemic and systematic collection of interrelated norms that constrain and enable the decision makers and practice of transitional justice, and importantly, if not exclusively, constitute the corresponding institutional designs and discursively frame the expected outcomes. This analytical framework produces a two-fold argument when applied to the empirical evidence in the selected case studies of Rwanda, East Timor, and the International Criminal Court. First, the norms identified as part of the international normative structure of transitional justice are salient with respect to
decision-making and institutional design across diverse cases. The discourse, institutions and policies of transitional justice are therefore guided by a specific set of interrelated norms and not simply pre-determined institutional forms or context-specific variables. Second, despite the salience of these norms, putting these principles into practice has revealed a variety of institutional challenges and sources of normative contestation between and among international and local actors and among the norms themselves. Understanding and distinguishing between institutional challenges and contestation in the process of implementing transitional norms is instructive for determining the direction of structural change in this field.

The multiple contributions made by this dissertation’s analysis, which will be elaborated upon in this chapter, can be divided by those that are theoretical, those that characterize the field of transitional justice, and those that pertain to the individual case studies. First, this analysis uses and contributes to constructivist scholarship on norms and their diffusion by building on the undeveloped concept of normative structure and utilizing measures of salience and implementation to explain how norms have causal effects and evolve. In contrast to those who would explain such a broad and diverse range of practices as a regime or as driven by an individual meta-norm, an international normative structure more aptly characterizes the international-local dynamic of norm diffusion and the interrelated nature of the collection of norms that constitute this structure. These features are unique to a structural approach. The measures of salience and implementation, moreover, capture many of the dynamics inherent in norm diffusion that is central to how norms evolve from their emerging status to eventually become institutionalized and internalized. Implementation, however, is something that occurs across the life cycle of a norm and the challenges it faces in doing so have observable effects on the effectiveness and legitimacy of their related institutions. Implementation itself a simple concept, but the key contribution here is the distinction between the institutional failures versus normative contestation that result from implementation. While both can accumulate to create certain crises of legitimacy for norms and their institutions, contestation resulting from different interpretations of norms in new contexts is also instructive for determining change.
Second, explaining the field of transitional justice as constrained and enabled by an international normative structure provides a more empirically accurate and nuanced characterization of this diverse set of institutions and case studies. I contend that transitional justice scholarship is often caught up in false dichotomies of institutional designs and *sui generis* case studies. Alternatively, approaches that overgeneralize the field as one that is driven by a single meta-norm of international justice or anti-impunity are equally misleading by obscuring the complex interrelationship between multiple norms. Transitional justice is, therefore, a norm driven practice and not one that is driven by pre-determined institutional designs or dichotomies. The variety of institutions, such as trials, truth commissions, hybrid courts, “grassroots” mechanisms, etc., that comprise the international scope of transitional justice are determined by and constitute a collection of interrelated norms that are consistent across time and space. While the mere identification of these transitional justice norms is not likely to be contentious among scholars of this field, combining them for a structural approach to transitional justice and demonstrating that they matter and how they work in diverse contexts is a major contribution.

Finally, as I trace the institutional trajectories of these norms across diverse contexts and over a period of nearly two decades, the empirical analysis of the individual case studies also provides for its own set of contributions. The case studies chosen for this dissertation’s analysis include post-genocide Rwanda, post-conflict East Timor, and the International Criminal Court. Transitional justice in Rwanda and East Timor are often situated in the literature as unique case studies and not situated in the broader structural context that has influenced decision-making, and in turn, how the implementation of transitional norms in these cases affects their institutional trajectory. Similarly, the ICC is often narrowly portrayed as a pinnacle institution that follows instances of international trial and punishment; it has also been shaped by transitional justice norms that are also local and restorative in their origins and processes. What is more, the collection of these three case studies presents a wide variety of transitional justice institutions over across diverse contexts of atrocities and a unique set of post-conflict political and social variables. The diversity in the cases studies and their transitional justice institutions is thus juxtaposed to the consistency in which transitional justice norms are salient across the cases and the nature of their
implementation challenges, lending credence to the influential effects of the international normative structure of transitional justice.

This chapter will first proceed with an analysis of the concept of normative structure as differentiated from individual norms and institutions. The bulk of this chapter will then provide an overview of the scope of the field of transitional justice, and proceed to identify the four norms that constitute this normative structure and their structural implications for institution design. Next, I will draw on constructivist insights into the salience and contestation of these norms, as this will form the basis for my argument that the normative structure has casual and constitutive effects on transitional justice institutions and policies, and to identify the sources and significance of institutional challenges and contestation when putting such principles into practice. Finally, this chapter will conclude with an outline of the research design for this dissertation, including its methodology and case study selection.

NORMATIVE STRUCTURES

“Normative structure” is an analytically useful concept, but difficult to define and differentiate from other concepts in the study of how, why, and when social and political actors will behave in a particular manner. A social structure, as opposed to a material structure, is defined by an intersubjective and stable set of meanings, or norms, that both constrain and enable the possibilities for actors’ behaviour and constitute their identities.¹ Moreover, the mutual constitution of structures and actors explains the origins of the structure, sources of political change, and how “reciprocal interaction” between structures and actors allows the former to endure.² Therefore, defining a normative structure draws on sociological insights into the constraining and enabling effects of structures and institutions, and constructivist


A normative structure simply exists at a higher level of aggregation than a single norm, which is defined as a standard of appropriate behaviour for actors with a given identity. A normative structure is a social structure that contains a collection of interrelated norms that shapes actors’ identities, interests, and behaviour in a manner that is both “systematic and systemic.” Similar claims have been made about prominent international meta-norms such as slavery, sovereignty, and humanitarian intervention, which are more accurately defined as a collection of different but interrelated regulative, constitutive, and prescriptive norms.

There are various interpretations of how a normative structure, or any social structure, is to be differentiated from an institution. Institutions are defined as “stable sets of norms, rules, and principles that serve two functions in shaping social relations: they constitute actors as knowledgeable social agents and they regulate behaviour.” Kowert and Legro describe “diffuse normative structures” in a manner that is similar to institutions in that they not only prescribe behavioural norms but also constitute actors’ identities, which in turn shape interests. But an institution differs from a normative structure in several ways. Institutions, and issue-specific institutions like regimes, exhibit a high degree of specificity and internalization with regard to their component principles, rules and norms.

3 Other scholars may refer to this concept as a "normative framework" or "normative context," which I take to be equivalent to a normative structure. Some scholars use the term very generally, e.g. the normative structure of world politics. Others, such as Martha Finnemore, use the term with regard to a specific issue area, i.e. the normative structure of humanitarian intervention.


8 An issue-specific institution is identified as a regime, commonly defined as "implicit or explicit principles, norms, rules, and decision-making procedures around which actors expectations converge in a given area of international relations." Stephen D. Krasner, ed., International Regimes (Ithaca: Cornell University Press, 1983) 2. Reus-Smit further differentiates fundamental institutions from regimes; the former "operate at a deeper level of international
a higher level of abstraction in this regard and the norms themselves are often emerging and thus lack precision in their meaning and have not become fully institutionalized or internalized. According to Finnemore and Sikkink’s “norm life cycle,” emerging norms often precede institutionalization, which is then followed by a norm “cascade” that ends with internalization.⁹ Klotz and Lynch conceptualize structures as cumulative end points: “meanings stabilize into rules; sets of rules constitute institutions; cluster of institutions constitute structures, which in turn are the building blocks of systems.”¹⁰ Therefore, one view sees normative structures as comprising emerging norms that precede and come to constitute institutions, whereas another view sees normative structures as subsuming both norms and institutions at a higher level of abstraction and aggregation. This analysis ascribes to the former conceptualization of normative structure that views this interrelated collection of emerging norms as preceding and constituting institutionalization.

Prior to a discussion of the analytical significance of assessing the salience and implementation of transitional justice norms, it is first necessary to outline the scope of this field and to detail the principles and parameters of these norms. Outlining the scope of transitional justice as a field of research and set of practices entails an overview of its origins, evolution and the important role of agency in framing principles and institutions. This overview will be followed by a detailed discussion of the collection of four interrelated norms that constitute this structure: a hierarchical division of criminality; accountability, localization, and reconciliation.

TRANSCITIONAL JUSTICE: THE SCOPE OF THE FIELD

Transitional justice encompasses a range of principles, practices, and institutions that seek accountability for atrocities constituting violations of international humanitarian law. The 2004 UN society than regimes. In fact, in the modern society of state they comprise the basic rules of practice that structure regime cooperation. See, Reus-Smit, The Moral Purpose of the State: Culture, Social Identity, and Institutional Reality in International Relations 13.


¹⁰ Klotz and Lynch, Strategies for Research in Constructivist International Relations 25.
Secretary-General’s Report on *The rule of law and transitional justice in post-conflict and conflict societies* defines transitional justice as:

the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with different levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.\(^{11}\)

Similarly, the International Centre for Transitional Justice (ICTJ), a prominent NGO in the field, defines transitional justice as a “response to systematic or widespread violations of human rights. It seeks recognition for victims and to promote possibilities for peace, reconciliation, and democracy.”\(^{12}\) The above definitions suggest that transitional justice is conceptually holistic, varied in practice, and reflect interdisciplinary approaches to the legal, political, and social needs of societies in transition from violence. It is these characteristics of transitional justice that have recently led to some debate over its origins, criticism of the field of study and practice, and a need to unpack the various principles of justice and their associated institutions.

**Origins and Evolution**

Debates over the origins of transitional justice are instructive in so far as they help to define and differentiate contemporary institutional designs and goals from their predecessors. Some locate the origins of transitional justice with Ancient Greece, while others more commonly reference the Nuremberg Tribunal as the most relevant institutional precursor.\(^{13}\) Teitel’s genealogy makes the case that there have been three phases of transitional justice, beginning with the Nuremberg Tribunal and the post-war era, in which “transitional justice becomes understood as both extraordinary and international.”\(^{14}\) Recent

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historical and critical analysis of the “field” transitional justice convincingly locates its conceptual origins in the late 1980s and early 1990s when the term was coined in reference to the transitions from authoritarianism to democracy in Latin America, and secondarily in Eastern Europe, which would correspond to Teitel’s second phase. Therefore, the transitions in this context were viewed through a “dominant normative lens” of democratization, which in turn framed the options for justice and the initial intellectual framework for the field. The options to facilitate the transitions were indeed framed by a perceived choice between stability and democracy or rule of law. The prosecution of elite perpetrators was desired and demanded but the realities of transitions necessitated political bargains that would prevent a resurgence of violence or a return to oppressive rule. Orentichler explains that “although military juntas had formally ceded political power to democratically elected governments, armed forces continued to occupy an autonomous realm of power with the potential for imperilling their countries’ fragile transition if the new government breached their citadel of impunity.” As such, amnesties for mass human rights abuses, including torture, killings, and disappearances, were de facto or self-granted by outgoing oppressive political and military elites, and impunity was guaranteed by incoming elites who sought stability above all else. Some cases (e.g. Peru and Guatemala) found a “middle-way” with truth commissions that were mandated with uncovering abuses, assigning responsibility, and offering some justice to victims that fell short of prosecutions. Local contexts and actors, by and large, determined justice choices in this generation of transitions. The international community, while still reaffirming a state’s obligations to prosecute perpetrators of atrocities and human rights abuses, was unable to affect the


18 Martha Minow conceptualizes truth commissions as a "middle way" between vengeance and forgiveness. See, Martha Minow, Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence (Boston: Beacon Press, 1998).
domestic political choices favouring stability. In sum, this second phase of transitional justice was characterized by the primacy of concerns for stability over justice, the use of truth commissions as a trade-off or middle-way, and impunity for those most responsible for the worst possible crimes.

The norms that comprise the international normative structure of transitional justice characterize the third and present phase of transitional justice, which began in the mid-1990s. As was already established, transitional justice norms and their underlying principles have originated and developed over several historical phases, arguably since the Nuremberg Tribunal, but the present phase is distinct from the post-World War Two and Cold War phases in which transitional justice was exceptional and ad hoc in response to context-specific political circumstances. In this present period, as Teitel explains, “transitional justice moves from the exception to the norm to become a paradigm of rule of law.”19 In this phase, transitional justice becomes internationalized, norm-driven, and represents something no less than the globalization of the rule of law. Moreover, this period of transitional justice is based on both past precedents and new political contexts, namely the expansion of its scope to include intra-state conflicts, and periods of war and peacetime, and its application to new subjects, including both state and non-state actors.20 As such, this is also a period of flux as transitional justice norms are salient but interpreted and implemented to fit to new contexts.

There are several pivotal junctures that framed the emerging norms, altering the trajectory of transitional justice, and leading to the consolidation of the field after 2000.21 The United Nations mandated ad hoc tribunals to try those “most responsible” for atrocities committed in the Former Yugoslavia and Rwanda, which began in 1993 and 1994 respectively and are set to complete their trials by 2011. Despite their many flaws, most notably procedural shortcomings and inability to affect perceptions of justice at the local level, these institutions have successfully held to account a broad swath of elite leadership responsible for atrocities and contributed to the international institutionalization of transitional justice. The 1998 Rome Statute establishing the International Criminal Court, mandated as a

21 Bell, "Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field'," 7.
court of last resort for those “most responsible” for atrocities committed under its jurisdiction, represents
the culmination of lessons learned about the consequences of impunity.\(^{22}\) The international community
reinforced the importance of combating a legacy of impunity by exacting retributive justice for elite
perpetrators, but was largely permissive of a broader range of non-judicial and non-punitive sanctions for
low-level perpetrators at the local level. Thus, the trend of impunity for those “most responsible” for the
worst crimes was reversed and this now constitutes an important part of the normative structure. The ad
hoc tribunals, hybrids courts, and the ICC are mandated with exactly this task of holding elite perpetrators
accountable through trial and punishment.

Another pivotal moment was the establishment of the South African Truth and Reconciliation
Commission (TRC) in 1995 that relied on mechanisms of truth-telling, reparations, and an amnesty
programme to facilitate reconciliation.\(^{23}\) Unlike the amnesties used in the Latin American transitions,
those in South Africa were perceived with greater legitimacy by the international community as they were
limited to politically motivated crimes and had conditions of truth-telling and apology. The processes of
restorative justice are nothing new to traditional dispute resolutions mechanisms and greatly influenced
the truth commission in Latin America, but the use of restorative processes as transitional justice for
atrocities was internationally legitimized after the perceived success of the TRC. Truth commissions are
increasingly used to complement and coordinate with the work of tribunals, such as in Sierra Leone and
East Timor, and hybrid courts have proliferated in order to achieve a better balance between international
and local institutional features and combine retributive and restorative justice processes.\(^{24}\) The hybridity
within and among institutions is indicative of a change from the first generation of transitional justice in


\(^{23}\) See, Alex Boraine, A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission (Oxford:
International Political Science Review 26.4 (2005), Paul Van Zyl, "Dilemmas of Transitional Justice: The Case of

\(^{24}\) See, James Cockayne, "Hybrids of Mongrels? Internationalized War Crimes Trials as Unsuccessful Degradation
American Journal of International Law 97.2 (2003), Caitlin Reiger, "Hybrid Attempts at Accountability for Serious
Roht-Arriaza and Javier Mariezcurrena (Cambridge: Cambridge University Press, 2006).
that there is a blurring of boundaries between the international and the local. Moreover, the combined failures of purely retributive models, such as the ad hoc tribunals, with the contentiously perceived successes of the TRC lent more legitimacy and credibility to the use of restorative justice for atrocities. As such, the range of principles and institutions considered appropriate for transitional justice has broadened considerably.

**Agency and Norm-Makers**

Scholarship, human rights advocacy, and policy agendas for transitional justice flourished in parallel with the prominence of these aforementioned institutions and transformative junctures. Often conflated as the “international community,” the distinct agency of the United Nations, key states, and norm entrepreneurs, particularly non-governmental human rights organizations and individual advocates, cannot be underestimated when explaining when and how this structure has emerged. These various actors arguably constitute an epistemic community and/or advocacy network in the field of transitional justice.25 The influence and legitimacy of the United Nations stands above all others in this field. First, the UN has produced a number of seminal policy statements, not least of which is the aforementioned 2004 Secretary-General’s report (and subsequent annual reports) on *The rule of law and transitional justice in post-conflict societies* that is widely cited and referenced by scholars and practitioners.26 Moreover, the Office of the United Nations High Commissioner for Human Rights (OHCHR) has published multiple thematic reports as part of a *Rule of Law Tools for Post-Conflict States* series on topics including, but not limited to, truth commissions, prosecution initiatives, vetting, reparations programmes, hybrid courts, amnesties, and so on.27 The principles and institutional guidelines laid out in these various

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25 Other prominent organizations in this field include, but are not limited to: Human Rights First, International Crisis Group, The Institute for Justice and Reconciliation, and The Open Society Institute Justice Initiative. For more debate on whether this area of scholarship and practice should be considered as an advocacy network, epistemic community, and /or field, see Ellen Lutz and Kathryn Sikkink, ”The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America,” *Chicago Journal of International Law* 2.1 (2001), Arthur, ”How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice.”, Bell, ”Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field'.”


27 These reports were published between 2006-2009 and are available through OHCHR's publications resources online:www.ohchr.org/EN/PUBLICATIONSRESOURCES/Pages/SpecialIssues.aspx
reports provide a standard for transitional justice policies that both the UN and other actors follow. Second, multiple UN agencies engage in transitional justice activities on some level. The recently established United Nations Rule of Law Coordination and Resources Group reveals the institutional scope of UN activities in this field and its recognition of the importance of a coordinated, coherent, and systemic approach to rule of law activities, among which transitional justice holds a prominent place.28 Third, the United Nations carries out the initial investigatory commissions into atrocities and subsequently mandated many of the most prominent transitional justice institutions, specifically international tribunals, since the emergence of the field. The UN has lent its resources, legitimacy, and power to the ad hoc tribunals for Yugoslavia and Rwanda, hybrid courts for Sierra Leone, East Timor and Cambodia, and played an instrumental role in the creation of the ICC and its ongoing prosecutorial strategy. These policies and activities underscore the UN’s primary agentic role in implementing transitional justice norms.

Individual states and notable diplomats associated with their views have shaped transitional justice norms and practices through their participation in commissions and debates within the UN, providing human and financial resources to institutions, and arguing and advocating for the necessity of justice after atrocities. According to David Scheffer, former Ambassador-at-large for War Crimes under the Clinton administration and lead negotiator for the US delegation during the Rome negotiations of the ICC, the United States was a “judicial carpenter” of institutions in the 1990s.29 Indeed, the US lent its legitimacy, political will, and considerable resources to building the ad hoc courts and crafted much of the institutional design of the ICC even though it has yet to ratify the Statute. Also important were states, like Canada and many Nordic countries, advocating for a human security approach to conflict management and who framed international or transitional justice as part of this agenda. Canada chaired a group of

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28 See United Nations Rule of Law (www.unrol.org) - a coordination and resource group operating under the Secretariat's Rule of Law Unit. The various agencies engaged in rule of law activities include: Department of Political Affairs (DPA); Department of Peacekeeping Operations (DPKO); Office of the High Commissioner for Human Rights (OHCHR); Office of Legal Affairs (OLA); United Nations Development Programme (UNDP); Office of the United Nations High Commissioner for Refugees; United Nations Children's Fund (UNICEF); United Nations Development Fund for Women (UNIFEM); United Nations Office on Drugs and Crime (UNODC).

“like-minded states” during the Rome negotiation and several prominent Canadians have been affiliated with international justice institutions.\textsuperscript{30} South Africa too has wielded considerable influence in the evolution of transitional justice owing in large part to the perceived success and credibility of its TRC. South Africa and officials affiliated with the TRC, such as Justice Richard Goldstone and Archbishop Desmond Tutu, are widely considered to be voices of experience and expertise and are regularly called upon to participate in decision-making forums that craft transitional justice institutions.

Numerous international non-governmental human rights organizations have also figured prominently in shaping and institutionalizing transitional justice norms. Both Human Rights Watch (HRW) and Amnesty International (AI) have consistently carried out comprehensive and field based research on atrocities and post-conflict transitions and been vocal advocates against impunity. This often puts them at odds with political elites at the domestic level, and occasionally UN actors, who they accuse of sacrificing judicial principles for political expediency. Nevertheless, the persistent calls from HRW and AI to hold account those most responsible for atrocities and deliver justice to victims played an important role in reversing a norm of impunity that persisted prior to the early-mid 1990s. The International Center for Transitional Justice has also been a forceful entrepreneur in this field by bridging scholarship, field experience, and consulting and capacity building in countries in transition. The ICTJ has quickly become the go-to NGO for transitional justice consultations. And as will be shown in the case of the ICC, the Coalition for the International Criminal Court (CICC) demonstrated the power of civil society in shaping the institutional design of the Court and continues to engage in advocacy for and constructive criticism of ICC activities. These organizations have, however, been criticized by scholars and domestic advocates for justice for prescribing cookie-cutter solutions. As such, less prominent but no less active and diverse domestic NGOs have pushed for more context-specific and locally appropriate transitional justice mechanisms.

\textsuperscript{30} Former Foreign Affairs Minister Lloyd Axworthy is widely credited with spearheading Canada’s human security agenda under the Chretien government and Canada’s strong presence in advocating for the ICC. Louise Arbour formerly served as Chief Prosecutor of the ad hoc court. Philippe Kirsch formerly served as the first President of the International Criminal Court.
Finally, a sizable cohort of individual diplomats, scholars and practitioners has been influential in their own right. For example, the current and former chief prosecutors for the ICC (Luis Moreno Ocampo) and ad hoc courts (Richard Goldstone, Louise Arbour, Carla Del Ponte, etc.) have been active in shaping their respective institutions and continuing to advocate for international justice. Moreover, many lawyers and legal scholars have worked with several international tribunals and hybrid courts, thus contributing to a growing epistemic community and fostering institutional learning.\(^\text{31}\) In sum, transitional justice norms and institutions have been shaped by a variety of influential agents, although the United Nations has a particularly hegemonic presence. A more comprehensive and systematic mapping of agency in transitional justice would fill an important research gap in this field, however, this is beyond the scope of this analysis. Nevertheless, the individual case studies of transitional justice decision-making and the subsequent institutions selected for this dissertation will highlight the interplay between the normative structure and the role of agency in different post-conflict contexts. I will now proceed in this chapter with an analytical description of the norms that constitute this structure, highlighting how its contemporary trajectory weighs against past practice and responds to persistent debates among scholars and practitioners in transitional justice.

**THE INTERNATIONAL NORMATIVE STRUCTURE OF TRANSITIONAL JUSTICE**

I contend that the contemporary normative structure of transitional justice is comprised of four interrelated but conceptually distinct emerging norms: a hierarchical division of criminality; accountability; localization; and reconciliation. The collection of norms identified in this analysis frames the discourse and structures the transitional justice policies and institutions that are expected for states in transition from violence to peace. I do not discount the fact that these transitional justice norms also have constitutive effects on policymakers and states. Certainly, states are likely to conform to transitional justice norms and (re)build the rule of law in order to be viewed as democratizing and peaceful, and thus

\(^{31}\) It is well known that many of those working with the International Criminal Court are transplants from "down the road" at the ICTY. As the ad hoc and hybrid courts are mostly nearing completion, many of their researchers and jurists are finding their way to other international justice institutions, think tanks, United Nations, etc.
more legitimate in the eyes of the international community. Mandating transitional justice institutions and policies and engaging in its discourse signals that states are breaking from a past culture of the impunity that the normative structure has replaced.

Despite classifying these elements of transitional justice similarly as norms, these elements could be differentiated as a hierarchy of principles and norms and/or as different types of norms. One take on differentiating these norms would be to follow Krasner’s hierarchy of principles, norms, rules, and decision-making procedures that define international regimes. With these distinctions, both accountability and reconciliation could be characterized as principles of transitional justice that frame and subsume behavioural norms of a hierarchical division of criminality and localization. I have chosen to conceptualize these all as norms for several reasons. First, there are a number of principles, such as individual criminal responsibility, truth-telling, local ownership, etc., that underlie and cross-cut the norms identified. The subsequent discussion that describes the parameters of these norms will highlight the various principles that underlie them. Second, it will become evident in the following analysis how these norms, in fitting with the standard definition of norms, structure behaviour and interests and thus are analytically distinct from and subsume their underlying principles. By focusing on norm as expectations of appropriate behaviour gives more insight into how principles are interpreted and put into practice. The distinctions between transitional justice norms and principles is important, particular when analyzing the different sources of contestation (to be taken up with the discussion of implementation); however, the argument put forward in this analysis is that the empirical world of transitional justice discourse, policies and institutions is best understood by the causal effects of this distinct collection of norms.

Another take on how one can differentiate these norms is the distinction is by their regulative, constitutive and prescriptive qualities. For example, a hierarchical division of criminality and localization are primarily regulative norms in that they are akin to an ordering mechanism and constrain the mandate and design of transitional justice policies and institutions. In contrast, accountability and

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33 Finnemore and Sikkink, "International Norm Dynamics and Political Change," 891.
reconciliation could be more aptly characterized as constitutive norms in that they define what a proper state is to look like when in transition from violence to peace and/or authoritarianism to democracy and legitimize the justice policies and institutions themselves. In reality all four norms exhibit regulative, constitutive, and prescriptive characteristics and rigidly classifying them into sub-types of norms obscures their degrees of salience and various ways in which they are implemented. In order to provide the groundwork for assessing those causal effects, I will now turn to defining the collection of interrelated emerging norms that define this contemporary normative structure of transitional justice.

Hierarchical Division of Criminality

While international laws against war crimes, genocide, and crimes against humanity demand that these crimes be prosecuted and punished, the reality is that neither the international community nor domestic judicial institutions have the capacity to prosecute and punish all those responsible for atrocities. Additionally, there are important distinctions among the participants of extraordinary crimes. In fact, it is the ordinariness of so many perpetrators that necessitates differentiating between models of justice to suit variations in the nature of criminal perpetration. The norm of a hierarchical division of criminality is therefore principled upon legal and social distinctions between elite and low-level perpetrators, individual criminal responsibility, and the rule of law, resulting in a division of labour between institutions and fostering a degree of complementarity between them.

The distinction between elite and low-level perpetrators reflects an understanding of how and by whom atrocities are committed and the social and political environments that sanction their crimes. Elite perpetrators often justify their crimes by citing a duty or obligation to their superiors or state, a lack of knowledge of the extent of the crimes, and a claim of “necessity” to protect themselves or their country. Irrespective of the variety of justifications there is little disagreement over how to hold accountable for their crimes those “most responsible” – that is elite perpetrators, such as those in a position of authority to plan, lead, organize, and instigate mass violence. Despite the extraordinary nature of their crimes, ordinary criminal law is often used, particularly for domestic courts, to “recognize extreme evil and
sanction it as a breach of universal norms.” The United Nations has often assumed responsibility for the trial and punishment of elite perpetrators in accordance with international humanitarian and criminal law and has done so in international retributive judicial fora, which are professed to be politically neutral and legitimate. As Byers explains, “the higher the office of the alleged offender, and the more serious his crimes, the more appropriate an international judicial forum becomes.” But the extent of perpetration of atrocities goes far beyond the role of elite perpetrators who could not have systemically and systematically carried out such crimes without the popular participation of community leaders and ordinary civilians. In contexts as disparate as Cambodia, Yugoslavia, Rwanda, East Timor, and Sierra Leone, civilians actively and passively participated in atrocities against strangers, neighbours and relations. The scale of such popular participation is a serious institutional challenge for transitional justice and one that the hierarchical division of criminality norm seeks to address.

What is to be done with these ordinary civilians who commit extraordinary crimes is complicated by a number of factors that are common to post-atrocity societies. First, local prison and judicial systems lack the capacity to deal with the tens, if not hundreds, of thousands of perpetrators. Judicial infrastructure and personnel are often targeted by extremists who seek to wipe out a regime that has been repressive. But even a fully operational and human rights-respecting prison and judicial system would not be able to address such a large number of perpetrators. Second, those ordinary civilians who have committed atrocities have often been reintegrated or still remain in the communities where their crimes were committed. On the one hand, their “ability to fit in suggests something curious, and deeply disquieting, about atrocity perpetrators: namely their lack of subsequent delinquency of recidivism and their easy integration into a new set of social norms” reinforces their place in society as ordinary civilians and not deviants. On the other hand, their mere presence creates fear and social distrust and risks inciting vengeance. Local communities therefore demand that the crimes of the masses be addressed in some

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manner to avoid a resurgence of violence by either victims or perpetrators. Third, despite the extraordinary nature of their victimization, survivors of atrocities often desire a process of accountability that addresses the daily socioeconomic obstacles to moving past their physical and emotional trauma. These local obstacles are typically left unaddressed and unaltered by the process and outcomes of international judicial institutions whose institutional mandates often prevent them from offering forms of justice that affect social repair and financial redress.

While it seems simple and obvious to distinguish between elite and low-level perpetrators, the implementation of this distinction, and its attendant expectations of appropriate responses, is significant for the normative structure of transitional justice. I argue that the institutional response to the differentiation in degrees of perpetration and the needs of post-atrocity societies has been to transform the social hierarchy of perpetration into a legal distinction and institutional division of labour. Merely holding elite perpetrators or low-level perpetrators accountable is insufficient for justice to be seen to be done and to combat a culture of impunity. In other words, the normative implication of a hierarchical division of criminality is that transitional justice policies and institutions should inclusively address the range of criminal perpetration inherent in the commission of atrocities. Specifically, this norm reinforces the principle that the breadth and depth of individual criminal responsibility should be addressed by transitional justice; I make this distinction in the empirical analysis with respect to the differences between the horizontal and vertical scope of criminal responsibility respectively. Nevertheless, context-specific and political variables are likely to necessitate that different level of criminal perpetration are addressed through different justice mechanisms. There is consensus among the international community and within the societies affected by violence that those most responsible for atrocities should be held accountable through a retributive justice process – ideally at the national level, and if not, in an international court. According to Orentichler’s seminal argument, “exemplary prosecutions” of those “who appear to bear principal responsibility for systemic atrocities or (of) individuals believe to have committed notorious crimes that were emblematic of a regime’s depredations” would be squarely within
the scope of state’s duty to investigate and prosecute in periods of transition.\textsuperscript{37} This approach to “exemplary prosecutions” is a priority for international courts when states are incapable or unwilling to follow through on their obligation to prosecute and punish elite perpetrators, marking a dramatic change from past decades when impunity for elites predominated in practice.

Addressing the crimes of low-level perpetrators is equally important in post-conflict societies but, due to issues of capacity and competing local expectations that may perceive a prosecutorial form of justice as insufficient, these low-level perpetrators are often held accountable with non-judicial and non-punitive mechanisms. The UN OHCHR’s policy guidelines on prosecution initiatives make specific mention of the need to address low-level perpetrators in several respects. First, the guidelines recommend that policymakers assess the “universe of suspects” with a “vertical or longitudinal approach (that) entails investigation and indicting perpetrators from different levels of the chain of command” in order to build cases against elite perpetrators.\textsuperscript{38} Second, the “fact that many people will not be investigated, much less prosecuted, should not mean that they should escape any form of accountability;” these guidelines recommend that to “bridge the impunity gap, prosecutorial initiatives will need to build constructive relationships with other transitional justice mechanisms.”\textsuperscript{39} These mechanisms are often, but not exclusively, restorative justice processes that operate at the communal level and facilitate truth-telling, forgiveness, and reconciliation. Therefore, unlike in the past when addressing low-level perpetrators was ad hoc and left only to domestic institutions that were unaffected by international norms of justice, the hierarchical division of criminality norm underscores the expectation that both the breadth of criminality responsibility among elites and the depth of criminal responsibility that includes ordinary civilians as perpetrators should be addressed in post-atrocity states through an institutional division of labour.

The hierarchical division of criminality norm then sets the stage to further entrench the importance of trial and punishment for elite perpetrators, and legitimize non-punitive sanctions that were

\textsuperscript{37} Orentichler, "'Settling Accounts' Revisited: Reconciling Global Norms with Local Agency," 14.
previously considered an ineffective and inappropriate form of transitional justice. In this sense, it will become apparent that the norms of a hierarchical division of criminality and those of localization and accountability are highly interrelated. This legal pluralism is a contrast from previous decades in which transitional justice choices were characterized by a dichotomy of punishment versus impunity.

**Accountability**

Transitional justice institutions are animated and justified by a norm of accountability that frames the range of appropriate punitive and non-punitive sanctions. As such, this norm does not only prescribe formal judicial mechanisms of trial and punishment but also justifies mechanisms such as reparations and limited and conditional amnesties as accountability because they are principled on the value assigned to truth-telling, redistributive justice, and community participation. Philpott argues that “accountability can take many forms. Aside from imprisonment, it can take the form of a condemnation spoken by a public authority, shame imposed by a public, and reparations.”

Moreover, as the aforementioned Secretary General’s report articulates, the range of sanctions in transitional justice includes punitive and non-punitive, judicial and non-judicial measures. There principles associated with retributive and restorative justice processes, such as retribution, deterrence, truth-telling, reintegration, and compensation, correlate to the punitive and non-punitive sanctions that constitute the accountability norm in the international normative structure of transitional justice.

The current accountability norm defies a simplistic dichotomy of punishment or impunity, which is how transitional justice choices were cast well into the 1990s. The normative structure demonstrates that transitional justice has evolved past these types of dichotomies by reinforcing a consistent set of norms that are institutionalized in variety of ways. Transitional justice institutions have exemplified an increasingly more complex combination of justice mechanisms, and sought to create complementary relationships between retributive and restorative justice processes. This complementarity is a key constitutive component of the normative structure. What is more, both international and local communities ideally desire punishment of all perpetrators but recognize the political and social value of

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also incorporating non-punitive sanctions into justice institutions. What ultimately determines the range of sanctions and how they are to be applied is not the geography of institutional design or a dogmatic adherence to a particular set of judicial principles, but rather the aforementioned norm of a hierarchical division of criminality. Put simply, punishment is expected for elite perpetrators whereas a broader range of punitive and non-punitive are considered appropriate for low-level perpetrators. Furthermore, the effectiveness and legitimacy of punitive and non-punitive sanctions are mutually reinforcing. As Fletcher and Weinstein argue, “an approach that does not integrate trials with…other capacity-building measures is insufficient to attend to social repair.”

Likewise, to encourage perpetrators to submit themselves to non-punitive sanctioning and for victims to perceive these sanctions as a legitimate form of accountability, there must be a credible possibility and genuine process of trial and punishment. The following will address the various processes and justifications for this range of sanctions.

Accountability must first and foremost provide for punitive sanctions such as punishment with incarceration (but importantly, sentencing in international courts has precluded capital punishment since the 1990s). Punishment, meted out through formal judicial mechanisms such as national or international trials, has always figured prominently in the discourse and institutions of transitional justice even when political considerations prevented it from being realized. Why punish? First, the egregious nature of the crimes committed is reason enough to justify punishment and compounds victims’ calls for retribution. The scope and brutality of such crimes also provokes the international community to respond with an appropriate degree of punishment that is considered just and not simply revenge. The severity of sentencing is expected to further the deterrence function (discussed below) of punishment because, in the words of Justice Robert Jackson, Chief of Counsel for the United States, in his opening statement to the International Military Tribunal at Nuremberg, “civilization cannot tolerate their being ignored because it

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42 Mark Drumbl has provided an exhaustive and nuanced analysis of this question in the context of international and national trials for atrocities in several cases, such as Bosnia, Rwanda, and East Timor. See, Drumbl, *Atrocity, Punishment and International Law.*
cannot survive their being repeated.”43 Second, it has been argued by legal scholars and reinforced by various international treaties that states have an obligation to undertake criminal investigations and proceedings against those who perpetrated human rights abuses, to punish accordingly, and that victims have a right to a remedy.44 Third, the underlying assumption behind the value of punishment is that societies who have experienced atrocities have endured a legacy of impunity which, if left unaddressed, will continue to threaten a resurgence of violence. Amnesty International has consistently argued that “when investigations are not pursued and the perpetrators are not held to account, a self-perpetuating cycle of violence is set in motion resulting in continuing violations of human rights cloaked by impunity.”45 There is much contentious academic and policy debate surrounding the relationship between international accountability and deterrence.46 The UN OHCHR’s policy guidelines question whether deterrence should be an explicit goal of prosecutions as it “may raise expectations that are difficult to sustain.”47 The deterrent value of trial and punishment is difficult to measure in transitional justice contexts and there is a “dearth of empirical evidence to date supporting the view that prosecutions deter the commission of crimes such as genocide, war crimes and crimes against humanity.”48 Nevertheless, it is a logical assumption that a history of impunity emboldens perpetrators of atrocities; furthermore, the

43 International Military Tribunal (IMT), Trial of the Major War Criminals before the International Military Tribunal (Nuremberg, Germany: International Military Tribunal, 1947), 99.


48 OHCHR cites ongoing crimes committed in the DRC, despite prosecutions in the ICTR and the ICC's activities in the DRC, as potential evidence that a "general possibility of prosecutions is not sufficient to dissuade those inclined to commit massive atrocities..."Office of the United Nations High Commissioner for Human Rights (OHCHR), Prosecution Initiatives, 4, note 8.
perception of impunity can spark vengeance against perpetrators in the aftermath of violence and destabilize fragile post-conflict societies. It has thus become a regular part of transitional justice discourse and institutional mandates that a goal of prosecutions and punishment is to affect peace and stability.

Trial and punishment are prioritized for those most responsible for committing atrocities for a variety of reasons (in addition to the general justifications for punishment stated above). Practically, there is a lack of local and international capacity to try and punish all those responsible. Also, focusing on the crimes of elite perpetrators assists in establishing a historical record of the systematic and systemic nature of the violence, its planning and organization, and individualizes criminal responsibility. Therefore, unlike the political compromises made in post-authoritarian transitions in Latin America, impunity for elite perpetrators can no longer be presumed by outgoing elites who equate their positions of authority with impunity, or justified by incoming elites as a trade-off for stability and democratization. As the recent HRW report Selling Justice Short describes:

the trials of Serbian leader Slobodan Milosevic and Liberia’s Charles Taylor demonstrate that insulation from prosecution is no longer a certainty for former heads of state. The expectations of victims for justice have changed in this evolving context.49

Prominent organizations in the field of transitional justice waged advocacy campaigns in the 1990s that were generalized arguments against impunity writ large.50 Recent policy statements from such organizations reflect more focused efforts on ensuring accountability for elite perpetrators.51 That the focus of punishment should first and foremost be for those “most responsible” has also been consistently

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49 Human Rights Watch (HRW), Selling Justice Short: Why Accountability Matters for Peace.


51 A recent report by Amnesty International strongly criticizes the outcomes of transitional justice in East Timor and calls for an international tribunal. Notably, they identify the primary failure as impunity for those responsible for the most "serious crimes" committed during the 1999 popular consultation, and resist calling for the trial and punishment of all those responsible. Many were held accountable through a truth commission. See, Amnesty International, 'We Cry for Justice': Impunity Persists 10 Year on in Timor-Leste (London: Amnesty International Publications, 2009).
reinforced by the mandates and prosecutorial strategies of a range of institutions, not least of which are the ad hoc tribunals, hybrid courts, and ICC.52

There are a number of non-punitive sanctions, most importantly reparations and limited and conditional amnesties that also constitute accountability in transitional justice institutions.53 The prominence accorded to these sanctions as accountability varies according to the nature of the violence, the extent of military and civilian perpetration, and the nature of the transition itself. Non-punitive sanctions can be used in conjunction with one another and are more often used to complement punitive sanctions. I will briefly address reparations as forms of accountability and then turn to a more in depth analysis of limited and conditional amnesties, as their conceptualization and use as accountability are more contentious in the field of transitional justice.

Reparations are a form of redistributive justice for victims of mass human rights violations and are designed to restore relationships and provide compensation and redress for those who lost family members or had violence inflicted up on them, and to return or rebuild lost and destroyed property. The OHCHR’s Rule of Law Tools for Post-Conflict States: Reparations programmes outlines the dual dimension to reparations under international law:

(a) a substantive dimension to be translated into the duty to provide redress for harm suffered in the form of restitution, compensation, rehabilitation, satisfaction and, as the case may be, guarantees of non-repetition; and (b) a procedural dimension as instrumental in securing this substantive redress. 54

Reparations can therefore be symbolic or substantial and meted out as monetary and symbolic compensation, health and education services, and memorial. Victims’ rights to reparation are “becoming

52 The relative successes of these international institutions are also frequently judged not only by the number of trials, but also by the extent to which they are able to indict, prosecute, and convict the "big fish."

53 Vetting and lustration, a means of addressing human rights abuses committed by those in positions of authority and entailing the removal of such persons from such positions if they are associated with past oppressive regimes. are also sometimes characterized as a transitional justice mechanism. Increasingly, however, vetting and lustration are more closely associated with peacebuilding and broader security sector reform in post-conflict contexts framed as transitions from authoritarian to democracy. These mechanisms may or may not be intertwined with transitional justice institutions. Office of the United Nations High Commissioner for Human Rights (OHCHR), Vetting: An Operational Framework (New York and Geneva: United Nations, 2006).

firmly established” in doctrine and in practice and reparations can be meted out in various ways, often but not exclusively through truth commissions.  

Those receiving reparations can be collectively or individually identified as victims; reparations can be provided directly by individual perpetrators or by the state as a form of acknowledgement of its own or of a past regime’s wrongdoing. More diligent efforts at public consultations have revealed the importance of reparations as accountability, particularly in the following contexts: where material rewards were motivations for perpetrators of atrocities; where victims and perpetrators are differentiated by socio-economic classes; and when “for some victims reparations are the most tangible manifestation of the efforts of the state to remedy the harms they have suffered,” particularly when justice for atrocities is lacking or corrupted. Reparations have therefore been accorded a high priority by victims in post-conflict contexts that are framed as transitions from authoritarianism to democracy and /or conflict to peace. And as a recent “guidance note” on transitional justice from the UN Secretary-General’s office states, reparations programs can be “effective and expeditious complements to truth-seeking processes and prosecution initiatives by providing concrete remedies to victims, promoting reconciliation, and restoring public trust.” Despite the growing consensus that reparations constitute an important mechanism of accountability, implementing such redistributive justice is hampered by the lack of capacity and funds in many post-conflict states; this means its use is limited to non-existent in precisely the places that require it the most.

Limited and conditional amnesties have become a controversial, but nevertheless prominent, form of accountability. Put simply, an amnesty is a pardon granted by a governing authority for a legal offense. The OHCHR’s *Rule of Law Tools for Post-Conflict States* defines an amnesty as

legal measures that have the effects of (a) prospectively barring criminal prosecution and, in some cases, civil action against certain individuals or categories of individuals in respect of specified criminal conduct committed before the amnesty’s adoption, or (b) retroactively nullifying legal liability previously established.

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But important distinctions need to be made to determine whether an amnesty can constitute accountability, and not impunity, in the context of transitional justice. Amnesties are “impermissible” by United Nations standards if they foreclose all prosecution and/or violate victims’ right to remedy and reparations and victims’ and societies’ right to know the truth. As such, self-accorded, de facto, and blanket amnesties are rejected as synonymous with impunity. These types of amnesties rule out prosecutions completely, violate victims’ rights to reparations and truth, and therefore are inconsistent with states’ obligations under international law. There is also no form of non-punitive sanctioning attached to these amnesties and ironically they are often associated with elite perpetrators of atrocities. In contrast, limited and conditional amnesties have gained currency as a legitimate and effective form of accountability and are now often incorporated into or coordinated with several tribunals and truth commissions. Limited amnesties are those granted by a governing authority to specific groups or individuals for a specific set of crimes committed. In this circumstance, individuals are usually required to go through an amnesty application process to prove their eligibility and the extent of their criminal activity, as was the case for the TRC’s amnesty program in South Africa. Conditional amnesties are granted by a governing authority in exchange for the perpetrator performing one or more of the following acts (usually in a public forum): acknowledgement, truth-telling, apology, and compensation or restitution. Generally speaking, the more limited and conditional the amnesty is the more politically and legally palatable it is to the international community and to victims. The debate over whether amnesty is impunity or accountability has also been somewhat mediated by the above discussed hierarchical division of criminality. Limited and conditional amnesties are increasingly used as a form of accountability for

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60 Self-accorded amnesties are those granted by political leaders who pardon their own crimes. De facto amnesties are undeclared and apply to perpetrators that have committed crimes but have not been held accountable through judicial or non-judicial means, i.e. an unofficial policy of doing nothing. Blanket amnesties are granted by a governing authority to a large group of individuals who have committed similar crimes (usually presented in the form of a general “amnesty law”). The OHCHR's Rule of Law Tools for Post-Conflict States: Amnesties also makes similar distinctions between self-, blanket, conditional, de facto, and disguised amnesties. Office of the United Nations High Commissioner for Human Rights (OHCHR), Amnesties, 43-44.

61 It is important to note that blanket amnesties are sometimes conditional, whereas limited amnesties are almost always conditional.
low-level perpetrators, and justified in both pragmatic and idealistic terms by domestic and international actors. By contrast, amnesties for elite perpetrators are considered off-the-table and international pressure often results in the revocation of previously offered amnesties.62

Human rights activists, international lawyers, academics, and the United Nations have challenged the legality, legitimacy, and effectiveness of amnesties in general. Legally, amnesties for atrocities are not permissible under international criminal and human rights law because they violate victims’ rights to justice and the state’s duty to investigate and prosecute these crimes. Since the early 1990s, the UN has been the biggest diffuser of international humanitarian law through international and hybrid tribunals. Given the UN’s prominent role in post-conflict societies, it is instructive to note that it claims not to use blanket amnesties as standard practice and opposes their use to facilitate peace negotiations.63 The most notable example of this was the UN’s opposition to the Lomé Peace Agreement of 1999 for Sierra Leone, which granted a blanket pardon to all combatants and collaborators.64 Amnesties also face accusations of illegitimacy from the international human rights community. Amnesties offered to negotiate an end to violence are seen as illegitimate by those who argue that justice should be free of politicization and not subject to use as a bargaining tool.65 While the provision of amnesties may bring about a temporary peace among political elites, reintegrating perpetrators back into the communities where their living victims

62 The most notable trend of revoking amnesties has been apparent in Latin America, where amnesties for former top military officials in Chile, Argentina, Peru, Uruguay, etc., have been overturned and many are now facing trial. See Naomi Roht-Arriaza, "Amnesties Laws in Latin America: Devalued Currency?," Human Security Bulletin (Canadian Consortium on Human Security) 6.1 (2008). Another telling example is in Uganda, where with the ICC’s intervention, amnesties offered for rebels who give up arms against the government and return but are excluded for top LRA leadership. For a broad range of views and empirical analysis of amnesties see also, Jessica Gavron, "Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court," The International and Comparative Law Quarterly 51.1 (2002), Louise Mallinder, "Can Amnesties and International Justice Be Reconciled?" The International Journal of Transitional Justice 1.2 (2007), Office of the United Nations High Commissioner for Human Rights (OHCHR), Amnesties.


64 Office of the United Nations High Commissioner for Human Rights (OHCHR), Amnesties, 7.

remain can often incite violence, displacement, and embolden future perpetrators by institutionalizing impunity.

Despite strong moral arguments against them and legal and human rights efforts to prevent them, the use of some types of amnesties is increasing and the accountability norm has reflected both pragmatic and idealistic justifications for it.66 The primary pragmatic justification for amnesties is the aforementioned trade-off of justice for peace. This is particularly true in contexts where accountability is part of the negotiation to end an ongoing conflict or if the peace that has just been brokered is threatened by spoilers and weak institutions.67 In these types of political and security contexts, “the fear of retribution by those perpetrators may convince even the staunchest human rights advocates that amnesties are preferable to coups.”68 Domestic contexts also come into play if amnesties have “democratic approval,” such that they are approved by all warring parties, the public is consulted and approves, and those legislating amnesties are democratic elected leaders.69 Another pragmatic justification for the use of amnesties is that post-atrocity societies commonly lack the capacity to prosecute and punish tens of thousands of perpetrators. The aforementioned distinctions between the degrees and contexts of criminality come into play here. In order to mitigate the problem of institutional incapacity and lengthy judicial processing time, low-level perpetrators of lesser crimes are offered limited and conditional amnesties to unclog the judicial and penal systems. Finally, the increasing legitimacy at the international level is specific to limited and conditional amnesties and stems from the value attached to non-punitive and non-prosecutorial principles of justice in different ways. It follows then that an additional justification for the mechanism of limited and conditional amnesties is that they are principled upon and can enable other non-punitive transitional justice goals, such as truth, reintegration, local ownership, and

66 The Amnesty Law Database shows an upward trend in the use of amnesties worldwide since the end of World War Two: over 430 amnesties have been meted out in this time and many of these occurred since the advent of the ad hoc tribunals. Mallinder, "Can Amnesties and International Justice Be Reconciled?," 2009.


69 See, Mallinder, "Can Amnesties and International Justice Be Reconciled?."
reconciliation; these goals are often central to restorative justice strategies and community dispute resolution mechanisms. In a telling example, the Secretary General’s 2004 report acknowledges that, beyond condemning amnesties for perpetrators of war crimes, crimes against humanity, and genocide, “carefully crafted amnesties can help in the return and reintegration of both groups and should be encouraged.” These “carefully crafted” limited and conditional amnesties require an exchange, or trade-off, of truth and possibly compensation from the perpetrator in return for a pardon from the state and even sometimes the victims themselves. In short, rather than being seen in dichotomous terms as a choice between justice and realpolitik, as debates between realist and normative theories have suggested, the acceptance of limited and conditional amnesties indicates a more nuanced understanding of the complementary and co-constitutive relationship between punitive and non-punitive principles of accountability.

This broader range of sanctions has been met with increasing acceptance by the international community. The aforementioned definition of transitional justice from the 2004 Secretary-General’s report makes clear that it considers a variety of non-judicial and non-punitive mechanisms appropriate in some circumstances, if combined with prosecutions. The OHCHR’s definition of amnesties, as foreclosing prosecution and violating victims’ rights to reparations and truth, suggest that blanket, self-granted, de-facto amnesties are impermissible while limited and conditional amnesties would be more legitimate, particularly if combined with other transitional justice mechanisms. On the one hand, the UN policy of opposing amnesties in peace negotiations “represents an important evolution” and reinforces that a norm of accountability, and the normative structure of transitional justice as whole, can be juxtaposed to the norm of impunity in the past. On the other hand, the international community has come to be more permissive of limited and conditional amnesties in certain contexts and conditions. In practice, the United Nations mandated a truth commission for East Timor that included limited and

71 Office of the United Nations High Commissioner for Human Rights (OHCHR), Amnesties, 33, 43.
72 Office of the United Nations High Commissioner for Human Rights (OHCHR), Amnesties, 2.
conditional amnesties for low-level perpetrators, has increasingly included provisions for reparations schemes in international and hybrid tribunals, and has been permissive of alternative dispute resolution mechanisms as a practical alternative to formal trials. With respect to global civil society, the various organizations that comprise the transitional justice network have also included non-punitive sanctions within their conception of transitional justice. Furthermore, it is frequently and correctly assumed that human rights organizations have been the staunch advocates for punishment of atrocities; however, “in terms of global civil society’s effects on transitional justice, none has been more dramatic than the rapid spread of the truth commissions,” which often institutionalizes amnesties and reparations. The research, support, technical expertise and legitimacy lent by global civil society were essential for setting up truth commissions in Latin America, Eastern Europe and South Africa.

In sum, the accountability norm in its present form is permissive of both punitive and non-punitive sanctions that are meted out by a variety of transitional justice mechanisms. This part of the normative structure reflects a change from earlier generations of transitional justice where impunity for elites was a de facto political reality, yet non-punitive sanctions for all perpetrators were equated with impunity. The reality that has evolved is more complex, with the several kinds of amnesties that I have identified here that are typically only offered in conjunction with other mechanisms of accountability. The institutionalization of this accountability norm is largely determined by the aforementioned hierarchical division of criminality norm, whereby trial and punishment is expected for elite perpetrators, and non-punitive sanctions are justified as appropriate for low level perpetrators.

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73 For example, Amnesty International conceptualizes international justice as including justice, truth and reparations (see www.amnesty.org/en/international-justice/background). Organizations such as Human Rights Watch, the International Centre for Transitional Justice, Open Society Institute Justice Initiative, Human Rights First, etc. all address non-judicial and non-punitive mechanisms under a broad rubric of transitional justice.


Localization

The localization norm in the international normative structure of transitional justice is based on principles of capacity building and local ownership. To be considered legitimate and effective, transitional justice policies and institutions increasingly involve international and local legal participants, build local capacity, and ensure that those victimized and implicated by atrocities can actively participate and have ownership in the process. The UN OHCHR’s policy guidelines for prosecution initiatives clearly state that “long-term and sustainable solutions to impunity should aim mostly at building domestic capacity to try these crimes.” Therefore, transitional justice institutions at the local (i.e. national and community) level are now considered the ideal whereas international institutions are a last resort. This norm represents an evolution in the nature of international courts as transitional justice. The ad hoc courts for Rwanda and the Former Yugoslavia had primacy of jurisdiction and were purely international whereas the subsequent hybrid courts in Sierra Leone, Cambodia, and Timor were a mix of international and local elements. Finally and despite its characterization as a culmination of the international institutionalization of transitional justice, the ICC is a court of last resort and primacy of jurisdiction is retained at the national level.

Localization is interrelated with the aforementioned norms of a hierarchical division of criminality and accountability but “local” justice does not necessarily correspond to only restorative processes for low-level perpetrators. To be sure, the international community has institutionalized retributive justice for elite perpetrators in many fora and has been slow to embrace and design local and restorative justice processes for atrocities. Likewise, communal groups often desire a form of accountability that is consistent with local and restorative traditions of dispute resolution. There are, however, no straightforward correlations between retributive justice as international or cosmopolitan and restorative justice as domestic or communitarian. The international community has now not only

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76 Office of the United Nations High Commissioner for Human Rights (OHCHR), Prosecution Initiatives, 1.

77 William Schabas claims that the ICC is "arguably the most important new international institution since the establishment of the United Nations." Similarly, Payam Akhavan states that the "ICC is a landmark in the historical evolution from a culture of impunity to a more nature age of accountability." See, William A. Schabas, The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone (Oxford: Oxford University Press, 2006) 424, Payam Akhavan, "The International Criminal Court in Context: Mediating the Global and Local in the Age of Accountability," The American Journal of International Law 97.3 (2003): 217.
sanctioned but mandated the use of non-punitive sanctions in local institutions and domestic institutions and policies of transitional justice recognize the pragmatic necessity of complementary approaches to accountability. The emphasis here is not on the nature of criminality or associated sanctions but rather on the why and how the localization norm explains institutions with varied judicial principles and processes.

Localization requires several things of transitional justice. First, it is to involve local participants in the process specifically as witnesses and legal and administrative personnel and generally as stakeholders. With respect to victim involvement in prosecutions, “domestic and international initiatives have often failed to appreciate the central importance of protecting the dignity of victims...(and) frequently relegate victims to instruments of proof, rather than human beings and citizens with rights and needs.” At the international and communal level, using local participants can often lead to more collective participation in transitional justice and a sense of ownership over the process and outcomes. Second, localization requires incorporating local laws and legal customs in addition to respecting international standards of criminal law. This is precisely where localization correlates with the use of restorative justice, the processes of which can be incorporated into an internationalized and retributive institution, or it can define a separate institution that is complementary to a retributive one. Third, localization is also indicative of the appropriateness of physically situating transitional justice institutions and/or outreach initiatives in the territory where the crimes were committed and the perpetrators and/or survivors continue to live. There was a shift in practice in this regard from the mid 1990s onwards; the ad hoc tribunals for Yugoslavia and Rwanda were purposely isolated from the societies affected by violence in an effort to free the institutions from politicization and interference. But both the ICTR and ICTY have been plagued by institutional inefficiencies, budgetary shortcomings, and difficult relationships with domestic jurisdictions and victim communities, all of which have accumulated to render them largely irrelevant to local populations. A shift towards locating tribunals in the territories where victims and/or perpetrators reside has been thought to be more practical and more appropriate in order for the processes to resonate with local communities. Moreover, many lessons have been learned regarding the failings of

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the ad hoc tribunals with respect to the importance of local outreach. These outreach activities can include communicating and explaining the prosecutorial strategy of a tribunal and ongoing proceedings to local communities, the potential for their involvement, and partnering with local media and civil society.  

International institutional learning has subsequently led to complementing criminal tribunals with quasi-judicial and restorative justice institutions and mandating international courts with the ability to engage in local outreach and witness/victim involvement. Debates over how to appropriately and effectively institutionalize accountability, previously framed in the scholarly literature as tradeoffs between justice and peace, are now framed by debates over the extent of complementarity and interdependence between different conceptions of justice that are seen as necessary for both justice and peace. New types of transitional justice institutions, such as hybrid tribunals, evolved that reflected the outcomes of these debates. Roht-Arriaza argues, “in theory, these hybrid institutions can combine the independence, impartiality and resources of an international institution with the grounding in national law, realities and culture, the reduced costs, and the continuity and sustainability of a national effort.”

Indeed, the mix of international and local institutional characteristics is what defines a hybrid tribunal: international and local participants, a national location and jurisdiction, and a combination of national and international laws. The Guatemalan Historical Clarification Commission and the Haitian Truth and Reconciliation Commission pioneered the use of hybrid institutions that have now proliferated to address atrocities in Kosovo, East Timor, Sierra Leone and Cambodia.

There are many justifications for localization. The 2004 Secretary-General’s Report articulates some of these changes in the normative structure of transitional justice by emphasising the importance of localization; the report stresses involving the local level at the consultation stage of designing transitional justice institutions and states that the “United Nations is looking to nationally led strategies of assessment


and consultation carried out with the active and meaningful participation of national stakeholders."\(^{82}\) The report goes one step further and even equates the “most successful transitional justice experiences” with the “quantity and quality of public and victim consultation carried out” prior to institution building.\(^{83}\) Another justification for localization is the goal of fostering local ownership over transitional justice. Local ownership is an ill-defined concept often associated with peacebuilding in transitional societies. In most cases, local ownership means local actors are designing, managing, and implementing transitional justice policies and institutions. Local ownership is easiest with community based processes, however local ownership of international institutions is also possible if those responsible for its implementation foster awareness and engagement of the institution in order to give it value and relevance to the local population. The United Nations has learned that local outreach and legitimacy were major failures of the ad hoc tribunals and recommended that they “must learn better how to respect and support local ownership, local leadership and a local constituency for reform…”\(^{84}\) A more recent statement from the UN, from the aforementioned “guidance note” of the Secretary-General, articulates that “the impact and sustainability of transitional justice processes will depend significantly on ensuring that they are understood and communicated coherently during and after their implementation.”\(^{85}\) This reflects a degree of international institutional learning in the field of transitional justice about how to create institutions that resonate at the local level without sacrificing international standards of justice.

The hierarchical division of criminality, accountability, and localization norms constitute the framing principles and processes for contemporary transitional justice institutions. By and large, these norms prescribe a means to an end. As such, it is equally important to establish how the international normative structure has framed expectations about the outcomes of transitional justice institutions. Do these

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\(^{82}\) United Nations (UN), Report of the Secretary-General: The Rule of Law and Transitional Justice in Post-Conflict Societies. 6, para 15.


\(^{84}\) United Nations (UN), Report of the Secretary-General: The Rule of Law and Transitional Justice in Post-Conflict Societies. 7, para 17.

institutions represent justice for its own sake? Or is their purpose to ensure stability and security by fostering a minimalist form of non-violent coexistence among victims and perpetrators? Or are these institutions expected to achieve a deeper level of inter-personal and societal reconciliation in deeply divided societies? The following addresses the reconciliation norm as a frame for the expected outcomes of institutions and a contentious measure of success in transitional justice.

Reconciliation

The causal relationship between justice and reconciliation is subject to much debate. Nevertheless, a norm of reconciliation persists in transitional justice and is discursively identified by policy-makers, practitioners, and scholars as a goal of such policies and institutions. As the UN holds, “by striving to address the spectrum of violations in an integrated and interdependent manner, transitional justice can contribute to achieving the broader objectives of prevention of further conflict, peacebuilding, and reconciliation.” Reconciliation, principled on ideas of co-existence and healing, is often referenced as the ultimate measure of success for transitional justice institutions. Conversely, some contend that transitional justice cannot promise reconciliation, which is inter-personal and subjective, and therefore not the stuff of politics or justice. This raises a number of empirical and normative questions. What is reconciliation and which persons or groups are to be reconciled? What are the institutional drawbacks to invoking reconciliation as a measure of success and has it retained its normative value? I will address these questions in order to demonstrate how reconciliation has become part of the normative structure.

Transitional justice commonly seeks to affect social and political reconciliation at various levels in post-conflict societies, such as inter-personal and communal reconciliation, and political reconciliation among elites, and between political elites and society. The intended targets, or beneficiaries, of reconciliation will depend on the context of the violence itself and which groups constitute the perpetrators and victims. A good deal of conceptual confusion and disagreement exists over the limits and measures of reconciliation; the result has been the operationalization of a range of minimalist to maximalist concepts of reconciliation that leave little basis from which to compare and contrast its use as

a measure of success for transitional justice. The confusion is in part because of a “failure to clearly distinguish between two of the concepts’ key dimensions – scope and intensity;” distinctions between such minimalist and maximalists concepts illustrate these dimensions.\textsuperscript{87} A minimalist or thin definition of reconciliation means simply a form of “non-violent co-existence”\textsuperscript{88} “…between antagonistic or formerly antagonistic persons or groups.”\textsuperscript{89} Therefore, minimalist reconciliation is equated with basic security and stability, whether between individuals or on a national level. Alternatively, a maximalist or thick conceptualization of reconciliation “refers to the accommodation of former adversaries through mutually conciliatory means, requiring both forgiveness and mercy.”\textsuperscript{90} With a maximalist conceptualization, reconciliation is a socially transformative goal that is inclusive of inter-personal and communal healing and harmony. Transitional justice institutions are rarely explicit regarding the scope and intensity of reconciliation they seek to achieve. Moreover, many scholars and practitioners find the concept of reconciliation to be too imprecise or malleable to be of any analytical use. Stover and Weinstein contend that reconciliation

is a murky concept with multiple meanings. Although reconciliation is a lofty and worthwhile goal, our studies have led us to question the validity of this vague assertion, the narrow perspectives of each of the disciplines that study and work with societies after mass violence, and the lack of attention to the opinions and wishes of those whose lives have been destroyed.\textsuperscript{91}


\textsuperscript{89} Priscilla B. Hayner, Unspeakable Truths: Confronting State Terror and Atrocity (New York: Routledge, 2001) 155.


Similarly, others have argued that inferred measurement of reconciliation and tendencies toward conceptual stretching have eroded its normative meaning. But despite these contentions, a norm of reconciliation is significance to the point where it is constitutive of transitional justice practices in that it has a prominent appearance in the discourse, determines the relevance of institutional processes, and set the parameters for defining the success of transitional justice institutions.

Both minimalist and maximalist conceptualizations of reconciliations have been employed in transitional justice and are problematic in different ways. On the one hand, maximalist forms of reconciliation are difficult to measure in post-conflict societies, owing in part to the sensitivity, subjectivity, and personal nature of victim-perpetrator relationships. There is also no definitive time point at which one can say this level of reconciliation should be achieved or to causally attribute its presence to the effects of transitional justice institutions and acts of reconciliation can occur independently from a justice process. On the other hand, the conflation of stability and reconciliation inherent in minimalist concepts has had important institutional consequences for transitional justice and political consequences for post-conflict societies.

First, minimalist or vague definitions of reconciliation overestimate the successes of transitional justice institutions that have optimistically stated reconciliation as a goal. For example, the South African Truth and Reconciliation Commission provided precise definitions of four elements of truth (narrative, forensic, historic, and social or dialogic), but left reconciliation undefined. The TRC has been lauded as a success in part because systemic racial violence has not resumed and democratic institutions are in place, even though “scholarship has detected a widespread desire for revenge, not reconciliation, in the country.” While reconciliation is often associated with the impact of truth commissions because of the value assigned to knowledge and acknowledgement, the UN OHCHR’s policy guidelines caution against this causal relationship. Their report on truth commissions state that “care should be taken not to raise

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92 Meierhenrich, "Varieties of Reconciliation," 204.
undue and unfair expectations among the victims that they, or the country as a whole, will or should feel quickly “reconciled” as a result of knowing that truth about unspeakable past atrocities – or, in some cases, receiving official acknowledgement of a truth that they already knew.\textsuperscript{95}

Second, with regard to the political context of reconciliation, political elites will reference the relative harmony among former adversaries and a lack of overt military hostilities as a sign that the political and judicial institutions of post-conflict societies have achieved reconciliation. However, these minimalist conceptualizations rely on indicators that are more likely to be precursors, or prerequisites, to a more maximalist form of reconciliation or simply benchmarks of democratic institution building. These are not indicative of the kind of mended relationships between perpetrators and victims that is needed in post-conflict societies to ensure long-term stability. Thus, conflating such dimensions by invoking the term reconciliation can be misleading.

Finally, states wishing to mask questionable political bargains, including illegitimate amnesties, or human rights abuses, often seek to justify these policies in the name of “reconciliation.” Justifying amnesties in the name of reconciliation was common in many of the political transitions in Latin America, and is a practice that continues to this day in cases where transitional justice measures are used in ongoing conflict and cases where societies have transitioned out of conflict but not out of authoritarian rule. The label of reconciliation is attractive to the international community and thus its normative value is rarely questioned and politicization rarely scrutinized.

The feasibility of achieving reconciliation with transitional justice institutions has ebbed and flowed with changes in institutional designs. In previous generations of transitional justice, reconciliation did not transcend the boundaries between retributive and restorative justice and trials were seen as an obstacle to reconciliation. As Minow states, “reconciliation is not the goal of trials, except in the most abstract sense.”\textsuperscript{96} But by the mid 1990s reconciliation was invoked, at least discursively, as an appropriate potential goal for any and all transitional justice policies and institutions. In a telling instance, in 1994


\textsuperscript{96} Minow, \textit{Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence} 26.
Madeline Albright, serving as United States Ambassador to the United Nations in 1994, argued that the proposed ICTY was necessary because “establishing the truth about what happened in Bosnia is essential to – not an obstacle to - national reconciliation.”97 The UN mandates for the ICTY did not, in the end, stipulate reconciliation as a goal and while the mandate for the ICTR made reference to reconciliation as a goal, it created no means to achieve it. Fletcher and Weinstein provide a comprehensive account of how and why trials have little effect on reconciliation. Drawing from their extensive interview data in Bosnia, they demonstrate that the selectivity of prosecution in trials leaves out accountability for ordinary citizens swept up by the violence and the masses of bystanders, therefore rendering justice incomplete.98 Additionally, they insightfully explain that individualizing guilt “may contribute to a myth of collective innocence,” which distorts the truth and hinders the healing of victim-perpetrator relationships.99 Fletcher and Weinstein therefore argue that the selectivity of prosecution and individualization of guilt inherent in the legal paradigm is ill-suited to affecting the kind of communal and social healing required of reconciliation. In sum, trials and tribunals have somewhat loosely been affiliated with minimalist conceptualizations of reconciliation. Leaving the scope and intensity of the reconciliation they seek to achieve as undefined has allowed such institutions to claim success irrespective of how deep an impact they have on post-conflict societies and led some to question whether such institutions should seek such a goal in the first place.

Maximalist forms of reconciliation then devolved as solely the purview of restorative justice institutions, particularly truth commissions, which provide communal healing processes in response to communal violence and seek to affect relationships between victims and perpetrators. The National Commission on Truth and Reconciliation in Chile “was the first to use the term prominently – its TRC was a prototype for attempts at political restoration” and South Africa’s Truth and Reconciliation Commission used the term “most famously – its TRC is the most ambitious socially restorative effort

98 Fletcher and Weinstein, "Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation."
99 Fletcher and Weinstein, "Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation," 580.
Many traditional justice mechanisms recently used in response to atrocities, such as those in Northern Uganda and Rwanda, have derived their credibility from their alleged ability to contribute to reconciliation. But the contemporary normative structure no longer confines reconciliation to restorative justice institutions; “reconciliation now shows up regularly in political discourse” and defines the socially transformative goals of a variety of transitional justice institutions. In sum, the conceptual utility and normative value of reconciliation in the normative structure of transitional requires a more critical perspective. Putting aside the lack of consensus on a definition, the continued use of reconciliation as a discursive goal has institutional and political consequences for all models of transitional justice.

The purpose here is not to definitively measure the extent of reconciliation in post-atrocity societies, nor to make a normative argument that reconciliation should be a goal of transition justice. What the elucidation of the normative structure of transitional justice reveals is that reconciliation is now an expected outcome of transitional justice and this expectation is manifested and problematic in two ways. First, reconciliation is a concept that is frequently invoked by local and international political elites to justify the choice of a particular transitional justice strategy, regardless of how feasible it is for justice to achieve reconciliation or how appropriate it is to ask those who participate in transitional justice institutions to be reconciled. I argue that the expectation that justice will achieve reconciliation creates an unmeasurable and unrealistic barometer for defining success of a particular institution, and as such the concept has lost its meaning and legitimacy. This carries importance implications for practice. Second, strategically using the concept of reconciliation to justify the mandates of institutions has masked a variety of political bargains that are in fact not considered to be just and implied a level of stability and communal harmony that is often far from true. This kind of politicization of reconciliation, which creates unrealistic expectations and obscures political and social realities of post-conflict societies, can and does negatively affect the perceived legitimacy of transitional justice institutions in the eyes of victims and the international community. In the absence of this international normative structure of transitional justice we

would expect to see the concept of reconciliation only sparingly linked to transitional justice, if at all. This would enable both local and domestic architects and beneficiaries of transitional justice institutions to evaluate the successes and failures of these institutions more realistically and on their own merits. If anything, the current misuse and politicization of reconciliation has hindered institutional learning in the normative structure. It remains to be seen whether developments on the ground will replace the monolith of reconciliation with a more subtle and complex set of regularized practices, comparable to how stark dichotomies between justice and impunity have given way to a more complex structure of expectations and practices that are widely replicated around the globe.

This chapter has so far sought to identify and document four norms that constitute the contemporary international normative structure of transitional justice. Having done so can thereby provide a theory of transitional justice practices with respect to the important and mutually reinforcing elements that have evolved after decades of trial and error, without which an attempt at transitional justice from either international or local level or elements would likely proceed at its peril. First, a hierarchical division of criminality has corresponded to an institutional division of labour among varied transitional justice institutions. Second, a norm of accountability is inclusive of both punitive and non-punitive sanctions in a variety of institutional forums at the local and the international levels. Third, localization has influenced the mandates and processes of all varieties of transitional justice institutions. While localization brings with it more serious risks of failure, it also has greater potential to achieve reconciliation. Finally, reconciliation is the fourth norm in the international normative structure of transitional justice. The concept of reconciliation increasingly constitutes transitional justice choices, but brings with it the stuff of politics that obscures the intended contributions of justice to post-conflict societies.

What transitional justice looks like today is much different than what human rights activists, political scientists, and legal scholars would have predicted a few decades ago, when amnesties were always off the table for the international community, restorative justice was always local, and international tribunals were idealized as the pinnacle of accountability. Assessing the empirical world of transitional justice with a theoretical framework of a normative structure would allow one to explain the
consistencies and irregularities across case studies and how the political choices of transitional justice are framed and justified. Additionally, it addresses and in many ways goes beyond the dichotomizing debates among transitional justice scholars, such as justice versus peace or punishment versus impunity, which have hindered our ability to see the sources of consistency, contestation, and change in transitional justice principles and practices.

FROM PRINCIPLES TO PRACTICE

Conceptualizing and analyzing transitional justice as a normative structure leads to a more empirically nuanced understanding of how expectations and processes of transitional justice is consistent across a variety of post-conflict contexts and despite such institutional variation. A structural approach to transitional justice also appreciates the international-local level dynamics of how norms go from principle to practice, thereby encompassing a less restrictive conception of agents and sources of structuration. As Reus-Smit argues, this kind of “holistic scholarship” (specifically, that which bridges the international and domestic domains) “has the merit of being able to explain the development of the normative and ideational structures of the present international system, as well as the social identities they have engendered.” To determine the causal effects of this normative structure, I seek to determine both the salience of transitional justice norms in the decision-making and institutional design stages and subsequently the significance of the norms’ implementation challenges. Explaining the norms’ salience, as a consequence of mechanisms of norm diffusion and socialization and reinforced by their interrelated nature, identifies the causal relationship between these norms and transitional justice discourse, policies and institutions. But while norms represent relatively stable meanings and are salient, their emerging nature and invocation in new and disparate contexts reveals that they are in a state of flux and subject to re-interpretation and change. In the process and outcomes of norms’ implementation, specific institutional challenges and sources of normative contestation emerge; identifying and distinguishing between these two phenomena is important for determining the direction of structural change in

102 Reus-Smit, "Constructivism," 201.
transitional justice. I will return to a more detailed discussion of both salience and implementation following a brief explanation of the role of legitimacy in this analysis.

Assumptions of legitimacy loom large in any analysis of transitional justice norms. The more a norm is perceived as legitimate the greater its salience, but somewhat paradoxically norms can suffer a loss of legitimacy if they are perceived to be unjust and impractical in the process of implementation. The concept of legitimacy plays a central role in analyses of whether actor’s interests and behaviour are driven by norms or more material and pragmatic variables. As Hurd defines it, legitimacy is a mechanism of social order (in addition to coercion and self-interest) that “refers to the normative belief by an actor that a rule or institution ought to be obeyed.” Furthermore, Hurd argues that unlike with coercion or self-interest, legitimacy induces compliances out of an internal sense of moral obligation. This particular conceptualization of legitimacy is useful in the context of transitional justice in which the moral obligation to pursue accountability for atrocities can be juxtaposed to or reinforced by self-interest and coercion. As will be elaborated upon in the forthcoming chapters, understanding the legitimacy of transitional justice norms requires identifying specific audiences, or the “actual social grouping in which legitimacy is sought, ordained, or both.” There is no single and cohesive audience for transitional justice norms and such audiences would vary in different transitional justice contexts depending on the architects and beneficiaries of the institutions. But certainly victim communities are important audiences in all contexts as the credibility and functionality of transitional justice institutions suffers without their support. One implication for legitimacy in this analysis is that accumulated sources of institutional failures and normative contestation, if unresolved or unaddressed, could result in a “crisis of legitimacy” for the normative structure and the institutions constituted by it. A crisis of legitimacy, as Reus-Smit defines it, is “crisis in an actor’s ability to achieve their ends, or an institution’s capacity to enlist norm-compliant behaviour. In other words, it is a crisis in an actor’s or institution’s power; in response to such

104 Hurd, "Legitimacy and Authority in International Politics," 387.
crises of legitimacy, an institution must either “adapt or face disempowerment.” Therefore understanding the outcomes of implementation would signal whether transitional norms are eroding or being reinterpreted and made more precise in order for them to endure. The remainder of this section will address the nature of norm diffusion and salience as measures of causal effects, the role of institutional obstacles and contestation that result from implementation, and lastly the utility of the theoretical debate over whether transitional justice is ultimately a norm-driven phenomenon.

### Salience

A simple definition of a salient norm is that it matters and is important. The literature on norms frequently questions how and why some norms matter, implying that some norms can exist but are not important because they do not have causal effects on behaviour. But what, specifically, is the behaviour that salient norms are important for and for whom? In the context of the international normative structure of transitional justice, salient norms are those which are important and instrumental for framing the discourse of decision-makers and structuring the range of appropriate options for policies and institutional design in post-conflict states. Moreover, salience is conditioned by perceptions of legitimacy and contextual relevance among international and domestic decision-makers and victim communities whose expectations of justice are also framed by these norms and influence the decisions of elites.

Following from this conceptualization of salience, I subscribe to Cortell and Davis’ approach which measures the degree of a norm’s salience by its appearance in discourse, changes in national

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108 Cortell and Davis argue that domestic salience is indicative of the resonance, strength, and legitimacy of a norm and that "salience requires a durable set of attitudes towards the norm's legitimacy in the national arena." Cortell and Davis Jr., "Understanding the Domestic Impact of International Norms: A Research Agenda," 67-69.
institutions, and state policies.\textsuperscript{109} I do, however, utilize these measures at both the domestic and international levels. Of these three measures of salience they argue that “discourse is the most important if also the least objective” because “discourse will precede and accompany changes in institutions and policy….and provide insights into ‘non-events’ that may be norm-governed.”\textsuperscript{110} The discourse of transitional justice is most readily assessed in the decision-making stage that follows episodes of violence, entailing numerous investigations and commissions of inquiry, debates, and public statements by international and domestic political elites on the expectations for justice. The discourse measure also extends to the justifications for the transitional justice institutions that follow from decision-making and therefore there is not a clear temporal dividing line between the different measures of salience. The institutions and policies of transitional justice comprise the institutional mandates that result from such decision-making (and any subsequent changes to these institutions as they progress) and national policies related to issues of post-conflict justice. Norms are not salient everywhere all the time and salience is a measured on a continuum, although I do put a specific metric on it in order to avoid overly simplistic comparisons between norms and between cases. The purpose of using these measures of salience is to argue that transitional justice norms enabled and constrained the possibilities for actors engaged in transitional justice decision-making, and subsequently constitute the corresponding institutional designs. The degree to which transitional justice norms are salient not only within but across the cases of Rwanda, East Timor, and the International Criminal reinforces that that transitional justice ideas and practices represent an international normative structure and not a collection of \textit{sui generis} cases in which discourses, policies, and institutions are primarily driven by context-specific variables and pragmatic preferences.

Why and when does it matter if a norm is salient? The salience of a norm promotes compliance and therefore it is an important characteristic for emerging norms that require compliance to become diffused, institutionalized, and implemented. Scholarship on norm emergence and diffusion is vast and

\textsuperscript{109} Cortell and Davis Jr., "Understanding the Domestic Impact of International Norms: A Research Agenda," 70-71. Analysis of these measures yields a four-value scale of saliency: higher, moderate, low and non-salient (p72).

\textsuperscript{110} Cortell and Davis Jr., "Understanding the Domestic Impact of International Norms: A Research Agenda," 71.
addresses various socialization mechanisms and measures of compliance. Of utmost relevance for this analysis is what this literature reveals about how norms come to have causal and constitutive effects, particularly with respect to the international-local dynamics of norms diffusion. In terms of the origins of norms, Finnemore and Sikkink argue that in the first phase of the “life-cycle” emerging norms originate from norm entrepreneurs with organizational platforms and their persuasion of domestic actors is a “characteristic mechanism” of this phase.\textsuperscript{111} The second stage of the cycle constitutes a “norm cascade” in which the primary mechanism “is an active process of international socialization intended to induce norm breakers to become norm followers.”\textsuperscript{112} The third and final stage is one of internalization, when a norm inhabits a “taken for granted” status. Both the second and third stages comprise norm diffusion facilitated by various mechanisms of socialization, particularly between the international and domestic levels. Others have contributed to the study of norm diffusion by identifying such mechanisms of socialization, a phenomenon defined as the “process by which international norms are internalized and implemented domestically.”\textsuperscript{113} Commonly identified mechanisms of socialization include arguing, persuasion, bargaining, learning, and emulation that are not entirely distinct from those that explain norm emergence. As Hoffman states, “the mechanisms by which an idea becomes a norm are not all that different from the mechanisms by which an actor outside a normative community is brought within.”\textsuperscript{114} In their study of Southern states that are socialized into accepting international human rights norms, Risse and Sikkink argue that their “spiral model” consisting of three different mechanisms of socialization explains the variation in the domestic effects of these norms.\textsuperscript{115} This analysis pays due attention to the more dynamic relationship between the international and domestic levels; the key agents of socialization

\textsuperscript{111} Finnemore and Sikkink, "International Norm Dynamics and Political Change," 895.

\textsuperscript{112} Finnemore and Sikkink, "International Norm Dynamics and Political Change," 902.

\textsuperscript{113} Risse and Sikkink, "The Socialization of International Human Rights Norms into Domestic Practice," 5.


\textsuperscript{115} The three causal mechanisms are: processes of instrumental adaptation and strategic bargaining; processes of moral consciousness-raising, argumentation, dialogue and persuasion; processes of institutionalization and habituation. Risse and Sikkink, "The Socialization of International Human Rights Norms into Domestic Practice," 5.
are transnational advocacy networks that interact between these two levels to manipulate and internalize these norms.

Another addition to this body of scholarship is the disaggregation of different stages of norm diffusion and socialization. Checkel describes the earliest phase of norm diffusion from the international to domestic level as one of empowerment, “occurring when the prescriptions embodied in a norm first become, through in changes in discourse and behaviour, a focus of domestic political attention or debate” before compliance becomes an issue. Checkel identifies two distinct social mechanisms of norm empowerment: first, norms are adopted instrumentally by political elites, or gatekeepers, who are responding to societal pressure from non-state actors and policy-makers; second, norms are adopted via a process of “elite learning” when these agents adopt new values and interests that constitute their identities and subsequent behaviour. In another take on diffusion that similarly focuses on the importance of domestic variables and agency of domestic actors, Acharya argues that “localization” is a key aspect in determining which norms will take effect. He argues “local agents reconstruct foreign norms to ensure the norms fit with the agents’ cognitive priors and identities,” thereby encompassing a more dynamic understanding of norm diffusion. In sum, this type of analysis moves beyond the static and dichotomizing conceptualizations of international norm-makers and domestic norm-takers.

The aforementioned scholarship moves beyond privileging the agency of international actors and incorporates the agency of domestic actors and their dynamic interaction with the international level in determining how norms become salient. As structures and agents are mutually constitutive, determining whose agency is most influential is instructive for understanding structural change. The analysis of norm diffusion crucially depends on the socializing effects of agents like norm entrepreneurs, transnational

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117 Checkel notes that domestic structures are intervening variables in both these processes. Checkel, "International Norms and Domestic Politics: Bridging the Rationalist-Constructivist Divide," 476-78.
advocacy networks, international organizations, and elite decision-makers. Early analysis of international norms privileged the role of international agents and only attributed agency to domestic actors for emerging norms. As Finnemore and Sikkink state, “many international norms began as domestic norms,” attributing the most importance to domestic agency at the first stage of a norm’s life cycle and contend that these actors’ influence lessens as a norm become institutionalized and internalized. Other contributions (e.g. by Acharya, Checkel, Cortell and Davis, and Klotz) redirect the norm diffusion literature by placing greater emphasis on domestic variables and their dynamic relationship with international structures and agents. For these scholars, the “cultural match” of international norms with those at the domestic level, and the role played by domestic elite decision-makers who shape and modify international norms signify an important corrective to the assumption that good international norms merely replace or displace bad domestic ones. Cortell and Davis also reinforce the importance of the dynamic relationship between these two levels: “the fact that legitimating discourses are bounded by prevailing domestic understandings should not obscure the dynamic nature of the relationship between domestic and international normative structures. Both are usually evolving.”

An important corollary to this is that the socialization mechanisms inherent in norm diffusion “affect both the socializers and targets of socialization” at both levels. In sum, domestic agency and the international – domestic dynamic is most significant at the earliest stage of norm emergence and diffusion.


121 Finnemore and Sikkink, "International Norm Dynamics and Political Change," 893.


123 Cortell and Davis Jr., "Understanding the Domestic Impact of International Norms: A Research Agenda," 75.

124 Hoffman, "Norms and Social Constructivism in International Relations."
The international-domestic dynamic is important for evaluating the origins and subsequent causal effects of transitional justice norms. At their current stage of emergence there is a considerable give and take between international agency and the ability and willingness of domestic actors to adopt and manipulate these norms to suit their local context. For example, international actors have increasingly come to define a norm of accountability as inclusive of both punitive and non-punitive sanctions, largely because domestic actors have sought to legitimize the latter with justice practices that are culturally rooted in tradition. Prior to the emergence of this normative structure, accountability was synonymous with punishment. Similarly, while past practices in transitional justice heralded the necessity of international, and thus supposedly neutral, institutions, input from domestic actors have been the driving force behind hybrid tribunals and other changes in international institutions that support a norm of localization. In my analysis, transitional justice norms are not assumed to be exclusively international or domestic in origin. The purpose here is to assess their degrees of salience and thus the likelihood for further institutionalization and diffusion. Moreover, I treat those involved in transitional justice decision making across the cases as being both norm makers and norm takers. Both of these assumptions contribute to a better understanding of how norms are interpreted dynamically, between levels and actors, and with varying degrees of salience. But explaining the continuing evolution of and changes in the normative structure of transitional justice requires going beyond demonstrating the salience of these norms. Salient norms can still faces significant challenges when implemented and put into practice. The institutional failures and normative contestation that accompanies implementation are the primary mechanism by which norms are framed and reconstituted, and determine the sources of political change.

**Implementation**

Assessing implementation requires understanding how norms work and how their meaning is interpreted in the process. Whereas measures of salience are addressed with respect to the early phases of transitional justice decisions making when dialogue, negotiating, and designing policies and institutions occurs, a study of their implementation requires analysis of how the process and outcomes of transitional justice institutions and policies are put into practice and an assessment of their successes and failures. Transitional justice norms do face institutional failures and contestation once implemented and the task at
hand it to distinguish between these two sets of challenges and the subsequent implications for the normative structure.

In the process of implementation, variations in institutional design are expected. As was previously argued in this chapter, transitional justice norms do not pre-determine specific institutional forms, such as trials or truth commissions, and thus institutional variation in post-conflict states does not suggest that transitional just norms were improperly implemented. Poor or failed institutionalization can result from a number of factors. The first factor is the degree of lack of capacity in terms of financial and human resources and affects the implementation of some norms more than others. For example, the localization norm prescribes the involvement of local actors, building local ownership through community participation, and thus requires resources and political will that is difficult to muster in post-conflict societies where human and financial resources are depleted by violence and a legacy of authoritarian governance. The second factor that contributes to institutional failures is the politicization of transitional justice institutions. In these instances, the meddling of political elites in the justice process or their abuse of it to serve other purposes, namely to ensure their political survival, constitutes politicization. Transitional justice policies and institutions can suffer a loss of credibility and legitimacy in these circumstances, not because the norms that structure and constitute them are in dispute but because external variables have limited their capacity and effectiveness of policies and institutions.

In contrast to institutional failures, contestation represents a challenge or disagreement over the meaning of a norm in terms of how it should be implemented, and applicability of a norm and thus whether it should be implemented in a specific context. Given that transitional norms are emerging ones and thus lack precision and a history of consistent implementation, they are particularly subject to contestation from different interpretations over their “meaning-in-use” and normative conflict.125 These understandings locate normative contestation in the path towards institutionalization for emerging norms, which are juxtaposed to competing frames of what constitutes appropriate behaviour. Note, however, that

contestation should not be conflated with violation. Contestation is largely conflict over the interpretation and implementation of emerging norms among a “communities of norm acceptors”\textsuperscript{126} whereas violation is characterized behaviourally by a lack of compliance over institutionalized and/or internalized norms and rhetorically by their explicit rejection or implicit abandonment. In other words, “if the meaning of a norm can change or if different communities of actors adhere to different norms (or different versions of a norm), then “norm-breaking” takes on a different meaning.”\textsuperscript{127} Violations, therefore, prompt justifications that then reinforce the quality of a norm’s already “taken for granted” status whereas contestation over emerging norms is not only expected but considered an important element in a norm’s evolution.

Normative contestation is significant because it is productive for political change. The very definition of norms and structure implies that there is a stable set of meanings to constrain and enable actors’ behaviour, but norms themselves are not static constructs. Many constructivist scholars have explained this seemingly paradoxical quality of norms as both stable and structuring but at the same time in a state of flux. Finnemore states that normative conflict can create change over time and “as internationally held norms and values change, they create coordinated shifts in state interests and behaviour across the system”.\textsuperscript{128} Klotz and Lynch state that “even the most stable structures evolve…(but) these changes need not follow a linear or teleological path.”\textsuperscript{129} The outcomes of contestation over norms, according to Sandholtz and Stiles, is “always to change the norms under dispute” by either changing their substantive content or along other dimensions, such as “making them stronger or weaker, more specific (or less), broader or narrower.”\textsuperscript{130} Therefore, contestation from implementation is not to be viewed as disconfirming the existence of the norms or normative structure, but rather as a productive and necessary process in order for a normative structure to endure and shape identities, interests, and behaviour.

\textsuperscript{126} Hoffman, “Norms and Social Constructivism in International Relations.”
\textsuperscript{127} Hoffman, “Norms and Social Constructivism in International Relations.”
\textsuperscript{128} Finnemore, National Interests in International Society 2.
\textsuperscript{129} Klotz and Lynch, Strategies for Research in Constructivist International Relations 9, 10.
Moreover, “if norms evolve interactively…then any process of contestation will reflect a specific re/enacting of the normative ‘structure of meaning-in-use’. It will therefore be constitutive towards norm change.”

What circumstances and characteristics of a norm prompt contestation? First, transitional justice norms are contested when they are perceived as incompatible with others in the normative structure, with competing normative structures, and with meta-norms of international relations. The collection of individual norms in a normative structure may be inconsistent or incoherent and therefore create conflict. As Sandholtz and Stiles explain, “because rules cannot cover every contingency and because conflict among rules are commonplace, actions regularly trigger disputes.” For example, whether or not the hierarchical division of criminality norm prescribes that elite perpetrators on both sides of conflict should be subject to the same degree and nature of accountability has been contested in a number of the cases. Also, how the norm of accountability is implemented can conflict with the expected outcomes of transitional justice that frame the reconciliation norm. In this sense, the interrelated nature of norms in a structure may serve to either strengthen their salience or be fodder for contestation. Furthermore, collectively these norms may compete with other normative structures pertaining to similar issue areas or meta-norms in international relations, such as sovereignty. For example, the oft-cited debate of “justice versus peace” reveals that the normative structure of transitional justice can conflict with normative structures of conflict management or democratization and judicial interventions are contested as violations of the meta-norm of state sovereignty.

Second, contestation occurs when such norms are considered inappropriate for a given context or time period, in which actors therefore contest the universality of the norms as applicable across time and space. This type of contestation can manifest itself in two ways. Situations of crises may challenge...
these norms as applicable under ideal circumstances or for politically uncompromised actors and introduce new (and often more pragmatic) variables to consider. For example, the extent to which accountability should be sought during periods of conflict versus during a post-conflict period has arisen as a significant source of contestation. In these circumstances, which are particularly apparent for the case of the International Criminal Court, an array of actors at the international and local levels frequently challenge whether transitional justice norms are both appropriate and practical in cases of ongoing conflict, such as Darfur and Northern Uganda. There is a lack of consensus on whether implementing transitional justice norms should serve the purpose of both conflict resolution and accountability, or whether they can only facilitate a transition to peace and the rule of law once conflict has ceased. Another manifestation of a norm’s out-of-context contestation occurs when there is conflict between the international and domestic levels. Some describe this conflict in terms of the “cultural match” between new international norms and existing domestic institutions; conflict might arise if recognizing an international norm is “likened to cultural imperialism or colonialism and cause domestic resistance of rejection.” Acharya argues that this kind of contestation is most often resolved through a process of localization, which is a more dynamic process of congruence-building that goes beyond simply matching, grafting, or reframing of international norms into domestic contexts. For example, many states in transition from violence have challenged the notion that accountability should comprise solely punitive and formal judicial mechanisms, and have charged that the proliferation of international tribunals for atrocities represents a form of Western judicial colonialism. In response, post-conflict states have interpreted accountability as inclusive of both punitive and non-punitive mechanisms of justice and international institutions have gradually demonstrated a similar interpretation of accountability. A redirection of this type of contestation can also occur if prevailing domestic norms are internationally change in the norm-taker; international or regional demonstration effects. See, Wiener, "Contested Compliance: Interventions on the Normative Structure of World Politics," 182, Acharya, "How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism," 247.

institutionalized. For example, the international community’s resistance to certain types of amnesties has been tempered by the perceived success of amnesties used in conjunction with truth commissions in domestic contexts.

In sum, contestation can be triggered by circumstances in which norms compete or appear to be irreconcilable with other norms and normative structures, out-of-context application, and disputes between the international and domestic levels. Distinguishing these forms of contestation from the aforementioned institutionalization challenges is important because the former provokes political change in the implementation of the norms and such change allows the normative structure to endure and adapt. The analysis in this dissertation’s empirical chapters seeks to distinguish between these different types of implementation challenges and thus their implications for change.

**Principles versus Pragmatism**

This arguments put forward in this dissertation underscore that transitional justice is a norm-driven set of practices, which speaks directly to an ongoing debate about the role that interests and pragmatic variables play in determining transitional justice discourse, policies, and institutions. Empirically, the debate is focused on whether a norm-driven “justice cascade” exists and the conditions under which justice, specifically tribunals, can be most effective in establishing order and deterring atrocities. Some scholars contend that a “justice cascade,” i.e. a collection of norm-affirming events, has been facilitated by a transnational justice network and explains the surge in domestic human rights trials in response to atrocities. This theory builds on the aforementioned analysis of a norm life cycle and the role of transnational advocacy networks in developing human rights norms. The increasing reliance on human rights trials as an appropriate response to atrocities and as a mechanism to establish order is identified as part of a “broad shift in international norms towards greater protection of human

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In response to what they perceive as a “fundamentally flawed understanding of the role of norms and law in establishing a just and stable political order” among advocacy groups and constructivist scholars, Snyder and Vinjamuri alternatively contend that atrocities will only be deterred if “politically expedient bargains” are struck among contending groups prior to the institutionalization of justice norms. The empirical predictions of this argument are that amnesties, as opposed to tribunals, are sometimes necessary if the political context (i.e. weak institutions and strong spoilers) necessitates such a bargain. In sum, Snyder and Vinjamuri argue that pragmatic political interests (a logic of consequences) should take precedence over norm-guided behaviour (a logic of appropriateness) about justice if potential spoilers of peace are to be kept at bay, strong rule of law institutions are put in place, and atrocities then deterred.

The analysis in this dissertation makes several correctives to this debate and challenges the false dichotomies presented by Snyder and Vinjamuri in particular. First, the dichotomies of principles versus pragmatism, norms versus interests, and logics of appropriateness versus consequences are largely false, as scholars of the justice cascade have since refuted and as are explained by theories of norm diffusion. Constructivist scholars, by and large, have attributed causal significance to both logics and never discounted that actors can adopt norms instrumentally or for material interests, particularly for emerging norms in the early stages of socializing domestic actors. The aforementioned analysis of contestation between the international and domestic levels sufficiently accounts for the relevance of both logics. In what Finnemore and Sikkink refer to as “strategic construction,” “actors strategize rationally to reconfigure preferences, identities, or social context” and therefore “norms and rationality are intimately


141 These distinct behavioural logics have been most prominently described by March and Olsen.James G. March and Johan P. Olsen, “The Institutional Dynamics of International Political Orders,” International Organization 52.4 (1998).

connected." With respect to diffusion of norms between the international and domestic levels, Checkel argues that actors adhere to international norms out of societal pressure (instrumentally) and via elite learning (out of principle). Similarly, Cortell and Davis caution that “international norms can become salient in the domestic discourse by being linked to important material interests, but they are not easily reducible to those interests.” The mechanisms by which norms become salient generally accord with both rationalist and constructivist analysis of norm diffusion and socialization. And Acharya explains that while localization may be easier to explain from a rationalist perspective, “localization is not simply a pragmatic response …(it) also depends on its positive impact on the legitimacy and authority of key norm-takers, the strength of prior local norms, the credibility of local agents, indigenous cultural traits and traditions, and the scope for grafting and pruning presented by foreign norms.” Scholars of the “justice cascade” did not discount the presence of pragmatic interests, particularly with respect to the proliferation of domestic human rights trials: it is a “blend of principle and pragmatism that leads governments and militaries to conclude that if they are going to face trials, it is preferable to face them in their own country than abroad.” As the case studies in this dissertation will demonstrate, the decision-making for transitional justice does not discount the importance of pragmatic interests, which can affect the degree of a norm’s salience, the extent to which it can be feasibly implemented despite variations in capacity and interpretation. Dichotomizing whether actors behave in accordance with principles or pragmatic and material interests has little utility in explaining the causal effects and implications of these norms.

144 Checkel, "International Norms and Domestic Politics: Bridging the Rationalist-Constructivist Divide," 478.
146 The conditions and mechanisms include cultural match and four pathways of political rhetoric (i.e. “repeated declarations by state leaders on the legitimacy of the obligations”), domestic (material) interests, domestic institutions, and socializing forces (e.g. international organizations and transnational advocacy networks). Cortell and Davis Jr., "Understanding the Domestic Impact of International Norms: A Research Agenda," 73-83.
Second, the theoretical and empirical dichotomy of trials as justice versus amnesties as impunity does not accurately represent the scope or principles behind transitional justice practices. A “justice cascade” accurately explains the proliferation of domestic human rights trials but an analytical framework of a normative structure has a different purpose in that it explains normative consistency despite institutional variations in transitional justice. The previously described collection of interrelated norms in this normative structure reveal that there is not a single meta-norm of justice and policymakers do not face a choice of justice or impunity. The normative structure constrains and enables policymakers to conform to these norms in principle, but allows for a great deal of institutional variation that can consider various pragmatic concerns. Contra Snyder and Vinjamuri, states are not resisting a meta-norm of justice or tribunals, but rather they are engaging in normative contestation over the institutionalization of more specific norms and localizing them to suit their context. This is also not purely a matter of political bargaining among contending groups but about matching international norms with the local justice and socio-economic needs of a post-atrocity society.

Empirically, contrasting trials with amnesties obscures how these practices no longer easily conform to ideal-types and indeed work in conjunction with each other. The contemporary institutional design of tribunals, and transitional justice institutions more broadly, adhere to a norm of accountability that is inclusive of a range of sanctions and a norm of localization that includes many communal and restorative justice processes. With their empirical evidence of Latin America, Booth Walling and Sikkink refute Snyder and Vinjamuri’s claims about amnesties: “there is no evidence that amnesties are highly effective, because amnesties are almost a constant. It is difficult to untangle their impact from that of other transitional justice mechanisms.” Moreover, juxtaposing tribunals to amnesties ignores the distinction between blanket and self-granted amnesties as impunity and limited and conditional amnesties as accountability. Therefore, making these distinctions is important for determining the causal effects of transitional justice norms, as opposed to ideal-type institutions or processes, on political order and deterrence of atrocities.

To summarize, the causal effects of the normative structure of transitional justice can be measured in terms of the salience of its component norms in terms of discourse, institutions, and policies. But the salience of these norms does not discount the possibility that they will be poorly or unsuccessfully implemented because of institutional challenges and normative contestation. At this stage in the normative structure of transitional justice, in which the norms are in flux, it is important to distinguish between these implementation challenges in order to determine the direction of political change. The international normative structure of transitional justice is assessed here as constituting the third phase of this field, beginning in the mid-1990s until the present. The case studies selected for this dissertation span the period of nearly two decades and their decision-making and implementation stages overlap considerably and therefore this analysis puts forward the view that there is a dynamic, and not linear, progression of norm development in this field. This analysis seeks to make sense of the array of institutional variations and complex discourse in this period by highlighting the consistency with which transitional justice norms are salient within and across the cases and a stock-taking of their implementation, and thus to provide a validation of the significance of this normative structure that characterizes this period. The remainder of this chapter will detail the research design for this analysis, including the methodology and justification for the case studies selected to determine the causal effects of this normative structure and possibilities for political change.

RESEARCH DESIGN

The research design selected for this dissertation uses a process tracing methodology and a small-n approach for within-case and cross-case comparison of the salience and implementation of transitional justice norms that comprise the normative structure in three case studies: Rwanda, East Timor, and the International Criminal Court. Both Rwanda and East Timor have similar characteristics as case studies in that they are both post-conflict societies that have adopted a variety of transitional justice institutions. The ICC represents a different type of case study in that it is a single international transitional justice institution operating in numerous conflict and post-conflict contexts.
Methodology: Process Tracing

The combination of within-case and cross-case comparison to study the causal and constitutive effects of norms and structural change in transitional justice lends itself to a process tracing methodology. Process tracing is a form of causal analysis that “attempts to trace the links between possible causes and observed outcomes…to see whether the causal process a theory hypothesizes or implies in a case is in fact evident in the sequences and values of the intervening variables.” Among the many advantages of this methodology, process tracing is particularly suited to small-n studies where the researcher wants to increase the number of observations that can be made about both the mechanisms and outcomes. Therefore, this type of analysis is likely to induce stronger inferences because “more than one mechanism can be activated, and, within each mechanism, the relative strength of the explanatory variables may be unclear.” As such, process tracing can resolve a potential methodological pitfall in a small number of cases, namely there is the potential for a lack of independence between variables and cases; it “can inductively uncover linkages between cases and may thereby reduce the danger of any unanticipated lack of independence of cases.” This is particularly important for this study in which the overlapping temporal sequencing of various policy choices and outcomes, at both the international and local level, has had an effect on the choices made in other cases. As a corollary to this methodological safeguard, process tracing is “particularly effective at examining the kinds of detailed sequences in learning and diffusion processes than create relationships between cases.” As this study addresses transitional justice as constituting a collection of interrelated norms, which through their salience have causal and constitutive effects on policy-makers and institutions, process-tracing is particularly adept at explaining both consistency and divergent interpretations in the international normative structure.

152 King, Keohane and Verba, eds., Designing Social Inquiry: Scientific Inferences in Qualitative Research 228.
153 George and Bennett, Case Studies and Theory Development in the Social Sciences 33.
154 George and Bennett, Case Studies and Theory Development in the Social Sciences 33.
This methodology also allows for an exploration of the dynamics between the structure and the contextual differences that affect local expectations of justice. This alludes to a necessary trade off between parsimony in favour of “thick description” of each case study. For example, the extent and nature of atrocities committed, the degree of involvement by the international community, the political positioning of the transitional government(s) are all important considerations for how deep the impact the structure will have on the local level. Furthermore, process tracing recognizes that the relationship between the international structure and the local level is indeed dynamic. This analysis will uncover when and where there are feedback effects on the international structure from implementation and as a result of local demands and expectations, and successes and/or failures of implementing transitional justice norms.

The type of process-tracing that this analysis undertakes is to trace the trajectories of development in transitional justice discourse, policies and institutions, as opposed to tracing the motivations and cognitive framing of decision-makers. Tracing these trajectories not only serves to highlight the importance of the normative structure across diverse cases but also to makes sense of the institutional variations and different interpretations of this particular set of norms. This approach will be a major contribution of this study as past analyses of transitional justice have often failed to move beyond *sui generis* case studies of institutional designs and post-conflict contexts, and thus ignored the broader international normative and structural environment in which transitional justice practices are designed and justified.

Data for the case studies will be drawn primarily from the vast array of primary and secondary sources on transitional justice strategies and from the well established international relations literature on norm diffusion, which was previously referenced. While transitional justice is a relatively new field of research to the study of international relations, its empirical record has deep historical roots in comparative politics and has been studied by a variety of other disciplines and practitioners. The secondary literature is comprised of single case study analyses, and comparative studies from the perspectives of both international relations and international law. Single case study analyses offer the kind of rich historical narratives and detailed research data that will benefit an assessment of the contextual differences between the case studies. In addition to the secondary literature, information about how and
why transitional justice institutions were chosen, justified, and evaluated are drawn from published interviews and statements by political elites, and news reports, and practitioner surveys will be utilized.

Data is also drawn from some primary research and is used for the case study of Rwanda. A brief time was spent doing fieldwork on the transitional justice in Rwanda; this fieldwork comprised observations of local transitional justice strategies, and interviews with survivors, political elites, and representatives of various NGOs and research organizations. Fieldwork findings contributed significantly to framing the main transitional justice issues in Rwanda and for providing illustrative examples of context-specific challenges in this cases study, however, these findings are also compared and reinforced with secondary research. The comparative literature on transitional justice often provides new and interesting theoretical frameworks from which I can position my own contribution to the study of transitional justice and will also reveal some of the bases for contrasting contexts of the case studies.

**Case Selection: Contrasting Contexts**

There are three case studies selected for this research design, which represent two post-atrocity societies (Rwanda and East Timor) and one international organization (the International Criminal Court). Despite the availability of numerous cases of transitional justice institutions used in response to atrocities, there are a number of advantages to a qualitative small-n analysis. First, small-n analysis is useful for theory building. Scholarship in the area of transitional justice has been heavily empirical and few theoretical contributions have been made to explain these practices at an international structural level or to explain the normative conflict and changes amongst transitional justice institutions. Empirical studies have largely focused on a single country case or a type of institutional design. As the normative structure has both international and local implications for institutional design and expectations of accountability, it

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155 Fieldwork in Rwanda was completed in January and February 2006 and was funded by the Canadian Consortium on Human Security (Doctoral Dissertation Fellowship Programme). Approval was obtained in 2005, prior to this fieldwork, from the University of British Columbia's Behavioural Research Ethics Board prior.

156 Atrocity is a broad term of reference to mass violence that, as crimes, refers to acts of genocide, crimes against humanity and, to a lesser extent, war crimes. These types of atrocities are well defined under international law and have been recognized by national governments through the Genocide and Geneva Conventions.

is necessary to offer an analysis of how these varied but related practices fit together and how learning amongst them has created change. Furthermore, as the concept of normative structure is rarely used and has never been applied to the field of transitional justice it useful to employ a research design and case selection strategy that is more amenable to theory-building. Second, small-n analysis allows for the necessary detailing of the contextual differences between the cases. It is important to recognize that many transitional justice strategies are crafted from cultural traditions and individual lived experiences of violence. For example, many restorative justice practices are based on cultural traditions of dispute resolution, which involve community elders and symbolic offerings of compensation. While these types of institutions have been incorporated into the international normative structure of transitional justice, their origins are highly contextualized and locally legitimized. One of the goals of this analysis is then to incorporate these contextual differences into a broader analysis of how the normative structure has responded and adapted to them. Likewise, these contextual differences will be contrasted and compared with the high degree of consensus-building that has occurred concerning transitional justice.

Such small-n studies are often subject to criticisms of selection bias, which can occur “when cases or subjects are self-selected or when the researcher unwittingly selects cases that represent a truncated sample along the dependent variables of the relevant population of cases.”\(^{158}\) The relationship to be explained in this analysis is the dynamic trajectory in the normative structure of transitional justice over the past two decades with respect to the discourse, policies and institutions that are guided by its norms and therefore to trace the conditions under which the normative structure and individual institutions of transitional justice have become mutually prescriptive and constitutive. Thus in a research design such as this “it is sometimes appropriate to select on the dependent variable” where the variance is to be found in the independent variables or the processes by which the cases arrived at the expected outcome.\(^{159}\) It is precisely variance in the degrees of conflict between the international and local levels

\(^{158}\) George and Bennett, *Case Studies and Theory Development in the Social Sciences* 23.

\(^{159}\) George and Bennett, *Case Studies and Theory Development in the Social Sciences* 23, 80.
and institutional learning that will be used to understand the salience and implementation challenges of transitional justice norms.

The post-atrocity cases were selected in part because they demonstrate a variety of post-conflict contexts across time and space and subsequently variation in transitional justice processes. The array of institutions makes for a complex but fruitful comparison, but will reveal much more about the how the normative structure has been implemented. Both the cases of Rwanda and East Timor have several transitional justice institutions; Rwanda has a more traditional distinction between a retributive/international and a local/restorative practices while East Timor presents a more complex combination of institutional characteristics and judicial processes. Finally, the International Criminal Court is an international organization and permanent transitional justice institution. As it is meant to replace the types of ad hoc and country specific transitional justice institutions used in the other cases, it is considered a case on its own, and occupies a place of obvious relevance in identifying the structure and dynamics of transitional justice.

These case studies were also selected because their respective institutions represent important junctures in the evolution of the normative structure of transitional justice. The case study of Rwanda represents the re-internationalization of transitional justice since the first phase of the post-war years. The ICTR for Rwanda was one of the first exercises of international justice since Nuremberg, and both its successes and failures have been instructive for institutional learning. Moreover, the Gacaca courts, while local in origin, have been funded and sanctioned by the international community. They have been widely cited and scrutinized by scholars and practitioners who seek a better understanding of how such mechanisms can balance justice and reconciliation. However, Rwanda is a difficult case in this analysis because the initial decision-making for transitional justice occurred at the beginning of this phase of transitional justice but has continued throughout the last decade as the normative structure has evolved and its norms become more precise. The case study of East Timor is essential and unique as it presents us with the first officially United Nations mandated truth commission and an example of a hybrid court, which has become a popular substitute for ad hoc tribunals and even the ICC. Moreover, the purposeful complementarity between these institutions marked an important change in transitional justice practices.
Therefore, in terms of temporal sequencing this case study is fruitful because the choices made for Timor reflect a degree of institutional learning from past practices of tribunals and truth commission and, given the international community’s direct involvement in decision-making, is a useful case with which to assess the international-local dynamic of transitional justice norms. Finally, the ICC case study serves the purpose of investigating the claim that the Court’s principles and institutional characteristics reflect the cumulative experience of past and contemporary transitional justice approaches and that the ICC is thus an appropriate substitute for them. While the literature on the ICC and its first cases is vast, none have yet to assess the Court within the broader normative structure of transitional justice, despite the widespread recognition that the ICC represents the pinnacle achievement of internationalizing transitional justice. Merely focusing on the ICC as a stand-alone institution obscures its place in a complex and interdependent network of transitional justice norms and practices.

The combined used of within-case and cross-case comparison will show that the case studies individually reflect the salience of the four norms identified as part of the international normative structure by analyzing decision-making and subsequent policies and institutions of transitional justice. For Rwanda and East Timor, I will first address the nature of the atrocities and the political and demographic challenges of the post-conflict environment; these contextual characteristics often play a role in defining the range of options for transitional justice institutions. With respect to the ICC, I will begin with an overview of the development of the Court followed by brief summaries of the first situations under its jurisdiction. Each case study will then address several questions with respect to the salience and implementation of transitional justice norms, which will form the bulk of the analysis. First, what were the various options considered for transitional justice institutions and who were the main actors, both locally and internationally, that were influential in this decision-making process? To what extent were these decisions influenced by other cases of transitional justice, by local expectations and social or cultural norms of dispute resolution, and by international standards and institutions of human rights and criminal law? The analysis of transitional justice decision making with each case study will be structured around the four norms identified and will seek to first demonstrate their salience in terms of transitional justice discourse, and policies. Second, what were the processes and outcomes of
implementing these norms? To what extent have they faced institutional challenges, if not failures, and to what extent has there been normative contestation from inter-normative conflict, different interpretations, out-of-context application, etc. when they are part into practice? And do the various sources contestation suggest that a norm is eroding and considered impractical and/or inappropriate or has the contestation been resolved by re-interpreting the norm in new contexts? This second set of questions will also be addressed for each of the four norms comprising the structure and by evaluating their implementation. In addressing these questions I trace the causes and implications in the institutional trajectory of transitional norms across diverse and significant cases of atrocities accountability and over the period of two decades in which the international normative structure of transitional justice has emerged and evolved.
CHAPTER TWO

POST-GENOCIDE RWANDA

“I heard about reconciliation on the radio. But it won’t bring back my family members.”
-Rwandan genocide survivor

Post-genocide Rwanda has been politically reconstructed on pillars of unity and reconciliation that have been aided from the outside and imposed with from the top down. International and local transitional justice institutions for Rwanda seek to embody these pillars while meting out accountability for the extreme brutality of the 1994 genocide that produced high levels of victimization and perpetration. Rwanda “has received greater judicial attention than any other case of mass atrocity in recent history” and the international community has invested, to an unprecedented degree, in justice and human rights in Rwanda to prevent a recurrence of violence and foster reconciliation.¹⁶⁰ This case study presents two distinct transitional justice institutions: the International Criminal Tribunal for Rwanda (ICTR) and the domestic Gacaca courts.¹⁶¹ Both institutions have been individually researched, compared, critiqued, and lauded on their own merits and as models for judicial institutions in other post-conflict societies. But this analysis goes beyond past scholarship of transitional justice in Rwanda by explaining the consistency of transitional justice norms across these two institutions and by situating the Rwandan experience in the international normative structure of transitional justice. As such, understanding the causal effects of transitional justice norms in Rwanda is equally matched in importance by an understanding of how contestation and subsequent feedback effects on the structure have allowed it to evolve.

The case of Rwanda is instructive for this dissertation’s analysis in several respects. First, as the field of transitional justice began to emerge in the early 1990s, the various debates and negotiations following the 1994 Rwandan genocide to determine the most appropriate judicial responses represents


¹⁶¹ I recognize that the ICTR and Gacaca courts are not the only judicial response to the genocide; both the national court system and foreign courts have and continue to try elite perpetrators of the genocide. These processes and institutions will be addressed where appropriate but in much less detail. Both the ICTR and Gacaca courts represent transitional justice on a much larger scale and are considered the primary judicial institutions for the genocide.
one the first instances in which we can see how transitional justice norms were articulated and institutionalized. Given the timing of these judicial responses, there is undeniably a mutually reinforcing and evolving relationship between what the normative structure prescribed and what the local context in Rwanda necessitated. In other words, the contextual variables of Rwanda did not determine the normative structure in the early 1990s nor can international norms fully account for the institutional variations that followed. This is in large part because there is no single juncture at which transitional justice decision making began or has ended. Since the ICTR and Gacaca were first given their mandates they have undergone significant changes that over time illustrate a dynamic relationship between transitional justice practices in Rwanda and the international normative structure.

Second, the ICTR and Gacaca courts represent two distinct and influential models of transitional justice and together they are representative of the range of principles and processes in transitional justice. The ICTR, along with the ICTY, was one of the first international tribunals for atrocities since Nuremberg and is the first clear international departure from the norm of impunity for elite perpetrators that characterized past decades of transitional justice practices. The success and failures lessons of the ICTR would prove to be influential for the subsequent hybrid tribunals and the International Criminal Court. And despite its characterization as a localized approach to transitional justice, international transitional justice norms clearly influenced the policy-makers involved with the establishment of Gacaca courts. Moreover, international human rights advocates and foreign donors became heavily involved in designing, legitimizing, and criticizing Gacaca. The high-profile international scrutiny of Gacaca has had feedback effects on the normative structure over time, by redefining the meaning of transitional justice norms and retooling how they can be more effectively institutionalized. In sum, transitional justice norms were salient in that decision-makers were constrained and enabled by them in the initial decision-making phases and the causal effects are evidenced in discourse, policies, and institutions; yet lessons learned from contestation in the form of institutional failures, mechanisms of localization, etc. also had feedbacks on the normative structure and shaped its evolution.

This chapter will first proceed with a brief description of the 1994 genocide and an overview of the political, social, and judicial characteristics of post-genocide Rwanda. An analysis of the decision-
making for transitional justice for Rwanda will be structured around the four norms of the normative structure, i.e. a hierarchical division of criminality, accountability, localization, and reconciliation. The purpose of assessing the various inputs and outputs of decision making is to explain the decision-making dynamics between and among the international and local levels, how these norms are interrelated, and how they would come to shape the institutions that followed. The following section is devoted to the institutional designs and outcomes of the International Criminal Tribunal for Rwanda and Gacaca courts, with pointed references to the normative structure that informed their design and institutional successes and failure. The final section is devoted to identifying and explaining the implementation of the four norms of transitional justice and distinguishing between institutional failures and contestation.

**ATROCITIES**

The Rwandan genocide took place over one hundred days in the spring of 1994 and resulted in the deaths of approximately 800 thousand to 1 million Tutsis and moderate Hutus. Various macro-level factors including colonial policies, ethnic divisions, poverty and deprivation, and power struggles among political and military elites have been used to explain why and how the genocide was perpetrated.\(^\text{162}\) Ultimately, all of these factors played a role but their causal significance varied between regions and among individual perpetrators. In contrast to popular and journalistic narratives of violence, “the Rwandan genocide was neither an atavistic outbreak of recurrent African ‘tribalism’ nor a spectacular instance of state failure. Ethnic violence in Rwanda is a modern, sporadic, and mostly state-initiated phenomenon.”\(^\text{163}\) Nevertheless, while labelling the genocide as an “ethnic conflict” is a gross


simplification of the factors that mobilized and targeted Rwandans for acts of violence, it is fair to argue that Tutsis were collectively targeted for their ethnicity whereas Hutus were individually targeted for their political and social allegiances.

Prior to its colonization by Germany and then Belgium, Rwanda’s “ethnic” groups more accurately resembled distinct classes of agriculturalists and cattle herders – the former as Hutus and the latter as Tutsis. The Tutsis have always been a small minority of the population – approximately ten per cent. These social identities were mutable and fluid – acquiring wealth meant one could become a Tutsi and marriages between the groups were common. Yet, historical myths of the different ethnic origins of Hutus and Tutsis persisted despite a common culture and language. The Belgian colonial administration transferred legitimate authority to the Hutu elites prior to Rwanda’s independence in 1962, owing to a belief that power in the hands of the majority would ensure stability in Rwanda. Mobilized by the fear that Tutsis would continue to politically and economically marginalize Hutus and eventually render them extinct, radical Hutu extremists under called for the extermination of all Tutsis and those moderate Hutus opposed to the government. Tens of thousands of Tutsis subsequently fled to neighbouring countries, most notably Uganda, after successive waves of violence in 1959, 1963, 1982, and the early 1990s. A rebel movement named the Rwandan Patriotic Front (RPF), well trained and with strong leadership from their experiences in the Uganda military, formed in 1987 among these refugees in Uganda and its primary purpose was to seek the forced repatriation of Tutsis back into Rwanda. The radical elements of the Hutu

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164 For example, the of-cited Hamitic hypothesis is that Hutus are indigenous to the territory and Tutsis are descendents of northern Hamites from Ethiopia. This hypothesis also aided the stereotyping of differences in physical appearances between Hutus and Tutsis, i.e. that Hutus are dark skinned, short and stocky, broad nosed, etc. and Tutsis as light-skinned, tall and thin, and slender noses, etc.

165 Tutsis were systematically privileged in nearly every aspect of society (except religion) and identity cards were issued to clearly distinguish Hutus from Tutsis. This colonial privileging of Tutsis was made more controversial by the fact that Tutsis represented approximately ten per cent of the population as compared to the nearly ninety per cent that were Hutu.

166 The radicalization of Hutu political elites had begun prior to independence, as was evidence in a 1957 Hutu Manifesto expressing violent hatred towards Tutsis, warnings for Hutus against contact with them, and argued for their elimination.
government in Rwanda continued to organize an elaborate propaganda campaign that demonised and the dehumanised Tutsis. Battles between RPF and government forces constituted a de facto civil war by the early 1990s; the RPF’s periodic attacks and advances into Rwanda heightened fears among Hutus that Tutsis sought control over Rwanda’s territory and, if successful, would violently subjugate Hutus to their rule once again.\textsuperscript{167} In 1993, President Juvenal Habyarimana reluctantly entered into peace talks with the RPF to end the civil war, but radical elements inside his government had no intention of ending the war or of power-sharing with Tutsis. A ceasefire was agreed to by the warring parties as part of the Arusha Agreement and a UN peacekeeping force, the United Nations Assistance Mission in Rwanda (UNAMIR), was deployed under the leadership of General Roméo Dallaire with a limited mandate to monitor the cease fire and implementation of the peace agreement. A plane crash that resulted in the death of President Habyarimana on April 6\textsuperscript{th}, 1994 triggered the beginning of the genocide.\textsuperscript{168} The atrocities began in earnest and spread throughout the country. Atrocities were concentrated in the centre and south of the country, whereas the north experienced less violence owing to a smaller Tutsi population there and a rapidly advancing RPF military campaign, replete with its own atrocities, against the Rwandan government from the north.

The scale of atrocities was staggering with a death toll of approximately eight hundred thousand and hundreds of thousands of perpetrators. Among those killed, nearly seventy-five to eighty per cent were males and approximately three-quarters of the Tutsi population were eliminated. The killings initially targeted moderate Hutus, especially in Kigali, in order to eliminate those in positions of authority to prevent or curtail the genocide. But much of the violence targeted Tutsis as an ethnic group. Tutsis were easily identified because they were known to be Tutsi by their neighbours, they had identity cards

\textsuperscript{167} In addition to this violence, insecurity, and political oppression, Rwandan had been plagued with cycles of famine and extraordinarily high population increases since independence. Famines followed after every political upheaval and the fall of coffee prices and a drastic decline in cash crop exports in the late 1980s resulted in the imposition of harsh structural adjustment programs. These environmental and social pressures further inflamed fears that socio-economic differences between ethnic groups would correlate to violent repression.

\textsuperscript{168} No individual or party has ever been tried or indicted for shooting down the President's plane. Some argue that Hutu extremists carried out this attack to trigger the genocide. Other argues that the RPF is responsible, which Kagame categorically denies, and that members of the RPF should be charged for committing a war crime for this act.
stating their ethnicity, and lists of names had already been drawn up and were distributed at the local level. Acts of individual and mass violence were often horrific, graphic, and public. Guns were used sparingly to create control and establish authority and the vast majority of the killing was done by machete or other crude implements. Those who were not killed openly on the streets were slaughtered en masse in churches and schools or individually in their own homes. Sexual violence was committed against most Rwandan females, regardless of their ethnicity, and Tutsi women were targeted for their ethnic features and reproductive organs. The genocide ended after one hundred days with the capture of Kigali by the predominantly Tutsi RPF, under the leadership of the current President of Rwanda, Paul Kagame. The RPF considered this a victory over the both the civil war and the genocide.

The elite perpetrators of violence consisted of the Rwandan army, the Forces Armées Rwandaises (FAR), and many key political and military figures centralized in Kigali and spread throughout the country. The FAR was able to ensure that every cell (the smallest unit of administration in Rwanda) received a gun; they mobilized every unit of authority in the country and trained death squads.\textsuperscript{169} If there was a central commander in the violence it was Colonel Théoneste Bagosora (head of the Presidential Guard) who took military control of the country after the death of President Habyarimana.\textsuperscript{170} Other actors located in Kigali orchestrated extensive propaganda through the media, most notably the extremist radio station, Radio-Télévision Libre des Milles Collines (RTLM).\textsuperscript{171} RTLM was responsible for inciting violence with its programming and going as far as listing the names and locations of Tutsis and giving detailed instructions on how to inflict grotesquely violent acts on them. Many of those in positions of authority throughout the country, such as political leaders, educators, and religious figures, orchestrated and facilitated the genocide in their local communities. The combination of these actors reveals that the violence was hierarchically and systematically organized. Investigations carried out after the genocide

\textsuperscript{169} Pottier, Re-Imagining Rwanda: Conflict, Survival and Disinformation in the Late Twentieth Century, 31.

\textsuperscript{170} Immediately following the death of the President Habyarimana, the country was technically headed by Prime Minister Agathe Uwilingiyimana but she was killed along with her husband shortly afterwards.

\textsuperscript{171} For more detail and analysis of the role of media in the genocide, see, Allan Thompson, ed., The Media and the Rwandan Genocide (London: Pluto Press, International Development Research Centre (IDRC), and Fountain Publishers Ltd., 2007).
quickly revealed that these elite perpetrators carefully planned and organized the genocide and that it was not spontaneous ethnic violence.

In addition to the important role played by central military and political figures, the genocide could not have been carried with such efficiency and scope without the active and popular participation of “ordinary” Rwandans, ranging from those in positions of authority at the community level to peasants. Many of these ordinary Rwandans were non-elite Hutus who did participate in the violence but to varying degrees. As a Rwandan human rights researcher explained, there were four types of Hutus during the genocide: leader perpetrators, follower perpetrators (or “joiners”), those who were indifferent or complicit, and those who opposed the genocide and/or rescued Tutsis. It was extremely difficult for Hutus to be indifferent, complicit, let alone opposed, as doing this would make them a target for their alleged Tutsi sympathies. The “followers” were numerous and came in many forms. At the top of the hierarchy of “follower perpetrators” was a radical Hutu youth paramilitary group known as the Interahamwe, meaning “those who stand together.” The role of the Interahamwe was to whip up the genocidal motivations of Hutus in every community with propaganda, intimidation, and threats, and to direct and participate in the violence themselves; they were often imported into communities where there were too few willing participants in the violence. Therefore, while in some communities victims and perpetrators knew each other as neighbours and friends, much of the violence in Rwanda was not “intimate” in the sense that the victims knew their killers.

Among those who followed behind the Interahamwe and authority figures in their community were ordinary civilians, many of them farmers from the rural hills of Rwanda. Some of these civilians

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172 The vast majority of Rwandans are classified as peasants, i.e. those in rural areas, living off of subsistence agriculture, and mostly illiterate.


175 The Interahamwe had a striking presence in communities, with their garish clothing, chanting of propaganda, and barbaric violence. Those recruited into this group were primarily youth with few socio-economic opportunities.

actively and enthusiastically participated in the killings and needed no further convincing of the Tutsi “threat” and need for elimination. But many Hutus participated for other reasons. There were material rewards to be reaped for the violence, primarily by looting the property of victims, and those who killed in the highest volumes and with the most enthusiasm would benefit the most. The stories of perpetrators who have recounted their experiences after the genocide reveal the myriad of individual and communal motivations for committing atrocities. That many perpetrators referred to the killings as “work” and comparisons of the efforts to manual labour gives some insight into their mindsets and the sense that this was both a civic obligation and a means to an end. Another oft-cited motivation among ordinary Rwandans was deference to authority and the fear of punishment if orders were not carried out. Killing was framed by the authorities as a civic obligation, similar to the practice of umuganda that required Rwandans to participate in communal projects on a weekly basis. Many Rwandans will themselves admit, and was commented on to the author in interviews with survivors, that it is a prominent cultural norm to be extremely obedient to authority.\textsuperscript{177} The argument that obedience to authority was alone was enough reason to incite Hutus to kill is insufficient and does not account for the many Hutus who disobeyed orders, but is an oft-referenced factor among many perpetrators explanations as a means to lessen their responsibility.

Several scholars have provided a more nuanced analysis of why ordinary Rwandans participated in the genocide.\textsuperscript{178} These analyses discount the role of ethnic fears or hatreds as catalysts for the genocide and provide a more contextual explanation for the motivations of individual perpetrators; ethnicity had a more functional role in that it played a part in drawing up lists of those to be killed, the use of identity cards, and local knowledge of identities enabled perpetrators to know who their targets were supposed to be. But with extensive fieldwork both Straus and Fujii found other variables to explain the individual pathways to participation in genocide. Straus argues that intra-ethnic coercion was a motivating force that

\textsuperscript{177} Various fieldwork interviews conducted in Rwanda in January/February 2006.

\textsuperscript{178} Fujii, \textit{Killing Neighbors: Webs of Violence in Rwanda}, Straus, \textit{The Order of Genocide: Race, Power, and War in Rwanda}.
gave ordinary Hutus few options.\textsuperscript{179} Also contrary to the simplistic causal assumptions of ethnic hatreds arguments, Fujii reveals that “exigencies of war”, interpersonal greed and jealousy, and a contaminating logic of group participation, in which “killings produced groups and groups produced killings,” were all more prevalent than overwhelming ethnic fears or hatred of Tutsis.\textsuperscript{180} The role of ethnicity was state sponsored at an elite level, she argues, and was used strategically by state and local leaders to consolidate power through genocide and created “scripts” for violence that ordinary Rwandans were compelled to act out.\textsuperscript{181} In sum, there are no simple causal pathways to explain why so many ordinary Rwandans participated in such extreme violence. Individual communities experienced the genocide according to their own historically rooted logics of interactions, relation to the state, and interpersonal understandings of identity. As this discussion denotes, the range of motives and degrees of criminal perpetration would be a significant challenge for justice in post-genocide Rwanda.

The significance of these complex pathways to violence later revealed themselves in the post-genocide justice institutions and policies, which have unsuccessfully tried to force a single narrative of the genocide and simplify the role of ethnic hatreds. Also, the recognition that so many ordinary Rwandan participated as perpetrators, but that ultimately the genocide was systematically and systemically organized at an elite level, necessitated an organizing logic to post-genocide judicial institutions that could deal with such a high volume of cases and mete out accountability in various forms. Moreover, ensuring that ordinary Rwandans could coexist in communities that were divided and reconstituted by the genocide meant that any judicial response, at least at the national level, would have to engage with and be perceived as legitimate by local communities. As much as the characteristics of the genocide have informed choices for transitional justice, so too do the characteristics of post-genocide Rwanda. I will now turn a brief overview of the demographic, socio-economic, and political transformations that have beset Rwanda since 1994 and influenced the context in which transitional justice institutions were negotiated and designed.

\textsuperscript{179} Straus, The Order of Genocide: Race, Power, and War in Rwanda.
\textsuperscript{180} Fujii, Killing Neighbors: Webs of Violence in Rwanda 101, 28.
\textsuperscript{181} Fujii, Killing Neighbors: Webs of Violence in Rwanda 12.
POST-GENOCIDE RWANDA

Post-genocide Rwanda has faced enormous obstacles of recovery. In addition to the extensive physical destruction of the country, in terms of agricultural land, infrastructure, and so on the social fabric of Rwandan society was forever altered by the violence. The nature of population displacement and that perpetrators and survivors continue to live side by side in their communities are two defining features of Rwandan society and have reconstituted identities. Notably, the close proximity and shared social space of survivors and perpetrators has made justice and reconciliation a necessity to prevent instability. The demographic changes produced by the genocide and subsequent outflow of Hutus, inflow of Tutsis, and eventual return and reintegration of both groups, upset the social order of rural and urban Rwandans, and redefined the political space in which reconstruction, justice, and reconciliation was to take place.\textsuperscript{182}

Post-Genocide Social Demography and Identity

The RPF’s advance into Rwanda and takeover of Kigali in 1994 enabled the return of Tutsi refugees who had been displaced in the Great Lakes region and prompted the flight of two million Hutus en masse to neighbouring countries, primarily the Democratic Republic of Congo (DRC - formerly Zaire) and Tanzania, fearing reprisals from the advancing RPF and Tutsi returnees. Among these refugees were the Hutu extremists who had planned and orchestrated the genocide, and who subsequently continued to spread their extremist and anti-Tutsi ideas and behaviour and militarized the refugee camps.\textsuperscript{183} Most Hutu refugees returned to Rwanda after 1996 but many of the \textit{genocidaires} have remained in the DRC; their


\textsuperscript{183} The international community was heavily criticized for providing aid and protection to the genocidaires and many aid organizations eventually left out of frustration. The French government was also heavily criticized for its \textit{Operation Turquoise}, and going "out of its way to provide a protective corridor to save those politically responsible for the genocide in Rwanda." Mamdani, \textit{When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda} 254-55.
presence there and protracted impunity has brought continued conflict within the DRC and between the 
DRC and Rwanda.\textsuperscript{184}

The exile and return of displaced persons created significant shifts in the social demography of 
Rwandan communities and the political and economic distributions of power on all levels. These Tutsi 
returnees had spent generations living outside of Rwanda, are English speaking, and were not present in 
their homeland during the genocide. Thus, this group is distinct from those Tutsis who are considered 
“survivors” or living victims, are francophone, and were present in Rwanda during the genocide and 
therefore have experienced the physical and emotional trauma of the violence. Mamdani explains how the 
Government of Rwanda (GOR) has “adopted a ‘genocide framework’ from which to categorize the 
population politically” as refugees, returnees, victims, survivors and perpetrators.\textsuperscript{185} These identities 
correlate with the historically significant displacement of Hutus and Tutsi populations and their role in the 
genocide, and there is also a correlation between pre-genocide ethnic identities and post-genocide 
political identities. In addition to the aforementioned categories of refugees and returnees, the different 
identities of victims, survivors, and perpetrators are politically significant. Both Hutus and Tutsis who 
perished during the genocide and the political repression that followed are considered \textit{victims}. However, 
only living Tutsis are considered \textit{survivors}, as it is assumed that Hutus were not widely targeted and those 
who opposed the genocide were killed.\textsuperscript{186} As was explained to the author in an interview with a survivor 
and human rights researcher, the corollary to this assumption is that living Hutus today in Rwanda are 
“seriously suspected” of being genocide perpetrators.\textsuperscript{187} “Survivors” and “perpetrators” are not 
anonymous or generic categories to most individuals who live in close proximity to each other and 
participate in communal activities with those who they personally victimized or were victimized by. This 

\textsuperscript{184} The Government of Rwanda continues to seek the arrest and detention of all those suspected of participating in 
and masterminding the genocide and has pursued this strategy in the DRC through military means, thereby greatly 
contributing to regional insecurity.

\textsuperscript{185} Mamdani, \textit{When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda} 266.

\textsuperscript{186} Mamdani, \textit{When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda} 267.

\textsuperscript{187} The term "seriously suspected" was referenced and explained to the researcher during a fieldwork interview in 
Rwanda in 2006. The term was used in reference to Hutus that were technically considered innocent until proven 
guilty, but in reality all Hutus were "seriously suspected" of committing acts of genocide.
has fostered enormous insecurity and fear at the communal level where justice has been most controversial and reconciliation most unlikely. This local dynamic became part of the justification for trying perpetrators in communities and the initial focus on reconciliation over punishment.

**Post-Genocide Politics**

The post-genocide governance has been dominated by members of the RPF and its leader, President Paul Kagame. After several years of failed power sharing arrangements, the RPF effectively seized control over all political institutions and positions of leadership and Kagame was promoted as President in 2000. The first local elections were held in 2001 and presidential elections in 2003 (the end of the transition) and 2010; President Kagame received 95% and 93% of the vote in these elections respectively amidst international criticism of high levels of intimidation, voting irregularities, and repression of opposition, civil society and media. The RPF has continued to eliminate any significant opposition to its party and leadership of Kagame; the recent defections of military and political elites and their exile indicate that dissent is growing within the RPF over Kagame’s centralization of executive authority. The RPF’s strategy for banning opposition and quelling dissent, particularly parties whose support is aligned with Hutu populations, is to accuse parties and individuals of harbouring a “genocide ideology” and fostering “ethnic divisionism”; the GOR enacted legislation that made these criminal offenses in 2008.\(^{188}\)

Since its election in 2003, the RPF-led government has faced opposition from survivors of the genocide who continue to feel marginalized and dispute some of the government’s approaches to justice and reconciliation. Waldorf provides a list of four issues that have created tension between the government and survivors:

- they opposed the reintegration of suspected genocidaires into the government and military; …some of their (survivors’) associations objected to the government’s policy of publicly displaying skulls, bones, and corpses at genocide memorial sites, in violation of Rwandan religious and cultural traditions; …Tutsi survivors’ organizations publicly

disagreed with the government over how to commemorate the genocide; finally, Tutsi survivors complained about the lack of reparations.\textsuperscript{189}

Political and socio-economic differences between the Tutsi returnees who make up the Kigali elite and RPF government and the Tutsi survivors in Rwanda continue to grow, exacerbated by transitional politics and justice. Therefore, tensions in Rwandan cannot be simply classified along ethnic lines. While Hutus have certainly been marginalized by the government, there is also a considerable rift between the Tutsi governing elite and the ordinary Rwandans who constitute the survivors of the genocide.

The GOR promotes a unity and reconciliation agenda that is primarily overseen by the National Unity and Reconciliation Commission (NURC).\textsuperscript{190} The NURC orchestrates various “reconciliation tools” that range from community based initiatives, education forums, memorials, and justice initiatives. Some observers have been impressed by the NURC’s impact on education and attempts to eradicate biased curriculum and have lauded electoral outcomes that have seated women in over fifty per cent of parliamentary posts. However, many of the education and peace and conflict management programmes have been controversial to those who have critically evaluated the government’s policies and have cited the NURC as an authoritarian bureaucracy that indoctrinates and represses Rwandans into a false sense of unity.\textsuperscript{191} These political policies have gone hand-in-hand with military and violent responses to suppressing dissent and enforcing unity.

One important aspect of the government’s unity and reconciliation agenda is enforcing the post-genocide erasure of ethnic identities from the public sphere. The government’s conceptualization of “unity” is grounded in a rigid interpretation of history, in which Rwandans were united in pre-colonial times based on linguistic, clan, and socio-economic ties, and a narrative of the causes of the genocide, which finds fault with colonial and post-colonial political elites who respectively created and manipulated


\textsuperscript{190} The NURC consists of three structures: the Department of Civic Education; the Department of Conflict Management and Peacebuilding; and the Department of Administration. See, www.nurc.gov.rw

It follows then, that the government’s conception of unity precludes ethnic identities and enforces cohesion and a homogeneous identity of “Rwandaness.” It is considered by authorities to be divisive to use ethnic identities and those that do are also accused of harbouring a “genocide ideology.” Nonetheless, ethnic identities in Rwanda are still very much a reality in local communities and continue to define differences in socio-economic opportunities between Hutus and Tutsis, and among Tutsis. As Reyntjens explains, “while it officially rejected ethnic discrimination and even the notion of ethnicity, the RPF rapidly reserved access to power, wealth, and knowledge to Tutsi.”

The public elimination of ethnic identities renders it difficult for researchers and human rights advocates to voice concern over the characterization of the government as a Tutsi ethnocracy and the GOR’s privileging of Tutsis returnees in the political and economic spheres. The vast majority of the population – Hutus – are collectively considered a guilty majority and are being ruled by an “aggrieved and fearful minority” of Tutsis. Power sharing between these two groups is not considered an option by the ruling elite who have deprived Hutus, and anyone who openly opposes the government irrespective of their ethnic identity, of their political and civic rights.

Accusations of the GOR as creating a semi-authoritarian state and a repressed civil society have long been present but have not been heavily criticized by foreign governments or donors, with the exception of the intensified focus on the 2010 presidential election. Foreign governments, the international media, and donors have easily bought into the GOR’s unity and reconciliation agenda for several reasons. The GOR’s self-characterization as the victors of war and liberators of Rwanda plays upon the international community’s guilt for failing to curb the genocide. Furthermore, the government’s


194 Mamdani, When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda 266.

narratives on the causes of the genocide and the persistent threat of a genocide ideology serve to justify its heavy handed policies of unity and reconciliation that, not coincidentally, allows the RPF to centralize and strengthen its power. As Des Forges and Longman argue,

RPF leaders have a strong sense of their own moral rectitude and great certainty of their right to rule… the regime has frequently invoked the genocide to deflect responsibility for its own human rights abuses, claiming that protecting against future genocide requires extraordinary means, a position which leaders of many other governments, shamed by their own failures during the genocide, have been willing to accept.\textsuperscript{196}

Finally, the GOR’s public commitments to democracy, ending impunity, building the rule of law, and their legitimately impressive improvements in rebuilding the economy and some social sectors, have the international community extolling praise and funneling money toward investment and infrastructure projects. Yet civil society remains severely repressed, media is heavily controlled by the government, political opposition and public dissent is likened to genocidal ideology, and unity and reconciliation is enforced at the expense of truth and justice.\textsuperscript{197}

**Post-Genocide Justice**

In addition to the illusive transition to democracy, Rwanda has also struggled to rebuild its judicial system and the rule of law. Post-genocide, Rwanda’s fledgling judicial system was all but destroyed in terms of personnel and infrastructure. The judiciary was a primary target in the violence and the genocide eliminated all but 244 out of a previous 750 judges, with many of the survivors fleeing into exile and only a handful of prosecutors remaining.\textsuperscript{198} The former government “destroyed what it could not take with it out of the country” leaving behind destroyed courthouses and offices stripped bare of everything from computers to legal texts to pens and paper.\textsuperscript{199} By 1996 there was still an “absence of a functioning police and judiciary, (and) Rwanda’s army was making sweeping arrests, in theory to ensure

\textsuperscript{196}Des Forges and Longman, "Legal Responses to Genocide in Rwanda," 61.


\textsuperscript{198}Neuffer, The Key to My Neighbor's House: Seeking Justice in Bosnia and Rwanda 257.

people did not take vengeance into their own hands. An assessment completed by UNHCHR’s field office in Rwanda in 1996 revealed the scope of the impact of the genocide on the penal system as well; state prisons and local detention centres were vastly overcrowded, resulting in high rates of disease and mortality. Many of those in detention had been arrested based on accusation alone and had no case files. In the first few years following the genocide, approximately 70,000-100,000 Rwandans were put in prison upon suspicion of genocide crimes and it is now estimated that there are between 700,000 and 1 million Rwandans accused as perpetrators. It was clear that the national court system, even if revived to maximum efficiency and professionalism, would not be able to process such a high case load. Furthermore, retaining such higher numbers of suspects in overcrowded and dilapidated prisons quickly became a human rights concern for the international community.

The national court system became consumed with a rehabilitation that would cost tens of billions of dollars. In addition to replacing physical resources, there was a mass and accelerated training of legal staff, lawyers, judges, and gendarmes and communal police to prepare for the large case load of genocide suspects. The international donor community contributed vast amounts of support and resources to rebuild Rwanda’s judicial sector, ranging from the facilitation of justice workshops and training programs, to the provision of office supplies, vehicles and legal texts, to rebuilding infrastructure, and to budgetary support.

The post-genocide political and social environment in which decisions about transitional justice would be made by domestic and international policy-makers does highlight a number of important

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200 Neuffer, The Key to My Neighbor's House: Seeking Justice in Bosnia and Rwanda 257.


202 {NOTE: There is no consensus on precisely how many perpetrators there are. The GOR regularly cites the estimate of 1 million which comes from the number of cases processed in Gacaca. However, an individual can be charged in several cases and therefore the number of perpetrators is actually lower than the number of cases. Other estimates put the number at 700,000 or even as low as 400,000 as processed in Gacaca, and the estimates vary from there to include those perpetrators who have either died or not been dealt with in the courts.}

203 Major donors and participants in rebuilding the justice sector included various UN agencies (e.g UNDP, HRGOR, UNHCR, UNICEF, etc.); the European Union and individual European states, Canada, United States, and a variety of human rights and legal NGOs. See, United Nations Office of the High Commissioner for Human Rights (UNHCHR), The Administration of Justice in Post-Genocide Rwanda 6.
contextual variables. First, Rwanda has made a tentative transition from violence to peace but it has not made the transition from authoritarianism to democracy. The Rwandan decision-making elite, while cognizant of and constrained by international norms, are equally limited by their own heavy-handed unity and reconciliation policies that frame every institution and form of political behaviour in Rwanda. Similarly, international policy-makers have been reluctant to challenge the GOR’s policies of unity and reconciliation, within which justice is the most important pillar, which therefore allowed for transitional justice norms to become localized and to take various institutional forms. Second, changing social demographics in Rwanda, a large case load of suspected genocide perpetrators, and an incapacitated justice system legitimized seeking out a broader array of justice mechanisms. Given these domestic variables, the justifications for the chosen transitional justice institutions would reflect a blend of justice principles and pragmatic compromises. The influence of these domestic variables has not been static over time, however, and the influence of context-specific variables in decision-making for Rwanda demonstrates a dynamic relationship with the international normative structure of transitional justice.

THE SALIENCE OF TRANSITIONAL JUSTICE NORMS

This section of the chapter measures the salience of transitional justice norms at the decision-making stages of designing transitional justice institutions for Rwanda, in terms their effects on the discursive aspects of negotiations, policies, and initial mandates for institutions. In Rwanda’s case, transitional justice decision-making was a dual and disjointed process between the international community and local actors, differentiated by UN investigations and decisions for an international tribunal in 1994-1995 and local decisions for the Gacaca and national courts in the mid to late 1990s. This adds a considerable degree of complexity to measuring salience, because some norms were salient for decision-making at the local level but not at the international, or vice versa. But over the course of many years since the mid 1990s, the institutional trajectories of both the ICTR and Gacaca courts have been altered by the accommodation of local and international variables and expectations of justice respectively - the full extent to which is more evident with the discussion of implementation. The temporal period in which transitional justice institutions were designed and implemented for Rwanda
provides for a difficult but fruitful measurement of the salience of transitional justice norms. As I contend that the origins of many of these have deeper historical roots than the mid 1990s (but it is beyond the scope of this analysis to systematically trace these origins) and that the international normative structure constitutes this time period of the last two decades, the case study of Rwanda is one of the first transitional justice contexts that demonstrates the varying degrees of salience of these norms in the decision-making phases and throughout the evolution of its institutions.

After the genocide ended, the United Nations was quick to dispatch investigators and experts to Rwanda with the purpose of uncovering the causes of the genocide, assessing Rwanda’s short and long term peacebuilding needs, and assigning responsibility for the crimes committed. Given the lack of judicial capacity and precarious political and social stability in Rwanda, the early stages of decision-making were dominated by the international community, specifically the United Nations, and focused exclusively on the need for an international tribunal. As it had been done for many cases of contemporary mass violence, the United Nations assigned a Special Rapporteur (in this case - Mr. René Degni-Segui) and an impartial Commission of Experts to investigate the causes and consequences of violence, and make recommendation for post-conflict peacebuilding. As will be shown below, the Special Rapporteur’s and Commission of Experts’ reports were very influential in the subsequent justifications for an international tribunal and spurred controversy over the scope of responsibility for the atrocities.204 Therefore, the agency of the United Nations in promoting the emerging transitional justice norms stands well above those political elites at the domestic level, at least in these early years. Various foreign governments were also involved in post-genocide Rwanda as donors and peacebuilders; donor support was a critical and controversial factor in the rehabilitation of Rwanda’s justice sector.

The subsequent decision regarding who had the capacity to hold genocide perpetrators accountable was straightforward; the national court system in Rwanda would have to carry its share of

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cases but it was obvious to both domestic and international actors that an international court was needed. The institutional design and judicial principles that would guide transitional justice in Rwanda, however, was much more contentious. Rwanda’s new leaders were by no means passive recipients of international aid and advice on transitional justice by the mid to late 1990s; the transitional government was quick to begin to arrest genocide perpetrators and develop judicial responses that ultimately became a delicate balance of what international norms prescribed and what local realities required. The first Organic Law for genocide was passed in 1996 and meetings held at Village Urugwiro in 1998 to 1999 lay the main groundwork for Rwanda’s domestic efforts at accountability for genocide and crimes against humanity. Village Urugwiro is the location of the President’s official residence, and these meetings were “reminiscent of national conferences held a decade earlier in a number of African countries, and brought together several hundred government, business, academic, and civil society, and religious leaders to strategize for the country’s future.”

Evidence of the salience and causal effects of transitional justice norms is drawn from the aforementioned initial investigations and meetings carried out by the United Nations Rwandan authorities and various secondary sources that have also analyzed elements of these decision-making dynamics. The norms exhibit varying degrees of salience in Rwanda. The hierarchical division of criminality norm has a high degree of salience as the organizing logic of the ICTR and Gacaca’s prosecutorial strategies reflects the norm’s prescription for the institutional division of labour between elite and low-level perpetrators. Evidence for the salience of the punitive sanctions aspect of the accountability norm is strong in regards the international and domestic discourse of justice and clearly the Tribunal’s mandate reinforces this. The debates and subsequent policies and institutions at the domestic level, however, reveal that the accountability norm was also somewhat salient with respect to non-punitive sanctions. The expressed justifications for limited and conditional amnesties and reparations reveal the increasingly international


legitimacy accorded to such non-punitive sanctions as form of accountability. The localization norm, however, was initially salient at the local level but not internationally until later in the Tribunal’s work. Finally, the salience of the reconciliation norm is most evidence in the discourse of justice among Rwandan decision makers but also notably enters the international discourse more prominently than in the past. This chapter will now proceed with a discussion of salience followed by implementation challenges and this organization accords generally with the temporal order of decision-making through to institutionalization and outcomes; each of these two sections is structured around the four individual norms of transitional justice.

Hierarchical Division of Criminality

The hierarchical division of criminality norm prescribes an institutional division of labour that reflects legal and social distinctions between degrees of perpetration. International decision-making for Rwanda focused exclusively on setting up an international tribunal to try those most responsible for the genocide. Rwanda was not the first case in which it was considered appropriate for an international court to focus exclusively on elite perpetrators. The Nuremberg and Tokyo trials pursued this prosecutorial strategy and after several decades in which international justice was all be absent, the United Nations mandated the ICTY to focus on those most responsible. The salience of the hierarchical division of criminality norm is evident in part to the extent to which the ICTR adheres to this strategy. But this norm also prescribes the masses of low-level perpetrators also be held accountable as complementary to an international court, and thus the subsequent institutional division of labour is important. Therefore, the salience of this norm in Rwanda is only fully revealed when also analyzing the domestic Organic Laws – the organizing mechanism by which the vast majority of perpetrators would be categorized and processed. Rwanda’s schematic organization, which reflects legal and sociological understandings of how violence is systemically and systemically perpetrated, demonstrates that both international and local expectations of what constitutes an appropriate prosecutorial strategy is influenced by and shapes the hierarchical division of criminality norm.

What markedly differentiates the efforts by international and national decision-makers to categorize criminality is a distinction between the horizontal (i.e. the breadth of elite perpetrators across
various positions of authority) and vertical scope of criminal responsibility (i.e. the depth of criminality responsibility that extends to low-level perpetrators). International investigations and recommendations focused on determining who was most responsible, but made a specific point of articulating that the breadth of such responsibility extended to all parties to the conflict and individuals in various types of positions of authority. While acknowledging that many ordinary Rwandans participated in acts of genocide, at the time it was not conceivable for such investigations to determine the nature or depth of such perpetration. Alternatively, Rwandan authorities could not be as dismissive of the vertical scope of criminal responsibility and therefore developed a scheme reflecting the social and legal distinctions among perpetrators. While the salience of the hierarchical division of criminality norm is reflected in the institutional division of labour that resulted from these decisions, interpretations of the distinctions between the horizontal and vertical scope of criminality would later prove to be a significant source of normative conflict.

**The Horizontal Scope of Criminal Responsibility**

Both the Special Rapporteur and Commission of Experts confirmed that the mass violence in Rwanda constituted genocide, and that crimes against humanity and war crimes were also committed by both sides. The Special Rapporteur submitted two reports on his findings: the first report “confirmed the responsibility of the Hutu Interahamwe, and impuzamugambi militias and the ‘interim’ government of Rwanda” that was established after the genocide ended; the second report assigned responsibility also to RTLM and the former interim government, as Hutu extremists, who had now fled to neighbouring DRC and were actively creating insecurity and preventing the return of refugees.\(^{207}\) The Special Rapporteur was not in a position to list specific individuals as responsible for atrocities; however, he did identify the following extremist organs and authorities that could be assigned responsibility immediately:

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The Rwandese state authorities and, in particular, senior national political figures….; various components of the government security forces….; and some local authorities;

FPR organs, particularly those in charges of military activities;

Private individuals such as members of the militias, leaders of extremist political parties (MRND and CDR) and the founders and broadcasters of RTLM;

Some light needs also to be shed on the responsibility of certain foreign states and their interference in Rwandan politics;

Finally, the role of the international community and, in particular, the response of the United Nations to the urgent needs of the population, especially with regard to security and humanitarian assistance, calls for examination….

The Special Rapporteur went on to urge further investigations into the “chains of command and individual responsibility” and links between the political party militias, such as the Interahamwe, FAR, and Presidential Guard. From the above description, it is evident that the Special Rapporteur conceived of those most responsible as involving an array of elite perpetrators and extending to all parties of the conflict - beyond simply those in positions of political and military authority in Rwanda at the time.

The Commission of Experts succeeded the Special Rapporteur, beginning its investigations in August 1994, and was comprised of members acting in their individual capacities; they were tasked with collecting information from various sources, including NGOs, foreign governments, and private individuals. According to Moghalu, their investigations “became a statistical battleground between the genocidal Hutu-dominated former government, now exiled in Zaire, and the RPF government, with both sides submitting lists of alleged perpetrators and victims.” The Commission of Experts report ultimately made the following determinations on criminal responsibility:

individuals from both sides to the armed conflict have perpetrated serious breaches of international humanitarian law….


individuals from both sides to the armed conflict have perpetrated crimes against humanity in Rwanda;

acts of genocide against the Tutsi group were perpetrated by Hutu elements in a concerted, planned, and systematic and methodical way. These acts of mass extermination against the Tutsi group as such constitute genocide…

The Commission has not uncovered any evidence to indicate that Tutsi elements perpetrated acts committed with the intent to destroy the Hutu group as such.²¹¹

The Commission of Experts’ report lists specific incidents of mass killings throughout the country and attributes much of the responsibility to the same organizations that the Special Rapporteur identified, such as the MRND, Presidential Guard, FAR, *Interahamwe*, and RTLM.²¹² It also cited more specific claims that the RPF was responsible for mass killings, summary executions, and political persecutions against Hutu, but emphasized that there was no evidence of genocidal intent.²¹³ While the genocide against Tutsis was to eventually become the sole focus of criminal responsibility, both the aforementioned reports stress the need to investigate and hold perpetrators accountable for crimes that were committed in the broader armed conflict. (Herein lays a distinction between the civil war and the genocide that continues to threaten the legitimacy of transitional justice practices for Rwanda, and is a subject that will be revisited in subsequent sections.) In sum, both reports established that genocide had been perpetrated by various factions of Hutu extremists against the Tutsi group, and crimes against humanity and war crimes had been committed by both sides in the context of war and genocide.

The recommendation for an international tribunal for Rwanda was made by international and Rwandan authorities. Both the Special Rapporteur and Commission of Experts’ reports specifically urged a judicial intervention by the international community:


pending the establishment of a permanent international criminal court, the United Nations should establish an ad hoc international criminal tribunal to hear the evidence and judge the guilty parties…

the Commission of Experts strongly recommends that the Security Council take all necessary and effective action to ensure that the individuals responsible for the serious violations of human rights in Rwanda during the armed conflict triggered on 6 April 1994 are brought to justice before an independent and impartial international tribunal.

These recommendations were reinforced by a formal request from the Rwandan government, addressed to the Security Council, to set up a tribunal:

There is evident reluctance by the international community to set up an international tribunal to expose and punish the criminals who are still at large. This is tantamount to diluting the question of genocide was that was committed in Rwanda…We request the international community to reinforce government efforts by….setting up as soon as possible an international tribunal to try the criminals…

Thus, there was little to no debate that an international tribunal to try elite perpetrators was needed as a judicial response to the genocide in Rwanda. While there would prove to be much more contention between the international community and Rwanda over the institutional design and judicial principles of a tribunal, there was consensus on the variety of pragmatic, political and moral justifications for setting up such an institution.

The pragmatic justifications for an international tribunal were two-fold. First, the lack of capacity of Rwanda’s judicial system meant that it could not immediately address such a large number of cases, facilitate fair detentions or trials, or have competent human resources to try such complex international crimes. Second, an international tribunal would have legal jurisdiction over elite perpetrators who had fled to other countries and their arrest and detention would require compliance from other states that

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could only be enforced with a Chapter VII mandated UN institution.\textsuperscript{217} Such a mandate underscores that these issues were not just of concern to the internal affairs of individual states, but that responding to and preventing atrocities was of international concern. That an ad hoc tribunal already existed (the ICTY), with a similar prosecutorial strategy, certainly reinforced the possibility of one for Rwanda; it was specifically recommended by the Special Rapporteur and Commission of Experts’ report that the jurisdiction of the ICTY be extended to include the crimes committed in Rwanda.\textsuperscript{218} However, the existence of the ICTY merely facilitated a Rwandan tribunal and cannot logically be considered a justification for it in and of itself.

The justifications for an international tribunal reflect a consensus among international investigators and scholars, and Rwandan themselves, that the culture of impunity that had persisted in Rwandan for decades had normalized ethnic violence and made possible the systematic planning and execution of the genocide.\textsuperscript{219} This assumption reinforces the appropriateness of an international tribunal following a prosecutorial strategy focusing on elites is partly based on the principle of individual criminal responsibility. This justification also extends to a concern that trials for suspected genocide perpetrators should be neutral and impartial, regardless of whether it was a national or international court. The Commission of Experts’ report pointedly addressed the debate over whether a national or international tribunal would be most effective and appropriate, and it concluded that for the “purposes of independence, objectivity, and impartiality, there are advantages in having trials conducted by an


international tribunal…” Even the *perception* of victor’s justice would render accountability incomplete at best, endanger the relationship between justice and reconciliation, and exacerbate this persistent culture of impunity.

Finally, there were moral justifications for a tribunal that would be both punitive and international in principle and practice. Many scholars and human rights advocates have attributed the push for a tribunal to the international community’s guilt for not intervening in the violence and allege that judicial intervention would compensate for a lack of military intervention. Moghalu attributes considerable weight to the guilt factor and see the creation of a tribunal as an act of “political contrition…; faced with its moral failure, the society of states did the next best thing – establishing a mechanism of juridical intervention…” Moreover, in the tradition of the Nuremberg trials and the ad hoc tribunal for Yugoslavia, the extreme levels of victimization and brutality that characterized the genocide in Rwanda warranted a punitive response and an institution that would express the world’s revulsion at the scale of the atrocities. That the tribunal would be established under a Chapter VII mandate from the Security Council reveals that the gravity of the violence in Rwanda was a threat to international peace and security.

Following the recommendations from the Special Rapporteur, Commission of Experts, reports from human rights organizations submitted to the Commission, and the Rwandan government itself, the International Criminal Tribunal for Rwanda (ICTR) was established by United Nations Security Council Resolution 955 on November 8, 1994. Resolution 955 establishes the tribunal for:

> the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring states between January 1st 1994 and December 31st 1994…

Ironically, Rwanda cast the sole vote against the tribunal owing to disagreements over the temporal jurisdiction and location of the tribunal, and the form and extent of punishments for convicted

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Irrespective of its location in Arusha, Tanzania the ICTR closely resembles the ICTY with respect to its statute and institutional design. This relationship was initially thought to be beneficial, as the ICTR would benefit from the ICTY’s jurisprudence and staff and they would even share a prosecutor. Both the Appeals Chamber and the Office of the Prosecutor were originally located in The Hague when a single prosecutor, the public face of the tribunals, was assigned to both the ICTY and ICTR. In 2003 the ICTR was assigned its own Chief Prosecutor.\textsuperscript{225}

The prosecutorial strategy of the ICTR was directed at bringing justice to those most responsible for the genocide, such as those in a position of leadership, whether it be political or military authorities, religious and local leaders. To enable this prosecutorial strategy, the tribunal has primacy over Rwandan national courts and accordingly can request a national court to defer cases to it at any time during its proceedings; it likewise requires of Rwanda to cooperate fully in identifying and locating suspects, producing evidence, and access to witnesses, etc. The tribunal’s primacy ensured that it “had the upper hand in obtaining custody of the ‘big fish’ accused of responsibility for the genocide.”\textsuperscript{226} To establish the horizontal scope of criminal responsibility, former Chief Prosecutor, Louise Arbour, argued for an approach that would entail, akin to the Nuremberg Trials, group trials that represent a broad spectrum of the criminal activity of the genocide with the goal of establishing that the “genocide was at its core a conspiracy by the Rwandan government and military high command at the time.”\textsuperscript{227} The judges refused this proposal but instead permitted a similar strategy of joint trials of several defendants in smaller groups. The result was combined indictments that reflected certain types of leadership and episodes of mass violence in specific areas, in accordance with this particular interpretation of the breadth of criminal responsibility.

\textsuperscript{224} The contention over punishment was not solely about whether or not the ICTR should use capital punishment, but rather the proportionality of punishment between those convicted in Rwanda versus the Tribunal. But, the location and judicial processes of the Tribunal proved to be a much more significant source of contention between the Tribunal and the Rwandan government than the degrees of punishment.

\textsuperscript{225} The first Chief Prosecutor was Richard Goldstone (South Africa) from 1995-1997, followed by Louise Arbour (Canada) from 1997-1999, and then Carla Del Ponte (Switzerland) from 1999-2003. In August 2003, the Security Council amended the ICTR statute and assigned the court its own prosecutor, Hassan Jallow, who was reappointed to another four year term in 2007.

\textsuperscript{226} Moghalu, Rwanda's Genocide: The Politics of Global Justice 33.

\textsuperscript{227} Moghalu, Rwanda's Genocide: The Politics of Global Justice 59.
responsible, and included: “Military I and II cases;” “Media case;” “Cyangugu case;” “Butare case;” “Government I and II cases;” etc. Another important element of the prosecutorial strategy, also at the initiative of Arbour, was to prosecute crimes of sexual violence, elevating those responsible for these crimes to the level of elite perpetrators. The case and conviction of Jean-Paul Akayesu, a former mayor, was the most high-profile indictment and judgment in this area. The Akayesu case also marked the first conviction for the ICTR and the first conviction for genocide by an international court, signalling an important international institutional juncture in accountability for the most serious crimes. The ICTR also convicted the following: Jean Kambanda, former Prime Minister and therefore the most senior political official at the time of the genocide; Théoneste Bagosora, former senior head of defence during the genocide and who was believed to be responsible for much of the planning and organizing, including training and organizing the Interahamwe militia and drawing up lists of Tutsis to be killed; and convicted Ferdinand Nahimana, Jean-Bosco Barayagwiza, and Hassan Ngeze, who were responsible for distributing hate media and propaganda through Radio Milles Collines and Kangura respectively.

The ICTR’s prosecutorial strategy has been lauded as one of its successes. International criminal justice scholar, Payam Akhavan, argues the Tribunal has made a significant contribution to post-conflict peacebuilding and that there is some evidence to suggest that it has “discredited and incapacitated the remnants of the former genocidares.” Judge Erik Möse, former President of the ICTR from 2003-2007, has articulated “accountability of high-ranking perpetrators” as one among many of the Tribunal’s successes. A review of the completed, in progress, and forthcoming trials at the ICTR reveals that its

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229 The Akayesu case was the first time that an international court had punished for crimes of sexual violence and the first that rape was found to be an act of genocide.


231 Mose lists the other successes of the ICTR as "providing fair trials by an impartial tribunal, assisting victims and witnesses, contributing to the process of national reconciliation, and improving its relationship with Rwanda. Möse, "The Main Achievements of the ICTR."
prosecutorial strategy is indeed specifically focused on high-ranking perpetrators, such as former department ministers, senior political and military leaders, town majors and prefects, religious leaders, and influential media personalities.\textsuperscript{232} The aforementioned cases set important precedents for international criminal jurisprudence and has established a historical record proving the genocide targeted the Tutsi as an ethnic group, that it was planned and organized by elite leadership, and that violence was carried out in a systemic and systematic manner. The discourse surrounding criminal responsibility and expressions of a need for an international tribunal combines with the institutional design of the ICTR and its prosecutorial strategy to demonstrate the salience of the hierarchical division of criminality norm with respect to the breadth of criminal responsibility. This norm, however, prescribes an institutional division of labour that would ensure that the rule of law and individual criminality responsibility extends also to the crimes of the masses through national and local fora.

\textit{The Vertical Scope of Criminal Responsibility}

The aforementioned reports commissioned by the United Nations generalize the collective nature of victimization and participation in the violence, although they also emphasize the importance of individual responsibility for such crimes and that all persons responsible should be held accountable. The full scope of criminal responsibility, however, numbered in the hundreds of thousands and many had already been rounded up by the new government and imprisoned. Addressing accountability for all those who fell outside the ICTR’s prosecution strategy remained the responsibility of Rwandan authorities. In November, 1995, the Rwandan government hosted a conference that was one of a few decisive moments for transitional justice. This colloquium was held in Kigali and entitled, “The Struggle against Impunity: A Dialogue for National Reconciliation.”\textsuperscript{233} In the proceedings it was recommended that new mechanisms be created to deal with the genocide cases, including specialized chambers of the existing courts, a classification scheme to separate the main organizers of the genocide from criminals with lesser degrees of responsibility and a


unique approach aimed at encouraging offenders to confess in exchange for substantially reduced sentences.\textsuperscript{234}

One of the developments that came out of the conference was a practical classification scheme (to be detailed below) that would hierarchically categorize and recognize the broad scope of criminal responsibility in the genocide; it would later be codified as Organic Laws to organize prosecutions and assign sanctions to guilty verdicts in each category.\textsuperscript{235}

The Organic Law of 1996 created Specialized Chambers within the national and military court system to try crimes against humanity and genocide. Article Two of this Organic Law classifies persons accused of these offenses, committed between October 1\textsuperscript{st}, 1990 and December 31\textsuperscript{st}, 1994 and hierarchically organizes their criminal responsibility into four categories.\textsuperscript{236} Category one is reserved for those elite perpetrators, including those in positions of authority, who planned, organized, instigated, supervised, acts of genocide and crimes against humanity, “notorious murderers”, and perpetrators of sexual torture; accused in this category were initially only addressed in national courts. (Note that this is not a distinct category of perpetrators, per se, from those investigated and indicted by the ICTR; in cases where ICTR defendants are transferred to Rwanda they would fall under Category one). Category two is for other perpetrators, conspirators or accomplices of homicide or assault resulting in death. Category Three is for those who committed acts of assault that did not result in death. Category four is for those who committed offences against property. This 1996 Organic Law also details confessions and guilty plea procedures, appeals processes, and assigns penalties and damages, the details and significance of which will be discussed in more detail in subsequent sections.

Several modifications were made to the first Organic Laws over the years. Most notably, the 2004 Organic Law modifies and reduces the categories of offenders to three, instead of four:


\textsuperscript{235} Mark Drumbl explains that "in Rwanda, the term 'Organic Law' refers to law that ranks higher in normativity than ordinary laws, and secondary only to the Constitution." Drumbl, Atrocity, Punishment and International Law 72.

\textsuperscript{236} Government of Rwanda, Organic Law No. 08/1996 of 31 August 1996 on the Organization of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes against Humanity Committed since 1 October 1990. Ministry of Justice, Government of Rwanda, 1 September 1996.)
Category One
(a) The person whose criminal acts or criminal participation places them among the planners, organisers, inciters, supervisors and ringleaders of the genocide or crimes against humanity, together with his or her accomplices;
(b) The person who, at that time, was in the organs of leadership, at the national at the level of Prefecture, Sub-prefecture, commune, in political parties, army, gendarmerie, communal police, religious denominations or in militia, has committed these offences or encouraged other people to commit them, together with his or her accomplices;
(c) The well known murderers who distinguish himself or herself in the location where he or she lived or wherever he or she passed, because of the zeal characterized him or her in killings in excessive wickedness with which they were carried out, together with his or her accomplices;
(d) The person who committed acts of torture against others, even though they did not result into death, together with his or her accomplices;
(e) The person who committed acts of rape or acts of torture against sexual organs, together with his or her accomplices;
(f) The person who committed dehumanising acts on the dead body, together with his or her accomplices.

Category Two
(a) The person whose criminal acts or criminal participation place among killers or who committed acts of serious attacks against other, causing death, together with his or her accomplices;
(b) The person who injured or committed other acts of serious attacks with the intention to kill then, but who did not attain his or her objectives, together with his or her accomplices;
(c) The person who committed or aided to commit other offences against persons, without the intention to kill them, together with his or her accomplices.

Category Three
The person who only committed offences against property. However, if the author of the offence and the victim have agreed on their own, or before the public authority or witnesses for an amicable settlement, he or she cannot be prosecuted.237

These changes essentially expanded upon category one, and combined the previous categories two and three into a single category two, and leave the remaining category for property offences. The Gacaca courts, the principles and process of which will be address in a subsequent section, primarily handle suspects in categories two and three; however, category one suspects face Gacaca during the information collection phase of their trial only.

The importance of this hierarchical division of criminality, as evidenced in the Organic Laws, is three-fold. First, it recognizes the range of criminal behaviour that characterized the violence in the

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genocide, which was detailed in the previous discussion of the atrocities. It was of paramount importance to Rwandans that elite perpetrators, i.e. category one suspects, be tried and punished. But the vast majority of suspects were in the remaining categories and these perpetrators and their crimes were well known among the hills and towns of Rwanda. Rwandans themselves often delineate between crimes committed by persons ranging from the “*hauts responsables* (high leadership) to the *bas people* (ordinary people)...(and accordingly) a sliding scale of responsibility and morality.” In a recent study, one scholar reported that 42% of her respondents cited the “main cause of the genocide was ‘authorities’ taking advantage of the ‘ignorance’ of the *bas people* to persuade them to participate in the killing.”

During my own fieldwork in 2006, survivors interviewed consistently assigned primary responsibility to elites for directing the violence over the radio and in their communities. Second, the distinctions between crimes were a pragmatic solution to organizing and systemizing prosecutions and penalties for such large numbers of perpetrators. For the trials that would later follow, assigning a category of responsibility to an accused was one of the first priorities for documentation and determined the subsequent procedures and penalties. Finally, it set the groundwork for a division of labour among Rwanda’s national court system and its grassroots transitional justice institution that would be reinvented for genocide crimes. This division of labour would be readjusted with subsequent Organic Laws, with category one suspects increasingly off-loaded from the national court system to *Gacaca* court jurisdictions.

In sum, in the years immediately following the genocide, the international community assumed the responsibility for investigating the nature of the genocide, taking the initial steps towards establishing who was most responsible for such crimes, and subsequently recommending that an international tribunal try those most responsible. The two investigations and reports commissioned by the United Nations, by its Special Rapporteur and Commission of Experts, articulate the importance of principles of the rule of law and individual criminal responsibility. The assumption that the prosecutorial strategy of an international tribunal should be focused on elite perpetrators, as the post-World War II tribunals and

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ICTY had done, underscores the salience of this aspect of the hierarchical division of criminality norm. But addressing depth of criminal responsibility is an equally important prescription of this norm and thus decision-making at the domestic level in Rwanda reinforces that local discourse, policies and institutions are importance measures of salience. The Organic Law of 1996 was the first crucial mechanism with which to hierarchically organize criminal responsibility at the national level and is the primary ordering mechanism for meting out justice in Rwanda. The affiliated range of punitive and non-punitive sanctioning that would be applied to convicted perpetrators of atrocities of all levels of criminal responsibility reveals how the hierarchical division of criminality and accountability norms are highly interrelated.

**Accountability**

The norm of accountability is highly constitutive of contemporary transitional justice practices and represents an important departure from past decades when impunity for elite perpetrators was all but assured. As was previously explained, the timing and nature of the case of Rwanda represents an importance juncture in this respect. At the international level, there was little debate that punitive sanctions were both appropriate and necessary for elite perpetrators and such sanctions would best be meted out with an international tribunal. But the norm of accountability that has been implemented throughout that last two decades also prescribes non-punitive sanctions by recognizing that punishing all those responsible is next to impossible and, more importantly, that alternative forms of sanctioning can enable a broader range of transitional justice goals. In the early stages of decision-making and institutional design in Rwanda, the discourse at both international and local levels clearly articulates the appropriateness of punitive sanctions for elite perpetrators irrespective of circumstances, and ideally writ large for all perpetrators. But more importantly, the justifications for and institutionalization of non-punitive sanctions also accord with the norm of accountability in that it recognizes the practical and normative value of mechanisms such as reparations and limited and conditional amnesties for low-level perpetrators. This represents an important departure from past practices that considered non-punitive sanctions to be an injustice and provides an important corrective to the simplistic characterization of transitional justice as governed by a meta-norm of retribution or anti-impunity. Instead, the accountability
norm is underpinned the retributive and restorative justice principles that carry international and local legitimacy. The transitional justice institutions in Rwanda, therefore, both accord to this international accountability norm and as local practices were internationally sanctioned they contribute to its evolution by further legitimizing the use of restorative justice processes as complementary to retributive ones.

**Punitive Sanctions**

A point of consensus on the causes of the genocide is that a “culture of impunity” persisted in Rwanda for decades, and this sanctioned an environment that normalized ethnic violence and enabled the perpetrators of genocide to organize and carry out their crimes without fear of retribution. As the prior discussion of atrocities addressed, Rwanda had experienced successive waves of violence, most of it directed by political elites, which further eroded the rule of law and entrenched impunity. The Special Rapporteur’s report cites impunity, in addition to a “rejection of alternate political power” and “incitement of ethnic hatred and violence,” as continuous causes of human right violations up until and including the genocide.\(^{240}\) This presumption of impunity partially explains the disturbing *public* displays and incitement of violent acts against Tutsis, ethnic violence instigated and perpetrated by political party militias and armed forces, and even the promotion of local officials who “distinguished themselves by their acts of cruelty.”\(^{241}\) Subsequently, a great deal of concern was expressed regarding the need to suppress reprisals and pursue fair punishment in the aftermath of the genocide.

the main aim of the Special Rapporteur’s approach to the new authorities in Kigali was to make sure that they would not engage in summary executions. The Special Rapporteur was satisfied by the reply...The Prime Minister stated: ‘I undertake not to permit any summary executions, and any persons guilty of such executions will be punished...Impunity cannot be tolerated in this country.’\(^{242}\)


Much of the initial decision making in the international community on transitional justice for Rwanda was focused on setting up a tribunal with the assumption that it would entail punitive sanctions like its predecessor tribunals. The ICTR was thus given a mandate to mete out life sentences but capital punishment was ruled out. As Drumbl explains, “retribution and deterrence are the two most prominent punishment rationales in international criminal law”\(^{243}\) – they therefore represent important principles underlying this norm. Plea bargains and certain mitigating circumstances do allow for more lenient sentencing, but amnesties were never considered to be an option for the ICTR. The perceived leniency of its punitive sanctions, however, was one of the primary reasons why Rwanda voted against Resolution 955; capital punishment was, at the time, part of Rwanda’s penal code but was not considered for the ICTR.\(^{244}\) This created a difficult moral anomaly, in which the elite perpetrators of the genocide would conceivably receive lighter sentences than lower-level perpetrators convicted by Rwandan courts. This potentially significant source of contention has been resolved since Rwanda removed the death penalty as a sentencing option for those convicted of genocide, which it did in order to facilitate extradition of *genocidaires* in exile and the transfer of remaining defendants at the ICTR after its closure.

The Tribunal expects to complete all trials by the end of 2011, pending new arrests, and all appeals by the end of 2013. As of November, 2010, the ICTR has completed cases regarding fifty-two accused (including eight pending appeal and eight acquitted), twenty-two trials are in progress, two individuals are awaiting trial, and ten suspects remain at large.\(^{245}\) Nearly all of the convictions have been for genocide and crimes against humanity, with very few for war crimes.\(^{246}\) The maximum sentence permitted by the ICTR’s statute is life imprisonment and it carries the possibility of multiple life

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\(^{243}\) Drumbl, *Atrocity, Punishment and International Law* 60.

\(^{244}\) In order to facilitate the extradition of elite genocide perpetrators living abroad, Rwanda has since removed the death penalty as a sentencing option in genocide trials. However, prior to this, in April 1998, twenty-two men and one woman were the first to be publicly executed in Rwanda upon conviction of genocide crimes.

\(^{245}\) International Criminal Tribunal for Rwanda (ICTR), *Status of Cases*. International Criminal Tribunal for Rwanda, 2009). Among those at large is Felicien Kabuga, whose arrest is a top priority for the tribunal. He is widely believe to be living as a fugitive in Kenya since 1994 but Kenyan authorities have been averting and resisting cooperation with the ICTR for his arrest. The arrest of Kabuga or any of the other three high-level accused would likely extend the judicial calendar.

\(^{246}\) International Criminal Tribunal for Rwanda (ICTR), *Status of Cases*. 

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sentences. Drumbl’s comparative analysis of sentencing between the two ad hoc tribunals shows that there is “considerable disparity between the ICTY and ICTR sentencing practices” with ICTR sentences being considerably harsher.\textsuperscript{247} None of the ICTR’s sentences have issued any restitution awards, largely because the defendants have been declared indigent.\textsuperscript{248}

There was more uncertainty regarding the extent of punitive sanctions to be applied by Rwandan courts. As of 1994, the crime of genocide did not have a specific sentence in Rwandan law; Rwanda had ratified the \textit{Convention on the Prevention and Punishment of the Crime of Genocide} in 1975 but had not yet implemented it. For those genocide perpetrators in category one, the 1996 Organic Law then specified life sentences or the death penalty. Debates over sanctions only became contentious with regards to the tens of thousands of perpetrators that were classified in categories two through four. In 1996, there were approximately 74,000 imprisoned upon suspicion of committing genocide crimes and most were eventually slotted into categories two to four.\textsuperscript{249} There was also the presumption that many more would eventually be implicated and charged. As Gahima, former Deputy Justice Minister, argued “if a million people died, then you have to figure at least 2 to 3 million are complicit in the crimes. But you can’t prosecute them all. We must punish the leaders and find a way of dealing more leniently with the rest.”\textsuperscript{250} And as one survivor, working for a local human rights organization that carried out public consultations on \textit{Gacaca} in local communities, explained to me, “90-100% of Rwandans would prefer the death penalty but realize it is not realistic” and will not bring back their dead relatives; he elaborated that Rwandans may place importance on the death penalty as a form of deterrence, but it could not be done so out of revenge or it would be equated with the violence of the \textit{genocidaires}.\textsuperscript{251} This assertion about Rwandans’ sentiments on punishment, in conjunction with Rwanda’s removal of capital punishment as a sentencing,

\begin{itemize}
  \item \textsuperscript{247} Drumbl, \textit{Atrocity, Punishment and International Law} 57.
  \item \textsuperscript{248} Drumbl, \textit{Atrocity, Punishment and International Law} 81.
  \item \textsuperscript{249} United Nations Office of the High Commissioner for Human Rights (UNHCHR), \textit{The Administration of Justice in Post-Genocide Rwanda}, 8.
  \item \textsuperscript{250} Neuffer, \textit{The Key to My Neighbor's House: Seeking Justice in Bosnia and Rwanda} 258.
  \item \textsuperscript{251} Author interview. February 10, 2006. Kigali, Rwanda.
\end{itemize}
reveals both pragmatic and principled assumptions about the accountability. Indeed there is little evidence to suggest that harsher punishments are a more effective deterrent to perpetrators of mass violence. There is also an acceptance at the domestic level of the prevailing international belief that justice perceived as revenge threatens a return of violence, and correspondingly the concern that capital punishment might be perceived as such revenge. Therefore, the absence of capital punishment in international courts, which reflects assumptions about the desired effects of punitive sanctions, has been matched at the domestic level in Rwanda is an important juncture in the evolution of the accountability norm in transitional justice.

Non-Punitive Sanctions

There was no single decisive moment at which a consensus on the degree and scope of sanctions for justice processes to be carried out by Rwandan authorities emerged. Various options for non-punitive sanctions were presented between 1994 and 2000 that included the possibility of a truth commission and amnesty, plea-bargaining mechanisms, and ultimately a compromise based on a reinvention of traditional Gacaca courts. The salience of this aspect of the accountability norm in the decision-making stages is relatively weak, but would become stronger as transitional justice institutions were mandated and implemented and the internationally community sanctioned the restorative justice processes at work. Nevertheless, it is clear from the decision-making stages that some compromise in favour of non-punitive sanctions would be necessary, which was at first justified as a practical necessity and would later become linked to more idealistic goals of facilitating reconciliation.

The possibility of a truth commission, modeled on South Africa’s TRC, was addressed in 1995 at a conference in Kigali as a means to deal with so many perpetrators and to enable truth and reconciliation in exchange for lighter sentences or non-punitive sanctions. The South African delegates urged that this kind of model, including an amnesty mechanism, would be an “appropriate ‘African’ approach to accountability.” A truth commission was not without precedent in Rwanda, as one had been mandated

by the Arusha Accords in 1993 but was ultimately hampered by the ongoing civil war. The suggestion of a TRC was appealing to many donors as well, who facilitated contacts between South Africans and Rwandans at this colloquium. This proposal was rejected by Pasteur Bizimungu, then President of Rwanda, as impunity and he ruled out any form of amnesty. Interestingly, the perceived legitimacy of the South Africa TRC meant similar exchanges of truth for amnesty would be palatable to the international community, but in the these early stages of decision-making many Rwandan elites were concerned about the perceptions of impunity. In addition to a TRC model, the 1995 conference was the first instance that the traditional Gacaca courts were considered as model for post-genocide justice. The origins and practice of traditional Gacaca, as a restorative, participatory process meant to address minor violations in the community, will be discussed in more detail in the subsequent section. But at this juncture it is instructive to note that “the government dismissed Gacaca on the grounds that it violated existing law regarding the need to formally prosecute serious crimes, particularly murder.” The new RPF government felt at the time that “only retributive justice could end the prevailing impunity,” but there were divisions among the ruling elites regarding the extent to which retributive justice could be meted out. Moderates in the government “wanted only the most high-ranking, powerful participants in the genocide to be prosecuted… but RPF hard-liners wanted as many of the guilty to be arrested and

256 While beyond the scope of this dissertation's analysis, the prominence and perceived legitimacy of South Africa's Truth and Reconciliation Commission is undoubtedly a major juncture in tracing the origins of the accountability norm - as it is defined here as inclusive of both punitive and non-punitive sanctions. As I briefly explained in Chapter One and as others have argued, truth-telling and reconciliation were code words and synonymous for impunity in the Latin America and Eastern European transitions. As of the mid-1990s, when the TRC was mandated and this international normative structure emerged, the restorative justice principles became internationally sanctioned as legitimate complements to retributive justice ones. That being said, no other country in transition has adopted the South African TRC model in its entirety but many have taken inspiration from it, consulted with South Africans involved in its institutionalization, and adapted its principles and process to suit local contexts.
punished as possible.” A blanket amnesty was rejected as impunity, yet this did not preclude devising a more limited and conditional approach to non-punitive sanctioning that would address the lack of capacity for punishing such a large number of perpetrators.

The first Organic Law that was developed in 1996 reflected some compromises in sanctioning for cases tried in national courts. Specifically, it incorporated a plea-bargaining mechanism for perpetrators in categories two through four and allowed for various forms of non-punitive sanctioning and lighter sentences to be offered in return for a full confession and guilty plea. In order for a confession and guilty plea to be considered valid, Articles 5 and 6 of the Organic Law “require that it be made before the trials, describe in detail all of the offenses and victims, provide information regarding other involved individuals, include an apology, and contain an explicit plea offer.” If the court accepts the confession and guilty plea, prison sentences for convicted category two and three perpetrators are substantially reduced as long as the conviction is pronounced after a confession and guilty plea, and there is a smaller reduction if the conviction is pronounced prior to a confession and guilty plea. The Organic Law also allowed for the courts to strip convicted perpetrators of their civic rights (such as voting and holding public office), referred to as dégradation civique, “which is a form of shunning and stigma insofar as the perpetrators are hindered from reintegrating back into the community.” Additional Organic Laws (2000, 2001, 2004, 2006) would be developed to set up the Gacaca courts and organize the prosecutions of alleged genocide and crimes against humanity perpetrators through these courts. These laws would specify even further reductions in sentences for confessions and guilty pleas, with both limitations and conditions attached in order to facilitate truth and reconciliation. The plea bargaining mechanism was not


260 Drumbl, Atrocity, Punishment and International Law, 74.

261 Government of Rwanda, Organic Law No. 08/1996 of 31 August 1996 on the Organization of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes against Humanity Committed since 1 October 1990, Articles 15 and 16.

262 Government of Rwanda, Organic Law No. 08/1996 of 31 August 1996 on the Organization of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes against Humanity Committed since 1 October 1990. Article 17, Drumbl, Atrocity, Punishment and International Law, 75. Drumbl explains that those civic rights than can be removed include: “the right to vote; other political rights; to serve as an expert or witness in trials or to be deposed judicially other than for the giving of simple facts; the right to carry arms; to serve in the armed forces; to be police officers; and to teach in any education institution.”
cast as an amnesty, in part owing to the legal and moral implications of doing so. And the plea bargain offered the possibility of either a reduced or no sanctioning. However, given that with the plea-bargaining mechanism the crimes are acknowledged by the perpetrators and authorities, the sentence reduced or eliminated in exchange for a confession and apology, and are limited to lower-level perpetrators, they are comparable to limited and conditional amnesties in most respects. And as such, is an important development in the dynamic of international and domestic conceptions of justice that has become standardized in contemporary transitional justice practices.

The possibility of repurposing traditional Gacaca resurfaced again at the Urugwiro meetings in the late 1990s, and at this time debates over sanctions intensified. Traditional Gacaca is a community-based method of dispute resolution that dates back to pre-colonial Rwanda and was “concerned essentially with incidents resulting from the fact that people in Rwanda live in close proximity to one another”, and addressed disputes over property, livestock, family and marital issues.\(^{263}\) As a “grassroots” dispute resolution mechanism, it was mediated and adjudicated by respected elders in the community and responded to “problems that the official courts categorize as civil affairs, using reimbursement or compensations and accompanying them with a formal, public reconciliation.”\(^{264}\) With regard to accountability, “it could impose a range of sanctions, and punishment was not individualized…rather, family and clan members were also obligated to repay any assessed judgment…the losing party typically had to provide beer to the community as a form of reconciliation.”\(^{265}\) It did not traditionally handle serious crimes, such as murder or theft, which were under the jurisdiction of national courts. The defining characteristics of traditional Gacaca were its communal, restorative, and informal nature.

Whether or not a reinvented Gacaca could provide appropriate sanctioning for genocide crimes was a major point of disagreement amongst the participants at Urugwiro, as summaries of the debates from the President’s report suggest. There was recognition that, in addition to the local incapacity to


punish all those responsible, no degree of punishment would be sufficient for such serious crimes; there was also some consensus that in addition to “eradicating the culture of impunity,” punishment or any sanction would have to address the various social and demographic implications of the genocide. But dividing lines were drawn over how to implement the plea-bargaining mechanism and the nature of sanctions for those that confessed. Among those who supported strict punitive sanctions were lawyers and those urban political and military elite that had remained in Rwanda during the genocide and later joined the RPF; among those who supported reinventing Gacaca by adhering to its communal nature and emphasis on non-punitive sanctions and social repair were non-lawyers, rural elites, and some prominent members of the diaspora. The former parties believed that compromises in sanctioning would “minimize” crimes of genocide by making them a simple offence and that weak justice would raise the ire of the international community. The latter parties emphasized that Gacaca would not minimize the crime, but rather put the “crime of genocide and massacres at the level in which it was committed” and it was even agreed that that a Commission should look into how “penalties provided for criminals can be replaced or completed by community service, but without disturbing the Government’s policy of eradicating the culture of impunity.” The Urugwiro meetings ultimately did not arrive at a consensus on sanctions to be meted out by the potential reinvention of Gacaca for genocide cases, but at this stage in the decision-making it is evident that compromises would be made introduce non-punitive or reduced sanctions via plea-bargains. This lack of early consensus underscores that the evolution of transitional justice norms is not neatly dichotomized by the intake of international norms at the domestic level, or vice versa. Debates about the appropriate form of accountability with respect to punitive and non-punitive


sanctions existed at both levels, and certainly the immediate lack of consensus on sanctioning created an opportunity for the Rwanda case to shape and be influenced by emerging transitional justice norms.

Reparations have been another option for non-punitive sanctioning in Rwanda, particularly as traditional Gacaca courts included compensation and restitution as a way of making amends. Adding to the credibility and legitimacy of Gacaca as a means toward redistributive justice, there is evidence that Gacaca’s continued use in the years immediately following 1994 addressed genocide-related crimes of property offences and awarded compensation.\textsuperscript{270} The Organic Laws did reference the need for reparations but deferred to eventual legislation to determine payments and recipients. In 1998, the GOR established the \emph{Fonds d’Assistance aux Rescapés du Génocide} (FARG) that provides medical and education assistance to survivors (primarily Tutsi survivors); however, this is not technically a reparations scheme and cannot be used as such by courts.\textsuperscript{271} Determining how a reparations scheme would work is highly complex because of the number of parties involved and a number of options available for determining amounts and recipients.

Three types of reparations have been suggested. The first type is from the government to the falsely accused for lost time in prison and/or because they too want to be considered survivors. Many falsely accused argue that they are survivors as well because they have lost family members and property, contracted diseases from sexual violence and assaults, and endure life-long physical and emotional injuries. However, they are not considered to be among the survivors because of their pre-genocide ethnic identity as Hutus and/or their prior legal status as accused. A telling example is that of 59 year old Hutu woman that I interviewed.\textsuperscript{272} She described how she lived alone because her husband had been killed prior to the genocide (suspected of cooperating with the RPA) and her four children died during and after the genocide as a result of displacement and imprisonment. This woman also contracted HIV as a result of being raped during the genocide, and was later tried and convicted (as part of a group trial) for crimes of


\textsuperscript{272} Author interview. February 18, 2006. Kigali (Nyarugenge), Rwanda.
genocide herself and falsely imprisoned. She was released nine years later when her conviction was overturned because she was proven to be falsely accused, but explained that the government refuses to compensate for her for her false imprisonment and does not recognize her as a “survivor,” despite her loss and victimization, because she is a Hutu.

The second type of reparations is from the accused to those recognized as survivors. This largely comes in the form of restitution for damaged or destroyed property or a minimal but symbolic compensation for the loss of family members; this type of reparation can also come in the form of community service acts required of convicted perpetrators. To a certain extent, the Gacaca courts would facilitate these reparations. Finally, the prospect of reparations from the government to survivors is a controversial but significant issue. There is a strong conviction among Rwandans that this was an elite orchestrated genocide. Despite a change in regime, they believe it necessary for the government to meet the socio-economic needs of survivors as a form of accountability and as acknowledgement for the past regime’s crimes.273 Nearly every survivor I interviewed articulated that compensation, whether material or symbolic from the accused or authorities, was one of the most important components of justice. Most expressed the need for material compensation from the government to rebuild their homes, pay for health and education expenses for the poorest of survivors, and to provide psycho-social services to victims of sexual violence. The lack of compensation thus far has proven to be a source of contention between survivors and the government, as will be addressed in a subsequent section.

Gacaca has provided a mix of punitive and non-punitive sanctioning; the latter is only available to those who confess to their crimes and apologize to the victims. The real possibility of punishment by imprisonment is necessary to encourage confessions. The 2004 Organic Law provides a detailed punishment schematic and “meshes punishment with a confession and plea bargain regime that bears some similarities with, although expands upon, that of the 1996 Organic Law.274 Plea bargaining is a

273 To a lesser extent, there is some debate over whether foreign countries should contribute to a fund for survivors to compensate for their lack of response or complicity of genocide. This is unlikely to happen, however, donor support to post-genocide is significant and certain countries (U.S. and U.K.) have devoted a significant amount of material and financial assistance to Rwanda since 1994.

274 Drumbl, Atrocity, Punishment and International Law 87.
controversial but key element of the process that allows for the possibility of a reduced sentence and/or immediate release if a suspect confesses. For this plea bargain to be accepted, the accused must:

- give a detailed description of the confessed offence, how he or she carried it out and where, when he or she committed it, witnesses to the facts, persons victimized and where he or she threw their dead bodies and damage caused;
- reveal the co-authors, accomplices and any other information useful to the exercise of the public action;
- apologise for the offences that he or she has committed (to the living victims and Rwandan society).

Plea bargains can be rejected by the community and judges if they are deemed to be false, insincere, or incomplete. Sanctioning in Gacaca ranges from life in prison to community work and compensation, depending on the confession. Although category one offenders have limited interaction with Gacaca, the penalties for this category are detailed in the 2004 Organic Law. Accused in category one who do not confess can receive up to life in prison. The death penalty was initially an option for category one sentencing; however, in 2007 the Government of Rwanda passed legislation excluding genocide perpetrators from the death penalty. This surprising political manoeuvre is largely a strategic and pragmatic one to enable the extradition of genocide suspects who have fled the country. Yet, as was explained, this pragmatic move also signifies a convergence of international and domestic expectations of punitive sanctions. Category one accused who confess can incur a penalty of twenty-five to thirty years. Sanctions for those convicted in category two reflect the range of crimes within this category and depend on whether the accused confesses, and whether they confess before or after they are listed as a suspect. The maximum penalty in this category is thirty years (for those who commit an attack with intent to kill and refuse to confess). The minimum sanction in this category is a few years in prison, half of which is commuted to community service. As many perpetrators have already served many years in prison, deductions of time already served commonly leads to an immediate release. Category three accused are usually required only to pay reparations for the damage and/or looting they are responsible for; this is

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considered distinct from the community service commutations of sentences in category two. Dégradation civique is also a possibility for sentencing but this was not regularly determined by Gacaca judges in the initial proceedings.276

Theoretically speaking there are two important dynamics in inherent in the evolution of the accountability norm; the first dynamic speaks to both the international and domestic influences on the normative structure and second speaks to the complex interplay of both pragmatic and principled reasons for combining punitive and non-punitive sanctions. The international accountability norm was therefore salient in Rwanda with respect to its institutional designs, policies, and the discourse inherent in decision-making and this is evident in the following ways. First, that elite perpetrators should be the specific focus of an international tribunal and that those convicted should be punished according to international standards was hardly questioned. As the implementation of this norm will further demonstrate, this represents an important juncture in transitional justice practice as elite perpetrators were often the most likely to be guaranteed impunity in the past despite proclamations to the contrary. Second, the nature of accountability for the masses of low-level perpetrators was thought best achieved by a mix of retributive and restorative principles and processes. Reluctance to embrace a South Africa TRC model entirely demonstrates that Rwandan decision-makers were conscious of the moral, political and legal implications of an amnesty. But as the initial plans to categorize perpetrators and institute a plea-bargaining mechanism reveal, some compromise was necessary in sanctioning. The Urugwiro meetings and first Organic Law indicates that this decision was a pragmatic one and the accountability norm was weakly salient in these stages; however, the interrelated nature of the accountability norm with that of localization and reconciliation will show that there were also more principled and idealized motivations for non-punitive sanctions ranging from plea-bargains to reparations. The principled and practical basis for non-punitive sanctioning originated with the re-invention of traditional dispute mechanisms to prosecute crimes against humanity and genocide. The analysis will now turn to the extent to which the localization norm was salient in the context of Rwanda.

276 Drumbl, Atrocity, Punishment and International Law 89, 91.
Localization

The localization norm prescribes that transitional justice institutions, international and domestic, should seek to build local capacity and ownership over its processes and outcomes. The extent to which this norm has been salient in Rwanda is mixed. On the one hand, this norm was not salient in the initial decision-making stages for the ICTR, which was purposely isolated from Rwanda and its victim communities to ensure neutrality. This would later prove to be an institutional failure resulting from implementation that had important corrective feedback effects on the international normative structure of transitional justice and would strengthen the salience of this norm. On the other hand, localization is more expected and thus more salient for domestic transitional justice institutions. The decision to reform a “grassroots” approach to dispute resolution in Rwanda was the initial and primary means by which the localization norm was salient; however, the modifications later made to the Tribunal to foster local ownership and capacity demonstrate the increasing salience of this norm over time.

International Justice in Isolation

The extent to which transitional justice should be localized by its setting, staffing, and primacy of jurisdiction, was a point of contention for the ICTR. It was decided that the ICTR would be located outside of Rwanda, in Arusha, Tanzania. Other locations, such as Nairobi, were proposed but locating the tribunal in Kigali was never considered to be a viable option. The Commission of Experts was the first to broach the subject of whether a “municipal” or international tribunal would be better suited to pursue accountability. The Commission’s report acknowledged that a domestic court “would be more sensitive to individual cases and more responsive to the needs of the locality,” would have greater access to evidence, and be of more “immediate symbolic value.” But they cautioned that “one should not confuse the jurisdiction of the tribunal competent with trying individual suspects with the site where the trial is held,” and to ensure “independence, objectivity, and impartiality” the perpetrators would have to be tried

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in an international court outside of Rwanda. Indeed, Kigali would have been an inhospitable environment for international justice in the years immediately following the genocide. The territory and peoples within it were not physically secure and the security of tribunal staff would be in question, the cities and towns were in need of massive rebuilding, and international legal authorities for the tribunal could not have avoided being influenced by their contact with victims, perpetrators, and government pressure. While it seemed logical at the time to locate the tribunal outside of Rwanda, this aspect of the localization norm would change with future tribunals. The design of hybrid courts would specifically reflect lessons learned from the isolation of the ad hocs and purposely situate themselves in the territory affected by the violence.

In addition to its physical isolation, the ICTR was not given a jurisdictional mandate that would aid local capacity building or ownership in Rwanda. The statute states that the ICTR shall have primacy over the national courts of all states, which “had the formal effect of rendering the international tribunal independent of Rwanda and its authorities.” This jurisdictional limit had the effect of precluding much cooperation between the ICTR and national courts. When Rwanda’s national court system later gained more credibility in terms of capacity and professionalism, the primacy of the ICTR’s jurisdiction would prove contentious. In terms of staffing, Rwanda wanted more influence over the selection of judges and prosecutors, in part to influence the outcomes of the trials but also to help rebuild its own judicial and rule of law institutions. These issues partly accounted for Rwanda’s opposition to Resolution 955. As Moghalu argues,

> Rwanda wanted a tribunal in its own image, with the selection of judges and the appointment of the chief prosecutor under its control and the text of the statute largely inspired by its own government…In fact, what it wanted was a hybrid court in which

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280 Despite ultimately voting against Resolution 955, Rwanda’s request for the tribunal in the first place was largely pragmatic. Only a tribunal with a Chapter VII mandate from Security Council and broad jurisdiction would have any success in apprehending the many genocidaires who had fled to neighbouring countries in Africa and abroad. Rwanda was not alone in its opposition to the ICTR Resolution. China, Pakistan, and Nigeria expressed concern regarding the need for Rwanda's cooperation with the tribunal and China abstained from the vote on Resolution 955.
international lawyers would work with Rwandans and cooperate directly with its judicial system, with some oversight from the government. 281

Finally, there was little mention of the need for the tribunal to engage in local outreach to victim communities, perhaps out of concern that it would affect the perceived neutrality and impartiality of the ICTR. Essentially, in the early stages of institutional designs, the principles of local capacity building and ownership did not trump, or were seen to conflict with, the principle of neutrality and practical need for political isolation of an international court. But the ICTR would eventually recognize the importance of this aspect of localization and enhance its mandate with regards to outreach, and this will be taken up in more detail in the section on implementation. These initial decisions related to localization, or the lack thereof, eventually created both physical and political distance between the tribunal and Rwandan authorities and from victim communities.

**“Grassroots” Justice**

Rwandan authorities sought to foster local ownership of transitional justice through their own national and grassroots institutions. Local ownership could not be assumed by physically situating justice in the country, rather it had to be facilitated by institutional design and capacity building. The international community invested heavily in rebuilding Rwanda’s legal infrastructure, with the assumption that improving the rule of law would bring stability and reconciliation. According to Uvin and Mironko,

> donors funded more than 100 justice-related projects, costing more than $100 million…they organized the training of lawyers, judges, investigators, and police; provided salary supplements to judges and prosecutors, as well as vehicles and the required fuel and maintenance; advised on reform of administrative and court procedures; constructed buildings, libraries, and prisons; improved the detention conditions of prisoners; and assisted with confessions and with defense. 282

But the national court system, despite this large infusion of financial and human resources from the international community, was struggling to process the large case load. Approximately 1,000 cases were being processed per year; while this was a commendable effort given the complete lack of capacity that it

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began with, at that rate it would take one hundred years to process all genocide cases.\textsuperscript{283} It was clear that the national court system would have to be supplemented with a more localized but expansive process, particularly for lower-level perpetrators that the national courts were in no way capable of addressing.

Recall that reinventing traditional \textit{Gacaca}, meaning “justice on the grass” in Kinyarwanda, was raised and debated as a serious possibility to deal with genocide crimes at the Urugwiro meetings. Part of the appeal of \textit{Gacaca} was its “indigenous” and “grassroots” characterization, which could localize transitional justice by encouraging community participation and situating accountability in the communities who directly experienced the genocide. But many of these “indigenous” and “grassroots” characteristics had been diluted and manipulated over the years and replaced by a more state controlled, institutionalized version of \textit{Gacaca}. In pre-colonial Rwanda, \textit{Gacaca} remained an informal mechanism that was not directly controlled or influenced by a central authority in the country, but in colonial times “it became less a community and family based institution directed instead by chiefs appointed by the colonial administration” and more serious cases would be handled by the new, Western style court system.\textsuperscript{284} In post-colonial Rwanda, traditional \textit{Gacaca} continued to be used and “gradually evolved into an institution associated with state power...(but) the conciliatory and informal character of the \textit{Gacaca} remained the cornerstone of the institution since decisions were to a great extent not in conformity with written state laws.”\textsuperscript{285} In the years immediately following the genocide, this practice of community dispute resolution continued in lieu of a functioning national judicial system and continues to be practiced today in its traditional form in rural communities.

Those who supported the proposal to reinvent traditional \textit{Gacaca} argued that the national court system could not handle the volume of cases and that \textit{Gacaca} would better facilitate truth-telling and reconciliation through community participation. There was not, however, consensus at the Urugwiro meetings over the possibility of reinventing \textit{Gacaca} for genocide related crimes. In addition to disagreements over nature of sanctioning that was previously discussed, the report on these meetings

\begin{itemize}
\item \textsuperscript{283} Uvin and Mironko, “Western and Local Approaches to Justice in Rwanda,” 223.
\item \textsuperscript{284} Longman, "Justice at the Grassroots? Gacaca Trials in Rwanda," 210.
\item \textsuperscript{285} Ingelaere, "The Gacaca Courts in Rwanda,” 34.
\end{itemize}
reveals that major divisions were apparent between those who argued that mass community participation in justice was necessary to eradicate a culture of impunity and foster unity and reconciliation, and those who argued that the masses could not be trusted to provide credible evidence and that they did not have the capacity to carry try such complex and serious crimes. In an interview with Protais Musoni (former prefect and one of the main proponents of Gacaca at the Urugwiro meetings), Clark quotes him recalling that “the issue of the population’s involvement in Gacaca was especially difficult. The lawyers kept saying, ‘how can we let the people judge their own cases so soon after the genocide?’ The prefects were pushing the participation angle...” The end result would reflect a compromise between utilizing Gacaca’s processes of community participation and presence in local communities and control by central and local authorities. After the Village Urugwiro meetings, the Gacaca proposal was circulated to various national and international groups for feedback and then sent to the Transitional National Assembly (TNA) for approval in 2000 and subsequently adopted as Organic Law.

Therefore, traditional Gacaca had to be significantly modified to suit the severity of the cases and the scope of the justice and reconciliation agenda. The official name for Gacaca for genocide cases would come to be Inkiko Gacaca, meaning Gacaca courts or jurisdictions (references from here on in to simply “Gacaca” will refer to these courts for genocide, and not its traditional use). The Gacaca courts for genocide would entail a complex balance of retributive and restorative justice principles to ensure accountability and reconciliation. The GOR has explicitly stated its justification and goals for the reformation of Gacaca to address crimes committed as part of the genocide:

a) It will enable the truth to be revealed about Genocide and crimes against Humanity in Rwanda.
b) It will speed up the trials of those accused of Genocide, Crimes against Humanity and other crimes.
c) It will put an end to the culture of impunity in Rwanda.
d) It will reconcile the people of Rwanda and strengthen ties between them.

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e) It revives traditional forms of dispensing justice based on Rwandese culture.
f) It demonstrates the ability of local communities to solve their own problems
g) Helps solve some of the many problems caused by Genocide.  

_Gacaca’s_ nationwide presence, use of community as witnesses, prosecutors and judges, and required weekly participation would certainly “localize” transitional justice to a much greater degree than any other accountability mechanism. The details of _Gacaca’s_ institutional design, processes, and progress will be discussed at length in the forthcoming section.

The institutional design of _Gacaca_, with a presence in every community and required a high degree of popular participation, accord with the principles of the localization norm. There are approximately 12,000 _Gacaca_ courts operating under the authority of the National Service of Gacaca Jurisdictions (NSGJ), and at three levels of administration: cell, sector, and appellate level. A pilot phase of _Gacaca_ began in 2002, with eighty cell level and twelve sector level courts, and spread countrywide in 2005. The pilot phase was accompanied by a massive education and public information campaign meant to explain how _Gacaca_ would work and to be a heavy-handed reminder to Rwandans of their duty to participate and tell the truth. All _Gacaca_ courts were set to finish their trials and appeals by July 2010 but the official closure of _Gacaca_ courts has been delayed indefinitely. The initial estimation of the number of accused to face _Gacaca_ was a few hundred thousand. This number has grown exponentially, mostly because the law encourages the accused to name their accomplices in their confessions and there is a high prevalence of false accusations among those seeking to implicate enemies and rivals. The current number of accused expected to be tried in _Gacaca_ is possibly over one million. This amounts to approximately one third of the country’s adult population and, by some estimates, almost  

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290 Rwanda has four administrative levels: provinces (4); districts (30); sectors (416), and cells. There are 10-15 cells in each sector, and each cell has approximately 100 people, or ten households.

291 This estimate has been provided by a number of scholars and by the executive secretary of the National Service of Gacaca Jurisdictions, Domitilla Mukantaganzwa. See, Schabas, "Genocide Trials and _Gacaca_ Courts," 882.
half of all Hutu males. In September 2009, the NSGJ estimated that *Gacaca* had already processed an estimated 1,127,706 cases and an additional 4,679 were pending completion by mid-2009.

*Gacaca* has several phases that begin with information collection and documentation and the categorization of criminal responsibility by *Gacaca* judges. During the information collection and documentation phase the general assembly (i.e. the community) acts as the prosecutor to identify perpetrators, victims, and present evidence. All categories of accused face the general assembly of the cell during this phase, even category one accused. The second phase of trial and sentencing is divided between administrative levels: category three accused are tried at the cell level, category two at the sector, and category one in the national court system. The Organic Law for *Gacaca* was once again amended in 2008, the significance of which was that some category one accused, including perpetrators of sexual violence, would be tried in *Gacaca* in an effort to reduce the back log of cases at the national level. During all phases any member of the community who has any information to present for or against an accused is required by law to step forward and provide testimony.

Moderating and adjudicating the exchange is the responsibility of the five judges, known as *Inyangamugayo*. These 170,000 *Gacaca* judges were elected by their communities as “persons of integrity” in 2001. The judges were trained for three months by local magistrates and final year law students on the principles of the Organic Laws and the procedures of the courts. In addition to their moderating role in the first phase of the trials, they are responsible for subsequently categorizing the criminal responsibility of the accused and making judgement and sentencing decisions in the final phase. During the trials they are responsible for controlling the discussion, the flow of evidence, and maintaining order. Judges are also responsible for record keeping, and the NSGJ provides booklets to them detailing trial procedure and the instructions and standardized forms for collecting information how the genocide


was carried out in each cell, lists of witnessed, accused, judgments and sentencing, etc.\textsuperscript{295} The reliance of Gacaca on such extensive community participation, as judge and jury on a weekly basis, and its extensive presence throughout the country certainly localized transitional justice in every way possible.

In sum, the international community made a decisive choice to set up an international tribunal for Rwanda outside of the territory where the crimes were committed. Localizing the tribunal, it was argued, would negatively affect the impartiality and credibility of the tribunal. Eventually the tribunal would try to build local ownership of its processes and outcomes by other means, such as the outreach program. Yet, in the decision making process for a tribunal there was a firm decision to physically and politically distance it from Rwanda. Rwandan authorities recognized that the bulk of its genocide cases could not be handled by its national court system, and instead chose to reinvent the traditional dispute resolution mechanism, Gacaca, in order to achieve accountability through an indigenous and localized institution. Essentially, localization was a local norm to begin with and was not salient at the international level; through the feedback effects from implementation of transitional justice it became an international norm and the Tribunal adapted to it. The appropriateness of the localization norm’s prescriptions was further strengthened by it interrelatedness with the accountability and reconciliation norms. As will now be shown, the oft-cited justifications for various forms of accountability and building local ownership of justice was their potential contribution to reconciliation.

Reconciliation

The reconciliation norm is constitutive of the expected outcome of transitional justice institutions and, as such, is commonly referenced in institutional mandates and discursive justifications for the justice processes. The origins of this norm are subject to debate. Certainly, and as with the origins of the current conception of the accountability norm, the appropriateness of prescribing reconciliation as an outcome of transitional justice is critically linked to the South African TRC. But the Rwanda case marks the first time that reconciliation was articulated as a goal for an international court and was sanctioned as a

legitimate goal for domestic institutions, as opposed to being equated with a political excuse for impunity
as it had been in Latin America in past decades. This, therefore, marks an important early juncture in the
defining this norm in the international normative structure. But as an emerging norm, the utility and
appropriateness of articulating reconciliation as an expected outcome is still questioned in the policy and
academic literature on transitional justice, particularly as its definitions, scope, and intensity are varied in
and because of the difficulties inherent in measuring the causal relationship between justice and
reconciliation.296 These issues are made more apparent by differentiating minimalist from maximalist
concepts of reconciliation that were discussed in Chapter One. Nevertheless, both reconciliation concepts
have a high degree of salience and this is evidenced by their hegemonic presence in Rwanda’s political
discourse on justice and the framing of its policies and justifications for institutional design.

It is important to note that the discourse of reconciliation in Rwanda is largely a political and
elite-driven one and “neither the Rwandan government nor the international community has solicited the
views of the Rwandan population regarding the best means of achieving unity and reconciliation.”297 One
academic study reveals the views of Rwandan participants, from surveys and interviews, as encompassing
a range of expectations of reconciliation; many “said that Rwanda needed reconciliation, and they
generally shared a common understanding that reconciliation was an effort to bring together victims and
the victimizers in order to rebuild community…but they disagreed sharply on how reconciliation can be
achieved.”298 This same study also noted that participants connected compensation or reparations with
reconciliation.299 Respondents in another study used a thin conceptualization of reconciliation,
referencing basic security and “being civil” to one another, indicative of the kind of minimalist

296 See, Fletcher and Weinstein, “Violence and Social Repair: Rethinking the Contribution of Justice to
Reconciliation.”, Meierhenrich, “Varieties of Reconciliation.”

297 Timothy Longman, Phuong N. Pham and Harvey M. Weinstein, "Connecting Justice to Human Experience:
Attitudes toward Accountability and Reconciliation in Rwanda," My Neighbor, My Enemy: Justice and Community
in the Aftermath of Mass Atrocity, eds. Eric Stover and Harvey M. Weinstein (Cambridge: Cambridge University

298 Timothy Longman and Theoneste Rutagengwa, "Memory, Identity, and Community in Rwanda," My Neighbor,
My Enemy: Justice and Community in the Aftermath of Atrocity, eds. Harvey M. Weinstein and Eric Stover

reconciliation that is equated with coexistence. In my own interviews, Rwandan survivors and local researchers articulated conceptualizations of reconciliation that also ranged from coexistence to healing; yet, all emphasized that reconciliation, irrespective of its scope or intensity, could only be achieved with truth-telling and possibly forgiveness and that Gacaca was the only mechanism with the potential to provide such knowledge and acknowledgement. Moreover, one survivor explained that “Gacaca is not a platform for justice, but is a platform for reconciling Rwandans,” which is illustrative of a common resignation that if Gacaca cannot provide justice in the punitive sense, there is an important trade-off of reconciliation.

**Minimalist Reconciliation**

The ICTR is the first international court of its kind to include reconciliation as part of its mandate. Neither the statutes of the Nuremberg trials nor the International Criminal Tribunal for Yugoslavia articulated such a socially and politically transformative goal for their trials. Resolution 955 states:

> convinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace.

The scope of reconciliation sought is not clear from the tribunal’s statute, such as whether it refers to minimalist or maximalist reconciliation. However, it was clear the Tribunal’s architects were “strongly convinced of the linkages between the concept of justice and that of national reconciliation,” irrespective of the type of justice or extent of reconciliation. Kamatali argues that “it was assumed that avoiding holding a specific group of individuals on ethnic, regional, political, or other grounds responsible for the

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atrocities committed in Rwanda was the most crucial step in bringing about reconciliation among Rwanda.304

The ICTR was established at a time when “transitional justice” as a concept and policy response to atrocities was being internationalized and a narrative of its goals, one of which was reconciliation, was reaching consensus. There are several reasons why the Security Council felt compelled to include reconciliation in the tribunal’s mandate. First, the impetus for the Tribunal partly came from the report provided by the Special Rapporteur that stressed the relationship between justice and reconciliation: “the (parties to the conflict) must establish mechanisms for the effective punishment of those responsible. That is one of the prerequisites for national reconciliation and unity.”305 Second, the international community at large was impressed with the process and outcomes of the South African Truth and Reconciliation Commission. As its name suggests, truth and reconciliation were the framing concepts of this institution and the TRC was judged by many outside of South Africa to be successful. As Stansell argues, the TRC’s “relative success made ‘reconciliation’ a touchstone in human rights vocabulary;” neither the international community nor Rwandan authorities could negate its influence.306 Even though the processes of a trial differ significantly from that of a truth commission, trials still serve a truth-telling function that is arguably linked to reconciliation outcomes. In theoretical terms then, the socialization mechanism of emulation has played an important role in the institutionalization of this norm. Third, some argue that the United Nations was still reeling from its unwillingness and inability to militarily intervene in the genocide, and reconciliation was “grafted onto this fundamental guilt factor.”307 Fourth, it is also likely that factors specific to the case of Rwanda played a part in identifying reconciliation as a goal for the


ICTR. The interpersonal and intercommunal nature of the violence logically led to a recommendation that reconciliation at this level would have to be achieved to prevent a recurrence of violence.

Finally, the inclusion of reconciliation is also a product of the ICTR being mandated by a Chapter VII Security Council resolution, which is explicitly reserved for situations that threaten international peace and security. Determining whether the ICTR was expected to affect a minimalist or maximalist degree and depth of reconciliation is related to what we have already learned about the salience of the aforementioned norms. Given the ICTR’s prosecutorial strategy was set to focus on the punishment of elite perpetrators under a Chapter VII resolution, in an attempt to remove them as a threat to national and regional security and deter a resurgence of violence, it is more likely that the tribunal was expected to serve a minimalist level of reconciliation by contributing to security in the region and avoiding perceptions of impunity that could incite revenge. Moreover, as the ICTR was not mandated with mechanisms and resources to build local capacity and local ownership, it could not reasonably be expected to then affect interpersonal or intercommunal reconciliation.

**Maximalist Reconciliation**

For authorities in post-genocide Rwanda, the inseparable concepts of “unity and reconciliation” have been used to frame policy and public discourse on justice and many social and political institutions. The government conceives of reconciliation as requiring more than mere coexistence and seeks to affect inter-personal and communal healing and national reconciliation between state and society. A 2005-2007 public survey by the GOR on “social cohesion” articulated that reconciliation and unity is measured by indicators of interpersonal trust, an ability to work together toward shared goals, and whether members of society believe that government represents their interests and furthers their well being. In the context of justice, Zorbas refers to this official government discourse on reconciliation as a “public transcript,” which she dubs the “RPF Healing Truth.” This discourse, she explains, is based on two pillars: “a ‘backward looking’ pillar, which attributes guilt for the genocide, and a ‘forward-looking pillar’, which

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seeks to prevent genocide in the future and amount to, in theory, an extensive societal transformation project.”

The idea that a social transformation is required for reconciliation is rooted in the Government’s understanding that, in addition to “bad history and “bad authorities,” a “bad culture” of obedience, submission, and ethnic divisions made the genocide possible. While justice is only one among many reconciliation tools used by the government, these pillars combined speak to the expectation of the causal effects of justice, as punitive and socially transformative, on reconciliation.

The maximalist conceptualization of reconciliation in Rwanda is most evident when examining how it shapes the mandate and processes of Gacaca. It was decided at the Urugwiro meetings in 1999 that “classical justice” could not sufficiently contribute to the “unity and harmony” of Rwandans, and thus a reinvention of Gacaca would become one of several institutional mechanisms to facilitate reconciliation. The report on these reflection meetings stated in various parts that reconciliation was dependent upon participation, living together, confessions, and eradicating a culture of impunity.

Moreover, the 2000 Organic Law establishing the Gacaca courts states:

considering the necessity, in order to achieve reconciliation and justice in Rwanda, to erase for good the culture of impunity and to adopt provisions enabling prosecutions and trials of perpetrators and accomplices without only aiming for simple punishment, but also for the reconstitution of the Rwandese society...

As traditional Gacaca was still in use in the year following the genocide, ordinary Rwandans had a sense of its possible utility for genocide cases and its impact on communities and various consultations “established that people thought it should function as a mechanism to restore order and harmony in society, and reconcile families and neighbours.”


Thus, the GOR came to increasingly rely on *Gacaca*’s indigeneity and restorative justice processes for low-level perpetrators to tout its reconciliation potential, particularly via its truth-telling and community participation mechanisms. In this sense, a norm of reconciliation in Rwanda is interrelated with the norms of accountability and localization, in that non-punitive sanctions and community participation are assumed to have positive effects on reconciliation. With *Gacaca*, it was assumed that the truth-enabling mechanism of a plea-bargain would be a facilitator of reconciliation. This assumption initially found resonance with Rwandan communities, as many were still awaiting the truth about what happened to their families and to know where they were buried.\(^{315}\) The other mechanism of *Gacaca* that is meant to facilitate reconciliation is community participation. In theory, community members’ “active participation contributes to political and personal reconciliation within the Rwandan population, since people are given the opportunity to confront their attackers, tell their stories and express pent-up emotions all in a secure environment.”\(^{316}\) It was hoped that this personal confrontation would enable communal reconciliation in the long term, even if it heightened tensions in the short term. As *Gacaca* developedinstitutionally over the years and its practice spread throughout the country, the government’s discourse that justice would contribute to reconciliation in this forum would become much more pronounced.

It is important to note that while there was talk of reconciliation as a product of justice in the late 1990s, the primary focus was on ending a culture of impunity and addressing the lack of capacity to prosecute such a high volume of cases. The 1999 report on the reflection meetings at Urugwiro references reconciliation sparingly; “the notion of reconciliation or restorative justice that is currently attached to the *Gacaca* court system only surfaced in the years that followed, and the Urugwiro meetings may have been the breeding ground for its introduction in public discourse.”\(^{317}\) The 2000 Organic Law makes only the one reference to reconciliation. *Gacaca* was initially framed as a pragmatic and necessary alternative to

\(^{315}\) A very high proportion of Rwandans are Catholics and providing a proper Christian burial for their families is considered important.


\(^{317}\) Ingelaere, "The Gacaca Courts in Rwanda," 38.
“classical justice,” but it was later increasingly touted as a mechanism of reconciliation and linked to broader discourse and policies on unity and reconciliation mandated by the government. Therefore, it was evident in the decision-making stage of transitional justice that the government conceived of a more maximalist conceptualization of reconciliation in connection with Gacaca, the salience of this norm would only become stronger as the institution was further developed and implemented.

To summarize the salience of transitional justice norms at this stage, decision making for Rwanda was a two-track process in which the international community and Rwandan authorities began to design institutions according to their own logics and priorities. The hierarchical division of criminality norm prescribes a pragmatic institutional division of labour that also reinforces the appropriateness of the range of sanctions that underlie the accountability norm. The salience of both these norms was best measured by their justifications and logics founds in the early investigations into the crimes and in early decision-making stages for these institutions. With respect to accountability, there was still much debate and contention over what was considered appropriate for low-level perpetrators – a characteristic not uncommon for an emerging norm. The salience of the localization norm was initially mixed and limited to the local level, but becomes increasingly more important at the international level through the course of implementation. Finally, the case study of Rwanda is key for illustrating the salience of the reconciliation – as a framing concept for the expected outcomes of both international and local justice processes. Like the localization norm, the reconciliation norm has been increasingly salient for Rwanda over the years, in part because of political currency its carries internationally. Despite the varying degrees of salience of these transitional justice norms, they have not been implemented without significance institutional challenges and normative conflict. Both kinds of implementation outcomes provide lessons learned for international normative structure of transitional justice, but also importantly contribute to re-interpretations of how to put these principles into practice in Rwanda and elsewhere.

IMPLEMENTING TRANSITIONAL JUSTICE NORMS

Recalling that implementation challenges are productive and necessary for the normative structure to endure and change, the lessons learned in the case of Rwanda provides a great deal of insight
into how international norms were put into practice at the local level and in turn, the potential feedback effects to the international normative structure of transitional justice. Various institutional failures negatively affected the credibility and legitimacy of transitional justice processes while normative contestation has revealed inconsistencies and re-interpretations over how transitional justice norms should be implemented in this particular context. The hierarchical division of criminality norm has had a clear functional role for the division of labour between and within transitional justice institutions. But contestation over whether this norm prescribes that parties on both sides of the conflict should be held to account has negatively affected the legitimacy of both the ICTR and Gacaca courts by collectivizing both guilt and innocence. With respect to the accountability norm, the extent to which justice can be meted out for low-level perpetrators has been stymied by various institutional failures, notably the politicization of the Gacaca courts and its compromises in sanctioning to facilitate truth-telling and reparations. Beyond the institutional failures, there is some evidence of contestation over different conceptions of justice between the international and local levels and between transitional justice norms. Likewise, the effects of localization, by attempting to build local ownership and reinvent a traditional dispute resolution, have only partially succeeded in connecting community with justice; this is due in large part to a lack of local capacity and lack of political will at the international level and the politics that have surrounded the reinvention of Gacaca as a communitarian form of justice. Finally, all of the aforementioned obstacles and growing insecurity have put reconciliation beyond the reach of ordinary Rwandans and rendered it an authoritarian policy and not a lived reality. Significant normative contestation exists over the nature and extent of reconciliation that should be expected from transitional justice institutions.

Hierarchical Division of Criminality

The breadth and depth of accountability for both high and low-level perpetrators respectively has been controversial. The most obstinate controversy has been the lack of accountability for war crimes and crimes against humanity committed by the RPF during and after the 1994 genocide, with the victims of these crimes numbering in the tens of thousands.\(^\text{318}\) Impunity for these political elites who consider

themselves the “victors” of the civil war is still politically relevant. The recent UN “Mapping Report” provides evidence that the RPF committed war crimes and crimes against humanity in the DRC between 1993 and 2003, and possibly constituting genocide.319 Rwanda’s hyperbolic reaction to this report attacks the credibility of the investigations and questions the legitimacy of the UN as a whole; it does not refute that individual crimes have been committed in its ongoing military campaign in the DRC but categorically denies what it calls the “double genocide” theory.320 This issue reveals contestation over the hierarchical division of criminality norm with respect to the horizontal scope of criminal responsibility.

The GOR and the ICTR have uncritically ascribed to the view that only elite perpetrators from one-side of the conflict, i.e. the Hutu genocidaires, should be the focus for transitional justice institutions. But the lack of justice for RPF crimes through the ICTR and Gacaca courts, and by implication the failure to recognize the victimization of Hutus in the war and genocide, risks rendering a one-sided justice and resulting in a loss of legitimacy and credibility for both institutions.

Victor’s Justice

The accusation of victor’s justice stems from the perspective that the Rwandan Patriotic Front is considered the liberator of Rwanda from the Hutu genocidaires. The current GOR is largely comprised of former RPF including their leader and now president, Paul Kagame. The origins, jurisdiction and mandate of the ICTR are designed to prevent it from being a “victor’s court” and the mandate “allows the prosecution to investigate and prosecute serious violations of international humanitarian law on all sides


319 Many rightly contend that the Mapping Report merely confirms what has long been known to experts on Rwanda regarding RPF Crimes, and would reference the suppressed 1994 Gersony Report that made similar contentions. However, the Gersony Report focused on committed by the RPF in Rwanda whereas the Mapping Report exclusively focuses on the DRC. Nonetheless, a persistent patterns of mass violations of human rights violations committed by the RPF emerges within and outside of Rwanda. See, Office of the United Nations High Commissioner for Human Rights (OHCHR), Democratic Republic of the Congo, 1993-2003: Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Humanitarian Law Committed within the Territory of the Democratic Republic of the Congo between March 1993 and June 2003 (United Nations, 2010).

of the conflict” within the year of 1994. This mandate, therefore, permits it to investigate crimes of genocide against Tutsis but also crimes committed during a portion of the broader civil war in which the genocide took place and for which perpetrators and which victims exist on both sides of the ethnic and political divides. Despite the institutional mandate of the Tribunal, “from the beginning there was an inbuilt risk that the ICTR would transform a long history of symmetrical barbarism, which stretches back as far as 1959, into a truncated history of asymmetrical conflict.” But any mention of investigating RPF crimes has been met with harsh criticism and rebuke from the Rwandan government, very few individuals have been tried for war crimes, and all those tried and punished have been Hutu genocidaires. These developments reveal contestation, mostly between international and local actors, over whether the hierarchical division of criminality norm prescribes that the breadth of criminality responsibility should be interpreted to mean accountability for elite perpetrators on both sides.

The degree to which the ICTR has been willing to investigate RPF crimes has varied between prosecutors. The first Chief Prosecutor, Richard Goldstone, argued the court was created primarily to deal with the crime of genocide, that the crimes of Hutu genocidaires far out-weighed those of the RPF, for which he falsely claimed there was little evidence. Both Chief Prosecutors Louise Arbour and Carla Del Ponte began preliminary investigations into RPF crimes, however, Arbour’s concerns about the security of investigators and Del Ponte’s difficult relationship with the GOR prevented the Tribunal from turning investigations into prosecutions. Former Chief Prosecutor Del Ponte made several attempts to investigate RPF crimes and the government responded by preventing witnesses from travelling to Arusha and temporarily ceased all cooperation with the Tribunal. The removal of Del Ponte from the ICTR and the diplomatic overtures made by her successor improved relations between Rwanda and the Tribunal.

1998, the Tribunal’s current prosecutor, Hassan Jallow, opened investigations into four RPF military officers but ultimately left the prosecution of these crimes up to the Rwandan national courts.\textsuperscript{324}

Contesting that this hierarchical division of criminality norm should prescribe balanced prosecutions is a result of implementing it in the particular context of Rwanda and its inter-normative conflict with reconciliation; specifically, the claim is that RPF prosecutions would re-ignite conflict and threaten reconciliation by stoking ethnic divisions and political dissent. As such, the ICTR has strategically ignored the broader context of the war and RPF crimes out of concerns for stability; President Kagame has taken advantage of the international community’s guilt and concerns about stability and the Tribunal’s desire for institutional effectiveness to prevent RPF prosecutions. With respect to the former concern, during Del Ponte’s embattled effort to open indictments, Kagame argued – “you are going to destabilize the country this way.”\textsuperscript{325} With respect to the latter, international tribunals must rely on the cooperation of states to turn over witnesses, suspects and legal assistance. With each attempt to investigate and indict RPF crimes the GOR put up obstacles to the Tribunal’s operations and made it clear that the ICTR’s access to obtain evidence, witnesses, and suspects would hinge on maintaining RPF impunity. To pursue those in positions of power in Rwanda the international community had to balance the pragmatic concerns of risking a backlash from the RPF and potential instability against the principled pursuit of justice.

Several recent incidents, largely played out in the media and diplomatic circles, illustrate the politically volatile nature of prosecuting RPF crimes and responses from the international community. A diplomatic row between France and Rwanda in late 2006 raised the possibility of individuals in the RPF, and Kagame himself, being prosecuted for shooting down President Habyarimana’s plane, an event which triggered the genocide and is tantamount to war crimes.\textsuperscript{326} As the diplomatic dispute unravelled, Rwanda cut off diplomatic ties with France, the French embassy in Kigali was shut down amidst protests, and

\textsuperscript{324} Human Rights Watch (HRW), \textit{Law and Reality: Progress in Judicial Reform in Rwanda}.

\textsuperscript{325} Moghalu, \textit{Rwanda's Genocide: The Politics of Global Justice} 147.

Rwanda continued to strengthen its political ties with less critical allies. The second incident stems from a petition to the ICTR, signed and circulated in May 2009 by scholars of Rwanda and human rights advocates, pressing for indictments and prosecution of RPF crimes at the ICTR. The petition states:

The Tribunal has achieved considerable success in bringing to justice those most responsible for the Rwandan genocide. However, a failure also to address the RPF’s killing of tens of thousands of civilians will result in serious impunity for grave crimes committed in 1994 and would leave many with a sense of one-sided, or victor’s justice….While not of the same nature or scale of the genocide, these serious crimes fall within the ICTR’s jurisdiction and should now be prosecuted.

The Rwandan media, particularly The New Times, largely a mouthpiece of the government, responded with vitriol and accused the petitioners of supporting the genocidaires, denying the genocide, and fostering “divisionism.” Many of the petitioners, in public speeches and scholarly work, continue to argue that while RPF crimes are not the moral or legal equivalent of genocide, these war crimes nonetheless require prosecution and an even-handed approach to accountability. Finally, Victoire Ingabire intended to run against Kagame in the presidential election in August, 2010. Her public contention that those who committed atrocities against Hutus during the genocide should also be held accountable and the victimization of Hutus recognized, was met with accusations by Kagame and RPF elite that she denies.

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327 The RPF elite and their supporters are largely Anglophone, having lived in Uganda for decades. This distinguishes them from the Tutsi population who has always lived in Rwanda and is primarily Francophone. Since taking power, the RPF government has deepened political and economic relations with the United Kingdom, applied to join the Commonwealth, legislated English as the secondary language on par with French, and mandated the teaching of English in primary schools.

328 Human Rights Watch (HRW), Letter to the Prosecutor of the International Criminal Tribunal for Rwanda Regarding the Prosecution of RPF Crimes (New York, NY: Human Rights Watch www.hr.org/node/83536, 26 May 2009). This petition was sent to the UN Secretary-General, President Obama and Prime Minister Gordon Brown and had a timely release to coincide with the presentation of the ICTR’s completion strategy to the UN Security Council. In the interest of full disclosure, I acknowledge that I have signed this petition. Among the petitioners are many notable experts of Rwanda, its history and its genocide, and those that have many spent many years living and working in the country. The petition was also signed by the husband of the late Alison Des Forges, formerly of Human Rights Watch and author of its seminal report, Leave None to Tell the Story. Des Forges dedicated many decades to the study of Rwandan history, to the genocide, and its victims. She was increasingly critical of the RPF-led government and was subsequently denied entry into Rwanda shortly before her tragic death in a plane crash in 2009.

329 Human Rights Watch (HRW), Letter to the Prosecutor of the International Criminal Tribunal for Rwanda Regarding the Prosecution of RPF Crimes.

the genocide and uses ethnicity to gain support. Ingabire has since been harassed, and threatened, and imprisoned without bail or trial and no meaningful opposition was permitted by her, or anyone else, in the 2010 Presidential election. This case coincides with a general pattern in which the RPF has quelled opposition and dissent even within its own party, most notably witnessed with the forced exile of prominent political and military elites and convictions against them (in abstentia) of “divisionism” and promoting “genocide ideology.” Prominent human rights organization, most notably Human Rights Watch, have joined academics and publicly and strongly criticized the GOR for its undemocratic practices and repression that coincides with impunity for RPF crimes. But the diplomatic and donor community, particular in the US and UK, has by and large been silent on issues of accountability, preferring instead to prioritize economic growth as a precondition for stability.

The turf war between the ICTR and the RPF-led government has damaged the legitimate authority of both parties within Rwanda. The important institutional achievements of the ICTR have been hemmed in by its inability to overcome the political obstacles inherent in meting out impartial justice. While the ICTR is an international institution, which can claim to be neither the victor nor the victim in this conflict, its inability and unwillingness to prosecute RPF crimes has rendered it a victor’s court by proxy. The government’s influence over the Tribunal is “enabling them to have their suffering in the war acknowledged and their vanquished enemies prosecuted on the world stage, while leaving their own war crimes unexamined and unpunished.” The Rwandan government has been able to legitimize its rule and discredit the Tribunal through its strategic decision making on when and how to cooperate with it.

The impunity of the RPF has carried over to the Gacaca courts, which have not prosecuted RPF crimes for two reasons. First, Gacaca has been structured to prohibit investigations into war crimes, 

333 Human Rights Watch (HRW), Law and Reality: Progress in Judicial Reform in Rwanda.
which has all but eliminated the possibility of prosecuting former RPF. Furthermore, the temporal jurisdictions of Gacaca extend back to 1990 and therefore can address the extent of the genocide’s organization and planning; the tail end of its jurisdiction ends at 1994 and thus excludes some of the RPF crimes committed after its liberation of the country and those that are ongoing. The government claims that these war crimes will be dealt with by the national court system but it has only prosecuted a handful of RPF related cases in the national courts and primary in military courts. According to a recent critical Human Rights Watch report,

in the four years after taking power, the RPF-led government prosecuted 32 soldiers accused of killing or otherwise violating the rights of civilians during the year 1994, of whom 14 were tried, convicted and sentenced to prison. Most of those convicted were of lower ranks or were ordinary soldiers and they received punishments that were not proportionate to the gravity of the crimes...After 1998, the Rwandan military courts prosecuted no soldiers accuse of crimes allegedly committed in 1994.336

Second, despite the “grassroots” moniker assigned to Gacaca, the authority of judges and participation of communities are heavily controlled and monitored by the state. A social climate of fear and suspicion of authority precludes any effort to bring RPF suspects to justice. Making any accusations against the RPF carries the risk of criminal charges and convictions for “genocide ideology” and “divisionism.” Therefore, broadening the scope of responsibility to include RPF crimes is likened by authorities to a return to inter-ethnic divisions and violence.

The significance of this contestation over the hierarchical division of criminality norm for the normative structure of transitional justice is two-fold. First, in the case of Rwanda the implementation of this norm has produced conflicts with that of accountability and reconciliation in this particular context. As the justification for RPF impunity is often framed as a trade-off for stability in the region and unity and reconciliation among Rwandans, in this context the hierarchical division of criminality norm conflicts with that of reconciliation. Similarly, ongoing impunity for the RPF effectively constitutes a blanket and de facto amnesty. As concern mounts about the nature and degrees of repression in Rwanda, the international community is steadily but sporadically reasserting the inappropriateness of such impunity and demanding accountability. Second, both the ICTR and Gacaca courts have lost credibility and

336 Human Rights Watch (HRW), Law and Reality: Progress in Judicial Reform in Rwanda.
legitimacy as transitional justice institutions as a result of this contestation. Very few international observers now contend that either model of justice is one to be replicated and their failures are cited more than their successes. A feedback effect on the international normative structure would result in a more precise interpretation of the hierarchical division of criminality norm as prescribing accountability for both sides to a conflict in practice, not just in principle.

**Accountability**

The salience of the accountability norm in Rwanda was demonstrated by the discourse that legitimates the complementarity of punitive and non-punitive sanctions meted out for genocide crimes and the policies and institutional designs that facilitate it. The ICTR was been a strictly punitive institution, owing in part to its prosecutorial strategy of focusing on elite perpetrators. The Gacaca courts, however, provide a mix of punitive and non-punitive sanctions that are determined by the categorization of perpetrators and plea-bargaining mechanism outlined in the Organic Laws. Gacaca has also been able to provide limited, and largely symbolic, reparations measures. The extent to which there has been numerous institutional failures and normative contestation when putting the accountability norm into practice is mostly confined to issues of non-punitive sanctioning, and specifically the quality and utility of truth-telling as a trade-off for punishment and the lack of a significant reparations scheme for survivors.

**Just Punishment**

One notable normative conflict between the ICTR and Rwanda has been with respect to the severity of punitive sanctions. The disputes that arose between Rwandan authorities and the United Nations Security Council at the Tribunal’s inception (with respect to its location, lack of death penalty, and lack of Rwandan influence over judges and prosecutors) have given way to broader divisions over the scope of crimes under the ICTR’s jurisdiction and the Tribunal’s irrelevance to Rwandans and their local conceptions of justice. An illustrative example of this tension is the Barayagwiza case, which attained notoriety after its dismissal and reinstatement. Barayagwiza was an elite figure during the genocide and was responsible for establishing RTLM. The ICTR dismissed charges against him in November 1999 when the judges ruled that prosecutors had violated his due process rights, given that the defendant had waited one and a half years from the time of his arrest to the time of being charged. Rwandans were
outraged at the decision and blamed Western conceptions of justice, which they alleged valued procedure over accountability, for the dismissal. In response to public outrage, internationally but especially in Rwanda, the Chief Prosecutor asked the Tribunal to reconsider and in March 2000 the ICTR controversially reversed its decision. While both the GOR and the ICTR desire punishment for elite perpetrators under the jurisdiction of the Tribunal, a number of conflicts between these parties reveal different interpretations regarding the prioritization of due process over punishment.

Similar concerns over due process and punishment have been raised about Gacaca, which has become increasingly punitive and less restorative since its inception. Human rights groups have voiced strong concerns over the possibility of a fair trial in Gacaca. The strongest critique arises from the various Organic Laws’ lack of adherence to international human rights and criminal law standards. In particular, that defendants have no right to counsel, the blurred lines between the role of the judges and the community, and lengthy pre-trial detentions, have been fodder for criticism. The response to these critiques is often that these violations are a pragmatic trade-off for a transitional justice institution that takes its cues from informal, restorative justice principle and that must provide accountability for such a high volume of accused and victims. But the more punitive Gacaca has become, the more there are concerns for due process for the accused. In this sense, the case of Rwanda reveals a conflict between the norms of accountability and localization. International norms, in this case that of the punitive and formal trial process of accountability, can be contested as the local level as an imposition of Western norms and the crowding out of more culturally prevalent modes of justice that have been justified by a norm of localization.

**Restorative Justice Compromised**

There is a consensus among government officials, donors, researchers, and especially Rwandans that truth-telling is the most important principle of Gacaca. The functional and normative significance of truth-telling is its provision of justice through knowledge and acknowledgement, which is particularly important when crimes have been committed in a political and social environment of myths,
misinformation, and secrecy. In Rwanda the benefits of healing, reconciliation, knowledge and acknowledgement are expected from truth-telling. But truth-telling is also the trade-off for punishment and the form of non-punitive sanctioning that is offered as a plea bargain in Gacaca facilitates and reflects this trade-off. Knowing the practical difficulties of punishing large numbers of accused, survivors highly value this trade-off. Those who support and oppose the Gacaca courts agree that without truth-telling there can be no accountability or reconciliation and that truth-telling is the responsibility of all Gacaca participants. Truth-telling from the confessions of the accused can provide catharsis for the perpetrators and knowledge and acknowledgement for the survivors. It is also important for survivors who do not know what happened to their relatives and want the truth as a precursor to personal healing and acceptance of their loss, and for those who do know what happened to their relatives and will not forgive until the accused confesses to their crime(s). Finally, truth-telling is important for all survivors who want to be able to locate and identify their deceased family members so they can provide a proper Christian burial.

The number of confessions in Gacaca courts across Rwanda was very low during the pilot phase: there were only 2,883 confessions among the 63,447. Another estimate places the rate of confessions from the pilot phase at only five per cent, after which there was a shift from confessions to accusations. However, the rate of confessions increased substantially as Gacaca eventually spread throughout the country. This is largely owing to greater knowledge of the plea bargain process and the realization that an accepted confession meant a reduced sentence, and likely immediate release. Also, owing to a “Born Again Christian” movement in Rwanda that swept through the prison system as well many prisoners felt

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338 One important caveat to this benefit is that the GOR is not allowing burials where bodies have been found in mass graves.


compelled to confess and repent for their sins. The extent to which compromises in sanctioning can still constitute accountability, however, has been thwarted by a number of institutional failures, largely due to the politicization of Gacaca. Despite the expected benefits to be derived from Gacaca’s restorative justice principles, the legitimacy and credibility of the truth-telling component of has been compromised and not met expectations of survivors and accused.

The institutional challenges of the plea-bargain mechanism are vast. The quantity and quality of confessions among many accused has been poor. Many of the accused were telling partial-truths, shifting blame to those who are deceased or fled the country, and admitting to lesser crimes in order to take advantage of a plea-bargain. Confessions that falsely implicate others, with the hope that enemies or rival would be imprisoned and the accusers could gain status or property, have been prevalent. As Waldorf details, “there is a lively market for confessions (inside prisons), with detainees being paid to name some and not others.”

By most researchers’ accounts of Gacaca observations, including my own, confessions have a formulaic and unemotional quality, which weakens their sincerity and creates doubts about their veracity. From my observations of a Gacaca trial in Kibuye, as an example, where the accused was a category one perpetrator responsible for orchestrating a massacre of thousands in the very same stadium that the Gacaca was taking place, impartial confessions were met with rebuke and disdain. The accused was brought to Gacaca for the information collection phase and therefore the testimony provided by the community and his own testimony would be the basis for his trial in a national court. Despite his crimes and degree of responsibility being well known to the community, the accused publicly denied most of the crimes, shifted responsibility to his subordinates, and he claimed he was either not present during the crimes or could not remember the details. He did take some responsibility for lesser crimes but denied being a position of authority, as is typical for many category one accused. Most of his testimony was met with outright laughter from the large crowd of several hundred, many of whom testified against him and could provide quite specific information on the crimes committed under his authority. This case is


illustrative of a pervasive issue for Gacaca, that the degree of knowledge and acknowledgement provided by accused has been both compromised and minimal. Given that this form of truth-telling is the most important trade-off for more punitive and criminal sanctions, the legitimacy and credibility of Gacaca as means to accountability is undermined as a result.

Truth-telling is also not benefiting victims of sexual violence. Very few accused are confessing to charges of rape because rape is a category one crime (receiving the harshest punishment). By identifying rape as a category one crime there has been little justice for victims of sexual violence and no change in the social stigmas associated with rape victims in the communities. Accusations of rape are usually brought forward by local NGOs or officials; victims of rape rarely come forward on their own for fear of the social and family repercussions. As an AVEGA (widows’ association) official explained to me, one of their primary challenges has been to explain to victims of sexual violence the necessity of speaking out about their crimes in Gacaca, not only to reveal the truth about these crimes to their community but aid in their own personal and psychological healing. \(^{343}\) But victims of sexual violence can be met with resistance and retaliation from their community, particularly from Hutu women married to those accused of rape who will then accuse the victim of lying. \(^{344}\) The 2004 Organic Law, in an attempt to “ensure greater privacy and dignity for victims…bans both public accusations and public confessions of sexual violence.” \(^{345}\) Victims were only able to provide their testimonies to judges in private, closed session, and therefore truth-telling about these specific but pervasive crimes has not been born out.

Truth-telling among community participants and the accused has not contributed an accurate narrative or historical record of the violence owing to several social, cultural, and political factors. First, Waldorf questions whether truth-telling is furthered hindered by the nature of Rwandan society, “given all the cultural and micropolitical constraints (not to mention the threat of prison)…there is a pervasive culture of secrecy in rural Rwanda….and) public displays of emotion are considered weak and

\(^{343}\) Author interview with AVEGA official, February 10, 2006 in Kigali, Rwanda.

\(^{344}\) Author interview with AVEGA official, February 10, 2006 in Kigali, Rwanda.

The impetus to implement a truth-telling mechanism, therefore, is not necessarily reflective of domestic norms of dispute resolution in Rwanda is more likely reflects the adoption of restorative justice principles that became internationalized with truth commissions and subsequently reflected in transitional justice norms. Second, the truth-telling facilitated by Gacaca has been hindered by a shift from confession to accusation, in which “the population could only validate the information already collected or add some more incriminating testimonies.” Therefore, “the truth becomes an outcome of negotiations between the actors” and not a true representation of the historical record. Finally, the truth that is revealed through Gacaca is most often the official, state-sanctioned version of the truth and reinforces the extent to which Gacaca has increasingly become a political tool for the state. Testimony and accusations that contradict the GOR’s narrative of the causes and nature of the violence, particularly anything that would bring attention to the victimization of Hutus or the criminal responsibility of the RPF, is heavily monitored and prevented by government authorities who have an obvious and coercive presence at Gacaca trials. Rwandans have therefore engaged in a significant degree of self-censorship that enables them to provide the limited testimony that is allowed within the confines of the GOR’s genocide narrative. Truth-telling was expected to not only be a trade-off for punishment, but also a mechanism of personal and communal healing. And as Ingelaere aptly explains, “the truth had to be spoken in a state-sanctioned manner… it implies not only that factual knowledge remains absent, but that a re-humanization and re-socialization of self and the other – the healing dimension of truth-telling is not easily forthcoming. What Gacaca facilitated for some it disturbed or destroyed for others.” These problems associated with truth-telling are largely a result of the government’s use of Gacaca as a means of social engineering and mechanism to quell political dissent, an issue which will be taken up in further details in the subsequent sections on localization and reconciliation.

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There has been a persistent expectation among survivors that a reparations scheme would ameliorate their daily socio-economic challenges and serve as a trade-off for the lack of punitive sanctioning. Despite the overwhelming desire and need for compensation among survivors, this aspect of accountability through the *Gacaca* courts or national court system has not be realized to any significant degree. In a document produced by the NSGJ the GOR states that reparations for damaged properties will be compensated by restitution, repayment, or labour and “other forms of compensation for the victims shall be determined by a particular law.”\textsuperscript{350} *Gacaca* does permit reparations, which is largely restitution from category three accused that looted and/or stole property to survivors. Since 2002, various draft laws have been bandied about that sought to establish a more comprehensive reparations scheme for survivors and to provide the finances for reparations assigned in *Gacaca*. This would also replace the aforementioned FARG and would acquire funds from the government, donors, and assets seized from wealthy perpetrators. The GOR did not make the contents of these draft laws known to the public; however, a government official interviewed bluntly stated that there will be “no compensation as such.”\textsuperscript{351}

To date, there have been no reparations for survivors beyond the limited and symbolic restitution provided by the *Gacaca* courts. This has created animosity between those who consider themselves survivors and the current government, who they believe does not represent their interests. The lack of reparations also affected *Gacaca* by removing one of the incentives for participation and leaving community service as the only mechanisms by which survivors can be compensated.\textsuperscript{352}

The challenges raised from implementing the accountability norm in Rwanda are largely those of institutional failures, in part owing to the complexity and scale of using a plea-bargain mechanisms for so many perpetrators but also from the increasing politicization of *Gacaca* by the state. But the extent to which there has been normative contestation is evident in two respects. First, there remains contestation between the international and local level regarding the degree of sanctioning and importance of due

\footnotesize{\begin{itemize}
\item \textsuperscript{350} National Service of Gacaca Jurisdictions (NSGJ), *Gacaca Process: Achievement, Problems and Future Prospects*.
\item \textsuperscript{351} Anonymous interviews with National Service of Gacaca Jurisdictions officials and local researchers in Kigali, Rwanda in January/February 2006.
\item \textsuperscript{352} Waldorf, "Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice," 59.
\end{itemize}}
process. This conflict has occurred with the ICTR’s adherence to international standards which, in some cases, has resulted in weaker punishments or dismissed trials for elite perpetrators than would not have been the case at the national level. In this particular context, there is an apparent cultural mismatch between interpretations of accountability. Second, the appropriateness of non-punitive sanctions used in 

*Gacaca* illustrates a complex correlation with the localization norm, which introduces communitarian justice principles and legitimizes a broader array of sanctions. But as *Gacaca* became more punitive and the emphasis was shifted from confessions and truth-telling to accusations and a state-sanctioned “truth” narrative, the trade-off for punishment has become less legitimate and credible.

**Localization**

The normative structure of transitional justice has increasingly ascribed functional and normative value to localization, to the extent that local justice is considered the ideal and international justice a last resort. The localization norm, as prescriptive of building local ownership and capacity, became increasingly salient for the ICTR but highly contested for *Gacaca*. The ICTR’s efforts at localization demonstrate an important juncture in transitional justice – namely, the recognition that *international* justice can and should be localized. But institutionally, the Tribunal has had neither the capacity nor the will to implement capacity building and local ownership mechanisms. Alternatively, the restorative and indigenous origins of *Gacaca* made for an obvious implementation of the localization norm. But as *Gacaca* has progressed it has become increasingly centralized and controlled by state authorities and local ownership has been detrimentally affected by coerced and reluctant participation.

**International Isolation and Local Indifference**

Despite its characterization as international justice and initial concerns over neutrality, the International Criminal Tribunal for Rwanda eventually developed some institutional components to foster local ownership of transitional justice within Rwanda. In response to the criticisms that the ICTR was too physically and socially remote from Rwandans, the Registrar, Okali, spearheaded the localization reforms. The reforms ultimately incorporated restorative justice principles into the ICTR and attempted to build local ownership among Rwandans as stakeholders in the trials’ processes and outcomes. First, Okali established a new unit for “gender issues and assistance to victims of the genocide” that sought to
provide legal and psychological counselling to victims, and especially for women who were victims of sexual violence.\footnote{Moghalu, Rwanda's Genocide: The Politics of Global Justice 67.} By focusing on victims as opposed to the more perpetrator-centric focus trials, Okali hoped to complement the ICTR’s retributive justice principles with restorative ones that would be more victim-centred and provide restitution and compensation. In 1998, Okali presented his argument and suggested that this program be directed by the Registrar’s office, funded by the Tribunal’s Trust Fund, and implemented by NGOs. He argued “the Tribunal’s policy goals …could be more effectively achieved by adding the restitutive justice program to the Tribunal’s retributive judicial response…out of moral and practical necessity.”\footnote{Moghalu, Rwanda's Genocide: The Politics of Global Justice 68-69.} The program was eventually implemented in 2000, under Rule 34 of the ICTR’s procedures.

Okali’s second initiative was to build local ownership of the ICTR among Rwandans through media outreach and information programs. The ICTR’s outreach programme has a variety of components and “particular attention is given to mass media and interpersonal communication in order to convey efficient and persuasive messages to targeted audiences inside and outside Rwanda.”\footnote{International Criminal Tribunal for Rwanda (ICTR), Achievements of the ICTR (Arusha, Tanzania: United Nations, No Date).} The programme disseminates information about the Tribunal in Kinyarwanda to the general Rwandan public, media and research organizations, arranges visits to Arusha and provides training and seminars to Rwandan journalists and law students, and contributes to local capacity building of the Rwandan judicial system and media. Assisting and exposing the Rwandan media to the Tribunal is an important function of the outreach programme. The first priority is accorded to radio, which is more widely available to Rwandans. Financial support has been provided to the Office Rwandais de l’Information (ORINFOR) and the Ministry of Justice to Report from Arusha.\footnote{The ICTR Outreach Program: Integrating Justice and Reconciliation: International Criminal Tribunal for Rwanda, United Nations.} By assisting these two institutions, the ICTR claims to have “filled the information gap about the Tribunal that exists in the rural areas of Rwanda.”\footnote{The ICTR Outreach Program: Integrating Justice and Reconciliation.}

\footnote{Moghalu, Rwanda's Genocide: The Politics of Global Justice 67.}
documentaries have been produced by the Tribunal in association with Internews, an American-based media organization, which advocates for and assists journalists around the world. The video reels produced by Internews show the Tribunals trials and judgments in addition to trials at the national courts and Gacaca; the documentaries have been shown to 200,000 Rwandans and 80,000 prisoners. Documentary viewings are followed by a question and answer session led by a Rwandan official from the Tribunal.

The Information and Documentation Centre of the International Criminal Tribunal for Rwanda was opened by the Registrar in Kigali on 25 September, 2000 and is a focal point of the outreach program. At the opening ceremony of the Centre, Okali explained that the “principal work of the tribunal is to try genocide suspects. . . those trials must make justice a reality to the Rwandan people and thus contribute to the process of national reconciliation within Rwanda itself.” The Centre’s name in Kinyarwanda is Umusanzu mu Bwiyunge, meaning a “contribution to reconciliation.” The Umusanzu is comprised of three facilities: a public information area that features print and video information of the Tribunal’s proceedings, including judgments and proceedings in Kinyarwanda; a library with volumes on international law, the Rwandan genocide and other related issues; the aforementioned Victims Assistance Programme, which provides counselling and support for victims who are serving as witnesses, or potential witnesses, at the tribunal. The Tribunal claims that the Information Centre “is fully utilized by the Rwandan public, particularly students and researchers, who wish to get first-hand information about the Tribunals.” Claims by tribunal officials that the Centre hosts nearly one hundred visitors a day are likely exaggerated as no independent researcher has been able to verify observing such a high number of

360 International Criminal Tribunal for Rwanda (ICTR), ICTR Information Centre Opens in Kigali.
361 International Criminal Tribunal for Rwanda (ICTR), ICTR Information Centre Opens in Kigali. While the information area and library are housed within the Umusanzu in Kigali, the Victims Assistance Programme was launched in the town of Taba.
362 International Criminal Tribunal for Rwanda (ICTR), Achievements of the ICTR.
visitors on any given day.\textsuperscript{363} Additionally, the location and design of the Centre demonstrates that it is only Rwandan elite, students, researchers and public officials, living in Kigali that can access the information and services available.\textsuperscript{364} The vast majority of Rwandans live in rural areas, have no access to telecommunications (with the exception of radio), and are illiterate; therefore the Umusanzu cannot possibly have relevance for this large portion of the population. Ultimately, the efforts of the ICTR to both inform and engage the Rwandan population have had a negligible impact on Rwandan communities. In a survey completed in February 2002, 87.2 per cent of respondents in four communities claimed that they were not well informed or not informed at all about the tribunal.\textsuperscript{365} But despite the lack of information, attitudes towards the tribunal fell largely within the “neutral” category and slightly more positive attitudes than negative.\textsuperscript{366}

Irrespective of its implementation challenges that were institutional in nature, the recognition that the Tribunal should localize its process to any degree is an important moment in the evolution of the international normative structure of transitional justice. The Tribunal’s mandate reflects an outmoded principle of transitional justice that neutrality and impartiality could only be insured with political and physical isolation from the communities and territories affected by the crimes. But as the Tribunal progressed, it was responsive to criticisms from within Rwanda and from advocacy in the transitional justice community that to affect justice and reconciliation dynamics it had to foster local ownership over its processes. The lessons learned from the ICTR, and thus the feedback effects on the normative structure of transitional justice, would become much more prevalent with the institutional variations of hybrid courts and the International Criminal Court.


\textsuperscript{364} The low number of visitors and prevalence of law students among them was also evident when I personally visited and observed the Umusanzu in February 2006.

\textsuperscript{365} Des Forges and Longman, "Legal Responses to Genocide in Rwanda," 56.

\textsuperscript{366} Longman, Pham and Weinstein, "Connecting Justice to Human Experience: Attitudes toward Accountability and Reconciliation in Rwanda," 213.
Violations of “Grassroots” Justice

Owing to its tradition as a community-based dispute resolution mechanism, the localization norm was implemented to a greater degree through Gacaca and the principles of local ownership and capacity building were not contested. The institutional challenges of localizing justice in Rwanda are in part a result of capacity and politicization, but also from an idealized conception of what constitutes the “local.” In many respects, Gacaca is markedly different than its traditional namesake and its claims to indigeneity and local ownership have become increasingly baseless. Competing meanings of “community” and the socio-demographic changes in post-genocide Rwanda represent one area of difference. Betts argues that Gacaca can make “no claims to legitimacy of the ‘local’ level, purely on the grounds of ‘authenticity’, ‘tradition’, or ‘communitarianism’.”367 This argument is in reference to the dynamic nature of post-genocide Rwanda communities, which have changed demographically due to incoming and outgoing refugee populations, and the loss of life from the genocide. Gacaca courts intend to try the perpetrators in the communities where their crimes were committed, but these communities have fundamentally changed and “generally do not correspond to the community that had been present at the time the crimes allegedly had been perpetrated.”368 This is also problematic in urban areas, namely Kigali and the major towns, where “migration, urban anonymity and individuality undermine the prerequisites of the Gacaca process – shared knowledge about the past and the fact of daily living together.”369

Traditional Gacaca operated without any direction or meddling from centralized authorities. Gacaca for genocide cases is heavily centralized and there is often an intimidating presence of armed guards and political elites, the latter often intervening to control the nature of information exchange and process. Various factors related to the top-down nature of Gacaca explain the indifference or reluctance of Rwandans to participate. First, participation in Gacaca is often coerced by local authorities. The GOR requires all Rwandans to attend during the information collection phase of the trial and attendance is

368 Drumbl, Atrocity, Punishment and International Law 85.
voluntary during the judgment and sentencing phase; however, participation in all phases of the trials is coerced as citizens can be reprimanded or punished for not participating, particularly if it can be shown that they know something about the crime or criminal. Local authorities are charged with monitoring who does and does not attend Gacaca and ensuring attendance. The GOR, in particular the NSGJ, claims that Rwandans freely and happily participate in Gacaca courts. Many report, however, that they only attend Gacaca out of a “sense of coercion: they liken attendance at Gacaca events to duties they owe the government and express fears of being branded as divisive should they not be seen as supporting the process.”

Many of those I interviewed also expressed a similar conviction, that attendance at Gacaca was more of a civic obligation and state-mandated responsibility. My own observations also confirm the intimidating presence of local and state authorities, whose (often armed) presence is obvious and whose control over the trials is exercised by monitoring, recording, and intervening if the testimonies presented do not accord with the GOR’s requirements. There are, however, significant regional disparities in the levels of attendance and participation and many Gacaca jurisdictions have struggled to maintain attendance and encourage participation. The largest disparity is between Gacaca courts in Kigali and the rest of Rwanda. Local authorities force Rwandans outside of the capital city to attend Gacaca by requiring shop closures and rounding up the community. This is a particular burden for most of Rwanda’s rural population, who rely on subsistence agriculture and long days spent at Gacaca are a major sacrifice.

Community members are reluctant to participate because of the trauma associated with recalling violent memories of the genocide. A study of the effects of Gacaca and re-traumatization for survivors reveal particularly troubling outcomes for victims of sexual violence. One such victim reported having a “psychological crisis” and breaking down while giving testimony; she was subsequently labelled as

370 Interview with NSGJ official in February 2006.

371 Drumbl, Atrocity, Punishment and International Law 96.

372 There are several explanations for the urban-rural disparity. First, authorities at the NSGJ claim that residents of Kigali have more important jobs to attend to and it is unreasonable to expect them to attend every Gacaca. Second, many residents of Kigali are returnees (former refugees not present during the genocide) and therefore have little stake in Gacaca. Finally, Kigali elite and returnees form the basis of RPF support in the country and as such are accorded greater leeway with their civic responsibilities. Anonymous interviews with local researchers, activists, and survivors in Rwanda in January/February 2006.
“insane” and was no longer let to speak at Gacaca. But much of the burden of participating in Gacaca has fallen to women who lost their husbands and children in the violence and now are heads of households in their communities. Providing testimony against an accused also creates a fear of reprisals from the accused once he/she is released, or family members of the accused. Similarly, many will not provide testimony in favour of an accused if the majority of the community attending the Gacaca has provided testimony against the accused.

The implementation challenges for the localization norm can also be shown with respect to the role of the Inyangamugayo (judges) in Gacaca; the possibility of coercion by local authorities was raised with respect to their election but the more significant problem proved to be the integrity of these judges. Many of those elected were later accused by victims’ groups of being involved in the genocide as active participants or complacent observers. After these accusations were investigated many were removed from their positions and some indicted for their suspected crimes. Despite the judges’ training and election by the community, human rights observers have voiced concern over the potential for bribery of judges, given that most are farmers and considered to be living in poverty, and that their qualifications are not sufficient. Other scholars of Gacaca have argued that these judges have “contextual competence” and have the trust and respect of their community members.

The benefits of localization have not been fully realized with Gacaca. In its reinvented form, Gacaca has lost its value as restorative justice in that it is heavily centralized and directed by the state and has not been conducive to voluntary community participation. The particular institutional failures resulting from implementing the localization norm in Rwanda, namely with respect to capacity and politicization, provides some important lessons that would be applicable to other post-conflict states. First, the appeal of localization is easily abused and manipulated by political authorities. The international community has largely ignored much of the coercion that lies behind participation in Gacaca owing in part to the appeal

373 Karen Brounéus, ”Truth-Telling as Talking Cure? Insecurity and Retraumatization in the Rwandan Gacaca Courts,” Security Dialogue 39.1 (2008): 69. My own interviews with officials at AVEGA, a widows association in Rwanda, confirms that most women who experience psychological trauma as a result of rape or sexual violence during the genocide are considered "crazy" in their communities.

of an indigenous and productive transitional justice institution. Essentially, the local was idealized to the point where it excused all manner of political manipulations. Second, ensuring that local institutions have capacity and credibility is important for reconciliation. In this respect, the particular manner in which localization has been institutionalized in *Gacaca* has rendered reconciliation unrealistic and unattainable.

**Reconciliation**

As the reconciliation norm prescribes the expected outcomes of transitional justice, the implementation challenges faced by the aforementioned norms accumulate to negatively affect the possibility of using justice to affect reconciliation in Rwanda. The ongoing impunity for the RPF, security implications of *Gacaca*, and violations of *Gacaca’s* restorative and indigenous roots in favour of a progressively punitive justice at the local level precludes the ability of Rwandans to reconcile amongst themselves and between state and society. Implementing the reconciliation norm has revealed some institutional failures but more importantly revealed contestation issues over different interpretations of the norm and the appropriateness of seeking reconciliation from justice in this context.

**Stability and Co-Existence**

The ICTR could only be expected to contribute to a minimalist level of reconciliation conceptualized as peace and security, or co-existence. The ICTR’s contribution in this regard has been negligible at best and it has no institutional means to affect this kind of change directly. As former ICTR President, Erik Møse admits, “reconciliation ‘mainly needs to be done through society itself’, (and) he claims this can be facilitated by the ICTR’s contribution to fair justice.” Moreover, determining whether a Tribunal can affect reconciliation by deterring further violence is difficult as it invokes counterfactual scenarios. But Akhavan claims that the ICTR has played a peacebuilding, or general deterrence, role by “moderating Tutsi revenge killings against Hutu…(and) has made the Tutsi government more cautious about violent anti-Hutu reprisals.” Alternatively, there is substantial evidence that contradicts these claims given that local actors in the region continue to commit crimes with

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375 Betts, "Should Approaches to Post-Conflict Justice and Reconciliation Be Determined Globally, Nationally, or Locally?,” 746.

the assumption of impunity. The RPF government continues to be militarily engaged in the DRC to capture former genocidaires and has been accused of committing various violations of international humanitarian law in doing so. While these violations do not constitute another genocide, there is no indication that any court, domestic or international, will hold RPF officials accountable. Even the evidence presented in the aforementioned recent UN “Mapping Report,” detailing alleged RPF war crimes and crimes against humanity committed in the DRC from 1993-2003, is unlikely to result in RPF prosecutions. Moreover, impunity for the RPF and opposition to it in general fuels the grievances of numerous Rwandan Hutu and Congolese rebel groups, namely the Democratic Front for the Liberation of Rwanda (FDLR). While the goals of such rebel groups are varied and crimes unjustified, their desire to remove the RPF as the ruling party and perception of their impunity is a contributing factor to ongoing conflict in the region.

There was a greater expectation that Gacaca could facilitate reconciliation as co-existence by displacing vengeance, both within communities and between communities and the state. To be sure, a tenuous level of intra-communal co-existence and co-habitation of survivors and perpetrators exists in many parts of Rwanda and this is not insignificant. But the primary obstacle to achieving this minimalist reconciliation is the security implications that have resulted from Gacaca and the political environment of fear and intimidation in which it operates. Vengeance killings “on the periphery of Gacaca” are persistent throughout Rwanda. When the Gacaca trials started in earnest in July 2006 the government was acutely aware of the potential security repercussions. Justice Minister Mukabagwiza told the New Times: “nobody should fear; witnesses should give their testimonies freely and the suspects should be


378 One of the alleged masterminds behind the FDLR, Callixte Mbarushimana, was recently arrested in France and extradited to the ICC to be put on trial for war crimes and crimes against humanity. See, "Rwanda Rebel Leader Callixte Mbarushimana Sent to ICC," BBC News January 25, 2011.

able to co-operate and not intimidate or cause harm to witnesses." 380 Nevertheless, security problems stemming from Gacaca steadily increased after the trial phase began. Vengeance killings or violent acts against survivors who participate in Gacaca are frequent. Those who are expected to testify or have already testified against an accused are killed, attacked, or threatened by family members of the accused or the accused him/herself upon release. Female victims of sexual violence have reported attacks and threats after testifying. Brounéus recorded that “security was one of the largest problems for all (16 interviewed) women, without exception. For all harassments and threats started after they began giving testimony in the Gacaca.” 381 Vengeance killings or violent acts also occur against the accused after they are released back into their community by the family members of the victims or survivors. Gacaca judges are frequently intimidated or threatened by the accused or their family; several instances of judges being killed have been reported in the local media. Often charges of corruption against Gacaca judges are offered as a possible explanation for their insecurity. This insecurity around Gacaca exists amidst of atmosphere of political instability, punctuated by several instances of grenade attacks in Kigali in the past year. 382 Finally, another important security implication is population displacement. There have been several reports from the international media and UNHCR over the years that thousands of Rwandans have fled their communities as refugees and internally displaced persons for fear of the Gacaca courts. While the majority of these refugees have now been returned, there were steady reports of individuals and small groups fleeing Gacaca. 383

Exact estimates of the number of killings and displacement are disputed as not all of them are reported in the local media or by the government. And violence against survivors and judges are often


382 Grenade attacks occurred several times preceding the August 2010 presidential elections and several since then. News reporting suggests that these attacks are directed at genocide survivors, but also reveal dissent among RPF ranks and against the ruling party. See, Josh Kron, "Grenade Attacks Shake Capital of Rwanda," New York Times May 16, 2010.

more widely reported by the local media than violence against the accused or their families. This problem with estimates and bias is particularly evident in a recent dispute between Human Rights Watch and *Ibuka*, the umbrella survivors’ organization. In a January 2007 report (“Killings in Eastern Rwanda”) HRW reports increasing violence committed by and against survivors.  

HRW also criticized the GOR for not responding in a comprehensive and impartial manner. The controversial aspect of this report is its identification of reprisal crimes committed by survivors against others in their community. Both *Ibuka* and the Rwandan National Human Rights Commission have reacted strongly to this report with *Ibuka* accusing “these human rights groups” of being “associations of criminals.”  

Kaboyi, Executive Secretary of *Ibuka*, argues that the “report is totally one sided.”  

*Ibuka* subsequently published their own figures of violence resulting from the *Gacaca* courts. These figures indicate relatively high levels of violence against survivors in the form of murders, attempted murders, intimidation and assault, and destruction of property by setting houses on fire, destroying crops and livestock.  

The significance of these security implications is clear: co-existence is most certainly a precondition for a maximalist conception of reconciliation as healing and forgiveness but in the case of Rwanda there is little evidence to show that transitional justice institutions have made a positive contribution to fostering co-existence.  

**Reconciliation through (Dis)Unity**  

The appropriateness and possibility of using transitional justice to affect healing and forgiveness has been contested in Rwanda along several lines, which demonstrates conflict between the different transitional justice norms. First, punishing perpetrators was hoped to displace a culture of impunity with accountability and therefore foster long term reconciliation. However, the one-sided nature of justice in Rwanda that has flowed from a narrow interpretation of the scope of criminal responsibility has given

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384 Human Rights Watch (HRW), *Killings in Eastern Rwanda* (Human Rights Watch, 2007). The report specifically documents two incidents of killings in which thirteen people were killed in November 1996. The first incident was an attack against survivors that was followed by the reprisal killings of eight people by survivors.


386 Agaba, "Ibuka Raps Rights Groups over Report."

way to the collectivization of guilt and innocence that threaten both unity and reconciliation. Second, it was expected that compromises in sanctioning and localizing transitional justice would foster healing, forgiveness and trust between survivors and perpetrators and within communities. The GOR’s heavy-handed approach to justice and reconciliation has negated this possibility.

The ICTR’s detrimental implication for reconciliation relates to the perception of victor’s justice – previously addressed with relation to RPF crimes. As Kamatali argues, “the approach of the Tribunal most likely to undermine Rwandan reconciliation was, after defining the Tutsi as the group against which genocide was committed, to go on to qualify Hutu as the group that committed genocide.”³⁸⁸ But domestic “unity and reconciliation” policies and Gacaca in particular have, to a much greater degree than the ICTR, collectivized guilt among Hutus and reinforced the collective innocence of the RPF government and the segments of the Tutsi community from which it draws support. Most Hutus, including those who were bystanders and rescuers, are reluctant to participate in Gacaca for fear that they will in turn be accused, or be denied the opportunity to expose their suffering.³⁸⁹ These truths have gone obscured and unacknowledged. The institutional restrictions on transitional justice, controlled by the state, and intimidation by authorities ensure that grievances against RPF crimes are not expressible in Gacaca. Moreover, the Gacaca courts have re-contextualized ethnic identities to the point where Hutu is synonymous with perpetrator, and Tutsi with survivor or victim. As a result, many Hutus view the Gacaca courts as a form of victor’s justice that is meant to politically and socially marginalize them or, for some, even subordinate or eliminate them. The social and economic benefits of Gacaca are heavily skewed in favour of survivors and this, combined with its characterization as victor’s justice, invites the danger of Gacaca dividing communities again by state-ascribed identities and threatening a resurgence of violence.

The reconciliation moniker that is attached to transitional justice in Rwanda, and now nearly every social, economic and political policy under the RPF, has been made less credible by the

aforementioned collectivization of guilt and by the erosion, or manipulation, of Gacaca’s indigenous roots and restorative processes. In one interpretation, Gacaca disrupted what would have been a more organic progression from co-existence to healing and forgiveness in Rwandan communities. In the years after the genocide and prior to the start of Gacaca, survivors and perpetrators co-existed out of necessity. As Ingelaere explains,

what we call truth-telling, rendering justice, fostering reconciliation or providing compensation (or the reverse emotions, such as vengefulness or distrust) had taken root in the ambiguities of local life...(but) the arrival of the Gacaca courts changed this situation significantly. They did not come as catalysts of a natural, if very difficult, process of cohabitation that had already started.\(^{390}\)

Owing to its indigenous origins and restorative justice process, Gacaca was first touted as an extension of traditional dispute resolution mechanisms in communities. Using respected community elders as moderators, encouraging truth-telling through confessions and forgiveness in return was justified as not only appropriate for Rwandans but necessary to achieve reconciliation. The GOR has modified and politicized Gacaca to such a degree that it has lost its indigenous and restorative value in favour of a disguised punitive and hierarchically controlled justice. Given its increasingly punitive and one-sided nature, state-sanctioned truth-telling, lack of compensation, coerced participation, and tendency to exacerbate fear and insecurity, Gacaca does not resemble its indigenous namesake not does it ascribe to the principles and processes of restorative justice. The GOR nevertheless demands reconciliation of its citizens and as such, many Rwandans see reconciliation as simply a buzzword for state programs and an imposition on them. A survivor was quoted as saying:

it’s an official thing…even when the killers ask forgiveness, it’s from the government and the Rwandan people and the victims, but they never name our names. I heard about reconciliation on the radio, but it doesn’t bring back my family.\(^{391}\)

To the casual observer, perceived acts of reconciliation are remarkable and consistent at Gacaca trials. However, Rwandans are merely “simulating reconciliation” and recognize that its affiliation with Gacaca is as a mechanism of “social control.”\(^{392}\) As Thomson explains,


individual action before the *Gacaca* courts is a performance that does not constitute or even indicate the presence of actual unity and reconciliation in the daily lives of most people. Instead, individual performances of *Gacaca* highlight the extent to which the programme of national unity and reconciliation creates an atmosphere of fear and distrust in relation to the RPF-led government.\textsuperscript{393}

In sum, Rwandans regard the institutionalized relationship between this form of justice and reconciliation with suspicion if not hostility, rendering it not only difficult for Rwandans to reconcile amongst themselves, let alone allow for reconciliation between state and society.

The GOR’s policies and institutions have also been contested and criticized by the international community. The African Union’s Peer Review Mechanism completed a country report on Rwanda in June 2006 that seriously questioned the operations and legitimacy of the *Gacaca* courts. The report states:

> While the *Gacaca* courts are viewed by the Government and some segments of Rwandans as the main alternative means for dispute resolution and a much-needed way to achieve justice and reconciliation, there are serious concerns about their legitimacy and ability to win trust and confidence in dispensing justice, while strictly conforming to contemporary international human rights norms and standards.\textsuperscript{394}

. . . People in rural areas fleeing in fear of being accused... this fear is based on allegations that the *Gacaca* courts are a camouflage for ‘victor’s justice’ . . . the Government has a singular challenge to assure all citizens that the *Gacaca* are not designed for retribution or witch hunting.\textsuperscript{395}

Human Rights Watch has also been an outspoken critic of the GOR’s approach to justice and reconciliation, highlighting problem with perceptions of both punishment and leniency. HRW’s concerns have been particularly notable since 2009 when it has become increasingly clear that the RPF was using the punitive functions of *Gacaca* to suppress political dissent. In their 2009 World Report, HRW states:

> While some Rwandans feel that the *Gacaca* process has helped reconciliation, others point to corruption and argue that the accused receive sentences that are too lenient, or are convicted on flimsy evidence....

\textsuperscript{392} Thomson, "A False Reconciliation."

\textsuperscript{393} Thomson, *Resisting Reconciliation: State Power and Everyday Life in Post-Genocide Rwanda*, 251. In contrast to serving as sites of justice and reconciliation, Thomson argues that Rwandans use *Gacaca* as sites of “everyday resistance” to the policies of the RPF government and the socio-economic hardships they face.


Recent cases increasingly related to government silencing of political dissent and private grievances, rather than the events from 1994, led many Rwandans to flee the country to escape condemnation or perceived threats of renewed prosecution.  

Kenneth Roth, Director of Human Rights Watch, has labelled the Gacaca courts as a “tool of repression” and stated in April, 2009 that:

...Gacaca has morphed into a forum for settling personal vendettas or silencing dissident voices. The prospect of suddenly being accused of past participation in the genocide, with little legal recourse against concocted charges, is enough to make most people keep their heads down in the political arena.

Likewise, Penal Reform International (PRI), the only NGO who has consistently monitored and reported on Gacaca from inside Rwanda since its beginning, expresses similar concerns over the causal relationship between justice and reconciliation. In their most recent and final report, PRI states:

Justice can contribute to restoring social peace, but reconciliation seems to be a concept that is far wider than can be dealt with in a court of law. At best the court would be able to contribute to achieving reconciliation, in conjunction with other bodies. The juxtaposition of punishment and reconciliation in the Gacaca process appears in some respects to be a hindrance.

PRI’s extensive interviews reveal that Rwandans recognize the need to peacefully co-exist, but are highly sceptical of the ability of Gacaca, to contribute to any deeper level of reconciliation and particularly if that level of healing requires forgiveness. Initially, various NGOs, donors, and foreign governments initially expressed concerns during Gacaca’s trials phases that it would be too lenient and foster impunity. As Gacaca has progressed the criticisms have shifted towards concerns that the punitive aspects of Gacaca, and by extension the false representation of its restorative justice processes, have hindered the courts’ ability to contribute to anything beyond co-existence, if that.

The GOR and RPF elites have provided strong rebuttals to these criticisms and frame the controversial nature of justice and reconciliation in Rwanda as necessary given their contextual

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399 Penal Reform International (PRI), The Contribution of the Gacaca Jurisdictions to Resolving Cases Arising from the Genocide, 36-40.
circumstances. Diplomatic responses from the GOR to the AU’s criticisms were included within the report itself: “In Rwanda, Gacaca is seen in the category of creative innovations under difficult circumstances, designed to address our specific problems.”\textsuperscript{400} Those that have publicly questioned Gacaca’s ability to reconcile Rwandans without holding RPF crimes accountable, protecting witness and accused, and allowing victims to participate freely have been forced out of the country or labelled as genocide deniers and divisionists. President Kagame also reiterates on many occasions that reconciliation must come from unity, and that the “niceties” of democracy and human rights being propagated by the Western world demonstrates their ignorance of Rwandan society and how this would threaten stability.\textsuperscript{401} As such, there is little doubt that reconciliation is desirable for Rwandans, however, there remain different interpretations about which form of justice can best accomplish this and to what extent the political contingencies of post-genocide Rwanda need for “unity” necessitate compromises in sanctioning and political interference in justice and reconciliation.

To be sure, the difficulties of implementing the reconciliation norm in Rwanda result, in part, from institutional failures. The ICTR has not had the will or capacity to backup its ambitious writ to affect reconciliation to any degree in Rwanda and one could go as far as to argue that its imbalanced prosecutions embolden perpetrators of war crimes and crimes against humanity in the region. Moreover, the politicization of Gacaca and the environment of insecurity in which it operates and creates have negatively affected the credibility of the justice process and hinder reconciliation. But the extent to which there is normative conflict over reconciliation is revealed two respects: first, in the extent to which Rwandans resist or reject the justice and reconciliation narrative and policies of the government; second, in the extent to which Rwandans and parts of the international community challenge the appropriateness of evoking and abusing reconciliation in Rwanda’s political context. This case of implementing the reconciliation norm, and those that will follow, accumulate to suggest that the institutional effects and normative of value of reconciliation in transitional justice are eroding.

\textsuperscript{400} African Union (AU), Country Review Report of the Republic of Rwanda., 139

CONCLUSIONS

The case of Rwanda is instructive for this structural analysis of transitional justice norms. Judicial responses to the 1994 genocide were designed and implemented at a time when transitional justice norms were first being articulated and implemented. Indeed, the salience of these norms in Rwanda reflected not only an emerging international consensus on what was considered the most appropriate judicial responses to atrocities, but also pragmatic and contextual particularities of Rwanda’s post-genocide society. When these norms were implemented with the ICTR and Gacaca courts, various kinds of institutional failures and normative conflicts emerged that provide important lessons learned for the direction of change in the international normative structure of transitional justice. While some of these normative conflicts will be consistent in other case studies, in other ways there are distinctive lessons learned from Rwanda.

The international community politically and financially invested in the international and domestic institutions that were designed to mete out accountability for atrocities. These institutions reflect old and new innovations of transitional justice. The ad hoc International Criminal Tribunal for Rwanda was created in the historical legacy of the Nuremberg trials as retributive justice for elite perpetrators, but nevertheless was designed to address the specific context and particularities of Rwanda’s genocide. Its successes would prove influential for international humanitarian law and its failures would provide lessons for the importance of avoiding victor’s justice and the need to build local ownership. These are lessons that would be heeded in future cases of transitional justice.

Rwanda’s attempt at transitional justice through Gacaca was no less controversial. Gacaca represents a new and increasingly popular approach to transitional justice – combining restorative and retributive justice principles in order to maximize potential for reconciliation. Unfortunately, much of the optimism that surrounded Gacaca at its inception was short-lived. The government’s heavy-handed approach to unity, justice and reconciliation in Rwanda has squelched any possibility that Gacaca would resemble its “grassroots” namesake and reduced the impact of community participation, truth-telling, and non-punitive sanctioning. These lessons would also be instructive for the international normative structure of transitional justice, which is increasingly acceptant of restorative and communitarian justice approaches as an appropriate means of accountability for atrocities.
CHAPTER THREE
POST-CONFLICT EAST TIMOR

“In fragile, post-conflict states like East Timor, criminal justice could not be pursued blindly – that peace there often had to be bought with reconciliation rather than trials.”
-José Ramos-Horta

East Timor’s struggle for independence incited violence with high levels of civilian victimization and perpetration. Its newly independent state was defined by an extreme lack of local capacity with regard to institutions and infrastructure, high levels of population displacement, fear, and insecurity which further fragmented society. The international community took a keen interest in the future stability of East Timor and embarked upon a state-building project that would bring issues of justice and reconciliation to the fore. Following its popular consultation on independence, East Timor was under a United Nations transitional administration from 1999-2002, which was indicative of the common short-term need for international leadership and the long-term desire for local capacity building and ownership. The United Nations was therefore the de facto and de jure governing authority in East Timor from 1999-2002, after which East Timor became an independent, sovereign nation. This would mark the first time that transitional justice took place in a post-conflict state entirely governed by the international community. East Timor then provides a good case in which to assess how international transitional justice norms matter and work in the context of an international state-building exercise and the contextualized justice demands of this post-conflict society. Moreover, this case marks the emergence of a particular institutional innovation - a hybrid tribunal - and the international institutionalization of a broader range of accountability mechanisms via a UN truth commission. These transitional justice practices in East Timor are illustrative of important changes in the normative structure and an emerging consistency and consolidation of transitional justice norms and trajectory of institutional variations.

The four norms identified as part of the international normative structure of transitional justice proved their salience in the early phases of decision-making for an independent East Timor and the subsequent institutions and policies. Investigations into the atrocities and acknowledgement of East Timor’s limited local capacity quickly revealed the relevance of the hierarchical division of criminality norm to prescribe an institutional division of labour. Likewise, concerns over the persistent impunity of
the Indonesian elite perpetrators and the urgent demands for justice among the many East Timorese caught up in the violence raised questions about the appropriate range of punitive and non-punitive sanctions. The need to build capacity and ownership in East Timor and a desire to off-set the political and financial costs of transitional justice for the international community justified localization. Finally, pleas for reconciliation were at the political forefront for both the international community and East Timorese and this concept would come to frame the institutional designs and trade-offs in justice.

Transitional justice norms were implemented through and across multiple institutions: a domestic court in Indonesia (the Indonesian Ad Hoc Court, 2000-2003), a hybrid tribunal jointly administered by the United Nations and East Timorese authorities in Dili (the Special Panels for Serious Crimes and Serious Crimes Unit, 2000-2005), a truth commission based throughout Timor local communities (the Commission for Reception, Truth, and Reconciliation (CAVR), 2002-2005), and a bilateral truth commission between Timor and Indonesia (Commission of Truth and Friendship (CTF), 2005-2008). The temporal scope of these institutions in the broader universe of transitional justice cases is significant as these institutions were established well after the ad hoc tribunals, shortly after the signing of the Rome Treaty (1998) and the beginning of the ICC’s mandate (2002), and coinciding with the proliferation of hybrid tribunals contemplated for Sierra Leone, Cambodia, and Kosovo. Therefore, there was the benefit of some accumulated lessons learned from the ad hocs but by and large the case of East Timor falls within a time frame in which transitional justice norms had emerged but were evolving through their implementation in diverse contexts, thus leaving these norms open to re-interpretation and institutional variation.

Once these transitional justice norms were implemented and put into practice, both old and new causes of institutional failures and sources of normative conflict emerged. Concerns over impunity were persistent with respect to a restricted interpretation of the horizontal scope of criminal responsibility. The appropriateness of non-punitive sanctions was evident but institutionalized with a lack of redistributive justice. The localization norm proves most salient in this case study but questions remain as to whether the various institutional innovations made any serious contribution to local capacity or fostered local ownership. Finally, the meanings and intentions of reconciliation became increasingly politicized and
inconsistent; the frequent use of reconciliation to justify impunity eroded the legitimacy of transitional justice institutions.

The structure of this chapter is similar to that of the treatment of Rwanda. Following a brief description of the atrocities and challenges in post-independence East Timor, the analysis will be divided into two main sections. The first section will briefly describe the key actors involved, followed by an analysis of the degree to which the four norms of the international normative structure were salient in the decision-making phases, institutional designs, and policies for East Timor. There are four primary transitional justice institutions for East Timor: the Ad Hoc Court for Human Rights in Indonesia, the Serious Crimes Regime, the Commission of Truth and Friendship and the Commission for Reception, Truth, and Reconciliation. The second section will assess the range of implementation challenges by distinguishing institutional failures from contestation, particularly drawing attention to three things: how the interrelated nature of these norms can foster conflict when put into practice; adherence to principles versus pragmatic demands; and the international-local dynamics that shape interpretation of these norms.

ATROCITIES

Atrocities and human rights violations were committed in East Timor during the decades of Indonesian occupation and in the surge of violence surrounding its 1999 “popular consultation” on independence. Indonesia invaded the former Portuguese colony and non-self-governing territory of East Timor on December 7th, 1975. This invasion was under the pretext of Indonesian President Suharto’s “New Order” administration, “which was designed to prevent islands in the eastern archipelago from declaring independence.” While the international community was opposed to the invasion, largely carried out by the Indonesian Armed Forces (TNI), the UN Security Council failed to take any action. The Indonesian occupation has been characterized by three distinct periods of violence and repression. The first period (1975-1979) witnessed the deaths of 200,000 East Timorese as a direct or

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indirect result of the Indonesian invasion. Approximately one-third of the East Timorese population killed during this period and virtually the entire population was affected by violence, displacement, and repression. The second period (1980-1989) “was marked by continued large-scale military operations and strengthening of East Timorese resistance to Indonesian rule.” The East Timorese independence movement, FRETILIN, clashed with the TNI on a large scale until 1979, and widespread rebellion and opposition to Indonesia continued through the entire period of occupation. Among its many repressive policies, the “government resettled close to eighty percent of the population during the first two periods and prohibited the international media and outsiders from entering the region.” The final period (1989-1999) saw a relaxation of certain restrictions and the media but violent episodes were still prevalent, albeit with more exposure to the international community. For example, the 1991 Santa Cruz massacre in which 200 protestors were shot and killed by the TNI was widely reported in the media. Despite widespread recognition of the TNI as the primary perpetrators of violence in East Timor and despite increasing local resistance to Indonesia’s occupation, there was a small minority of East Timorese who supported and benefited from both the occupation and repression.

Suharto’s regime collapsed in 1998 and the appointment of a new Indonesian President, BJ Habibie, created the political opportunity for East Timor’s independence. In early 1999 Habibie announced his intention to allow a referendum, or “popular consultation” as it is commonly known, in which East Timorese could chose between autonomy within Indonesia or full independence. The May 5th agreements between the United Nations, Indonesia, and Portugal provided the procedural framework for the August 30th ballot. The United Nations Mission in East Timor (UNAMET) was given the mandate to

organize and conduct the popular consultation, however, the May 5th agreements controversially included a provision granting Indonesia, and not UNAMET, full responsibility for providing security. Xanana Gusmao (former resistance leader who became the first President of independent East Timor) and José Ramos-Horta (former exiled resistance leader who became second and current President of independent East Timor) “strenuously protested Jakarta’s refusal to agree to an arrangement that would have provided real security for the East Timorese population;” the United Nations decided that “trying to get Indonesia to relinquish security during the consultation would have been a deal breaker.” These decisions would have dramatic consequences for stability in East Timor’s transition to independence.

The result of the popular consultation, in which 98.5 per cent of eligible voters participated, was a sound rejection of Indonesia’s special autonomy offer: 78.5 per cent of the population voted for full independence. Preparing for and preventing instability resulting from the popular consultation was made more difficult by contradictory developments on the ground. There was a “generally successful voter registration process, and then the actual vote…took place largely violence-free.” However, the popular consultation was preceded by a “widespread campaign of intimidation and violence that turned into brutal reprisals after the results indicating overwhelming support for independence were released.”

The pre and post-vote violence was characterized by mass murder, torture, assault, forced disappearances, mass forcible deportations, looting, destruction of property, a scorched earth campaign, rape and other forms of sexual violence. Over 1,000 East Timorese were killed and approximately 600,000 (at least three-quarters of the population) were uprooted from their homes, many of them fleeing to neighbouring

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409 UNAMET was established by Security Council resolution 1246 on June 11th, 1999 for a period up to August 31st, 1999. By Security Council Resolution 1257 of August 3rd, UNAMET was extended to September 30th, 1999.  
412 Nevin, A Not-So-Distant Horror: Mass Violence in East Timor 122.  
West Timor. UNAMET itself suffered from an attack on its compound and several of its staff members were killed; UNAMET and most international observers and journalists fled the area following these attacks. 414

The United Nations Commission on Human Rights convened a special session from September 24-27th, 1999 to address the violence in East Timor, just as it had done for the former Yugoslavia in 1992 and 1993 and for Rwanda in 1994. The Commission characterized and condemned the violence as “widespread, systematic and gross violations of human rights and international humanitarian law.” 415 The violence was perpetrated by local pro-government militias and paramilitaries who were armed, funded, trained, and directed by the Indonesian armed forces and there is a great deal of evidence to support the claim that Indonesian troops directly committed many of the atrocities. 416 Among the “East Timorese militia members….there were certainly some who were ideologically committed to the cause… (however), many of the rank and file militia members were unwilling recruits and had abandoned the paramilitary groups by the time of the vote.” 417 As was the case of Rwanda, there was a familiarity among many victims and perpetrators as most of the perpetrators came from the same village as their victims and had years of co-existence behind them. 418

POST-CONFLICT EAST TIMOR

After an extended period of violence the Indonesian government finally allowed for an international force in East Timor as a result of slow but mounting international pressure. The atrocities and destruction were put to an end with the intervention of an Australian-led peacekeeping force, International Force in East Timor (INTERFET), on September 20th, 1999. By providing basic security,

414 Nevins, A Not-So-Distant Horror: Mass Violence in East Timor 123.
417 Nevins, A Not-So-Distant Horror: Mass Violence in East Timor 144.
418 Drumbl, Atrocity, Punishment and International Law 27.
facilitating the distribution of humanitarian aid, and re-establishing law and order, INTERFET’s presence also allowed for the return of previously evacuated UNAMET staff. On October 25th the Security Council established the United Nations Transitional Administration in East Timor (UNTAET) under Resolution 1271 and gave it a broad three-year mandate to facilitate East Timor’s transition to independence. This marked the “first time that the UN had assumed complete administration over all sovereign functions of a country,” including filling an institutional vacuum with regards to security and judicial institutions. This set the stage for the international community to have enormous influence over both state and nation-building processes and significantly impacted the scope and nature of transitional justice institutions in East Timor. It also marks an obvious juncture for the international normative structure which this dissertation seeks to demonstrate, and displays the complex interplay between international expectations and local contextual variables.

As with many post-conflict societies, East Timor’s social fabric, infrastructure, and institutional frameworks were in ruins by the end of 1999. Degrees of individual trauma varied, but “in a country where family remains at the centre of the social fabric, the loss of one or more breadwinners had a profound impact on many families’ ability to survive.” While not every East Timorese suffered directly from physical violence, the widespread looting, plundering, and scorched earth tactics of the militias affected everyone. Furthermore, sexual violence against women was extensive and strategic. The United Nations Special Rapporteurs, who assessed the human rights situation in East Timor, observed that “the highest level of the military command in East Timor knew…that there was widespread violence against women in East Timor” and that “sexual violence was also used as a strategy of intimidation, particularly during the period from January to July 1999.”

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422 Special Rapporteurs Report: Situation of Human Rights in East Timor. 9-10.
inevitable that a sense of collective victimization would set in and subsequent expectations of accountability would be high.

A major challenge for peace and stability in the region was the displacement and need for reintegration of those who had been involved in the violence and had fled. In East Timor “most of the non-Indonesian lesser perpetrators had come from the same villages as their victims.” Given this reality, many observers speculated that the reintegrated former perpetrators, regardless of their “lesser crimes” status, would themselves become victims of violence as retribution. Conversely, there were reports in late 1999 of continuing abuses by militia elements directed against displaced East Timorese in camps in West Timor. As had been the case in post-genocide Rwanda, the reintegration of former perpetrators into the communities against which they committed violence and the day-to-day interaction between victims and perpetrators would influence the extent to which local accountability mechanisms would be expected and needed.

In addition to the many social and security concerns, UNTAET was faced with a judicial vacuum and institutions that were completely devoid of human and physical resources. This lack of local capacity is endemic to post-conflict societies and it quickly determined the scope of UNTAET’s state-building agenda as broad and long-term. With regard to basic infrastructure, “most public and many private buildings were ruined and smouldering in the midst of what had once been towns and villages, now all but abandoned by their former inhabitants, cut off from transport and communication, and lacking a governmental superstructure.” The judicial infrastructure was completely destroyed including court buildings and their contents, records, archives, law books and files, etc. Even the legal human resources were absent: “all judges, prosecutors, lawyers, and many judicial support staff who were perceived as

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being members de facto of the administrative and intellectual privileged classes, or who had been publicly sympathetic to the Indonesian regime, had fled East Timor. With only a handful of lawyers left in the territory, UNTAET was faced with the reality that its mandate would have to include a substantial import of physical and human resources for accountability to be meted out.

The political environment in East Timor after the popular consultation saw the re-emergence of Ramos-Horta and Gusmao as dominant political elites. Neither of these individuals had been present in Timor during the violence surrounding the popular consultation or in the decade prior. Ramos-Horta was forced into exile during the Indonesian occupation and for ten years acted as the representative of the resistance movement, FRETILIN, to the United Nations. After the violence, Ramos-Horta had a lead role with UNTAET in negotiating East Timor’s transition to independence and subsequently became the country’s first Foreign Minister. Gusmao, also a former resistance leader but had split from FRETILIN, was imprisoned in Indonesia from 1993 until his negotiated release in 1999. Gusmao was given a senior role in UNTAET’s administration and was subsequently voted in as the country’s first president in 2002. These high profile individuals were politically supported by the international community and viewed as the legitimate voices to represent East Timor. Given their absence prior to 2000, however, there has been tension resulting from their assumptions of leadership and those political elites who were in Timor during the violence and those engaged in fighting with the resistance. Moreover, it will be shown in the subsequent analysis that both Gusmao and Ramos-Horta prioritized relations with Indonesia and regional stability over aggressively pursuing Indonesia perpetrators. This, along with other controversial policies such as declaring Portuguese as the official language, has revealed a considerable disconnect between their political interests and the interests of the Timorese they have governed.

In sum, the violence in East Timor spanned decades of occupation and a spasm of violence in 1999 that heightened the need to address continued impunity for atrocities. While the criminal responsibility of the Indonesian government and armed forces was apparent, distinctions between victims and perpetrators at the local level were less clear-cut. In addition to high levels of insecurity and

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displacement among local communities, East Timor’s post-conflict judicial institutions were incapable of meting out any significant degree of accountability. This created a relatively unique circumstance in which the United Nations was the governing authority in East Timor’s transition to independence, and was therefore largely responsible for designing and implementing the transitional justice institutions expected by the local and international community. Would the UN follow the models of other transitional justice institutions it had designed? To what extent would local considerations of security, dispute resolution traditions, and the politics of state-building affect the desire for retribution and reconciliation? In theoretical terms, how and to what degree did the norms of the international normative structure influence the design and outcomes of these institutions? The following section will identify the various actors responsible for choosing and designing East Timor’s transitional justice institutions and subsequently the extent to which transitional justice norms were salient in terms in the decision-making phase and the subsequent policies and institutions.

Ultimately, transitional justice would be attempted in East Timor with four separate, and sometimes complementary, institutions: the Ad Hoc Human Rights Court in Indonesia, the Serious Crimes Regime centralized in Dili, East Timor, the Commission for Reception, Truth and Reconciliation in local communities dispersed throughout East Timor, and Commission of Truth and Friendship that was a bilateral truth commission. This collection of institutions exhibited a high degree of hybridity and diversity. The Ad Hoc Court and the Serious Crimes Regime were both retributive processes, whereas the CAVR outwardly prioritized truth and reconciliation over trial and punishment. But only the processes governed by East Timor and UNTAET, i.e. the Serious Crimes Regime and CAVR, made a significant attempt to coordinate and be complementary in order maximize international standards but still achieve local ownership. The CTF will be addressed with respect to its relevance for accountability and reconciliation, but not to the same extent as the three primary transitional justice institutions that were much more significant in East Timor in terms of their mandates, institutional features, and outcomes.
THE SALIENCE OF TRANSITIONAL JUSTICE NORMS

To demonstrate that transitional justice norms were salient, or mattered for shaping discourse policies, and institutions in East Timor, the analysis in this section will draw upon the stated positions, reports, and influences of the key actors involved in transitional justice decision-making: East Timorese political elites, civil society, and general population; the international community, as represented by the United Nations and human rights organizations; and the Indonesian government. There were only minimal public consultations carried out in East Timor to gauge public opinion on issues of justice and reconciliation. Much of what we know about public opinion has been voiced through East Timorese human rights groups, either based in East Timor or abroad. While these groups are not numerous, they have received considerable attention because their views differ from those of East Timorese political elites. Given the lack self-governance in East Timor for decades, there was not a significant number of influential East Timorese political elites to influence the decision making of transitional justice, save for two independence leaders: José Ramos-Horta and Xanana Gusmao. Both Gusmao and Ramos-Horta have been extremely influential, if not completely dominant, in East Timor’s post-conflict politics and their publicly stated preferences have far outweighed those of civil society or the general population. But while many transitioning societies attempt to assert their independence and sovereignty by implementing the rule of law and justice institutions, East Timor’s political elites did not realistically have this option. Choosing and designing transitional justice institutions was primarily the responsibility of the international community, which itself provides an indication of the significant of the normative structure.

As in many post-conflict contexts the international community’s pervasive political and physical presence is largely represented by the United Nations and a few prominent humanitarian aid and human rights NGOs. This is particularly true for East Timor where there was a complete lack of local capacity to rebuild and govern, and as such the UN was mandated as the governing authority and transitional justice was placed under UNTAET’s authority. Guiding the UN’s activities and activities in East Timor was a

428 While Australia has played an important role in pre and post-conflict East Timor, it did not actively participate in the decision-making of transitional justice.
clear “moral imperative” to make accountability both a priority and a collective responsibility.\textsuperscript{429} The perspectives of the international community on accountability were presented in two reports: the \textit{United Nations Report of the Special Rapporteurs on the Situation of Human Rights in East Timor} (1999) and the \textit{United Nations Report of the International Commission of Inquiry on East Timor} (2000).\textsuperscript{430} These reports were very significant as they laid the initial framework from which the subsequent transitional justice institutions and policies would be designed and on what grounds they would be justified. Both the Special Rapporteurs’ and Commission of Inquiry reports made clear statements on the nature of criminal responsibility in the atrocities, the lack of local capacity to address such crimes, and offered recommendations for transitional justice institutions to achieve justice and reconciliation. In response to the international outrage expressed in the UN’s two reports, the Indonesian government felt compelled to assert its own views. The government of President Wahid (1999-2001) established a \textit{Commission to Investigate Human Rights in East Timor} (KPP HAM) on September 22\textsuperscript{nd}, 1999, under the auspices of the \textit{Indonesian Human Rights Commission} (Komnas HAM). KPP HAM was tasked with investigating human rights violations in East Timor in 1999 and particularly the level of involvement of the Indonesian military and government in order to provide evidence for future prosecutions.

The following will address the strength and legitimacy of the four norms of the international normative structure in transitional justice for East Timor. Citing the various debates and positions among the UN, East Timorese and Indonesia officials, their public statements and commissioned reports will reveal how these elements have shaped and constituted transitional justice institutions and policies. Given the prominent role played by the UN in this case, assessing the salience of transitional norms here will provide important insights into the agency of various actors and the international-domestic dynamics of norm diffusion. Moreover, the need to incorporate local norms of justice and conflict resolution and overriding concerns for stability in the region will reveal whether various political trade-offs in transitional justice were framed as a conflict of principles or as pragmatic considerations.

\textsuperscript{429} Reiger, "Hybrid Attempts at Accountability for Serious Crimes in Timor Leste," 145.

**Hierarchical Division of Criminality**

Assigning responsibility for the crimes committed and identifying the nature of the crimes themselves is one of the first and most controversial steps in determining the most appropriate and effective transitional justice institutions. The debates quickly turned to whether or not an international tribunal would be appropriate for East Timor and was made more delicate with the pressing concern that identifying particular individuals or institutions as perpetrators would threaten stability internally and regionally. But ultimately the decisions and institutions affected by this norm reflect as much the principle of individual criminal responsibility and adhering to the rule of law as it does pragmatic concerns for stability. The following analysis demonstrates the extent to which legal and social distinctions between degrees of criminal perpetration in atrocities resulted in an institutional division of labour, as the hierarchical division of criminality norm prescribes.

**Horizontal Scope of Criminal Responsibility**

While it was clear to most that the Indonesian government and military were responsible for the atrocities committed during occupation and had an organizational role in 1999, it was important that its role be investigated by neutral parties and the information disseminated to the public. Additionally, there were many unknowns about the extent and nature of East Timorese participation in the 1999 violence and uncovering these facts would be essential in order for local communities to come to terms with their experiences through transitional justice institutions. The UN investigations into the 1999 violence in East Timor quickly determined who was most responsible. The Special Rapporteurs’ report made an explicit statement on this:

> While most of the atrocities committed in East Timor must clearly be attributed to pro-integration militia elements, the information gathered and testimonies heard by the Special Rapporteurs leave little doubt as to the direct and indirect involvement of TNI and police in supporting, planning, assisting, and organizing the pro-integration militia.431

Likewise, the International Commission of Inquiry was “of the view that ultimately the Indonesian army was responsible for the intimidation, terror, killings and other acts of violence experienced by the people

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of East Timor before and after the population consultation.”

Equally significant was the Special Rapporteurs’ realistic assessment of the extent of East Timor’s local capacity to try and prosecute elite perpetrators:

The East Timorese judicial system, which still needs to be created and tested, could not hope to cope with a project of this scale. It is clear that the best efforts of INTERFET/UNTAET...are unlikely to lead to the carrying out of complete investigations into the full range of crimes that require to be clarified.

Given the identification of Indonesian parties to the conflict as criminally responsible for the atrocities, the lack of judicial independence in Indonesia, and lack of local capacity in East Timor, both the Special Rapporteurs and Commission of Inquiry reports called for an international criminal tribunal to be established. The only qualifier to a tribunal was to first (“in a matter of months”) allow for a credible process in Indonesia to investigate TNI involvement in the 1999 atrocities. The International Commission of Inquiry’s recommendation was for the United Nations to establish an independent and international body charged with:

Conducting further systematic investigation of the human rights violations and violations of international humanitarian law in East Timor during the period from January 1999;

Identifying the persons responsible for those violations, including those with command responsibilities;

Ensuring reparations for the violations from those responsible;

Prosecuting those guilty of serious human rights violations within the framework of its function to ensure justice; and

Considering the issues of truth and reconciliation.

Civil society and non-governmental organizations in East Timor have continuously been forceful in their calls for accountability for high-ranking perpetrators. While most local and international NGOs recognized the need for a local restorative process, they were also the strongest advocates for an

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international tribunal. In a statement coordinated by the *International Federation for East Timor* and issued to the UN Secretary-General in 2000, the signatories of 89 organizations from 26 countries claimed it was “clear that East Timorese from every level of society want an international tribunal.” The letter argued that an international tribunal “is the only way you can fulfill your responsibility to ensure timely justice for East Timorese victims” and was “essential for peace, reconciliation and stability in East Timor – and for democracy and stability in Indonesia.” The founder of the *East Timor National Jurists Association*, Aderito de Jesus Soares, went further and argued:

Such a tribunal should not be limited to crimes committed in 1999 but should cover all crimes beginning in 1975…The United States, Britain and Australia have a special responsibility to ensure that this happens because for more than two decades they backed Indonesia’ occupation of East Timor. Their active support for an international tribunal would help them atone for their complicity.

It is often cited that there is great support among the East Timorese population for an international tribunal for the 1999 atrocities and the entire period of Indonesian occupation. However, the strong preference for a tribunal reveals a distinction in the nature of the conflict and levels of criminal responsibility for the violence. A 2003 report by the International Center for Transitional Justice showed that some of their survey participants “made a distinction between internal Timorese conflict issues, which they argued were the responsibility of the Timorese government and its fledgling justice system, and the role of Indonesia in East Timor, which is an international/UN responsibility.”

Finally, East Timorese political elites, such as Ramos-Horta and Gusmao, have continued to reject the need for an international tribunal. These two men have publicly advocated against the need

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437 Scheiner, *International Tribunal for East Timor*.


441 An early statement by Jose Ramos-Horta in 2000 in the International Herald Tribune called for an international war crimes tribunal to be set up. However, as the above quotes demonstrate he later withdrew from this viewpoint.
for an international ad hoc tribunal and they have been unenthusiastic about pursuing the upper echelon of Indonesian perpetrators for fear of destabilizing newly established East Timor-Indonesian relations and democracy in Indonesia. Both Gusmao and Ramos-Horta have expressed these concerns:

We also must respect the courage of Indonesians in accepting our independence and not disrupt their progress toward democratization by demanding formal justice.  
-Xanana Gusmao

If we are seen by Indonesia as conniving with the international community to continue to embarrass Indonesia, it could have a backlash against East Timor.  
-José Ramos-Horta

These individuals outwardly expressed that such ideals as democratization, stability and reconciliation would be better served by eschewing an international court (a more detailed discussion of which is taken up with respect to the reconciliation norm), but undoubtedly they also had pragmatic interests in preserving their political and diplomatic relationship with Indonesia. The concerns of Ramos-Horta and Gusmao were influential insofar as they reinforced the international community’s reluctance to interfere in the political and military affairs of Indonesia and played upon its reticence to provide the funding and political will necessary for a tribunal to be successful. Following on Ramos-Horta and Gusmao’s public disinterest in a tribunal, the Indonesian government’s response ultimately defined for the international community the political limits of transitional justice.

The Indonesian government responded to the calls for an international tribunal with indignation and resolve. The military had long held a great deal of influence over political institutions in Indonesia, including the judiciary, and as such had enjoyed impunity for it actions for decades. Fearing the embarrassing and potentially destabilizing effect of an international tribunal, the government of President Wahid and his successor President Megawati (2001-2004) downplayed TNI involvement in the atrocities and eschewed calls for a tribunal. Nevertheless, in early 2000, KPP HAM (the Indonesian human rights commission) published their surprisingly robust report with far-reaching conclusions and


recommendations for the Indonesian military to be held accountable. After analyzing thirteen incidents and several categories of crimes, KPP HAM “confirmed the existence of a very intimate relationship between the TNI, police, the civil administration, and the East Timorese militias, and stressed that the violence that arose in 1999 was the result of a systematic campaign and not a civil war.” After focusing on several notorious massacres and “considering the evidence of systematic planning and perpetration, (the report) concluded that crimes against humanity had been committed” in East Timor. The report went as far as to name specific individuals and laid ultimate responsibility on General Wiranto, former Commander of the Indonesian Armed Forces, for failing to provide security during the 1999 popular consultation. Komnas HAM submitted the report to Indonesian Attorney General Darusman, “recommending further investigations with a view to prosecuting the 33 persons named, and investigating all others suspected of involvement in serious human rights violations in East Timor.” These public statements and reports from Indonesia defined the limits for accountability as Indonesia created the expectation that such high-ranking perpetrators would be tried and punished. The fact that the United Nations had carried out their own investigations and that Indonesian investigations had reached similar conclusions and provided similar recommendations reinforced this expectation, and absent these reports it is more likely that the impunity for elite perpetrators would have been guaranteed.

The United Nations decided after the publication of the KPP HAM report that, in lieu of an international tribunal, it would give the Indonesian government an opportunity to ensure accountability for crimes committed by their own military. Nevertheless, the possibility of an international tribunal was threatened by the UN Human Rights Council (UNHRC) if Indonesia did not immediately and decisively take steps to investigate TNI involvement in the atrocities. Given the promises of Indonesia and the


retention of an international tribunal as “the most powerful tool in the arsenal of those seeking justice on behalf of the East Timorese,” the Secretary-General did not endorse the calls for a tribunal as had been called for by its own Special Rapporteurs and Commission of Inquiry.

Indonesia’s contribution to accountability thus came in the form of the Ad Hoc Court for Human Rights Violations in East Timor. In response to the KPP HAM report and pressure from the international community (inherent in the aforementioned UN investigations and reports), Attorney General Darusman assigned a team of investigators to focus exclusively on investigating the East Timor atrocities. Darusman’s decisions on the criminal, temporal and geographic jurisdictions had a significant impact on the extent of accountability for high-ranking perpetrators in Indonesia. In particular, Darusman restricted the investigations to five priority cases, which excluded the rest of the evidence presented in the KPP HAM report and precluded an investigation into the role of state policy. The investigation team spent the better part of a year doing its investigations and spent three weeks in East Timor where it was given extensive access to victims, witnesses, and crime scenes relevant to their cases. Following the investigations in September and October 2000, it was announced that the prosecutorial strategy would be restricted to twenty-two indicted persons. The extent to which it was able to follow through with this strategy is taken up in subsequent sections.

In November, 2000 the Indonesian legislature passed Law 26 incorporating the Rome Statute of the International Criminal Court, which also stipulated that human right violations perpetrated prior to its coming into force may only be prosecuted in an ad hoc human rights court established by presidential

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448 Linton, "Unravelling the First Three Trials at Indonesia's Ad Hoc Court for Human Rights Violations in East Timor," 308.


450 Investigations were restricted to five priority cases: the massacre at the João Britto church in Liquiça, on April 6th, 1999; the attack on the house of pro-independence leader Manuel Carrascalão on April 17th, 1999; the attack on the residence of Bishop Belo on September 6th, 1999; the massacre at the Ave Maria church in Suai on September 6th, 1999; and the murder of Dutch journalist Sander Thoenes on September 21st, 1999. See, Linton, "Unravelling the First Three Trials at Indonesia's Ad Hoc Court for Human Rights Violations in East Timor," 307.
On April 21st, 2001, President Wahid issued such a decree establishing the Ad Hoc Court for Human Rights Violations in East Timor to be located in Jakarta. The court’s temporal jurisdiction was restricted to events that occurred in East Timor after the referendum on August 31st, 1999; however, President Megawati extended this to include the month of April 1999 upon her succession from Wahid. The court’s geographic jurisdiction was limited to the incidents in Dili, Suai, and Liquiça and did not begin functioning until February 2002. The primary purpose of the Ad Hoc Court was to try and punish elite perpetrators for crimes against humanity, primarily TNI and security officials who were in positions of authority in East Timor during the time of the popular consultation.

In June 2000, UNTAET established a “Serious Crimes Regime” to be located in Dili comprising two institutions: the Serious Crimes Unit (SCU) was the prosecutorial authority under Regulation 2000/16 and the Special Panels for Serious Crimes were to carry out the trials under Regulation 2000/15. These institutions were governed by the United Nations under the authority of UNTAET but were jointly considered a hybrid tribunal in that it incorporated East Timorese laws and personnel. It is important to note, also, that it did not have the same international authority as the ad hoc tribunals did, given that it was not mandated by a Chapter VII Security Council Resolution. In accordance with the hierarchical division of criminality norm, UNTAET regulations for East Timor distinguish between “serious” and “less serious” crimes, which are institutionalized with a division of labour. The Special Panels have jurisdiction over serious crimes that include genocide, war crimes, crimes against humanity, murder, torture, and sexual offences, between January 1st, 1999 and October 26th, 1999 in the territory of East Timor. In terms of a prosecutorial strategy, this would come to mean prioritizing

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452 The "Serious Crimes Regime" is a term used by the ICTJ to jointly refer to the Serious Crimes Unit and Special Panels. Megan Hirst and Howard Varney, Justice Abandoned? An Assessment of the Serious Crimes Process in East Timor (New York NY: International Center for Transitional Justice, June 2005), 5.

crimes of the TNI and, more realistically, the Timorese militia leadership who operated under the authority and with the support of the TNI. These SCU and Special Panels are entirely funded by the international community but are not characterized as an international tribunal per se; as will be explained in a subsequent section, the Serious Crimes Regime is best characterized as a hybrid court. Nonetheless, given that UNTAET mandated the Serious Crimes Regime and constituted the governing authority in East Timor, this case comprises important international institutional designs to demonstrate the salience of international transitional justice norms.

**Vertical Scope of Criminal Responsibility**

The mandates and prosecutorial strategies of the Ad Hoc Court and the Serious Crimes Regime were focused on the crimes of the TNI and those Timorese in positions of leadership responsible for serious crimes. But under the leadership of the TNI, many East Timorese low-level perpetrators committed human rights violations during the period of occupation and the popular consultation, thus indicating the depth of criminality responsibility in society. Investigations into the crimes committed reveal significant distinctions in the nature and scope of criminality. Both the Special Rapporteurs’ and Commission of Inquiry reports distinguish between the ultimate responsibility of the TNI and secondary responsibility of the pro-government militia and paramilitary groups it directed. Furthermore, among the militias there were those who actively and violently participated in atrocities, while there were many more that either indirectly participated or committed less violent crimes. As such, one of the most significant and guiding institutional features of transitional justice in East Timor is the distinction of “less serious crimes” from the aforementioned “serious” crimes. Less serious crimes refers to human rights violations committed in the context of these periods of mass violence, including theft, minor assault, arson, looting, property destruction, etc. These distinctions are similar, although not articulated in as much detail, as the categorization of crimes in Rwanda’s Organic Laws that governed genocide prosecutions in the national and Gacaca courts. The distinction between “serious” and “less serious” crimes reflects an understanding of the various degrees of perpetration and motivations to commit such crimes, and the hierarchical division of criminality norm prescribes a division of labour between transitional justice institutions that reflects these distinctions.
The Commission for Truth, Reception, and Reconciliation was designed as a complementary mechanism to the Serious Crimes Regime to prosecute less serious crimes; it was established as an “independent authority” under UNTAET Regulation 2001/10. As a truth commission that ascribes to restorative justice principles, the CAVR alternatively addresses accountability for low-level perpetrators of less serious crimes in community-based hearings throughout East Timor. When determining a deponent’s case as constituting a serious or less serious crime, the CAVR was instructed to consider the nature of the crime, total number of acts committed, and the deponent’s role as a leader or follower. The mandate of the CAVR explicitly precludes it from dealing with cases of serious crimes, beyond an initial investigation and referral to the Serious Crimes Regime. It was given an initial operation period of only twenty-four months, which was eventually extended until October 31, 2005. The Commission was officially tasked with the following:

a) Inquiring into and establishing the truth regarding human rights violations which took place in the context of the political conflicts in East Timor between April 25th 1974 and October 25th 1999.

b) Preparing a ‘comprehensive report which sets out the Commission’s activities and findings…

c) Formulating recommendations concerning reforms and initiatives designed to prevent the recurrence of human rights violations and to respond to the needs of victims.

d) Recommending prosecutions, where appropriate, to the Office of the General Prosecutor.

e) Promoting reconciliation.

f) Implementing Community Reconciliation Processes (CRPs), whose object was to support the reception and reintegration of individuals who had caused harm to their communities through the commission of minor criminal offences and other harmful acts.

g) Assisting in restoring the dignity of victims.

h) Promoting human rights.

Many of these perpetrators of less serious crimes had fled, along with many innocent civilians, and were displaced from their communities and into West Timor. The mandate of the CAVR suggests that a

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transitional justice institution was needed that would not only be capable of addressing such a high volume of perpetrators but also mete out accountability in a manner that would facilitate return and reintegration, reparations, truth-telling and reconciliation, and a such, this also correlates with different expectations regarding appropriate forms of sanctioning.

The salience of this norm, therefore, is found in the various international negotiations and debates that, after making distinctions in degree of criminal responsibility, recommended that an institutional division of labour should reflect such distinctions. There was still contention over whether or not an international tribunal was appropriate or would be effective in this particular climate of political fragility and insecurity, and implementing justice for elite perpetrators would prove to be a significant challenge. This reveals that there is no one specific type of institution prescribed from this norm, but rather that there are different justice expectations for different degrees of criminal perpetration.

**Accountability**

The debate over the possibility of an international tribunal and the distinction between serious and less serious crimes in East Timor reveals the expectation that elite perpetrators of atrocities should and would be tried and punished. There remained the question, however, of what to do with the scores of low level perpetrators in East Timor, such as those that had participated in the violence under a variety of circumstances but had not been involved in organizing and planning. The salience of the accountability norm is evident in the investigative reports’ references to the causal relationship between impunity and violence, and thus the need to punish those considered most responsible to prevent a return to violence. Furthermore, that non-punitive sanctions were considered legitimate for low-level perpetrators is also an important aspect of this norm. The investigations into the violence and the mandate for the CAVR clearly articulate that accountability encompassed a broader range of sanctions, and to achieve reconciliation, could not be limited to punishment. The prosecutorial strategies and outcomes of the Ad Hoc Court, the Serious Crimes Regime, and mandates of CAVR and CTF further demonstrate the strength of the accountability norm in this diverse set of transitional justice institutions.
**Punitive Sanctions**

The severity of the crimes and the recognition of states’ responsibilities to investigate and prosecute human rights violations morally and legally justified a retributive justice mechanism for those considered most responsible for the crimes. Particularly in cases of mass violence, a persistent culture and history of impunity emboldens perpetrators and if left unaddressed continues to threaten a resurgence of violence. The assumption that such impunity for crimes and other human rights violations committed by the TNI and security forces enabled violence during Indonesia’s occupation of East Timor and surrounding the popular consultation is frequently referenced in the Special Rapporteurs’ report:

(A 1994 report) concluded that members of the security forces responsible for human rights violations enjoyed virtual impunity for their actions.…

…The perpetrators (of extrajudicial killings since 1975) have only exceptionally been brought to justice, and in the cases where they have been punished, the sentences have been disproportionately mild for the crime committed. In other cases, the perpetrators have been convicted for crimes of a less serious nature than the original accusation. Local non-governmental organizations assert that it was the long-standing virtual impunity enjoyed by the Indonesian army and police which emboldened militias and government forces to carry out widespread killings in such a brazen manner following the announcement of the results of the popular consultation held on 30 August 1999.…

…The greatest amount of sexual violence took place as a result of the climate of impunity that pervaded the island during the months leading up to and after the consultation.457

Moreover, both the Special Rapporteurs and the International Commission argued that ongoing impunity after the 1999 population consultation would threaten a resurgence of violence:

Impunity gives rise to frustration and anguish, which eventually may result in renewed cycles of violence.…

…The record of impunity for human rights crimes committed by Indonesia’s armed forces in East Timor over almost a quarter of a century cannot instil confidence in their ability to ensure a proper accounting…So far CNRT, Falintil and, under their encouragement, the East Timor population have, despite occasional excesses, been extremely disciplined in not resorting to summary “justice”. But there is a fear that unless justice is provided, it may not be possible to maintain this discipline.458


Future action with regard to the violations of human rights in East Timor should be governed by the following human rights principles: the individual's right to have an effective remedy for violations of human rights, which includes the State's responsibility to investigate violations, prosecute criminally and punish those; the individual’s right to reparation and compensation for violations of human rights from the State responsible for the violations; the need to act against impunity in order to discourage future violations of basic human rights.\(^{459}\)

Therefore, in accordance with both the hierarchical division of criminality and accountability norms, international decision-makers expected that elite perpetrators would be tried and punished, albeit not necessarily with an international tribunal. The trial and punishment of TNI was largely left to the Ad Hoc Court and various high-level perpetrators who could be apprehended by East Timorese authorities, such as mostly senior militia leaders, would be tried and punished with the Serious Crimes Regime. Neither institution was particularly successful in obtaining those most responsible nor in meting out strong convictions and severe punishment, the significance of which for implementing this norm will be analyzed in a subsequent section.

As the Serious Crimes Regime only had a limited capacity and time frame within which to hold perpetrators accountable, it was widely realized among UNTAET and East Timor elites that an alternative transitional justice process had to be in place to deal with the scores of perpetrators of less serious crimes. This alternative came in the form of a truth commission, which was mandated to provide an array of non-punitive sanctioning measures.

**Non-Punitive Sanctions**

East Timor was no exception to the near universal demand in the past few decades among post-conflict societies for reparations, truth-telling and reintegration that are commonly addressed with the principles and processes of restorative justice. This set of restorative justice principles that underlie the norm of accountability largely originate from domestic contexts in which cultural norms place a high value on non-punitive transitional justice processes and a pragmatic need for a process that would affect communities in terms of reintegration and reconciliation. Moreover, by the late 1990s there was more international consensus on the value of restorative justice, and truth commissions in particular, and the

more widespread use of restorative justice processes in conjunction with international courts. Therefore, an accountability norm as inclusive of non-punitive sanctions is one that has originated in domestic contexts, as exemplified by the South Africa TRC and Rwanda’s Gacaca, but diffused internationally and institutionalized in a manner that is considered appropriate by international standards. An important indicator of this dynamic process is the notions of appropriateness accorded to different types of sanctions, inclusive of some forms of amnesties.

After East Timorese human rights activists had proposed the idea of a truth commission at a workshop in 2000, the human rights unit for UNTAET and the UNHRC supported a steering committee of East Timorese organizations to conduct popular consultations in every district of East Timor and with political parties, jurists, human rights and victims organizations. The results of the consultation demonstrated “overwhelming support for a truth and reconciliation commission” and the need for a transitional justice mechanism that would complement the prosecution of elite perpetrators. The general sentiments expressed as a result of the consultation were as follows:

a) Communities wanted an investigation of the truth and what had taken place and who was responsible. This should include not only crimes but also issues such as informers who had harmed their communities by collaboration with the Indonesian military, which had led to disappearances and other violations.

b) Those most responsible for the planning and implementation of the program of violence and perpetrators of the most serious crimes should be arrested and tried in the courts.

c) Those involved in lesser crimes need not face a court, but they should face their community members and the victims of their acts.

d) Traditional systems of justice should be involved.

e) An investigation of the truth should involve 1999, the Indonesian military occupation and the civil war of 1974-1976.

These sentiments directly correlate to the desire for a restorative justice institution for lower level perpetrators, as indicated by the institutional separation of different types of perpetrators, the emphasis on a need for truth, and the use of traditional and community based processes. These expectations were also


461 CAVR, Formation of the Commission.

found in the Asia Foundation’s general survey of East Timorese “awareness and attitudes regarding law and justice,” conducted in December 2002.\textsuperscript{463} The survey was not conducted for the purpose of uncovering justice preferences in relation to the violence experienced during Indonesian occupation or the specific events of 1999. Nevertheless, the attitudes and knowledge expressed about the concepts of justice and reconciliation and general preferences for the use of traditional justice mechanisms have great relevance for post-conflict accountability in East Timor. Among the participants of the Asia Foundation’s survey there was only a very basic understanding of legal rights; however, the concept of “justice” included a “continuum” that embraces both traditional dispute resolutions processes and the formal legal system.\textsuperscript{464} Pursuant to this institutional separation of traditional and formal justice processes, there exists a moral economy of justice in East Timor that distinguishes between serious and less serious crimes and prescribes the appropriate dispute resolution mechanisms. The survey reveals the distinction that the traditional, largely restorative, processes are considered appropriate for less serious crimes (i.e. those that are more interpersonal, individual, and less violent such as theft, land and domestic disputes) and the formal judicial system as appropriate for more serious crimes (i.e. those that are institutionalized and/or more violent such as murder, government or police abuse).\textsuperscript{465} There was also a preference for an institutional sequencing of justice among local perceptions and expectations: “inclusion of traditional leaders and customary law is regarded as a critically important first stage, before matters get taken up in the formal criminal justice system.”\textsuperscript{466}

The International Commission of Inquiry also noted that “most East Timorese who addressed themselves to the Commission did not call for revenge or retribution, but sought justice, recognition of


\textsuperscript{464} Asia Foundation, Law and Justice in East Timor: A Survey of Citizen Awareness and Attitudes Regarding Law and Justice in East Timor, 5 and 28.

\textsuperscript{465} Asia Foundation, Law and Justice in East Timor: A Survey of Citizen Awareness and Attitudes Regarding Law and Justice in East Timor, 4 and 28.

\textsuperscript{466} Pigou, Crying without Tears: In Pursuit of Justice and Reconciliation in Timor-Leste: Community Perspectives and Expectations, 30.
their rights and reconciliation. In the Commission’s final recommendations, it noted the need to complement prosecutions with reparations:

In considering how the future investigations of human rights and international humanitarian law violations could be organized and how those responsible could be punished and reparations made to the victims… the International Commission of Inquiry recommends the following:

… an independent international body charged with… ensuring reparations for violations from those responsible

Moreover, the Commission also recommended that an international human rights tribunal be established, comprised of UN judges and with the participation of Indonesians and East Timorese, recognizing that

It is fundamental for the future social and political stability of East Timor, that the truth be established and those responsible for the crimes committed be brought to justice. Every effort has to be made to provide adequate reparation to the victims for only then can true reconciliation take place.

The Special Rapporteurs did not focus its attention on low-level perpetrators but did frequently reference the high level of population displacement and need for return and reintegrations in order for investigations and prosecutions to be carried out. In addition to reparations, and truth-telling, reintegrations would also become a significant aspect of East Timor’s transitional justice mechanisms.

The value of restorative justice principles inherent in the local expectations of transitional justice combined with the pragmatic need for an institution that could feasibility address so many victims and perpetrators, and do so in a manner that would not exacerbate communal instability. A truth commission, not unlike that of South Africa but tailored to the context of East Timor, was the likely option that would facilitate the range of restorative justice goals. An understanding of how amnesties were then incorporated into East Timor’s truth commission requires recalling the previously discussed hierarchical division of criminality and a look forward into the prominent use of reconciliation in the post-conflict

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political discourse. Amnesties would be restricted to perpetrators of “less serious” crimes only and with
the expectation that their inclusion in a restorative justice process would enable reconciliation.

The ideals expressed in its name, namely truth, reception (meaning return and reintegration), and
reconciliation, are both the functional principles and goals of the CAVR and are therefore fundamentally
different than those of its retributive justice counterpart. Truth-telling as accountability, whether
through knowledge provided by victims and bystanders, or knowledge and acknowledgment provided by
the perpetrators, is provided by public hearings and the publication of a final report. The types of
knowledge provided in truth commission hearings and reports are complementary: the processes of truth
commissions reveal and address individual experiences with violence, while reports analyze the
information compiled from hearings in order to reveal and address collective experiences with violence
and often assign collective responsibility. The CAVR’s mandate requires that it undertake “truth-
seeking” in a number of ways that are similar to many truth commissions:

a) Initiating, facilitating or coordinating inquiries into extent, nature, and causes of
human rights violations; which persons, authorities, institutions and organizations
were involved; whether human rights violations were the “result of deliberate
planning, policy or authorization on the part of a state or any of its organs, or of
any political organization, militia group, liberation movement, or other group or
individual;” the role of internal and external factors; and “accountability, political
or otherwise”
b) Initiating, facilitating or coordinating the gathering of information and receipt of
evidence from any person,
c) Preparing a comprehensive report…. 
d) Making recommendations regarding reforms’ and initiatives’ design to prevent
human rights violations in the future.470

But there are some important contextual and institutional particularities that distinguish the CAVR from
its truth commission predecessors and contemporaries in transitional justice. First, while the CAVR’s
mandate clearly stressed many common restorative justice principles and processes, it was unique in its
“quasi-judicial” nature as it still had broad investigatory and search and seizure powers and the mandate
to examine the role of international and non-state actors involved in violations.471 This again reinforces

470 UNTAES, Regulation No. 2001/10 on the Establishment of a Commission for Reception, Truth and
471 Lyons, “Getting Untrapped, Struggling for Truths: The Commission for Reception, Truth and Reconciliation
(CAVR) in East Timor,” 105.
that the accountability norm does not prescribe uniform, or cookie-cutter, institutional designs. This particular variety of a truth commission borrows from other models but is adapted to the context of East Timor. Second, UNTAET had designed the mandates of the CAVR and Serious Crime Regime such that they would be truly complementary and coordinated. The CAVR had procedures to deal with perpetrators and evidence that were not under its jurisdiction but would need to be forwarded to the Special Prosecutor’s office. This was by no means a seamless venture; however, the institutional design of transitional justice clearly reflected an awareness of other cases where restorative justice practices had competed with national and international prosecutions and were therefore rendered ineffectual. Finally, the CAVR is the first example of a truth commission fully mandated and overseen by the United Nations. All previous cases of truth commissions were mandated by the state. As East Timor was without capacity and without ownership over governance, the United Nations was left with the sole responsibility of designing transitional justice mechanisms. The UN’s recognition of the need for a truth commission to complement the Serious Crimes Regime is a significant departure from previous practices of the UN, which had only mandated international court thus far, in post-conflict societies; the range of sanctions included in this process is a key part of the international normative structure of transitional justice.

The mechanisms that facilitate the CAVR’s mandate as a truth commission are the Community Reconciliation Processes and Agreements (CRP/As), which effectively constitute a limited and conditional amnesty for perpetrators of less serious crimes. Recall that amnesties are considered more legitimate and political palatable by the international community (as was the case with the South Africa TRC) if they are only granted with limited to low level perpetrators and conditional upon processes of non-punitive sanctioning. While the CAVR’s mandate allows it to investigate both serious and less serious crimes, the CRP/As are limited to the latter and conditional upon completing what is required of them in their individual CRA. Regulation 2001/10 provided a list of positive criteria for determining whether specific and individual acts fell within the scope of the CRP application: nature of the crime (i.e.
serious versus less serious), total number of acts committed by the perpetrator, and the perpetrator’s role in the commission of the crime(s) (i.e. leader versus follower).

The steps and conditions for CRP/As are well defined. The extent of accountability is determined by the perpetrator’s voluntary written application and public hearing. The written statement must contain a full description and admission of responsibility for criminal and non-criminal acts committed in the context of political conflicts in East Timor and a renunciation of the use of violence for political objectives. If the perpetrator is found to have committed a serious crime, their case is forwarded to the Serious Crime Panel. If eligible, the CRP Panel determines the appropriate act(s) of reconciliation, i.e. community service, reparations, symbolic gifts (tais or livestock), public apology, and/or any other act of contrition. If the acts are agreed to by the deponent, are “reasonably proportionate” to the acts disclosed, and do not violate human rights principles, a Community Reconciliation Agreement is created and a time limit for its performance is forwarded to the relevant District Court. CRAs are tailored to the individual perpetrator, but all require a public apology and a commitment to never repeat the offense. Like the TRC’s amnesty programme and subsequently the plea-bargains in Rwanda’s Gacaca, the CRP/As in East Timor offered amnesties with the increasingly standardized conditions of apology, confession, and compensation, and limited them to low-level perpetrators. UNHCHR’s Rule of Law Tools for Post-Conflict Societies publication on truth commission later cited CRP/As process as legitimate and a model to be replicated: “Timor-Leste has offered a variation on the amnesty-for-truth model that has been considered acceptable internationally as well as nationally, including by victim communities” because of its roots in traditional dispute resolution mechanisms and limits and conditions placed on such a form of accountability.

472 Stahn, "Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor," 964.0


475 Office of the United Nations High Commissioner for Human Rights (OHCHR), Truth Commissions, 12.
In contrast to the CAVR, another truth commission was proposed and institutionalized but carried less legitimacy and credibility in the eyes of the international community and East Timorese. In March 2005 the governments of East Timor and Indonesia jointly established the world’s first bilateral truth commission, titled the Commission of Truth and Friendship. The CTF was based in Bali and composed of a ten member panel representing a mix of both Indonesian and East Timorese legal and human rights experts; it was given access to legal documents, including material from the Serious Crimes Regime and CAVR, and permitted to conduct interviews in both Indonesia and East Timor. Like the CAVR, the CTF Terms of Reference tasked it with uncovering the truth about the events surrounding the 1999 popular consultation with the goal of forward-looking reconciliation and rehabilitation of the accused. But unlike the CAVR, the accused that were the focus of reconciliation and rehabilitation comprised elite perpetrators among the Indonesian government and TNI. East Timorese political elites, notably Ramos-Horta, argued that it was a form of restorative justice that would contribute to accountability through truth-telling, providing acknowledgement, and apologies to victims. But the Commission was controversially not asked to make recommendations for prosecutions and was given the power to recommend amnesties. Amnesties were meant to be limited to those who disclosed the full truth about their criminal responsibility; however, there were no restrictions on granting amnesties to those who committed serious crimes.

A chorus of criticisms ensued from international and East Timorese human rights organizations regarding the CTF’s mandate to recommend amnesties for elite perpetrators, making the Commission’s cooperation with civil society nearly impossible. The views of both local and international civil society were consistent in their characterization of the CTF as a disguised form of impunity; this influenced East Timorese and international public opinion of this institution and by extension made states and victims less


likely to cooperate with it or sanction it. In response to the CTF’s terms of reference the United Nations announced in 2007 that it would not cooperate with CTF investigations or participate in its hearings unless the Commission was “precluded from recommending amnesty for crimes against humanity and other gross violations of human rights.”

Local human rights groups and the East Timor Catholic Church also expressed opposition to the CTF, accusing it of trading justice for burying the past. One local NGO representative was quoted as saying that “reconciliation and friendship must be based not only on establishing the truth about the atrocities committed in Timor-Leste, but also on justice for those crimes…the CTF comes at the high cost of truth, accountability and respect for human rights and international law.”

Significantly, the CTF responded to these criticisms and never did recommend amnesties. In lieu of direct interview evidence from CTF officials, it seems most plausible that the CTF was swayed by international pressure from civil society and the United Nations that, in order to ensure both legitimacy and effectiveness, blanket amnesties could not be an option. The illegitimacy of the CTF’s initial Terms of Reference is a direct contrast to the CAVR. While both were characterized as truth commissions that sought to reconcile Timorese via truth-telling, the fact that the CTF was empowered to grant amnesties to perpetrators of serious crimes rendered it illegitimate in comparison to the nature of non-punitive sanctioning in the CAVR.

To summarize, the accountability norm is salient in the context of East Timor to the extent that eradicating a history of impunity, by trying and punishing elite perpetrators in various institutions, was assumed to be necessary and was hoped to prevent a resurgence of violence. While neither the Ad Hoc Court nor the Serious Crimes Regime was particularly successful in doing so, their mandates were precisely to try and punish. The establishment of a UN truth commission for East Timor, on the other hand, represents a pivotal institutional moment for the normative structure of transitional justice. The legitimacy accorded to the use of non-punitive sanctions to enable a broader range of transitional justice


goals represents the internationalization of restorative justice principles, which were once the purview of domestic institutions and justified by pragmatic issues alone.

Localization

The transitional justice institutions in East Timor represent the significant effects of the international localization norm. Not only does this case present the first use of a hybrid tribunal, a key institutional evolution from the ad hoc courts that was meant to engage more with the local level, but also a case in which the international community directly engaged with local communities via its truth commission. Moreover, the aforementioned decision to allow Indonesia to investigate and prosecute crimes of the TNI, in lieu of an international tribunal, represents a significant shift away from the assumptions that justified past ad hoc tribunals, specifically that such courts would be more effective and neutral because of their geographical distance from the affected territory and perpetrators. Undoubtedly, Indonesia’s assertion of its sovereignty and insistence that it hold its own trials was a contributing factor, but similar claims by Rwanda in 1994 were rebuffed by the international community. For all transitional justice institutions and policies, the principles of local capacity building and ownership combined with the desire for inter-communal reconciliation make the localization norm highly salient in this case.

Localizing International Justice

The decision to allow Indonesia to first investigate and prosecute elite perpetrators is evidence to support the increasing salience of the localization norm for both principled and pragmatic reasons, which was not salient for the early stages of the ad hoc tribunals. Recall that the normative assumptions of the international community at the end of the Rwandan genocide was that a domestic tribunal would not be an appropriate forum for prosecuting elite perpetrators as only an international tribunal that was located a significant distance from the affected territory would ensure neutrality and fairness. The drawbacks of isolating the ICTR from Rwandan society proved to outweigh the expected benefits of neutrality through isolation and the Tribunal eventually implemented policies that would help build local capacity and ownership of its processes. The various UN reports on transitional justice, discussed and cited in Chapter One, cite these concerns about purely international tribunals. In contrast, geographically situating justice processes near the affected territory and including local participants not only ensures that victims have
better access to the trials and their outcomes, but that the court can contribute to building the rule of law in societies that are in transition to peace and democracy. Note that an Indonesian court is still considered “local” in this context as the expected benefits of trials were not only intended for East Timorese victims but also to address a culture of impunity in Indonesia and particularly in the military. In this vein, allowing Indonesia the opportunity to hold its own trials also had the pragmatic expectation that Indonesian perpetrators would theoretically be more likely to be apprehended.

There was some initial consideration, mentioned in the International Commission of Inquiry’s report, of Indonesia having a United Nations sponsored truth and reconciliation commission; it was suggested that such an institution could be modeled along the lines of the South African TRC, “with possibilities for both pardon and indictment.”\textsuperscript{482} After its meeting with the Indonesian Ministers of Defence, Foreign Affairs, and the Attorney General, the Commission decided against recommending this owing to concerns about neutrality and legitimacy and articulated that these difficulties were acknowledged by Indonesian authorities. Recall that the Commission recommended an international tribunal and not a domestic Indonesian court. Nevertheless, the idealistic and pragmatic assumptions about the benefits of localization won out in the decision to allow Indonesia to first investigate and prosecute elite perpetrators before the threat of an international tribunal could be made a reality. It was thought that the military could be successfully sidelined from politics in Indonesia by giving the new political elite an opportunity to the end impunity of the military elite.\textsuperscript{483} The robust nature of the KPP Ham report also encouraged the international community that Indonesian authorities would allow for fair and extensive trials. Bringing TNI military elite before an international court, however, would prove too embarrassing for a new and unstable democracy and likely provoke a backlash among the military establishment. Opposition from domestic political elites in Indonesia and East Timor stemmed from concerns about destabilizing the region by aggressively pursuing the TNI; these were the political and pragmatic reasons for localizing transitional justice. Unlike post-genocide Rwanda, Indonesia also had


\textsuperscript{483} Cambanis, "Trials for Timor: Dispensing Transitional Justice in Indonesian Courtrooms Instead of International Tribunals," 95.
the capacity to carry out such investigations and prosecutions, giving more legitimacy to the norm that justice should and could be localized. Finally, while many cite the cost-weariness of Security Council members towards international tribunals, “allowing domestic courts a first pass at punishing war criminals, and only in the event of a failure invoking the international right to stage a tribunal – follows (the model) of the International Criminal Court” that was developing in the same time period. Thus, while allowing Indonesia to establish its own tribunal was in part a decision of pragmatic necessity, it also conformed to the increasingly common principle and practice whereby where domestic institutions are first given an opportunity to prove themselves before the threat of an international tribunal was executed. This is precisely how the institutional division of labour fostered by the hierarchical division of criminality norm is interrelated with that of localization. In accordance with the international normative structure of transitional justice, there remained the expectation that elite perpetrators should be punished with judicial mechanisms that were in accordance with the international community’s standards, but that a domestic tribunal was ideal and an international tribunal a last resort. Prosecuting elite perpetrators of the atrocities in East Timor was therefore the foremost mandate of the Ad Hoc Court for Indonesia and in part the Serious Crimes Regime in Dili.

Some evidence of the push towards localization for the Serious Crimes Regime is found in the recommendations made by the International Commission of Inquiry and the Special Rapporteurs’ Report. Building local ownership would require local consultation and participation in the process and the accommodation of local accountability mechanisms, and the extent of localization was carefully considered and deliberate. The Special Rapporteurs’ report stipulated that “UNTAET should make particular efforts to involve the East Timorese in the devising and execution of all the measures of institution-building and governance … that will be undertaken during the transition to independence.”

The International Commission of Inquiry further emphasized the importance of victims and a human rights approach to justice: “victims must not be forgotten in the rush of events to redefine relations in the

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region, and their basic human rights to justice, compensation and the truth must be fully respected.”

The suggestions made in these reports for East Timorese participation in transitional justice were heeded by UNTAET by mandating a hybrid tribunal.

With the important exception of a prosecution strategy that targets the most serious crimes and perpetrators, there was no desire to fully replicate the models of the ad hoc tribunals for the Former Yugoslavia and Rwanda for East Timor. The International Commission of Inquiry would “recommend establishment of an appropriate mechanism taking into account various bodies that have been established previously for ensuring justice and reconciliation.”

This was primarily in reference to the new hybrid tribunals proposed for Kosovo and Cambodia. As was discussed in Chapter One, hybrid tribunals use a mix of international and local processes, laws and participants, and are located within the territories affected by the violence. Their invention was a response to the aforementioned failings of the ad hoc tribunals and it was hoped that hybrid tribunals would have a greater impact on local populations, build capacity, strengthen the rule of law, and therefore prevent a recurrence of violence in the long term. UNTAET hoped that a hybrid tribunal for serious crimes could “reconcile the need for expeditious prosecution and trial of serious crimes with the requirement of ensuring experience and expertise in the process.”

Many of the legal elite involved in designing the transitional justice processes for serious crimes in East Timor have cited the influence of the hybrid court proposals in Kosovo and Cambodia in UNTAET’s decision making:

the idea was drawn from the only other UN peacekeeping mission that was also acting as a temporary governing authority, the UN transitional administration in Kosovo which was planning to establish a specialized mixed War and Ethnic Crimes Court, although that proposal never in fact proceeded.

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489 Reiger, "Hybrid Attempts at Accountability for Serious Crimes in Timor Leste," 149.
-Caitlin Reiger, co-founder of the human rights NGO, Judicial System Monitoring Programme

East Timor’s ‘Serious Crimes’ enterprise is said to be based upon the model which was being discussed for Cambodia in early 2000… it is also believed to have been heavily influenced by United Nations work in Kosovo, where the War Crimes and Ethnic Crimes Court project has now been abandoned . . . while the Cambodian government has had the luxury of rejecting the offer of an international tribunal…

-Suzannah Linton, former prosecutor for Serious Crimes before the Special Panel for Serious Crimes in East Timor

There were some similarities among these post-conflict societies. Kosovo’s status as a territory under international administration and lack of local capacity was similar to East Timor; in both cases the UN was the de facto and de jure governing authority and therefore was the key decision-making authority for justice institutions. Likewise, the idea of using local participants and locating the court within the territory where the violence occurred was part of the early models proposed for Cambodia. The past experience of Hansjoerg Strohmeyer, former Principal and Deputy Principal Legal Advisor to UNTAET, in both Cambodia and Kosovo is also a key factor in explaining the preference for a hybrid process for serious crimes in East Timor. He has expressed this influence and his expectations of how a hybrid process would build local ownership:

In both Kosovo and East Timor, the establishment of independent judicial commissions became the primary mechanisms for the selection of judges and prosecutors …both commissions were to include local and international legal experts…

…the United Nations deemed it essential to recruit the majority of the commission members among local experts and to empower them to overrule the international members so as to build a strong sense of ownership over the new judiciaries and to inject as much domestic expertise as possible into the process.

-Hansjoerg Strohmeyer, former Principal and Deputy Principal Legal Advisor to UNTAET.

Strohmeyer justified his controversial decisions to appoint local judges and assign a great deal of responsibility to a practically non-existent legal infrastructure with the symbolic importance of meeting local expectations for self-rule and demonstrating the international community’s “commitment to

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domestic involvement in democratic institution building.\textsuperscript{492} It is important to note that while there was some evidence of institutional learning on behalf of the international community from the experiences of the ad hoc tribunals and proposed hybrids in Kosovo and Cambodia, East Timor would be the first case of a hybrid tribunal institutionalized for serious violations of international humanitarian law.

Some institutional characteristics of the Serious Crimes Regime are not unlike the ad hoc tribunals, as the Special Panels and SCU target only the highest levels of criminal responsibility, are funded by the international community, and are underscored by the retributive justice principles of trial and punishment. There are significant institutional features, however, which invoke a more accurate characterization of the Serious Crimes Regime as a hybrid court. This East Timor model of a hybrid tribunal was the “first of its kind to be implemented.”\textsuperscript{493} The Special Panels had two international judges and one East Timorese judge. The SCU consisted of four teams and was staffed almost exclusively by internationals. Alternatively, as there was no legislation for a corresponding Public Defender’s Office, defence lawyers continued to act under Indonesian legislation and mostly East Timorese staffed the Office.\textsuperscript{494} Both international and East Timorese law were applied. Regulation 2000/15 uses many of the substantive legal provisions and definitions of the Rome Statute of the ICC and “Indonesian laws previously in force continued to apply, subject to any inconsistency with international human rights law and any laws subsequently made by UNTAET.”\textsuperscript{495} Despite not having a Chapter VII mandate from the United Nations (as the ad hoc tribunals did) that would give it the authority to request and apprehend criminals outside of East Timorese territory, UNTAET signed a Memorandum of Understanding with Indonesia in April 2000 “regarding cooperation in legal, judicial, and human rights-related matters.”\textsuperscript{496} It

\textsuperscript{492} Kingston, "Balancing Justice and Reconciliation in East Timor," 276.

\textsuperscript{493} Linton, "New Approaches to International Justice in Cambodia and East Timor," 93.

\textsuperscript{494} The Public Defender's Office did have three international lawyers that were either funded or loaned by the UN, UNDP, and No Peace Without Justice. See, Katzenstein, "Hybrid Tribunals: Searching for Justice in East Timor," 251.


\textsuperscript{496} Hirst and Varney, Justice Abandoned? An Assessment of the Serious Crimes Process in East Timor, 6.
was hoped that this agreement would make up for any shortcomings in the Ad Hoc Court’s proceedings in Indonesia.

Therefore, despite the institutional precedents of the ad hoc tribunals that isolated justice from post-conflict societies, there was a deliberate attempt to localize justice for East Timor by allowing Indonesia the first opportunity to investigate and try TNI in the hope that this would eradicate a history of impunity in the region. Just as significant is the first institutionalization of a hybrid tribunal in the form of the Serious Crimes Regime, which seeks to build local capacity and ownership by situating justice in the affected territory and involving both international and local participants. The localization of the CAVR would prove to be even more extensive, owing to its characterization as a grassroots, culturally appropriate, truth commission. The localization norm becomes increasingly salient in this period of the international normative structure’s evolution in that local processes and participation are considered a priority and international institutions a secondary or last resort.

*Internationalizing “Grassroots” Justice*

The localization of transitional justice through the CAVR was evident in two primary respects: the influence of traditional justice practices and the extensive involvement of the community in its processes. One of the influences for the CAVR, and specifically its Community Reconciliation Processes/Agreements was East Timor’s traditional dispute resolution mechanism of *adat.* Similar to Rwanda’s traditional *Gacaca,* *adat* is a form of communal dispute resolution in East Timorese culture whereby

traditional leaders are responsible for making decisions and resolving disputes ‘based on both facts and principles set by ancestors of the group.’ The behaviour and activities of members of the society are bound by ‘collective norms’ which are adjudicated by traditional leaders, who ‘pronounce these norms, uphold justice and execute justice.’

Burgess notes that the traditional *adat* was more influential in the design stages of the CRP/As than had been anticipated; this is particularly true for the *adat* practice of *nahe biti bot* (“unrolling of the mat”), which became “part of most hearings….and could not be rolled up until the disputes had been settled.”

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The CRP/A process of the CAVR relied on extensive community participation to verify the statements of the witnesses, evaluate the veracity of their claims, and to have victims participate alongside perpetrators in acts reconciliation. Prior to perpetrators providing their written statement, the CAVR initially identifies and makes contact with the community affected by the violence, explains the process and asks the community members if they want to participate. A Regional Commissioner convenes a CRP Panel (three to five persons) in order to hold a hearing. The hearings are public, held in the local community of the perpetrator, and conducted in the local language. The hearings involve statements from both the applicant and the victims and other members of the community who have relevant information. Indeed, the hearings are more of a “community event” than an individual case. CAVR hearings were public and well publicized, including national thematic hearings that were broadcast live across Dili on national television and community education and outreach efforts extended to weekly radio programmes and regular television coverage of community hearings. Therefore, the CAVR involved an extensive amount of outreach and communication in order for local communities to have a sense of ownership over the process.

The CAVR was hailed internationally and locally as a successful truth commission and a necessary transitional justice institution to complement the Serious Crimes Regime. An interim review conducted by the CAVR in 2003 by showed that “over 90% of all those interviewed stated that the process had been a positive one and that they had been satisfied with its results.” Chega!, the CAVR’s final report, determined that the CRP had exceeded the expectations of the commissioners: the CAVR received 1,541 statements and 1,371 deponents completed CRP hearings, and 90% of all cases were


501 The CAVR was considered successful on its own terms, as is evidenced in its final report, Chega!. Moreover, numerous references throughout the United Nations' Rule of Law Tools publications note CAVR mechanisms as examples to be replicated, from amnesty procedures, national consultations, public participation, etc. The CRP processes, in particular, are documented as success by both Patrick Burgess and Piers Pigou. See, Burgess, "A New Approach to Restorative Justice - East Timor's Community Reconciliation Processes.", Piers Pigou, The Community Reconciliation Process of the Commission for Reception, Truth, and Reconciliation. United Nations, 2004).

CAVR hearings had an extensive presence in East Timor, as it is estimated that 30,000-40,000 community members participated and attended the hearings and “the CRP process has produced resolution involving perpetrators, victims and communities for approximately 1,400 cases, but several thousand similar cases are unresolved.” The CAVR also partially succeeded in meeting its mandated goal of “reception” by assisting and encouraging the repatriation of refugees, owing in large part to its public information programme that reached both East and West Timor.

In sum, the localization norm was highly salient for transitional justice in East Timor in that the international community was explicit about the need to mete out justice at the local level in a variety of institutional forms. But capacity building and local ownership was not sought out only for its own sake. Reconciliation was the oft-repeated long term goal of localization and the previously discussed complementarity of retributive and restorative justice. Reconciliation quickly became part of the political discourse of transitional justice; this was not only true for the international community but also for East Timorese and Indonesian political elites whose meaning and agenda of reconciliation were hotly contested.

Reconciliation

Reconciliation was frequently cited in East Timor as an ideal to be nurtured with post-conflict institutions. The studies commissioned by the United Nations, local consultations, and statements from political elites reveal that there are differing interpretations of reconciliation and the variety of processes thought capable of achieving it. For East Timor, a minimalist conceptualization of reconciliation came to be defined as the peaceful co-existence of Indonesia and East Timor, and thus regional and national stability. In turn, a maximalist conceptualization of reconciliation was also espoused in terms of

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^503 As explained by the report, 10% of all cases were not completed because the deponent did not attend, the hearing was adjourned, or the Office of the General Prosecutor withheld the case and did not consent to a CRP. CAVR, Chega! The Report of the Commission for Reception, Truth, and Reconciliation Timor-Leste (CAVR): Executive Summary. The Commission for Reception, Truth, and Reconciliation in Timor-Leste (CAVR), 2005) 23.


reintegrating perpetrators and healing relationships in local communities. To be sure, East Timor’s political and economic stability are arguably dependent on this kind of social harmonization. What is more, the pragmatic and principled framing of reconciliation in East Timor highlights the significance of the “peace versus justice” debate in transitional justice. Reconciliation, therefore, was a salient transitional justice norm in East Timor’s post-conflict political discourse: it framed local expectations of transitional justice and was conceptualized as meaning both stability and social harmony and subsequently was used to justify a range of justice policies and institutions. Specific to the case of East Timor, different interpretations of reconciliation were accorded to different levels of political and social relations – minimalist to the national and regional levels and maximalist to the local level.

**Minimalist Reconciliation**

Early on the International Commission of Inquiry established reconciliation as one of the UN’s goals for East Timor. The expectation of reconciliation was not restricted to only restorative justice processes but would also be tied to the prosecution of serious crimes and the need to punish elite perpetrators to ensure stability. The previous analysis of the international community’s concerns about the consequences of impunity for stability illustrate the assumption that punitive justice would foster at least a minimalist degree of reconciliation. Conversely, national and inter-national reconciliation became the mantra for both Gusmao and Ramos-Horta, who viewed justice, in its most punitive form for elite perpetrators, to be a secondary objective if not an obstacle to stability. They increasingly argued against prosecutions and in favour of restorative justice and amnesties as necessary to achieve stability. In this regard, Gusmao has even likened the East Timorese context to South Africa and Mozambique, in that the use of reconciliation and accommodating political spoilers should supersede punishment. In 2000, he argued that “nobody in the world said to Mandela ‘your commission of truth and reconciliation is unacceptable’, everybody applauded it… I am thinking of a process of reconciliation here that can avoid


instability in the future and one that people can accept.” This is illustrative of the increasingly pervasive influence of transitional justice models used in other contexts and used as points of reference to legitimize institutional choices. Theoretically, this again demonstrates a degree of socialization and diffusion of this norm. And the more pragmatic concerns for survival and the conflation of reconciliation and stability are also evident in many other statements from Gusmao, particularly after transitional justice institutions were established. Gusmao expressed these concerns for stability when he argued that “going down the path of prosecuting Timorese for their past actions during our struggle for independence will open old wounds, divide people at a time when we need unity and lead to chaos.”

This interpretation and conceptualization of reconciliation, as a substitute for prosecution, was most prominent with respect to the Commission of Truth and Friendship. Here Indonesian and East Timorese political elites decisively prioritized their bilateral diplomatic relationship and regional stability over prosecuting elite perpetrators. The CTF’s Terms of Reference make this obvious and explicitly reference the nature and scope of reconciliation to be sought:

Different countries with their respective experiences have chosen different means in confronting their past. The leaders and people of South Africa…opted to seek truth and reconciliation. Indonesia and Timor-Leste have opted to seek truth and promote friendship as a new and unique approach rather than the prosecutorial process…The prosecutorial system of justice can certainly achieve one objective, which is to punish the perpetrators, but it might not necessarily lead to the truth and promote reconciliation.

The Commission shall work under the following principles….Further promoting friendship and cooperation between governments and peoples of the two countries, and promoting intra and inter-communal reconciliation to heal the wounds of the past.

It is worth recalling that under the Terms of Reference, the CTF left open the possibility of offering amnesties and the reference to the South African truth commission demonstrate that those defining the mandate for the CTF viewed amnesties and reconciliation to be compatible. Ramos-Horta defended this

508 Xanana Gusmao's Views on Justice (Dili, East Timor: Commission for Truth, Reception, and Reconciliation in East Timor, December 18, 2000).


510 The Republic of Indonesia and The Democratic Republic of Timor-Leste, Terms of Reference for the Commission of Truth and Friendship, para 10.

511 The Republic of Indonesia and The Democratic Republic of Timor-Leste, Terms of Reference for the Commission of Truth and Friendship, para 13(d).
approach by citing stability concerns: “in fragile, post-conflict states like East Timor, criminal justice could not be pursued blindly – that peace there often had to be bought with reconciliation rather than trials.”\textsuperscript{512} The CTF never recommended amnesties, after much international criticism and rebuke from victims in East Timor, but nor did it recommend prosecutions. Therefore, the most prominent of East Timor’s political elite in the transition period were diplomatically eschewing the need for a purely retributive transitional justice strategy in the name of reconciliation. This conceptualization of reconciliation, as meaning national and regional stability, was particularly directed towards political elites and unlike other institutions and other transitional justice contexts, viewed retributive justice and minimalist reconciliation as trade-offs.

\textit{Maximalist Reconciliation}

The references to reconciliation in maximalist terms stems in part from an understanding of East Timorese conceptions of justice and the CAVR’s processes that reflect these conceptions. The United Nations and various NGOs have sought out, to some degree, the opinions of East Timorese on the relationship between justice and reconciliation. According to the ICTJ’s survey report in 2003, when speaking of reconciliation, “most (East Timorese) spoke of local and domestic dynamics and conditions, with very few making mention of reconciliation with Indonesia. Reconciliation is described in terms of both the intended objectives and the process by which Timor’s polarized society can be brought together.”\textsuperscript{513} Furthermore, “these perspectives recognized that there are necessarily different (albeit interrelated) levels of engagement, including reconciliation between political leaders, reconciliation between the government and society in general, and reconciliation between different elements within society.”\textsuperscript{514} Investigations by the United Nations and the ICTJ also showed that the relationship between justice and reconciliation was viewed by East Timorese as interrelated but not necessarily co-dependent. The Special Rapporteurs found that “most East Timorese (they) spoke to…were open to a process of

\textsuperscript{512} Lucy Williamson, "Ramos Horta Slams UN 'Hypocrisy','" \textit{BBC News} September 15 2008.

\textsuperscript{513} Pigou, \textit{Crying without Tears: In Pursuit of Justice and Reconciliation in Timor-Leste: Community Perspectives and Expectations}, 36.

\textsuperscript{514} Pigou, \textit{Crying without Tears: In Pursuit of Justice and Reconciliation in Timor-Leste: Community Perspectives and Expectations}, 38.
reconciliation, but not at the expense of justice.”\textsuperscript{515} In a similar vein, the Commission of Experts “cites a 2004 poll in which 52 per cent of the population responded that justice must be sought even if it slows down reconciliation with Indonesia, while 39 per cent favoured reconciliation even if it meant significantly reducing efforts to seek justice.”\textsuperscript{516} In a more definitive statement, the ICTJ reported that “a number of people regarded establishing liability and punishment as integral components of the reconciliation process, as victims would be able to come to terms with violations only if those responsible were held to account.”\textsuperscript{517} The Asia Foundation’s survey, however, found that reconciliation was a “strongly favoured and familiar concept to nearly all survey participants” and was understood to “involve an apology and forgiveness or peaceful coexistence.”\textsuperscript{518} While it cannot be assumed that these reports are entirely comprehensive or representative of East Timorese public opinion, these statements do illustrate the perception that justice and reconciliation are at times viewed as trade-offs or that one might be considered a secondary objective to the other.

Reconciliation was loosely associated with the Serious Crime Regime with respect to the aforementioned expected benefits of a hybrid tribunal, for example that such an institution could have a greater affect on local communities and perceptions of justice. But the conceptualization of reconciliation, as meaning social harmony and healing is most closely associated with the CAVR’s processes. UNTAET Regulation 2001/10 explicitly mandates the CAVR to “assist and restore the human dignity of victims,” support reception and reintegration through community based mechanisms of reconciliation and promote reconciliation. National and Regional Commissioners of the CAVR are made to swear an oath to, among other things, “promote reconciliation, national unity, and peace.”\textsuperscript{519} The mechanisms to achieve


\textsuperscript{516} Kingston, "Balancing Justice and Reconciliation in East Timor," 284.

\textsuperscript{517} Pigou, \textit{Crying without Tears: In Pursuit of Justice and Reconciliation in Timor-Leste: Community Perspectives and Expectations}, ix.

\textsuperscript{518} Asia Foundation, \textit{Law and Justice in East Timor: A Survey of Citizen Awareness and Attitudes Regarding Law and Justice in East Timor}, 4 and 32.

\textsuperscript{519} UNTAET, \textit{Regulation No. 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor.} Para 3.1, 5.1, 11.5.
reconciliation are the aforementioned Community Reconciliation Processes and Agreement that use truth-telling and voluntary community participation to reintegrate and reconcile victims and perpetrators, therefore restoring social harmony. After the hearings, the CRP Panel then determined the required “acts of reconciliation” from the perpetrators, which demonstrate a socially transformative goal that goes beyond mere coexistence; acts of reconciliation can include community service, reparations, public apology, and/or other act of contrition.\textsuperscript{520} The CAVR’s institutional mandate and processes reveal the interrelated nature of transitional justice norms, and in particular how reconciliation is an expected outcome of implementing the other norms. Given that the CRP/As are limited to perpetrators of less serious crimes, restorative justice principles of accountability are used to facilitate reconciliation and are dependent on community participation, including the voluntary submission of the perpetrator to the process. Furthermore, these mechanisms clearly indicate that the nature of reconciliation sought by the CAVR is conceptualized in terms of healing and social harmony at the community level, and distinct from the political reconciliation sought between elites at the national and regional levels.

In summary, the four norms constituting the international normative structure were salient for shaping the discourse and framing the policies and institutions of transitional justice for East Timor to varying degrees. The crimes committed by elite perpetrators were clearly identified and the prioritization of accountability for these crimes was evident in the debate over an international tribunal. Only the Ad Hoc Court and the Serious Crimes Regime attempted to try elite perpetrators for serious crimes, whereas the CAVR was responsible for less serious crimes. This institutional division of labour that the hierarchical division of criminality norm prescribes is interrelated to the norms of accountability and localization. With respect to the latter, there was an early realization that volume of low level perpetrators and the clear incapacity of the East Timorese justice system would require some combination of international and local institutions and expertise. Localization of transitional justice was pushed by the international community despite the fact that UNTAET was the governing authority, but was welcomed by East Timor. All three transitional justice institutions demonstrate the salience of this localization norm.
to some degree. The large number of perpetrators of less serious crimes and the desire to localize transitional justice justified the use of non-punitive sanctions. East Timor’s adat traditions presented a restorative justice option that was inclusive of non-punitive sanctioning and the CRP/A mechanisms of the CAVR included truth-telling, reintegration, and reparations. Finally, reconciliation became an overarching justification for many of these transitional justice choices. The many levels and meanings of reconciliation were reflected in the expected outcomes of these institutions.

The salience of international transitional justice norms in East Timor is made all the more significant given that the United Nations was the governing authority in the territory, and thus had the monopoly of authority on decision-making for institutions, but also by the fact that due consideration was given to domestic circumstances and pragmatic concerns. The variety of institutional forms in East Timor, however, underscores the argument that transitional justice discourse, policies and institutions are driven by determined by the international normative structure and not pre-determined institutional designs that are applied across time and space without the ability to adapt to different context. Moreover, given the international community’s influential role in East Timor, the timing and nature of the institutional challenges and contestation that have resulted from implementing these norms provide important lessons learned for future international transitional justice approaches.

IMPLEMENTING TRANSITIONAL JUSTICE NORMS

Much of the criticism of transitional justice in East Timor stems from a complex interplay of institutional failures and normative conflict. First, the concerns about neutrality, political and military interference, and capacity that justified the isolation of the ICTR from Rwanda proved to be a legitimate concern for Indonesia and East Timor as well. Therefore, despite the mandates of the Ad Hoc Court and Serious Crimes Regime to address the breadth of criminal responsibility, both failed to sufficiently do so largely because of the political and institutional obstacles associated with localizing justice. Moreover, calls from international human rights groups and threats from the UN to mandate an international tribunal were rebuked by the TNI as Western judicial colonialism, which is a source of contestation. Second, the inability to punish elite perpetrators due to a poor prosecutorial strategy and lack of political will, thereby
ensuring a de facto amnesty and impunity, rendered the punishment and non-punitive sanctioning of low-level perpetrators unjust. The institutional division of labour that is prescribed by the hierarchical division of criminality norm is justified in part by a range of sanctioning measures between institutions, and the assumption that elite perpetrators must first and foremost be punished. Finally, the justifications for a prosecutorial strategy that pursued elite perpetrators on paper but not in practice were tied to stability and reconciliation. Opponents of an international tribunal and a stronger prosecutorial strategy, particularly political elites in both countries, frequently argued that doing so would destabilize relations between Indonesia and East Timor and hinder reconciliation. But the persistent impunity of elite perpetrators has renewed calls from international civil society for an international tribunal for the atrocities committed in East Timor.

In addition to inter-normative conflict, in some instances contestation was also evident in an international-local dynamic whereby political elites played upon false assumptions of “Western” justice as purely punitive and “local” justice as reconciliatory and communal. The source of contestation is particularly apparent in the ongoing disagreement as to whether, despite the plethora of transitional justice institutions, an international tribunal is still needed to provide accountability. This conflict not only divides political elites in Indonesia and East Timor from the international community but also from the victims in their territories.

Hierarchical Division of Criminality

The form and extent to which the hierarchical division of criminality norm was institutionalized revealed contestation over the capacity and political will to try and punish elite perpetrators. The failings in this regard had two negative implications for justice in East Timor: a distortion of the truth and historical revisionism with respect to the horizontal scope of criminal responsibility; and the perception that middle and low-level perpetrators were disproportionately identified as responsible.

The Political Limits on Criminal Responsibility

The Ad Hoc Human Rights Court conducted investigations, held trials, prosecuted, and sentenced. Yet, Indonesia’s efforts at to hold accountable those most responsible are considered by most scholars and human rights activists to be an unequivocal failure. This failure was defined by the Court’s
inability and unwillingness to hold TNI perpetrators accountable and to acknowledge the extent of their responsibility. The international community reacted to the outcomes of the Ad Hoc Court’s cases with disdain and disappointment and looked to the prosecutorial strategy for explanations. A special UN commission weighed in on accountability for the elite perpetrators after the court’s first guilty verdict and light sentence (for Abilio Soares). A United Nations Commission of Experts was set up by the Security Council in 2005 to review the prosecution of serious crimes in both Indonesia and East Timor. The Commission of Experts strongly condemned both the process and the outcomes of the Ad Hoc Court and highlighted the significant disjuncture between KPP HAM’s findings and the prosecutorial strategies. The Commission argued:

Prosecutions…were manifestly inadequate, primarily owing to a lack of commitment on the part of the prosecution, as well as to the lack of expertise, experience and training in the subject-matter, deficient investigations and inadequate presentation of inculpatory material at trial…The selection of prosecution witnesses was also unsatisfactory. Most of the prosecution witnesses who testified in these trials were indictees, individuals affiliated to TNI and government officials. The prosecution did not make substantial use of available documentary evidence and witnesses’ statements gathered by KPP HAM and the Serious Crimes Unit investigators.

The extent to which elite perpetrators of serious crimes were identified as responsible in the Ad Hoc Court was not only hindered by the aforementioned institutional failures of a limited mandate and weak prosecutorial strategy, but was also mired by a lack of political will. International observers have argued that there was not enough political will within the Indonesian government and Attorney General’s office to ensure strong and comprehensive indictments, fair trials, and independent prosecutions. It was in Indonesia’s interest to demonstrate a modicum of individual accountability for serious crimes; however, there was no desire to make the case that the Indonesian government or military was collectively responsible for the systemic and hierarchically organized violence in East Timor. The International Centre for Transitional Justice provided a thorough assessment of the court after its trials were concluded and argued that the “central underlying failure” was:

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The failure of political will in the AG’s office and the highest levels of the Indonesian government to encourage or even permit a serious attempt to establish the identity and guilt of those most responsible for the crimes committed East Timor. This lack (of political will) is manifested in the government’s slow attempts to transform the militarized public prosecution service into a professional civil service body. In addition, the nature of the Indonesian administration of the justice system is centralized and hierarchical, such that the lack of political will at the highest levels is like a paralyzing narcotic that seeps downward through the whole system.\(^{522}\)

The pervasive presence of the TNI in and around the Ad Hoc Court did little to generate any will among the judges and prosecutors for the trial and punishment of elite perpetrators. The TNI presence in the courtrooms was constant and directed towards intimidating judges, prosecution, and witnesses.\(^{523}\) Furthermore, the TNI’s general attitude toward the court was dismissive and its members accused the process of “being contaminated with the virus of Western-influenced human rights concepts.”\(^{524}\) The TNI not only had a strong presence in the courtroom, but also the political culture of the Attorney General’s office has been described as “militarized” and the “weight of this militarization operates to ensure a commitment to the values and goals of the state’s policies rather than to the legal system and the values of justice that it nominally serves.”\(^{525}\) The Attorney General’s office, having both a militarized culture and subservient political agenda, was never in a position to issue strong indictments against the TNI. As such, the Ad Hoc Court could not hold accountable those with the highest levels of responsibility irrespective of its institutional obstacles. Therefore, implementing this hierarchical division of criminality norm, at least with respect to the Ad Hoc Court, failed because of institutional obstacles and contestation over the whether and how elite perpetrators should be held accountable. The implication was a loss of both credibility and legitimacy for the Ad Hoc Court, and subsequently the distortion of the historical record and absence of justice.


The failures of the Ad Hoc Court were numerous and ultimately there was little to no accountability for the crimes committed by the TNI and Indonesian government. Arguably, there was only a small chance that the court could distance itself enough from the military establishment to conduct fair trials, but the robust and daring nature of the KPP HAM report had created a cautiously optimistic expectation that Indonesia had reached a turning point in acknowledging its atrocities in East Timor. But the implication of a weak and limited prosecution of elite perpetrators in the Ad Hoc Court for Human Rights was a degree of historical revisionism regarding the systematic and systemic nature of the violence, which shifted the blame and responsibility. The Ad Hoc Court’s narrow temporal and geographic jurisdictions and the prosecutorial strategy of pursuing middle-ranking officials limited the extent to which it could demonstrate that the violence was widespread, hierarchically organized, and that ultimate responsibility lay with the highest command levels of the TNI. A senior official reported to the ICTJ that “the political objective was to establish clear command responsibility at the institutional level and not just individual culpability;” given the nature of the indictments as directed at middle-ranking officers, and the limited jurisdiction, this objective failed.\(^{526}\) By comparison, one of the commendable outcomes of the trials at the ad hoc tribunals for Yugoslavia and Rwanda is that the courts, through their indictments, trials, and verdicts, have been able to show that atrocities in these countries were well planned and orchestrated in a systemic manner. They therefore showed a common account and overall pattern of violence that is consistent with such high level crimes as genocide and crimes against humanity.

Also, while individuals were put on trial and were judged guilty in East Timor, the cumulative outcome of the trials did not establish sufficient individual or institutional guilt. The Ad Hoc Court served to perpetuate the view that the violence committed by Indonesians in East Timor was sporadic and limited, and that crimes were committed individually and without planning or command instruction to do so. As Linton observed of the Indonesian government after the first three trials:

They have been in a win-win situation: trials were held as demanded by the international community, those trials provided an excellent forum from which to broadcast the official

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\(^{526}\) Cohen, *Intended to Fail: The Trials before the Ad Hoc Human Rights Court in Jakarta*, 60.
TNI-police-pro-autonomy line without challenge, and Indonesian judges eventually acquitted Indonesian officials from any culpability in East Timor.  

The Indonesian version of events in East Timor was so pervasive and consistent throughout the trials that “the prosecution’s view of the overall context and pattern of the violence in East Timor did not differ significantly from that presented by the defense.” The implication for justice in East Timor was that the truth regarding the causes, nature, and scope of the violence was subject to a great degree of historical revisionism.

Another implication of the weak and limited prosecution of elite perpetrators was that the trials in the Ad Hoc Court served to shift the blame for the violence onto UNAMET and East Timorese themselves. De Bertodano explains that the “popular view in Indonesia, reinforced by decades of government misinformation, is that the majority of East Timor wanted integration with Indonesia, and the UN ballot which produced a result in favour of independence was shamelessly rigged…The trials in Jakarta have served to reinforce that view.” Human Rights Watch also expressed concerns regarding this particular distortion of truth after “…a brief presented by counsel to General Wiranto repeated this version of history, identifying UNAMET and its ‘deceit’ as ‘the trigger of the riots.’” The portrayal of the nature of the violence was that of a “civil war between the East Timorese and with the Indonesians as a neutral party standing in the middle.” The truth function of a trial is just as important as that of a truth commission; however, often trials have a greater capacity to provide credible knowledge and acknowledgement of atrocities that is needed for accountability. In perpetuating a “a version of the violence in East Timor that is accepted nowhere outside of Indonesia…the trials (in the Ad Hoc Court)

527 Linton, "Unravelling the First Three Trials at Indonesia's Ad Hoc Court for Human Rights Violations in East Timor," 360.

528 Cohen, Intended to Fail: The Trials before the Ad Hoc Human Rights Court in Jakarta, vi.


531 Linton, "Unravelling the First Three Trials at Indonesia's Ad Hoc Court for Human Rights Violations in East Timor," 315.
have lost a unique opportunity to set the historical record straight...” and prevented any contribution to accountability by shifting the blame to other parties and distorting the truth.\textsuperscript{532}

Prosecuting elite perpetrators of serious crimes proved just as problematic for the Serious Crimes Regime in Dili. But unlike the Ad Hoc Court, which made no genuine effort to hold elite perpetrators accountable, the efforts in Timor reflected poor and failed institutionalization resulting from a lack of capacity to apprehend suspects and hold proper trials. The perpetrators sought by the Serious Crimes Regime were not necessarily assumed to have the same degree of responsibility as the TNI, yet the serious crimes they were accused of committing set them apart from the low level perpetrators sought by the CAVR. Those indicted by the Special Panels did represent a cross-section of elite perpetrators, including: thirty-seven Indonesian military officers from the TNI; four police chiefs; sixty Timorese TNI officers and soldiers; a former civilian Governor of East Timor; and five former district governors.\textsuperscript{533} But given that an estimated 200-339 indictees remained outside the jurisdiction of the Special Panels and protected by Indonesia, most of those that came to trial were middle and low-level perpetrators from East Timor. The ICTJ reports that the legitimacy of the tribunal was negatively affected as a result, as “complaints were frequently heard” throughout East Timor that the Special Panels disproportionately prosecuted East Timorese over Indonesians.\textsuperscript{534}

Therefore, not unlike the Indonesian court, the Serious Crimes Regime was heavily criticized for its prosecutorial strategy. Despite its mandate to hold accountable those who were “most responsible,” the SCU’s initial set of indictments were largely directed towards East Timorese perpetrators and charged with lesser offences, such as murder, and not crimes against humanity and war crimes.\textsuperscript{535} The early investigations and indictments also focused narrowly on individual crimes and thus ignored the systematic nature of the violence. After much initial criticism, a more decisive and coherent prosecutorial

\textsuperscript{532} Cohen, Intended to Fail: The Trials before the Ad Hoc Human Rights Court in Jakarta, 61.


\textsuperscript{534} Reiger, "Hybrid Attempts at Accountability for Serious Crimes in Timor Leste," 2.

\textsuperscript{535} Hirst and Varney, Justice Abandoned? An Assessment of the Serious Crimes Process in East Timor, 7.
strategy developed that focused on the organizers and instigators of the crimes and included the indictment against Wiranto. However, by the end of its mandate those who were tried and convicted were considered to be the “small fish” and very few pro-independence perpetrators were indicted, which created the appearance of a one-side prosecutorial strategy. In the end, “whether a person (was) prosecuted or not appears to be the result of geography,” as residing in Indonesia provided protection from prosecution by both Indonesian and Timorese authorities.

The extent to which both institutional failure and normative contestation hindered justice institutions from pursuing elite perpetrators is evident in the case of General Wiranto’s indictment. General Wiranto had been named by the UN Commission and by the KPP Ham report as being most responsible for the crimes committed in East Timor in 1999, but had not been indicted by the Ad Hoc Court in Indonesia. The Serious Crimes Unit issued an indictment for him in February, 2003 but did not issue the arrest warrant until May 2004. Wiranto has close ties with the Indonesian political leadership and himself ran for the Presidency between August 2003 and July 2004. Relations between United Nations officials in the Serious Crimes Regime and East Timorese leadership reached a breaking point with the Wiranto case. Much to their discredit, the UN and East Timor “disassociated themselves from the Wiranto arrest warrant,” which “emboldened perpetrators, offended victims, and seriously undermined the integrity of the serious crime process.” To make matters worse, East Timorese political leadership declared the indictment to be the work of the UN and President Gusmao issued a public statement expressing that it was “not in the national interest to hold a process such as this one in East Timor.”

The Wiranto case is demonstrative of the government of East Timor’s reluctance to pursue justice for those most responsible for the atrocities. In this particular context, political considerations and concerns for stability have overridden the norm that elite perpetrators should be punished. East Timorese leaders, therefore, have not contested the principle that elite perpetrators should be punished but contest the full

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537 de Bertodano, "East Timor: Trials and Tribulations," 83.
538 Hirst and Varney, Justice Abandoned? An Assessment of the Serious Crimes Process in East Timor, 11.
539 de Bertodano, "East Timor: Trials and Tribulations," 84.
implementation of this norm given several contextual variables, such as the pragmatic obstacle of apprehending many elite perpetrators that are in Indonesia, and the possibility the pursuing such perpetrators would be destabilizing on a national and regional level. The former is an institutional and political obstacle whereas the latter represents a source of inter-normative conflict with the reconciliation norm. Therefore the underlying principles of the norm are not being contested, the manner and extent to which it can and should be implemented is.

The limited degree of horizontal criminal accountability for elite perpetrators had negative implications for the fairness of pursuing low-level perpetrators. In the end, the prosecutorial strategy of the Serious Crimes Regime was “simultaneously over and under-inclusive” in that the criminal jurisdiction initially extended to all manner of crimes but the temporal jurisdiction of crimes was only limited to 1999. As a result, those who maintained their impunity were the high ranking and protected TNI perpetrators and those were who prosecuted were lower ranked East Timorese perpetrators, many of whom are “illiterate farmers who admit to the part they played in the crimes committed, and state simply that they were acting under the orders of their superiors, often under threat of force.” Victims groups also criticized the temporal jurisdiction stating that “approximately 1500 lives lost in 1999 constituted less than one per cent of the death toll throughout the brutal Indonesian occupation.” This prosecutorial strategy had a negative impact on perceptions of justice among East Timorese. The East Timorese judge even commented that “this system is not fair. Is it fair to prosecute the small Timorese and not the big ones who gave them orders?” The intended outcome of this tribunal was to prosecute those most responsible for serious crimes and not to isolate and create resentment within East Timor. The implication for justice is that an inability to fully prosecute elite perpetrators of serious crimes meant that

541 de Bertodano, "East Timor: Trials and Tribulations," 81.
lesser perpetrators of serious crimes were perceived as bearing a disproportionate degree of responsibility for the atrocities.

The failure to fully prosecute elite perpetrators in the Serious Crimes Regime also had implications for lower level perpetrators being held accountable in the Commission for Truth, Reception, and Reconciliation. Despite the CAVR’s mandate to address only less serious crimes, it clearly laid out the broad scope of responsibility for atrocities during Indonesia’s occupation and the popular consultation in its final report. The CAVR completed its final report, titled Chega!, in 2005 and released it in March 2006. 544 The Commission’s report determined that Indonesia was largely responsible for these crimes: “57.6% of the perpetrator involvement in fatal violations was attributed to the Indonesian military and police, and 32.3% to East Timorese auxiliaries of the Indonesian military.” 545 Chega! also “concludes that there is credible and extensive evidence that planning for and knowledge of this scorched-earth campaign extended to the highest echelons of the Indonesia military.” 546

The CAVR is similar to most truth commissions in contemporary transitional justice practices in that they “have gradually developed into a justice-supportive machinery, designed to complement rather than replace national or international prosecution.” 547 As complementary institutions, there were some successes and failures in the institutional cooperation between the CAVR and the Serious Crimes Regime, and some cite the CRP process as an example of good cooperation. But the most significant challenge was that “the failure of one tended to undermine the other” and “victims in the districts appeared to be satisfied with the CRP system, but only to the extent that it was matched by a serious crimes process.” 548

It would be understandably viewed as unfair if lower level perpetrators were held accountable for their

544 The Commission estimated that there were 102,800 conflict-related deaths between 1974 and 1999 and a high rate of population displacement with approximately 55.5% of surveyed households reporting one or more displacement events. CAVR, Chega! The Report of the Commission for Reception, Truth, and Reconciliation Timor-Leste (CAVR): Executive Summary. 44.


crimes yet the elite perpetrators, who planned and orchestrated the violence by inciting and forcing lower level perpetrators to participate, were not tried and punished. These implementation challenges underscore the fact that elite perpetrators must be sought and held accountable if accountability for low-level perpetrators is to be considered just.

**Accountability**

The Ad Hoc Court and Serious Crimes Regime were criticized for institutionalizing a de facto amnesty for elite perpetrators, in part due to a lack of indictments and prevalence of weak sentences and acquittals. The extent to which this was deliberate would suggest that this implementation challenge is a form of contestation, however, the institutional failures that result from incapacity and politicization of the process are numerous and obvious. The lack of capacity and political will to mete out punitive justice for elite perpetrators rendered accountability for low-level perpetrators less credible and disproportionate. Other sources of contestation go beyond simple dichotomies of punishment versus impunity, and reveal the different notions of appropriateness accorded to non-punitive sanctions and reparations. With respect to the implications for the normative structure of transitional justice, and as will be shown in the forthcoming sections, the decision to localize justice and espousing the goal of reconciliation served to reinforce these sources of contestation when implementing the accountability norm.

**Partial Punishments**

Not only did the Ad Hoc Court not sufficiently address the horizontal scope of criminality in terms of indictments and prosecutions, but those who were prosecuted were acquitted or received disproportionately mild punishments. The issues that have arisen with respect to punishment demonstrate that the implementation challenges of the hierarchical division of criminality norm correlates to those of the accountability norm. The prevalence of acquittals and light sentencing can be explained by several institutional failures: an investigation and indictment strategy that targeted middle ranking perpetrators among the TNI; a political discourse that disassociated justice with punishment; and an unenthusiastic and politically subservient prosecutorial team. First, the Attorney General’s office decided to pursue middle-ranking officials at the outset. Particularly given that there was no indictment against Wiranto by the Ad Hoc Court, “it is generally felt that those tried represented the ‘second division’ and not the top
This strategy had serious implications for any future accountability of higher ranking perpetrators. If middle-ranking officials were not found guilty, indictments of their superiors would not satisfy the burden of proof for command responsibility, “for it cuts the link between direct perpetrators and policy makers.”

Second, after the sentencing of Abilio Soares the Court provided a justification for imposing sentences that were lighter than what was prescribed by Indonesian law:

The judges explained that ‘(they) are not slaves of the law’ and ‘punishment is not simply to obtain legal certainty or revenge but to fulfill a sense of justice.’ They found it relevant that the president of (East Timor), Xanana Gusmao, had written in support of Abilio Soares, which to them showed ‘the spirit of reconciliation cannot be defeated by a heavy sentence on the accused’…

Finally, it cannot be said that the prosecution did all it could to secure convictions and strong sentences. Linton described “an apathetic prosecution uninterested in proving the charges against the accused.”

Human Rights Watch also called attention to the lack of “professionalism, autonomy, and impartiality of the prosecution” and referenced observer reports suggesting that the “prosecutors (were) actively seeking acquittals… (and made) no attempt to portray the military as an active participant.” Nowhere was this behaviour more obvious than in the case of Adam Damiri, who was the regional military commander responsible for East Timor in 1999. In what was arguably the court’s most important case, the “prosecution demanded an acquittal on the grounds that it had not proved any of the charges on which the defendant had been indicted.” The incredulity of this prosecutorial move can be explained by a timely political intervention and/or general incompetence. Some have argued that it was partly both and that this level of incompetence, or the appearance of such, was politically “managed to produce desired results

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549 de Bertodano, "East Timor: Trials and Tribulations," 93.
552 Linton, "Unravelling the First Three Trials at Indonesia's Ad Hoc Court for Human Rights Violations in East Timor," 327.
553 Human Rights Watch (HRW), Justice Denied for East Timor: Indonesia's Shame Prosecutions, the Need to Strengthen the Trial Process in East Timor, and the Imperative of UN Action.
554 Cohen, Intended to Fail: The Trials before the Ad Hoc Human Rights Court in Jakarta, 12, 25.
while obscuring accountability for them.\textsuperscript{555} These failures of the prosecution all combined to limit the extent and nature of accountability for crimes committed by Indonesia in East Timor.

The prosecution also failed to build their cases with a diverse and unbiased selection of witnesses and evidence. One source of bias was that most of the witnesses were Indonesians who had been stationed in East Timor during the violent period. In the first three trials, as observed by Linton, “all the prosecution witnesses testified against the indictments” except for the only three East Timorese witnesses.\textsuperscript{556} The negative experiences of the three East Timorese who participated in the first three trials adversely affected the willingness of more East Timorese citizens to attend the trials and provide their testimony in Jakarta.\textsuperscript{557} East Timorese witnesses were not sufficiently protected inside or outside of the courtroom and were often intimidated by the presence of the TNI and militia leaders in and around the courtroom. The prosecution did also not draw on the many potential witnesses from NGOs, journalists, UN staff, etc. who would have been able to testify to the extent of violence committed and their observations of the command structure and responsibility of the TNI. Nor did they utilize the wealth of documentation already compiled by the KPP Ham report and database, or UNTAET documentation. While the prosecutors failed to present the volumes of evidence and multitude of witnesses at their disposal, the limited authority and perspectives of the judges added little to the investigations and testimonies.

The concerns expressed by the UN’s investigations and commissions that Indonesia was not likely to attribute responsibility or punish elite perpetrators proved to be a valid concern. The limited prosecutions and prevalence of weak sentences and acquittals in the Ad Hoc Court essentially amount to a de facto amnesty for the TNI. The Ad Hoc Court held twelve trials for eighteen indicted individuals (two trials were group trials, for Suai and Liquica Church massacres). The trials concluded in August 2003, only one year after they began. Of the eighteen individuals indicted, twelve were acquitted and six were found guilty and received sentences ranging from three to ten years in prison (some of which were then

\textsuperscript{555} Cohen, \textit{Intended to Fail: The Trials before the Ad Hoc Human Rights Court in Jakarta}, 53.

\textsuperscript{556} Linton, "Unravelling the First Three Trials at Indonesia's Ad Hoc Court for Human Rights Violations in East Timor," 327.

\textsuperscript{557} Linton, "Unravelling the First Three Trials at Indonesia's Ad Hoc Court for Human Rights Violations in East Timor," 330.
are below the statutory minimum of ten years). The appellate chamber of the court overturned the convictions of five of the six that were found guilty, all were high-ranking Indonesian security officials, and halved the ten-year sentence of the convicted TNI official, Eurico Guterres. All of those convicted remain free pending their appeals and some have been promoted.

There have been mixed opinions on whether the Ad Hoc Court judges were as much to blame for the Court’s failures as the prosecution. The judges were forced to operate in a courtroom environment of political pressure and military intimidation, and often were in a position of choosing between advancing their career and upholding international law. The Commission of Experts also found the competency and credibility of the judges to be lacking. The divergent degrees of professionalism, training, and attitudes of the judges are often used to explain the inconsistency in the findings and verdicts. Many of the findings in one case would directly contradict those of another, and same cases followed the case law of other ad hoc courts while others ignored or contradicted it. Therefore, the push in the international community to localize transitional justice via the Ad Hoc Court in Indonesia, and thus rely heavily on Indonesian prosecutors and judges, may have also unintentionally reduced the extent to which accountability was meted out. Beyond the institutional failures, the outcomes of the Ad Hoc Court reveal inter-normative conflict between accountability and localization in this instance.

The Serious Crimes Regime outperformed the Ad Hoc Court, but only in terms of the sheer number of indictments, convictions, and trials and not the extent of punishment. Contrary to the Ad Hoc Court where institutional failures were largely deliberate and resulted from a lack of political will or corruption of the judicial process, the inability to sufficiently hold elite perpetrators accountable through

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558 Roper and Barria, Designing Criminal Tribunals: Sovereignty and International Concerns in the Protection of Human Rights 56.


560 One observer explained these variations by identifying the different perspectives of three types of judges: conservatives judges were “go by the book” and were generally seen to be weak and inexperienced; career and ad hoc judges “who are known for their knowledge of International Humanitarian Law and progressive “, and are thus more understanding of the extraordinary nature of the crimes; and finally the middle group who can “go either way” and are more caught between advancing their career and upholding the law. Cohen, Intended to Fail: The Trials before the Ad Hoc Human Rights Court in Jakarta, 60.
the Serious Crimes Regime was owing to a general lack of capacity and professional expertise. According to a January 2006 Security Council report, the Serious Crimes Regime filed 95 indictments against 440 individuals; of those that came to trial there were 74 convictions and 2 acquittals; most of those convicted received sentences between seven and fifteen years.\textsuperscript{561} At the end of the court’s mandate there remained 200 outstanding arrest warrants against individuals, primarily the military elites who had fled or continued to live in Indonesia; by the ICTJ’s estimate this number of individuals at large is as high as 339 indictees.\textsuperscript{562} As a result, most of those who were successfully tried and convicted were all East Timorese and lower ranking than the TNI. As was previously mentioned, the length of sentences was comparable to that of the Ad Hoc Court and even to that of the ICTY in the beginning; however, Drumbl’s analysis reveals that “paradoxically, as indictments increasingly began to charge extraordinary international crimes, sentences grew shorter,” in part due to the increased use of plea bargaining.\textsuperscript{563} Note, however, that at the time of writing only one convicted perpetrator from the Serious Crimes Regime remains incarcerated; the rest have had their sentences reduced and/or paroled.

In addition to the increasingly lenient sentences handed down by the Special Panels, the extent of accountability provided for by the Serious Crimes Regime was partial in that it prosecuted mostly low-level perpetrators. The perception that these sentences were disproportionate compared to the de facto amnesty for those that were indicted and never put on trial damaged the credibility of this institution. The lack of a proper defence counsel contributed, in part, to this perception and loss of credibility. The ICTJ reports that there was a widespread perception that a “conviction was more or less a \textit{fait accompli}.\textsuperscript{564} On the one hand, there is symbolic value to the investigations and trials and that did occur.\textsuperscript{565} On the other hand, “the sometimes harsh punishments handed down to Timorese for domestic crimes have triggered


\textsuperscript{563} Drumbl, \textit{Atrocity, Punishment and International Law}\textsuperscript{58}.


\textsuperscript{565} Hirst and Varney, \textit{Justice Abandoned? An Assessment of the Serious Crimes Process in East Timor}, 17.
resentment among many locals and have reinforced the message that only the low level perpetrators – and only the Timorese are being held accountable."

The (In)Capacity for and Legitimacy of Non-Punitive Sanctions

The extent to which low-level perpetrators of less serious crimes were held accountable was hindered, in part, by a number of institutional failures that are common to communal and restorative justice processes. First, it was difficult to ensure the participation of all perpetrators in the CRP hearings; “due to the voluntary nature of the program, together with the lack of capacity of the justice system, (this) meant that these persons gained a practical impunity.” While there was a relatively credible threat of prosecution from the Serious Crimes Regime for those who had committed serious crimes, the CAVR did not have broad enough investigatory powers nor could it offer enough incentives for perpetrators of less serious crimes to come forward. Furthermore, the CAVR failed to hold accountable perpetrators who had committed human rights violations in their home communities, but remained protected within Indonesia. Second, due process was not followed with regard to the perpetrators’ right to legal counsel, the legal training of the judges, and the right to appeal. For some this was viewed as a significant violation of legal rights and negatively affected perceptions of accountability, while others viewed this as a necessary trade off that is common to many restorative justice institutions seeking to balance both law and tradition. Fully respecting international legal standards of due process for such a high volume of perpetrators in a system with limited capacity would be inefficient if not completely impossible. Finally, while the CAVR’s aforementioned final report was both extensive and robust, its impact inside and outside of East Timor was negligible. The acknowledgement and knowledge provided by truth commissions’ final reports are a key contribution to accountability, in that it publicly identifies and


shames those responsible and make recommendations for reform to prevent the return of violence. But dismissed by Indonesia, ignored by the West, and criticized by East Timorese political leadership, Chega! may have only been a bureaucratic adjunct to the CAVR’s more meaningful processes of non-punitive sanctioning and reconciliation.

The Community Reconciliation Process of the CAVR undoubtedly provided for various forms of legitimate non-punitive sanctioning that were limited to low level perpetrators of less serious crimes as conditional upon the requirements of the CRP, namely confession, apology, and compensation. One source of credibility and legitimacy for the CAVR’s measures of accountability stemmed from its complementarity to the Serious Crimes Regime. As such, the division of labour between the two institutions and the CAVR’s working relationship with the Serious Crimes Regime was subject to competing interpretations of what constitutes serious and less crimes. There were some criticisms made early in the design stages of the CAVR regarding “the generality of the eligible crimes,” which “could be interpreted to grant amnesty for serious crimes, if they fall short of the most violent, internationally recognized crimes.” Human Rights Watch was also sceptical of the initial amnesty law, arguing

The law fails to clearly define crucial terms such as violent crimes…These gaps raise fears of violations of due process and the possibility that perpetrators of serious crimes could go unpunished. If not carefully designed and implemented, amnesties may undermine reconciliation efforts and weaken the rule of law.

Many of the early criticisms over East Timor’s amnesty law were quieted once the CAVR’s institutional design and conditions and limits for amnesties were made known. But the institutional aspect of this conflict was reflected in some confusion over the distinctions between serious and less serious crimes, and controversy over cases that should have been considered serious crimes but were permitted to go through a CRP process. The most problematic aspect of the CAVR’s complementarity with the Serious Crimes Regime was that any failure to prosecute serious crimes detrimentally affected the ability of the CAVR to justify its amnesty provisions for less serious crimes. The implication for accountability


was that a lack of punitive justice for serious crimes created resentment among local communities who had meaningfully participated in and committed to accountability for less serious crimes.\(^{573}\)

Additionally, recall that the legitimacy of this type of amnesty partly came from its roots in the traditional community dispute resolution mechanism of \textit{adat}, which lent the CRP/A process a “collective (and) contractual legitimacy”\(^{574}\) among victims and perpetrators. While not a strictly punitive form of accountability, the “‘loss of face’ and shaming through public humiliation in these communities is a much larger sanction, which continues into the day-to-day relationships with each person the perpetrators meet after the hearing.”\(^{575}\) Mimicking the East Timor’s dispute resolution traditions was also practical because it allowed the CAVR to manage the high volume of less serious crimes cases and address the needs of both perpetrators and victims. A communally sanctioned amnesty with conditions of apology, confession, and reparations “serve (d) the interests of both the perpetrators (in responding to their desire to return home safely) and the victimized communities (many of which suffered extensive property damage due to the perpetrators’ acts).”\(^{576}\) There was, however, one source of institutional conflict created by combining a traditional process with the formal legal system: while \textit{adat} required the consent of the victim(s) to the final CRA, the laws governing the CAVR only required their participation and the consent of the panel and community members.\(^{577}\) In these few cases the traditions of \textit{adat} proved to be stronger and the deponents’ cases were sent back to the Office of the General Prosecutor. The non-punitive sanctioning through the CAVR was not contested, however, but did face a number of institutional challenges that are common to such restorative processes and perceptions of its proportionality were a by-product of the lack of accountability for elite perpetrators.


\(^{574}\) Lyons, "Getting Untrapped, Struggling for Truths: The Commission for Reception, Truth and Reconciliation (CAVR) in East Timor," 117.


\(^{576}\) Hayner, \textit{Unspeakable Truths: Confronting State Terror and Atrocity} 255.

The appropriateness and legitimacy of the CAVR’s limited and conditional amnesties are made more apparent by contrasting it to the de facto amnesty for the TNI that was the result of limited accountability from the Ad Hoc Court and the CTF. As such an amnesty is considered a violation of states’ responsibilities and inappropriate given the gravity of crimes and command responsibility of TNI, there have been persistent and renewed calls from international and domestic human rights groups for the United Nations to honour its commitment to an international tribunal. Recall also that the controversial CTF was initially mandated to offer amnesties to Indonesian perpetrators, including TNI, and this was met with indignation from the international community and the refusal of the UN to cooperate with the commission unless amnesties were off the table. The CTF’s final report was released on July 15, 2008 and while much of the report has not been made public, it is known that the Commission collectively found the institutions of the Indonesian military and its civilian authorities to be most responsible for committing crimes against humanity in East Timor in 1999 but did not name specific individuals as responsible. Bowing to international pressure, it did not exercise its power to recommend amnesties, however, the initial amnesty provision still did some harm “not by leading to de jure impunity but by inducing the Commission to hold hearings that have provided a platform to perpetrators to give self-serving public testimony.”

Criticisms against amnesties in East Timor have continued even now that all the transitional justice institutions have come to a close. In response to a recent change in East Timor’s penal code, Amnesty International cites their concerns:

Amnesty International fears that the Timor-Leste authorities’ potential use of amnesties due to the gap in its new Penal code, will damage the young nation’s ability to develop a strong deterrent to violence, maintain an independent and trusted judiciary, and hold armed groups and security forces accountable for their actions.

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But it was not amnesties writ large that were opposed by the international community for East Timor. It was specifically the notion that blanket amnesties granted to elite perpetrators were considered to be the equivalent of impunity and therefore were not acceptable. By contrast, the CAVR allowed for amnesties that were limited to lower level perpetrators of less serious crimes and granted only in exchange for other transitional justice goals, such as truth, acknowledgement and reparations. That this truth commission was mandated by the United Nations, the same body which flatly rejected participating in the CTF, speaks to the important distinctions between de facto and blanket versus limited and conditional amnesties and the different notions of appropriateness accorded to them. Interpreting when and where an amnesty is considered legitimate does reflect a degree of normative conflict between the international community and Timorese and Indonesian authorities, with the latter arguing that such blanket amnesties are necessary in the Timorese context because it safeguards a political transition and does not threaten stability. This is not dissimilar to the arguments made by the RPF in Rwanda, who justify their impunity with the same logic. This form of contestation, therefore, is prompted by what is considered out-of-context application and inter-normative conflict with reconciliation; a more detailed discussion of this will be taken up with the analysis of implementing the reconciliation norm.

Another set of implementation challenges for the accountability norm is with respect to reparations. The Serious Crimes Regime never realized its commitment to a reparations programme, and thus the potential for transitional justice to provide for reparations fell mostly to the CAVR. The CAVR addressed reparations in several respects. When the Commission began its work it quickly discovered the many victims were suffering from socio-economic deprivation as a direct result of the violence, and the Commission then set up an urgent reparations scheme. This reparations scheme, funded by a state program and administered by the World Bank, provided various forms of assistance to “vulnerable groups” whose needs had to be “severe, immediate, and related directly to a human rights violation” between 1974 and 1999, when other forms of assistance were not accessible or sufficient, and where reparations would help the recipient in a “sustainable way” by restoring their dignity, preventing further
abuse, promoting empowerment and healing. The form of reparations included emergency grants, medical and psycho-social care, equipment, access to survivors’ self-help groups, provisions of forms of commemoration and memorialization, and contracts with local counselling, NGO, and church groups. Another means of reparations, both material and symbolic, was from perpetrators to victims as facilitated by the CRP/As’ inclusion of community service and material compensation.

In its final report, the Commission recognized that its urgent reparations scheme was a “stop-gap” measure and was not intended to substitute for a much needed long-term and comprehensive reparations program that should be directed to both individuals and communities. Even though the CAVR was only capable of a minimal reparations scheme, the pressing call for reparations in its final report and the scope in which it conceives of this potential program is significant. The Commission reinforces states’ obligations to provide reparations for atrocities, outlines guiding principles for such a program, identifies and prioritizes the potential beneficiaries, and directs that reparations should include rehabilitation for individual victims, collective measures for communities, and symbolic measures to honour victims, prevent a repetition of violent acts, and promote reconciliation. Controversially, the Commission’s final report addressed the notion that while reparations should not necessarily be subsumed under development assistance, the governments of the permanent members of the Security Council that militarily backed the Indonesian government should assist the East Timorese government with a reparations program; the report also called upon the governments of both Portugal and Indonesia and any businesses that profited from the violence to provide reparations as a measure of accountability. Ramos-Horta publicly expressed opposition to these recommendations for reparations, citing it as “grandiose idealism” and


582 CAVR, Chega! The Report of the Commission for Reception, Truth, and Reconciliation Timor-Leste (CAVR): Executive Summary. 36. Chega! reports the outcomes of this urgent reparations scheme as including: cash grants to 712 survivors totaling $142,400; all 156 participants in their healing workshops received support; and in ten districts, 417 survivors receive support and assistance from local NGOs and church groups.


expressing the concern that it would destabilize relations with Indonesia. To this date, no significant reparations have been provided to victims in East Timor, prompting continued criticisms from the international community that this failure is an injustice.

The importance of Chega!’s recommendations cannot be ignored as the report underscores that reparations are an integral component of accountability and a means toward reconciliation. Compared to Rwanda, transitional justice institutions in East Timor (particularly the CAVR) made a more significant effort to provide for reparations and to characterize them as accountability, although in both cases the outcomes were minimal and insufficient. The inclusion of reparations as part of an accountability norm in the normative structure of transitional justice has become increasingly salient, partly in response to a greater sensitivity to the socio-economic needs of survivors and partly due to reinforcing states’ obligations to provide for such reparations. But the challenge for implementing this norm is consistently an issue of capacity and political will, and thus this aspect of the norm lacks precision and its history of implementation is minimal. The mandates of transitional justice institutions and the demands of survivors and their local advocates consistently call for reparations, but in most cases the responsibility for providing reparations is evaded and symbolic measures substitute for the kinds of material compensation and reinstatement that would constitute genuine accountability.

In sum, the extent and nature of accountability provided by East Timor’s transitional justice institutions was varied and partial. The most significant institutional failure that resulted from implementing the accountability norm was the unwillingness and inability of the Ad Hoc Court and Serious Crimes Regime respectively to adequately punish elite perpetrators in comparison to mid and low-level perpetrators. The range of sanctions used to hold the latter accountable thus seemed disproportionate to the weak sentences, and in some case de facto amnesties, for those most responsible. The contrasting use of amnesties does represent a form of contestation, where those amnesties deemed inappropriate by the international community and victims were justified by political elites as necessary in

the Timorese context and to serve reconciliation. Finally, the inability to provide for significant reparations represents a persistent problem in transitional practices in many contexts, where reparations are considered necessary and appropriate but the capacity and will to provide for them is absent. Nevertheless, the CAVR has been considered a success in terms of its contribution to accountability and this was in large because of, not in spite of, the Community Reconciliation Processes and Agreements. That the CAVR provided for multiple forms of non-punitive sanctioning did not ultimately hurt the legitimacy of the truth commission, but rather its ties to both traditional and formal justice processes boosted its legitimacy in the eyes of its local participants and the international community. Another success of the CAVR was its ability to localize transitional justice processes and bring accountability to the communal level. As a hybrid tribunal the Serious Crimes Regime also sought to accomplish this but had considerably less success.

**Localization**

The salience of the localization norm in the case of East Timor was evident in the UN’s decision to allow Indonesia to first try elite perpetrators and the institutionalization of a hybrid court within Dili, both of which were in lieu of an international tribunal. The previously discussed lack of accountability for elite perpetrators made clear that localizing justice in Indonesia was a mistake. But the localization failures of the Serious Crimes Regime also speaks to contestation over this norm as many of the justifications for its hybridity were that it would build local capacity and ownership to a greater degree than an international tribunal. These expected benefits never came to fruition. In contrast, the principles and practices of the CAVR as a community-based truth commission made for a more likely and effective localization of transitional justice.

**Localizing International Justice: The Best and Worst of Both Worlds**

A hybrid tribunal such as this was supposed to bring together the best of both worlds, such as combining international expertise with local ownership capacity building to reinstate the rule of law, but many contend that in the end it was the worst both worlds. Local politics, regional diplomacy, and poorly institutionalized UN policies all prevented this anticipated aspect of state building and outcome of transitional justice. There were a number of institutional failures and legal missteps that limited the degree
to which the Serious Crimes Regime, as a hybrid court, was an effective implementation of the localization norm. First, adherence to the standards of international law was absent with respect to due process and reference to legal definitions and precedents set by the ad hoc tribunals for Rwanda and Yugoslavia. One former defence lawyer for the Serious Crimes Regime noted that “no judgment contained any reference to any international criminal law” and the “definition of genocide used by the court (was) incorrect under international law.”

The East Timorese judicial and legal staff also had little to no training in international criminal law. Additionally, the high number of cases created a backlog and defendants were kept in custody and for unreasonably long periods of time. Many defendants were denied due process and adequate legal representation. Second, the inadequate level of funding from the United Nations was a constant source of criticism and limited the capacity of the tribunal. The result of inadequate funding was that judges and lawyers went without the extra training, resources, and assistance needed to carry out their work, there were poor transcription and translation services for trials, and no witness protection and counselling services. Third, both the judiciary and defence lacked the capacity to be effective and uphold defendants’ rights to a fair trial despite the expected benefits of combining international and local personnel. Each panel was composed of one East Timorese judge and two international judges; however, there was “never a time when all these positions were filled” and “until July 2003, there were never sufficient international judges for more than one trial panel to sit at once.”

There was also a considerable imbalance between the capacity and legal experience of the prosecution versus the defence. Whereas prosecutors were appointed through the United Nations, the defence counsel was reliant on sponsored lawyers through NGOs and human rights organizations.

Capacity building was not successful, despite it being an obvious necessity given East Timor’s legal system and community were vastly depleted. Instead of consulting with the East Timorese community on its specific needs, “the process was developed within the UN mission…by reference to a

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590 de Bertodano, "East Timor: Trials and Tribulations," 87.
model than had been planned for Kosovo.**591 The result was that all SCU staff members were international and only the Special Panels became the focus of local capacity building, which took the form of “mentoring of national judges by their international counterparts.”**592 Many argue that the mentoring and training programs were “significantly flawed” and that the UN’s “lack of concern with capacity building from the beginning” has meant that individual donor governments and NGOs were consistently the main funders of capacity-building programs, and not the UN.**593 The fact that increased local capacity of the judicial system did not occur is also often blamed on the policy decisions of UN Legal Officer Strohmeyer, who transferred control of the judiciary (with jurisdiction over ordinary crimes) to the East Timorese too early in January, 2000.**594 Furthermore, in cases where capacity building and training programs were implemented they only served to exacerbate mistrust between the East Timorese and the international staff.**595 The suggested lesson of this attempt at local capacity building is that “the involvement of international colleagues should not be assumed to automatically result in a transfer of skills to the national level” unless international involvement is spread through the system, as opposed to a highly internationalized prosecutorial team pitted against a localized and incapacitated judiciary and defence.**596

The Serious Crimes Regime also failed to thoroughly engage the local population, both as victims with a right to accountability and as citizens with a stake in this state-building process. Building local ownership is related in principle to local capacity building but requires distinct mechanisms of outreach strategies and communication. But the Special Panels never engaged in public outreach activities or made any significant effort to disseminate information about its activities. Several observers and participants remarked that there was “there was no real contact between victims’ organizations and the special

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591 Reiger, "Hybrid Attempts at Accountability for Serious Crimes in Timor Leste," 159.
593 Katzenstein, "Hybrid Tribunals: Searching for Justice in East Timor," 266.
596 Reiger, "Hybrid Attempts at Accountability for Serious Crimes in Timor Leste," 162.
panels” and that the “local population that was alienated from the process was worsened by a perceived failure to engage in outreach to the East Timorese and explain the Serious Crimes process, and allegations of cultural insensitivity and arrogance on the part of UNTAET’s foreign personnel.” It was only during the handover process in May 2005 that the Serious Crimes Unit “held community meetings in each district to explain to local communities what work the United Nations did, why it was closing, and what would happen to their cases.” The ICTJ suggests, however, the failure to engage with local communities was not necessarily a problem for East Timorese themselves:

Within Timor-Leste, there was a perception that the serious crimes process was an international initiative, but it was nevertheless welcomed as consistent with community demands for justice. Furthermore, the ‘externalized’ nature of the process was not inconsistent with a widespread belief held in Timor-Leste and beyond that justice for past abuses crimes is partly – or wholly – a responsibility of the international community.

This failure to build local ownership was not uncommon to tribunals managed by the international community. Recall that the ICTR also eventually engaged in local outreach activities but its efforts were minimal and came too late. However, the hybrid nature of the Serious Crimes Regime in Dili brought with it expectations that the local population would be engaged in the process and invested in the outcomes. The hybridity of the Serious Crimes Regime has been used to explain both its institutional form and innovations and excuse its failures. For example, a senior official in the Prosecutor’s office revealed in an interview that the “Tribunal did not have to meet international standards because it is a domestic tribunal and ‘domestic’ standards apply.” This perhaps is what allowed the Serious Crimes Regime to hold a relatively high number of trials and ensure a high conviction rate. Conversely, the lack of enforcement powers and funding for hybrid tribunals (as compared with heavily funded and Chapter VII authorized ad hoc tribunals) prevented it from meting out accountability for the crimes and

597 Reiger, "Hybrid Attempts at Accountability for Serious Crimes in Timor Leste," 159-60.
perpetrators that were the intended targets of its jurisdiction. As one astute observer commented: “rather than being a hybrid model that strategically combined the best features of national and international tribunals,” the United Nations’ Serious Crimes Regime in East Timor was “a misfit that inherited the worst of both.” Therefore, the implementation norm through a hybrid tribunal for East Timor suffered from such numerous institutional failures that it suggests this model cannot improve upon the failures of past international courts without adequate capacity and will.

In contrast, the CAVR has much more success with respect to fostering local ownership over its transitional justice processes. This was an expected outcome of the CAVR as its functioning entirely depended on local participation and perceptions of legitimacy. According to Chega!, the Commission collected 7,669 statements in East Timor and worked with a collection of local NGOs in order to collect 91 statements in West Timor; it also conducted 1,000 interviews with East Timorese civilians and fifteen interviews with those considered to be “key national figures.” One of the main outreach activities of the CAVR was with respect to its mandate for “reception,” which required that local communities accept the return and reintegration of those displaced by the violence (both perpetrators and victims). To facilitate this goal, the Commission engaged in various public outreach activities, including communication with refugees and community leaders via radio, press, and videos about the Commission’s work and the acts of reconciliation in their home communities. Other outreach activities included healing workshops and public hearings at the national and sub-districts levels; the fifty-two sub-district hearings were attended by approximately 6,500 people. Furthermore, the community reconciliation processes were the key mechanism by which the CAVR could build local ownership, for the process depended on the willing participation of community members and their acceptance of the process as legitimate. The CAVR was thus able to foster local ownership primarily because it

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602 Reiger, "Hybrid Attempts at Accountability for Serious Crimes in Timor Leste," 162.
“approached (the CRP process) as a community event and not an individual process.”\textsuperscript{605} The CAVR sought to fill the void that the judicial system’s lack of capacity created and “conducted significantly more grassroots programs, and of a more varied approach than any previous truth and reconciliation commission.”\textsuperscript{606} Therefore, the localization of transitional justice through the CAVR was not only salient in terms of policies and institutional mandate, but was also relatively uncontentious and institutionally successful when put into practice. The CAVR’s impact on local communities is a hallmark of its perceived success.

One of the intended benefits of localization, whether through a truth commission or a hybrid tribunal, is that it will foster reconciliation. In East Timor’s case, reconciliation was a dominant element of the political discourse and institutional mandates of transitional justice, but competing conceptualizations of reconciliation rendered it a contentious goal.

Reconciliation

The manner in which reconciliation was espoused as an expected outcome of justice in East Timor reveals the many problematic competing conceptualizations of this political and socially transformative goal. Punitive justice for elite perpetrators was eschewed by East Timorese political elites and argued to be a necessary trade off for stability; the Ad Hoc Court in Indonesia and recent Commission of Truth and Friendship sought to affect this minimalist and inter-national reconciliation between East Timor and Indonesia. Pursuing restorative justice was cast as a necessary means to healing and social harmony within East Timor, and both the Serious Crimes Regime and the CAVR sought to affect this maximalist and intra-communal kind of reconciliation. As was the case in Rwanda, the reconciliation norm is the most contested in East Timor and for the international normative structure of transitional justice, precisely because the institutional failures and normative conflicts that arose from implementing the other norms accumulate to prevent reconciliation from being realized and raises questions about its normative value.


Contestation over this conceptualization of reconciliation norms speaks to the so-called “peace versus justice” debate, revealing conflict between it and the hierarchical division of criminality and accountability. Tempering punishment of elite perpetrators and ruling out an international tribunal in favour of reconciliation has been persistently justified by Indonesian and East Timorese elites in pragmatic terms as a necessary means to stability. Concerns about the security implications of such measures of justice were associated with the Ad Hoc Court, Serious Crimes Regime and Commission of Truth and Friendship. But these institutions also suffered from public perceptions that they justified impunity in the name of reconciliation. Therefore, there is a complex relationship between peace and justice in this context, in which minimal accountability was justified by the need for reconciliation but paradoxically the lack of legitimacy that follows may undermine stability in the end.

The possible destabilizing implications of trials and the perceived trade-off between punishment and reconciliation were problematic for the Serious Crimes Regime in Dili. To successfully carry out its trials, the Serious Crimes Regime needed to facilitate the return of 100,000 refugees that comprised many perpetrators and witnesses and apprehend those TNI outside of its jurisdiction. First, the refugees were in West Timor camps under the control of ex-militia; the ex-militia were “afraid to return for fear of prosecution” and thus a vigorous prosecutorial strategy would discourage these refugees from returning. Attempts by UNTAET to broker deals and offer reconciliation with ex-militia leaders to induce the return of refugees seemed to contradict the Serious Crimes Regime’s commitment to accountability for those most responsible for the violence. Second, there was a high number of outstanding arrest warrants issued for members of the TNI and militias who were being by shielded by Indonesia and were located in Indonesian territory. The unwillingness of the Indonesian government to cooperate and comply with extradition requests or assist the Serious Crimes Regime in any way, and unwillingness of East Timor to pressure Indonesia to do so, has often been cited as a significant cause of

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607 de Bertodano, "East Timor: Trials and Tribulations," 82.
the regime’s failure.  This was in part an institutional failure on behalf of the UN when it did not establish the Serious Crimes Regime with a Chapter VII Security Council mandate as it had done for the ICTR and ICTY. Had it done this, the SCU and Special Panels would not only have received more financial and human resources but it would have at least legally obligated Indonesia to cooperate with investigations and prosecution, including extradition.

From the beginning the Timorese and Indonesian governments publicly stated that they would not push for an international tribunal and instead would pursue elite perpetrators with the Ad Hoc Court and Serious Crimes only to the extent that it would not damage their diplomatic relations and risk instability.  Ramos-Horta contends that warnings from the UN against impunity and demands from international human rights advocates for an international tribunal represent a Western perspective on the necessity of prosecutions and are ignorant of the East Timorese security context. A statement from Ramos-Horta in 2009 demonstrates this sentiment:

Rather than pushing for trials of everybody involved in past violence, we pursued different avenues through the mechanism of truth and reconciliation. This absence of prosecutorial justice as seen from the perspective of the UN or other Western countries has no bearing with the reality on the ground in [East Timor] or [between East Timor] and Indonesia. You don’t see in my country a single act of conflict between the pro-independence and the pro-Indonesia factions.

This represents a case where the source of contestation is between international and local levels and over different interpretations about the relationship between punitive justice for elite perpetrators and reconciliation. Ramos-Horta has also dismissed the “simplistic assertion” that impunity will result in further violence as merely “academic jargon.” Specifically responding to those calling for more prosecutions, Ramos-Horta has also retorted against Western conceptualizations of justice, arguing that “it’s great for the human rights activists to be heroic in Geneva and New York where they don’t have to

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Therefore, this contestation also speaks to differing perceptions of the appropriateness of this norm in the East Timorese context.

Reconciliation, as national security and stability between East Timor and Indonesia, was also used to justify the Terms of Reference for the Commission of Truth and Friendship and to excuse its outcomes that fell well short of accountability. These previously discussed Terms of Reference and mandate reveal that the CTF assumed it was capable of affecting inter-national reconciliation by eschewing retribution in exchange for truth (and initially amnesties). The CTF’s later retreat from its position on amnesties, however, was significant, as it cited in its final report that offering such amnesties would be a hindrance to reconciliation:

Amnesty would not be in accordance with its goals of restoring human dignity, creating the foundation for reconciliation between the two countries, and ensuring the non-recurrence of violence within a framework guaranteed by the rule of law.\(^{614}\)

The outcomes of the CTF were still heavily criticized by the international community and East Timorese victims. Its failure to establish individual, and not just institutional, responsibility and the reluctance to recommend prosecution led to renewed calls for an international tribunal.\(^{615}\) And as ICTJ critiques, its reconciliation measures were more directed at the rehabilitation of perpetrators rather than victims.\(^{616}\) In 2006, the UN Secretary-General critically responded to the outcomes terms of the CTF:

I recognize the unique steps that the two Governments have taken in searching for the truth and respect their efforts to achieve reconciliation, which have contributed to the development of positive bilateral relations between the two countries. Establishing the truth and promoting reconciliation are necessary parts of the healing process for both countries and victims and, it is my hope, a first step towards achieving justice. It would be deeply regrettable, however, if the reconciliation process foreclosed the possibility of achieving accountability for serious violations of human rights and international humanitarian law….\(^{617}\)

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\(^{613}\) Kingston, "Balancing Justice and Reconciliation in East Timor," 290.


But pressure from the UN for more punitive accountability in East Timor and Indonesia has been purely rhetorical. The lack of political will in the United Nations to make good on their threat of an international tribunal if the Ad Hoc Court proved insufficient or lacked credibility suggests that its concerns for stability trump justice in the punitive sense. For its part, Indonesia could also be “confident that in the post-9/11 world, pressures to pursue accountability are trumped by desires to cultivate Jakarta as a moderate Islamic ally in the war on terror”\textsuperscript{619} and the UN was reluctant to “risk destabilizing Southeast Asia.”\textsuperscript{619} The lack of political will among the international community, East Timor, and Indonesia was bound up in this universal concern that the prosecution of the highest levels of the TNI would be destabilizing. Reconciliation was, therefore, contested in East Timor insofar as it was used to justify impunity for elite perpetrators revealing not only the politicization of the concept but its perceived irreconcilability with transitional justice norms. The Commission of Truth Friendship most clearly illustrates this conflict over the meaning of reconciliation and how it should be implemented. In contrast, the nature and scope of reconciliation sought by the CAVR – also a truth commission – was deemed legitimate.

\textit{Communal Healing and Reintegration}

The CAVR’s processes and outcomes were closely associated with inter-personal and inter-communal reconciliation. Evaluations of the CAVR were mostly favourable with regard to its impact on reconciliation, and were particularly focused on the successes of the Community Reconciliation Processes and Agreements. One survey showed that “victims interviewed stated that after the CRP hearings they felt more respected within their communities and there had been a change of relationship with the perpetrator;” perpetrators interviewed also stated that the CRP process had aided in repairing their relationship with the community.\textsuperscript{620} This particular survey also revealed that truth-telling and the incorporation of traditional practices into the CRP process, namely a confession and symbolic reparations

\begin{itemize}
  \item\textsuperscript{618} Kingston, "Balancing Justice and Reconciliation in East Timor," 279.
  \item\textsuperscript{619} Katzenstein, "Hybrid Tribunals: Searching for Justice in East Timor," 272.
\end{itemize}
from the perpetrator in exchange for forgiveness and reintegration, was the most significant precursor for reconciliation.\(^{621}\)

The CAVR’s final report made clear that the task of reconciliation was far from complete in several respects and therefore suffered from some institutional challenges. The Commission addressed and made recommendations for reconciliation on multiple levels: grassroots, national political community, and with Indonesia.\(^{622}\) One particular challenge for the Commission was the interrelated tasks of reception and reconciliation. The reception mandate, more aptly described in East Timor as *acolhimento*, extends the scope of the Commission’s reconciliation objectives beyond local communities and sought to facilitate the return of displaced East Timorese within and outside of jurisdiction. *Acolhimento* was indicative of “people embracing each other as East Timorese, of coming back to ourselves, living under one roof, after many years of division and violence.”\(^{623}\) At the time of the report’s release there were still many displaced East Timorese and the CAVR reconciliation processes had worked towards facilitating their return and assuring them that their communities would welcome them without retaliation. But the scope and nature of reconciliation associated with the CAVR remained relatively uncontroversial until the CAVR released its final report and explicitly linked reparations to reconciliation:

> The Commission believes that lasting reconciliation cannot be achieved without establishing the truth, striving for justice, and providing reparations to victims. Reparations are necessary to restore the dignity of victims and to repair damaged relationships within our society...In the same way, acknowledging the suffering of victims through reparations is a cornerstone to lasting reconciliation…\(^{624}\)

In response to the CAVR’s recommendations, both Gusmao and Ramos-Horta expressed disagreement over the conflation of reparations and reconciliation and cited concerns that expected reparations from

\(^{621}\) Burgess, "A New Approach to Restorative Justice - East Timor's Community Reconciliation Processes," 188.


states would destabilize relations with Indonesia and Western donors.  President Gusmao criticized the “CAVR report for embracing what he terms ‘grandiose idealism’ and the insistence on prosecution, retribution, and reparations.” This reveals a new and interesting source of contestation, namely whether reparations were specifically meant to foster reconciliation in addition to accountability. Given the aforementioned implementation challenges of reparations, assigning such a socially transformative goal to them would seem to be idealistic in the short term. Gusmao subsequently postponed making the report public, which incited widespread criticism inside and outside of East Timor. He eventually presented the CAVR report to the Security Council in January 2006.

In sum, the concept of reconciliation has played a significant role in East Timor’s transitional justice discourse and institutions. The necessity and goal of reconciliation was used in political discourse to justify various trade-offs. The CAVR’s processes and recommendations sought an exchange of truth and reparations for inter-communal reconciliation, a trade off of punitive for non-punitive sanctioning. Alternatively, the CTF also sought truth in exchange for inter-national reconciliation, but because there was an absence of any kind of sanctioning the trade off was justified as one between justice and stability. This demonstrates that while reconciliation is an expected part of the discourse of transitional justice, its usage varies and can easily become infused with political and security considerations that are at odds principles and expectations attached to other transitional justice norms. The most contentious aspect of this transitional norm for East Timor is that reconciliation, as security and stability, was used to justify impunity for those most responsible and reconciliation, as healing and social harmony, was used to justify non-punitive sanctioning for low-level perpetrators. The latter is deemed inappropriate and damaged the credibility of the institutions that ascribe to such a conceptualization, such as the CTF, whereas the former served to further legitimize the processes of the CAVR. Moreover, the conflation of reconciliation and stability in such a politicized context continues to erode its normative value and utility in transitional justice processes.

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To conclude this analysis of implementation, transitional institutions and outcomes for East Timor exhibited a complex interplay of institutional failures and normative contestation. The hierarchical division of criminality norm created a division of labour between retributive and restorative justice institutions, but did not carry through to proportionate prosecutions and punishment largely owing to a lack of capacity and political will to hold elite perpetrators accountable. Accountability was realized at the local level through the CAVR, and somewhat for middle-ranking perpetrators prosecuted in the Serious Crimes Regime. But these efforts are in stark contrast to the persistent impunity for elite perpetrators. Justice cannot be wholly realized without rectifying this. Similarly, amnesty did not prove to be the death knell of the CAVR but rather its roots in tradition and pragmatic benefits lent the CAVR some credibility and legitimacy in the eyes of its participants. Conversely, de facto and blanket amnesties for elite perpetrators considerably weakened the ability of the Ad Hoc Court and Serious Crime Regime to provide much needed truth and acknowledgement of the atrocities; the different interpretations over what constitutes a legitimate amnesty and whether some amnesties are justified in the East Timorese context has been a significant source of normative contestation. The CAVR succeeded with localization, thereby bringing a hope of reconciliation to victim-perpetrator relationships in local communities. Despite the expectations attached to hybrid tribunals, the Serious Crimes Regime was less successful in this regard and limited the scope and depth of accountability. The institutional failures of this hybrid courts are important lessons to be learned for the international community and will likely have a feedback effect on the localization norm should be implemented in future cases. Finally, the outcomes of these many transitional justice institutions provided some interesting revelations on implementing the reconciliation norm. For the CAVR, its approach to reconciliation remained uncontroversial until it was associated with reparations. Alternatively, East Timor political elites balked at this conflation yet aggressively pursued reconciliation defined as stability with Indonesia, often at the expense of justice. As the case of Rwanda and East Timor have both shown, and the ICC will also demonstrate, reconciliation remains the most contested norm in the international normative structure of transitional justice, as the multiple interpretation over its meaning and how it should be implemented often conflict with other transitional justice norms but is also increasingly subject to politicization and institutional failures.
CONCLUSIONS

The volume and scale of transitional justice activity in East Timor has been considerable. Despite the oft-cited claim that independent East Timor is one of the UN’s biggest nation and state-building success stories, the UN acknowledges many transitional justice failures. East Timor still suffers from a host of socio-economic obstacles that were not addressed by any of the transitional justice institutions, including the CAVR. Poverty, high unemployment, and basic individual insecurity are persistent and widespread. This has reinforced calls for reparations and raised the contention that it would lead to communal and national reconciliation. Security in East Timor is precarious at best and some have even linked recent spasms of violence to the lack of justice, and particularly the need for police, military, and judicial reform. Finally, the light sentencing or absence of sentencing altogether has meant that many perpetrators have re-entered the communities where they perpetrated violence. This has had a disquieting effect on inter-communal stability despite the calls from political elites for healing and reconciliation instead of punishment. It is unlikely that East Timor will have another transitional justice institution, but expectations for justice and reconciliation are still very much a part of its political and social landscape.

East Timor represents an important point of institutional learning in the evolution of international normative structure of transitional justice. This is in part due to the prominent role by the United Nations in designing institutions but also the extent to which this case speaks to issues of international and local dynamics when interpreting and implementing transitional justice norms and the persistent debate over how justice can contribute to reconciliation. As such, many important lessons can be taken away from East Timor that are instructive for understanding the potential for political change, many of which are acted on by the International Criminal Court. First, distinguishing between degrees of criminality and the subsequent institutional division of labour does not guarantee accountability. The international community has become increasingly focused on ensuring that all sides and the broadest scope of criminal responsibility are held accountable. Second, understanding the many mechanisms of non-punitive sanctioning continues to shape our understanding of accountability. The ongoing redefinitions in the field

of transitional justice of what constitutes impunity and the increasing inclusion of reparations as
accountability illustrate these changes. Third, localization has become an increasingly salient transitional
norm; however, the manner in which this norm is implemented determines the extent of capacity building
and ownership. Moreover, localization carries with it its own perils of politicization and the reversion to
complementary institutions of international justice, at least to prosecute elite perpetrators, is underway.
Finally, different conceptualizations of reconciliation are not always compatible. The legitimacy of
espousing reconciliation as a goal for transitional justice not only depends on these conceptualizations but
on the extent to which other transitional justice norms were salient and institutionalized without
contestation. As such, reconciliation has increasingly become more discursive in its function than it is a
realistic or appropriate outcome of transitional justice.
CHAPTER FOUR
THE INTERNATIONAL CRIMINAL COURT

“It is time for political actors to adjust to the law...
We have no police and no army but we have legitimacy.”
-Luis Moreno-Ocampo, ICC Chief Prosecutor

By all accounts, the establishment of the International Criminal Court is a remarkable achievement. It represents the pinnacle of the international institutionalization of justice for crimes of genocide, war crimes, and crimes against humanity, and the culmination of debates over how to deter future acts of atrocities, mete out accountability for victims, and end impunity for perpetrators. Legal scholars of international humanitarian law have given due attention to the jurisprudential significance of the Rome Statute with respect to the aforementioned crimes, the power of the Court with respect to its jurisdiction, and the potential for such a permanent and international court to influence the development of judicial responses to atrocities at the national level. International relations scholars have assessed the establishment of the ICC and its political implications from a variety of theoretical perspectives. Some have called attention to the compromises made in the jurisdiction and power of the Court in order to ameliorate the concerns of sovereignty-conscious and powerful states. Others have highlighted the important role played by civil society in advocating for a strong and independent Court that would be free of politicization. Furthermore, many scholars have argued that the creation of the ICC demonstrates unprecedented cooperation between and among various actors in an issue area that shows remarkable normative convergence over the appropriate judicial responses to atrocities.

These have all been fruitful lines of inquiry and assessments of the Court, but none have thus far analyzed the ICC as reflecting and constituting a broader structural framework of transitional justice norms. The Court has primarily been compared to its institutional predecessors, i.e. the ad hoc tribunals for Yugoslavia and Rwanda and the International Military Tribunal (IMT) at Nuremberg, which were also international, formal judicial, retributive justice institutions. The decision makers responsible for creating the ICC have undoubtedly applied the lessons learned from the institutional failures and successes of these tribunals. Equally important were the lessons learned from the persistent impunity of political and military leaders in the decades in between Nuremberg and the ad hoc tribunals. However, the logic of
explaining the ICC as the pinnacle institution at the end of a sequence of international tribunals ignores the variety and influence of other institutions and principles that govern transitional justice practices, such as local, non-judicial, and restorative justice institutions, which also constitute the normative structure of transitional justice. The justifications for the creation of the Court’s mandate and activities illustrate the salience of transitional justice norms and not simply an adherence to a preconceived institutional framework. As the Chief Prosecutor of the ICC has stated:

The International Criminal Court is part of the transitional justice project (my emphasis) because it aims to confront centuries old methods of behaviour….and to reshape the norms of human conduct while violence is still ongoing, thus aiming, as stated in the Rome Statute, to contribute to the prevention of future crimes.  

What is more, given that the ICC is a permanent international institution, any institutional failures and sources of contestation that arise from implementation will significantly contribute to redefining what are considered appropriate and effective judicial responses to atrocities. Explaining the emergence of the ICC’s mandate, processes, and implications for justice as determined by and, in turn, constituting the international normative structure of transitional justice will therefore be a major contribution of this dissertation. Moreover, this analysis of the International Criminal Court provides insight into theoretical accounts of how norms are diffused between the international and local levels in order to explain the salience of emerging norms in contexts where there is still much contestation over their meaning and new issues that arise from implementation.

This case study of the International Criminal Court is empirically distinct from that of Rwanda and East Timor in several ways, and thus the structure of this chapter’s analysis is necessarily different than the two previous empirical chapters. First, the ICC is a single international judicial institution that can address multiple conflicts whereas Rwanda and East Timor were both cases of multiple judicial and non-judicial institutions addressing a single conflict each. Second, the establishment of the Rome Statute in 1998 provides a somewhat artificial temporal dividing line between phases of decision-making, implementation, and outcomes. The Rome Statute legally defined the mandate, organization, and

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jurisdiction of the ICC in accordance with the negotiated outcomes between and among states and civil society. Other actors, notably the Chief Prosecutor, Luis Moreno-Ocampo, the UN Security Council, and state and non-state actors affected by atrocities, continue to redefine the ICC’s political role and constraints up until this day. In turn, expectations about the ICC’s outcomes have also been redefined by these actors. Therefore, there is a continuous and dynamic process of interpreting and institutionalizing transitional justice norms with respect to the ICC.

The structure of this chapter’s analysis will be as follows. I will first briefly describe the historical predecessors, structure, organization, and jurisdiction of the International Criminal Court as it has been set out in the Rome Statute and Rule of Procedure and Evidence (RPE), to be followed by an equally brief description of the ICC’s first cases for situations in Uganda, Democratic Republic of the Congo (DRC), the Central African Republic (CAR), and Sudan, and other potential cases. The bulk of the analysis for this chapter will be structured around the four norms I have identified as constituting the current international normative structure, with each norm’s analysis divided between salience and implementation. With respect to each transitional justice norm, I will first address the extent to which there was evidence for its salience in the Rome negotiations and Statute, and then the extent and manner in which it was institutionalized, and where relevant, identifying key sources of agency in promoting and diffusing these norms. The analysis of each norm will then turn to implementation by identifying and distinguishing between institutional failures and normative contestation; this will specifically address how different expectations and interpretations over the meaning and implementation of such norms would affect the legitimacy of the Court, and create possibilities for political change in transitional justice.

INTERNATIONAL INSTITUTION BUILDING: TOWARDS ROME AND AFRICA

The first institutional predecessors of the International Criminal Court are arguably the trials for German and Turkish war criminals after World War I, which importantly sought individual criminal accountability. The Leipzig Trials in Germany in 1921, provisioned by the Versailles Treaty, were rife

629 While the previous "Hague Conventions (for the Peaceful Settlement of International Disputes) of 1899 and 1907 represent the first significant codification of the laws of war in an international treaty," they were created to hold

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with procedural flaws and weak judgments; an international tribunal was unable to extradite the German Kaiser and efforts to hold other German war criminals accountable were also unsuccessful.\footnote{243} These trials neglected to address the scope and gravity of the crimes and “the perceived failure of this early attempt at international justice haunted efforts in the inter-war years to develop an international tribunal.”\footnote{631} The Treaty of Sèvres envisioned war crimes trials for Turks and went beyond the scope of crimes attributed to Germans, including what would come to constitute crimes against humanity. These trials were never held and the Treaty of Sèvres was replaced by the Treaty of Lausanne, the latter containing a “Declaration of Amnesty” for all offences committed between 1914 and 1922.\footnote{632} There was interest within the League of Nations in the interwar period for an international court, which led to the establishment of an Ad Hoc Working Committee whose recommendations for such a court were met with substantial opposition and defeated by the League’s Council.\footnote{633} Concerns among great powers for an international court’s potential to infringe upon state sovereignty and right to non-interference would also plague the negotiations for the ICC in Rome decades later. Nonetheless, these failed attempts at international justice still reveal a growing acceptance of the principle of individual criminal responsibility, not only for crimes committed against states but for crimes committed against civilians.

As was briefly discussed in the introductory chapter, the IMT at Nuremberg after World War II is most commonly cited as the institutional precursor for the ICC and for transitional justice writ large. Certainly the IMT’s focus on individual criminal responsibility and the scope of the crimes defined at Nuremberg influenced the mandate and jurisprudence of the ad hoc tribunals and the ICC. The IMT contributed to post-war justice by revealing the scope of Nazi crimes against civilians and affirming the principle that individuals, irrespective of their position of political or military superiority, should and states, and not individuals, accountable for such crimes. William A. Schabas, \textit{An Introduction to the International Criminal Court} (Cambridge: Cambridge University Press, 2001) 2.

\footnote{630}{Caroline Fehl, "Explaining the International Criminal Court: A 'Practice Test' for Rationalist and Constructivist Approaches," \textit{European Journal of International Relations} 10.3 (2004): 360.}

\footnote{631}{Schabas, \textit{An Introduction to the International Criminal Court} 4.}

\footnote{632}{Schabas, \textit{An Introduction to the International Criminal Court} 4.}

could be held accountable. Furthermore, convictions for crimes against humanity of the Holocaust were subsequently the main impetus to the establishment of the Convention on the Prevention and Punishment of the Crime of Genocide in 1948. No less important to post-war justice were the Tokyo trials and many trials held within Germany and abroad for war crimes and crimes against humanity, notably the Dachau Trials in former German concentration camps that tried 1,700 mid-level functionaries, concentration camp officials, and military officers.\textsuperscript{634} Despite the IMT’s achievements and a discernable shift towards individual criminal responsibility for the aforementioned crimes, the Cold War era considerably dampened efforts to create a permanent court for the types of crimes that were so clearly defined at Nuremberg and shortly thereafter in the Genocide Convention. It is important to note that while the idea for an international court was stagnating, the application of universal jurisdiction (the principle that some crimes can be prosecuted by any states, regardless of where or by whom the crime was committed) was becoming increasingly accepted as a basis of prosecution for atrocities.\textsuperscript{635}

Upon the adoption of the Genocide Convention, the United Nations General Assembly tasked the International Law Commission (ILC) with studying the possibility of and drafting a statute for a permanent international criminal court to try individuals for war crimes, genocide and crimes against humanity. The ILC ultimately endorsed such an idea, but the Commission remained divided and subsequent committee reports request by the General Assembly were unable to win the attention or support of states.\textsuperscript{636} Various efforts to revive an international court stalled out until 1989, when Trinidad and Tobago requested that an international court be established to address violations of international law, but primarily illicit narcotics trafficking.\textsuperscript{637} In 1994, the ILC submitted the final version of its draft statute


\textsuperscript{635} Fehl, "Explaining the International Criminal Court: A 'Practice Test' for Rationalist and Constructivist Approaches," 361.


to the General Assembly, which primarily outlined procedural and organizational matters and left unaddressed the legal definitions and principles of core crimes.\textsuperscript{638} The ILC’s draft statute would prove to have an enormous influence in the preparations for the ad hoc tribunals and the ICC. International support for the ad hoc tribunals for Rwanda and Yugoslavia, combined with support for the ILC’s draft statute, pushed the United Nations General Assembly to begin preparing for ICC negotiations. In 1996, a Preparatory Commission was tasked with drafting a widely acceptable text to form the basis for negotiations (the Prep Com held two sessions in 1996 and three in 1997). The draft summaries produced at the Prep Coms presented the basic mandate and organizational structure of the Court.

Following the Prep Coms, the \textit{Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court} convened for five weeks Rome in June 1998. The negotiations brought together 160 state delegations, 33 intergovernmental coalitions and 236 non-governmental organizations; the Rome Statute was adopted on July 17 by an officially non-recorded vote of 120 votes in favour, 7 opposed, and 21 abstentions.\textsuperscript{639} The negotiations in Rome were controversial and cantankerous at times, and major divisions between and among state delegations and NGOs were most prominent on issues of jurisdiction, the Court’s relationship with the UN Security Council, and the powers of the Prosecutor. The compromises made on these issues would affect both the power of the Court and its independence. The Statute came into force on July 1, 2002 following the required ratifications of 60 states and as of February, 2011 it has been signed by 139 countries and ratified by 114. As such, the Court has broad support in the Western and non-Western world, with the notable exceptions of the United States, Russia, China, Israel, India and others who have not acceded to the treaty.

\textbf{The Rome Statute}

The International Criminal Court is governed by the Rome Statute and is a permanent, independent, and treaty based international organization based in The Hague, Netherlands. The Court has four official organs: the Presidency is responsible for administrative oversight; the Registry is responsible

\textsuperscript{638} Schabas, \textit{An Introduction to the International Criminal Court} 10.

\textsuperscript{639} Fehl, "Explaining the International Criminal Court: A 'Practice Test' for Rationalist and Constructivist Approaches," 362.
for all non-judicial matters of the Court, including the Victims and Witnesses Unit and outreach programs; the judiciary is split between pre-trial, trial, and appeals divisions; and the Office of the Prosecutor (OTP) is responsible for investigations and prosecutions. Luis Moreno-Ocampo was elected Chief Prosecutor in 2003 for a term of nine years. An Assembly of States Parties (ASP) is the main forum in which amendments to the Statutes are discussed and adopted, and the ASP makes decisions with regard to, among other things, the Court’s budget, nominations of judges, and recommendations from the PrepComs. As an independent institution, the ICC is a distinct organ from the United Nations and relies on voluntary contributions from States Parties for its funding.

**Jurisdiction**

There are three core crimes over which the Court currently has jurisdiction: genocide, war crimes, and crimes against humanity. These crimes continue to be redefined by developments in international humanitarian law since the 1940s; however, after difficult negotiations the Rome Statute considerably narrowed these definitions to create a higher threshold for jurisdiction. The Statute provides a narrow list of war crimes eligible under the Court’s jurisdiction, including those considered to be most fundamental whether committed in international or internal armed conflicts, including killing, torture, mistreatment of civilians and prisoners of war, and attacks on civilian targets and those engaged in humanitarian assistance and peacekeeping missions. Crimes against humanity are defined in the Rome Statute as a long list of prohibited acts committed “as part of a widespread or systematic attack directed against any civilian population.” Various definitions of crimes against humanity have been adopted by the United Nations over the years but the negotiations were able to produce a narrower list of prohibited acts, which

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640 The crime of aggression is also included under core crimes in the Statute, but state delegations in Rome could not agree on a definition for such crimes. States did agree on a definition of the crime of aggression at the ICC’s Review Conference in Kampala, Uganda in June 2010. However, there are significant restrictions on the Court exercising jurisdiction over this crime, and its jurisdiction will not be activated until January 1, 2017.


While some states, notably India, and NGOs strongly advocated for the inclusion of the use of nuclear, chemical and biological weapons as war crimes, strong opposition from other powerful states effectively kept this off the table.
reflected states’ concern over the ICC’s potential to intrude too far into their internal affairs. \(^{642}\) The definition of genocide, as originally defined in Article II of the Convention on the Prevention and Punishment of Genocide, was adopted without any changes in the Rome Statute. \(^{643}\) The ICC’s temporal jurisdiction is restricted to those core crimes that are committed after July 1, 2002, the date upon which the Rome Statute came into effect.

Issues related to universal jurisdiction, the power of the Security Council, and the power of the Prosecutor, were hotly contested in the negotiations and the Statute reflects many compromises in these respects. The Court does not exercise universal jurisdiction and is thus limited by Article 12 to the following territorial and personal preconditions of jurisdiction: the accused is a national of a State party; or the crime took place on the territory of a State party; or the Security Council makes a referral to the Court, irrespective of the nationality of the accused or the location of the crime. If these preconditions are met, the exercise of jurisdiction (Article 13) can subsequently be triggered if a State Party self-refers its “situation” to the Prosecutor, the Security Council refers a situation to the Prosecutor under Chapter VII of the UN Charter, or if the Prosecutor initiates an investigation. The latter \textit{proprio motu} powers (Article 15) of the Prosecutor to initiate and pursue an investigation is subject to review by the Pre Trial Chamber (PTC). \(^{644}\) Furthermore, with a Chapter VII resolution the Security Council has the power to defer any investigation or prosecution for a period of 12 months and it can renew this deferral indefinitely without subsequent resolutions.

The territorial and personal jurisdiction reflects a compromise, as some states were opposed to the Court exercising universal jurisdiction and it was a concern that pursuing this would discourage


\(^{643}\) These crimes are defined in Part II (Articles 5-8) of the Rome Statute, and such definitions were fully detailed in the notes in the Chapter One of this dissertation.

\(^{644}\) There are two Pre-Trial Chamber with at least six judges in total, most of whom have experience primarily in criminal trials. The PTC is an important check on the powers of the Prosecutor and has various functions in different phases, from prior to an investigation, to the investigation itself, and up until the arrest and confirmation of charges. The PTC has already clashed with the OTP and proven its mettle in two notable instances: its refusal to confirm that there was enough evidence for the Prosecutor to include genocide charges in the arrest warrant for President Bashir, and its dismissal of the Abu Garda case for lack of evidence.
ratifications of the Treaty. The powers granted to the Security Council with regard to these preconditions were also contested. The United States and China preferred that the Security Council have the power to authorize every ICC prosecution, enabling the Permanent Five (P5) members to exercise their veto. This was strongly opposed by those who wanted a strong Court that was independent of Security Council politics, namely NGOs, India (who put forward a number of proposed amendments to deprive the Security Council of its referral power), and those grouped together as the “like-minded states.” As a result, this was largely a battle between the P5 and everyone else and compromises were made in order to assure US support in particular. The Prosecutor was granted a considerable degree of power to initiate investigations of his own accord in return for this concession on the Security Council. Some state delegations, namely the United States, Russia, and China and many Middle Eastern countries, were opposed to the Prosecutor’s *proprio motu* powers on the grounds that it would violate international law, (but) it was agreed, in the end, that an independent prosecutor was needed as a condition for maintaining and promoting the independence of the ICC vis-à-vis the Security Council.

But even if all the aforementioned jurisdictional requirements are met, a case must still be deemed admissible under the Court’s principle of complementarity.

**Complementarity and Admissibility**

Unlike the ad hoc tribunals for Rwanda and the Former Yugoslavia, the ICC does not exercise primacy over national jurisdictions. Instead, it operates under the principle of complementarity, which “serves as the (functional) heart and soul of the ICC’s juridical structure.”

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645 Schabas, *An Introduction to the International Criminal Court* 61. State Parties are subject to the automatic jurisdiction of the Court by signing and ratifying the Treaty, and unlike the International Court of Justice (ICJ), no further declarations of acceptance are required.

646 Brown, “The Statute of the ICC: Past, Present, and Future,” 63, Lee, ed., *The International Criminal Court: The Making of the Rome Statute* 24. The “like-minded” states were a broad coalition of state delegations who favoured a strong and independent court. This coalition was actively involved in the Preparatory Commission and by 1998 had coalesced to a grouping of more than 60 of the total participating state delegations. Some of the notable “like-minded” states included Argentina, Australia, Canada, Germany, South Africa, and the United Kingdom (only after the Labour Party's election).


the ICC will only deem a case admissible if has not been and cannot be addressed effectively or appropriately by a national justice system. According to Article 17(1) of the Rome Statute, there are four circumstances in which a case would be deemed inadmissible:

a) The case is being investigated or prosecuted by a State that has jurisdiction over it, unless the State is unwilling or unable to genuinely to carry out the investigation or prosecution;
b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
c) The person concerned has already been tried for conduct which is the subject of the complaint…;
d) The case is not of sufficient gravity to justify further action by the Court.649

Article 17(2) outlines various parameters to determine the degree of “unwillingness,” such as deliberately shielding a person from criminal responsibility, unjustified delays, and a lack of independence or impartiality in proceedings.650 Article 17(3) clarifies “unable” as the “total or substantial collapse or unavailability of its national judicial system” and therefore “the State is unable to obtain the accused or the necessary evidence or testimony” for proceedings.651

This concept of complementarity first appeared in the ILC’s draft statute in 1994 and was partly seen as a compromise over state sovereignty concerns.652 The significance of the complementarity regime will be addressed more fully in subsequent sections, however, “the fact that a pre-eminent international legal body such as the ILC would accept this important principle gave added weight during the negotiations at this point.”653 Those involved in the Prep Coms and the Rome Conference debated this further and expressed some concerns regarding the operationalization and criteria for this regime. During the Prep Coms there were debates over whether criteria for establishing “unwilling or unable” should be broadened or narrowed, and whether both investigations and prosecutions were required at the national

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650 The International Criminal Court, The Rome Statute of the International Criminal Court, Article 17(2).

651 The International Criminal Court, The Rome Statute of the International Criminal Court, Article 17(3).


level before being deemed inadmissible. In the Rome negotiations, two key issues were raised that would continue to threaten the operationalization and legitimacy of the complementarity regime. First, the criteria stipulated for national court systems deemed “unable” to investigate or prosecute a case were such that it would be likely that the Court would only take on cases from developing countries. This would undoubtedly create a rift in global support for the ICC if it were to be perceived as a neo-colonial imposition of “Western” justice in the developing world. Second, it was entirely unclear whether non-judicial institutions and non-criminal sanctions, particularly with truth commissions, would suffice for a genuine process as the Statute does not stipulate that a criminal proceeding would be required. Indeed, unlike the Court’s jurisdictional requirements, determining admissibility requires a considerable degree of subjectivity and discretion and it would ultimately be left to both the Chief Prosecutor and the PTC to determine the political priorities and juridical scope of the Court in this regard.

In sum, the complementarity regime is a key component of the Rome Statute and the criteria for admissibility of cases will come to define the Court’s limits and opportunities. Furthermore, it will be shown that the justifications for complementarity and the expected outcomes of its operationalization are, in large part, what situate the ICC in the broader normative structure of transitional justice. The debates over complementarity and its use in the Court’s first cases will be addressed in more detail further on.

**Situations and Cases**

The ICC is boldly proceeding with its first cases since it began operating in 2002. The Court is presently pursuing a number of cases in four “situations”: Uganda, The Democratic Republic of Congo, the Central African Republic, and Darfur, Sudan. The Court is also conducting preliminary examinations of the situations in Afghanistan, Colombia, Côte d’Ivoire, Guinea, Kenya, and the Palestinian Territories. That the ICC’s first and only cases are for situations in Africa has not gone

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655 As Schiff explains, "referrals to, and investigations carried out by the Prosecutor are of 'situations', a term unique to the Statute that refers to conflict situations, rather than specific cases." Benjamin N. Schiff, Building the International Criminal Court (Cambridge: Cambridge University Press, 2008) 78.
unnoticed. But the reasons for the selection of these situations and the nature of the cases vary considerably. I will briefly address the activities of the Court in each situation but will reserve any analysis of its political obstacles and implications for subsequent sections.

**Uganda**

The situation in Uganda provided the Court with an early opportunity to establish its credibility and competency. A protracted war has been raging between government forces and the Lord’s Resistance Army (LRA) in Northern Uganda since the early 1990s. The LRA is a fundamentalist Christian rebel group, under the leadership of Joseph Kony, who claims to fight on behalf of its fellow Acholi in the North of Uganda. Their political objectives confound international observers almost as much as their tactics. In addition to their clashes with the Ugandan military, the LRA routinely attacks and brutalizes Acholi communities and is notorious for its widespread use and abuse of child soldiers. The overwhelming majority of the victims have been civilians, whose forced displacement by the government into Internally Displaced Persons (IDP) camps has not provided the intended protection from LRA attacks, sexual violence, and child abductions. In this vein, it has been duly noted that “the Ugandan government’s counterinsurgency has also been brutal toward Acholi…. (and they) have focused their use of force on destroying suspected rebel support among civilians.” In 2010, the LRA had reportedly moved into parts of the Central African Republic, Congo, and southern Sudan and began to launch attacks in these territories. Unable to quell the insurgency or capture LRA leaders, the Ugandan government self-referred the situation to the International Criminal Court in December, 2003. In October 2005, the arrest warrants were unsealed for five top LRA leaders, in which they are accused of committing war crimes and crimes against humanity. The accused individuals include Joseph Kony (LRA commander), Vincent Otti (second in command), Raska Lukwiya, Okot Odhiambo, and Dominic Ongwen. It has since

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been confirmed that both Lukwiya and Otti have been killed, the latter by Kony himself who feared that Otti would sell him out to the ICC. The rest of the accused remain at large and their cases are presently before the Pre-Trial Chamber II.

**The Democratic Republic of the Congo**

The civil war in the DRC has resulted in the death of at least four million people since 1996, distinguishing it as the most deadly conflict since World War II. Various rebel factions compete for power and wealth in this conflict, exacerbating regional dynamics involving Uganda and Rwanda, and thus making a negotiated peace settlement all the more difficult. A peace agreement and power-sharing arrangement were decided in December, 2002 under Joseph Kabila’s new leadership, but many areas of the DRC are outside the control of Kabila’s government and civilians have been subjected to the violent whims of rebel groups. Like Uganda, the situation of the DRC came to the prosecutor by way of the government’s self-referral in April, 2004. The referral left open the possibility for the Court to investigate crimes committed anywhere in the territory of the DRC, however, the Chief Prosecutor focused on atrocities committed in the north-eastern Ituri region. The Court subsequently issued indictments for five individuals, including Thomas Lubanga Dyilo, Bosco Ntaganda, Germain Katanga, Mathieu Ngudjolo Chui, and Callixte Mbarushimana. Lubanga and Ntaganda are charged with war crimes and the rest are charged with both war crimes and crimes against humanity. All the accused are, or were, in positions of leadership in various rebel groups and all, except for Ntaganda, have been apprehended and transferred to the custody of the ICC. The trial of Lubanga began in January 2009 but has since experienced many delays, with judges ending his trial and ordering his release on two occasions because the prosecution failed to provide the defense team with exculpatory evidence, but his trial was ordered to be resumed after

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659 For an elaborative analytical narrative on the civil war in the DRC and the regional dynamics, see Jason Stearns, *Dancing in the Glory of Monsters: The Collapse of the Congo and the Great War of Africa* (New York: Public Affairs (Perseus Books), 2011).

660 Lubanga is the alleged founder and president of the Union des Patriotes Congolais (UPC) and alleged founder and former commander-in-chief of the Forces Patriotiques pour la Libération du Congo (FPLC). Katanga is the alleged commander of the Forces de Résistance Patriotique en Ituri (FRPI). Chui is the alleged former leader of the Front des Nationalistes et Intégrationnistes (FNI). Ntaganda is the alleged former Deputy Chief of General Staff of the Forces Patriotiques pour la Libération du Congo (FPLC) and alleged Chief of Staff of the Congès National pour la Défense du Peuple (CNDP), and former member of the Rwanda Patriotic Army (RPA). Mbarushimana is the alleged Executive Secretary of the Forces Démocratiques pour la Libération du Rwanda (FDLR).
both these occasions. The trials of Katanga and Chui began in November 2009. The DRC trials have garnered a great deal of attention, in part because the war crimes of which these individuals are accused include enlisting and conscripting child soldiers to actively participate in hostilities and the widespread use of rape and sexual violence. Ntaganda is still at large and Mbarushimana was only recently arrested by French authorities (and his arrest warrant unsealed) on October 11, 2010.

**Central African Republic**

In yet another case of self-referral, the Prosecutor commenced investigations in 2007 into atrocities committed in the Central African Republic. The context of the violence entails a power struggle and successful coup against President Patassé in 2002-2003. Patassé had enlisted the support of various local and foreign militias to protect his hold on power, including Jean-Pierre Bemba’s *Mouvement de Libération du Congo* (MLC). Local civil society organizations and international human rights groups documented widespread attacks against civilians along ethnic lines and the use of sexual violence and rape against women. In May 2008, the ICC issued an arrest warrant for Bemba under charges of war crimes and crimes against humanity for rape, murder, and pillage; he has been detained by the Court and his trial has been ongoing since November, 2010. The significance of Bemba’s trial should not be understated. First, Bemba is a national of the DRC and former Vice-President, making him the highest ranking official to be put on trial by the ICC so far. Second, he is charged with both war crimes and crimes against humanity – notably for crimes of rape; gender crimes will be front and centre in this case and involve extensive testimony from victims, unlike past cases before international courts where crimes of sexual violence were a few among many charges. Third, it was largely pressure from local civil society that garnered the Court’s attention for what would otherwise have been a victimized society ignored by the international community. Lastly, many see the Bemba case as an opportunity for the Court, and especially the prosecutorial team, to prove it competence after the many blunders experienced in the Lubanga trial.

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661 Lubanga's case was nearly dismissed after the defence argued the OTP had not shared all of its exculpatory evidence and this constituted a violation of Lubanga's due process rights.

662 This case was referred to the ICC by the CAR government in 2004, but was not seriously pursued by the OTP until much later.
Darfur, Sudan

Following military confrontations between Darfuri rebels groups and the government in 2002, the Government of Sudan has used the Janjaweed militia to wipe out these rebels and attack the civilian population in Darfur. Aerial bombings and ground attacks have resulted in the total destruction of Darfuri villages, widespread sexual violence, the deaths of approximately 300,000, and the displacement of nearly 3 million civilians. The Government’s continued denial of its ties to the Janjaweed, relationships with members of the Security Council (i.e. China and Russia), and refusal to permit non-African peacekeepers on its territory have prevented efforts to end the violence. International civil society and the United Nations have identified the conflict in Darfur as the world’s worst humanitarian crisis, and have alleged that war crimes, crimes against humanity, and possibly genocide have occurred at the hands of that Janjaweed and under the authority of the Government.

The ICC’s cases for the situation in Darfur, Sudan are unique and significant for a variety of reasons. First, Sudan is not a State Party to the Rome Statute and the case was referred to the Court by the UN Security Council under a Chapter VII resolution in March, 2005. Following investigations, the OTP issued indictments and arrest warrants in 2007 for Ahmed Harun (Minister of State for Humanitarian Affairs) and Ali Kushayb (Janjaweed leader) for war crimes and crimes against humanity. This was the first occasion in which the UNSC referred a situation and the first time in which nationals of a non-State Party were indicted. Second, one of the cases represents the ICC’s first indictment against a sitting head of state. The ICC issued an arrest warrant for President Omar al-Bashir in March 2009 for war crimes and crimes against humanity, and a second for the crime of genocide in July, 2010.663 With respect to all of the ICC’s charges, the Government and President Bashir have rejected the jurisdiction of the Court and refused to apprehend or turn over any of the accused. Furthermore, in July 2009 the African Union announced that it would not cooperate with the arrest warrants. The ICC is thus reliant on the support and cooperation of States Parties to apprehend these suspects if they travel to the territory of such a party. But Bashir has recently travelled to several countries that are States Parties to the Rome Statute, e.g. Kenya

663 The initial indictment also included the charge of genocide, however, the Pre-Trial Chamber determined there was insufficient evidence for this charged and it was dropped from the arrest warrant.
and Chad, and despite their obligations to arrest Bashir they did not do so. Third, the ICC has also issued war crimes indictments for three leaders of rebel groups in Darfur for accusing them of killing twelve Africa Union peacekeepers in June 2007. All these individuals have since appeared voluntarily before the Court. In April 2010 the case against Bahr Idriss Abu Garda was dismissed by the Pre-Trial chamber for lacking sufficient evidence.\footnote{The Pre-Trial Chamber dismissed charges against Abu Garda in April 2010 for lacking sufficient evidence.} In June 2010, arrest warrants were unsealed for Abdallah Banda Abakaer Nourain, Commander-in-Chief of the Justice and Equality Movement (JEM) and Saleh Mohammed Jerbo Jamus, Chief of Staff of the Sudan Liberal Army (SLA), which is now integrated into the JEM, when they voluntarily appeared before the ICC. Their initial hearings began in December 2010.

**Other Situations**

The ICC is also looking into alleged crimes committed in Afghanistan, Colombia, Côte d’Ivoire, Georgia, Guinea, Kenya, Libya, North Korea, and the Palestinian territories. The most notable and high-profile of these cases have been Colombia and Kenya; these are also the most advanced in terms of investigations. In Colombia, the ICC has put pressure on the government since 2005 to investigate and hold accountable those responsible for crimes against humanity in its four decades long civil war involving various paramilitaries.\footnote{"ICC Probes Colombia on War Crimes," \textit{BBC News} March 31, 2005, "ICC to Investigate War Crimes in Colombia," \textit{Colombia Reports} October 12, 2009.} The Government of Colombia has pledged its full cooperation with the ICC but judicial corruption and the complicity and guilt of high ranking politicians in the violence has complicated accountability efforts. In Kenya, the 2008 post-election violence left 130,000 dead and displaced 300,000 in clashes that split Kenyans along ethnic and political lines. Despite a relative peace and a power sharing arrangement, those responsible for organizing the violence have not been held accountable in national courts. The ICC has announced that it will seek speedy trials for high ranking officials involved in the violence in advance of the next 2012 presidential election.\footnote{"ICC to Investigate Kenya Violence," \textit{BBC News} November 5, 2009, "ICC Seeking Speedy Kenya Trials," \textit{BBC News} November 7, 2009.} Investigations are ongoing and it is expected that two trials of up to six individuals are likely to be carried out in 2011. The post-election violence is officially considered a “situation” before the Court and while no arrest warrants
have been issues, the Court issued summonses in December 2010 for six individuals including the deputy prime minister and finance minister, who are alleged to have masterminded the post-election violence. The “Ocampo Six,” as they are colloquially referred to, appeared voluntarily for initial ICC hearings in April, 2011. Ocampo has stated that “Kenya would prove to be an example of how to work together with the international community and the Court to end impunity and prevent future crimes.” But the Kenyan government has since become uncooperative and many political elites argue that a local tribunal would be a better alternative; as of February, 2011 the government has recently enlisted the support of the Africa Union to seek a deferral of the case from the Security Council. This request was rejected by the Security Council.

Lastly, two high profile situations have recently come to the attention of the Court. In response to escalating violence against civilian protestors, UN Security Council Resolution 1970 imposed sanctions on Libya and referred the situation to the ICC to investigate possible war crimes and crimes against humanity committed by the Gaddafi regime. Ocampo has indicated that charges of crimes against humanity against Gaddafi are likely but that his investigations are not likely to be completed until May, 2011. The recent violence in Cote d’Ivoire, sparked by the contested re-election of Laurent Gbagbo over his rival Alassane Ouattara and subsequent political stalemate, is also likely to result in ICC investigations. Both the ICC and a recently appointed UN Human Rights Council Commission of Experts will investigate atrocities committed against civilians committed on both sides - by rebel forces loyal to the now deposed President Gbagbo and new President Ouattara and the two political figures themselves. Cote d’Ivoire is only a signatory to the Rome Statute but it accepted the ICC’s jurisdiction in 2003 and Ouattara has pledged his support for an ICC probe in addition to national trials and a truth commission.


ON BEING “PART OF THE TRANSITIONAL JUSTICE PROJECT”

The International Criminal Court is not only an institutional expression of the normative structure of transitional justice, but in many ways it also constitutes the structure and demonstrates new and familiar ways in which the norms are implemented. The following analysis will first provide a general overview of whose agency has been most influential in determining how the ICC conforms to transitional justice norms; this is an important element of normative diffusion that will be revisited throughout this chapter. The discussion will then turn to a brief outline of assessing the legitimacy of the Court, to set up the bulk of the analysis in this chapter on the salience and implementation of the individual transitional justice norms.

Agency and Advocacy for Accountability

Prior to the Rome negotiations, the institution building process for the ICC was largely a state-led project. The state delegations involved in the Prep Coms and the Rome negotiations were attuned to the experiences of other justice experiments for atrocities since Nuremberg. Most notably, references to the persistence of impunity and illegitimate amnesties for elite perpetrators in Latin America and the institutionalization of international justice in the ad hoc tribunals abound as justifications for the creation and institutional design of the ICC. Paradoxically, both tribunal “euphoria” and tribunal “fatigue” explains the sense of urgency for a permanent international criminal court in the early to mid 1990s. The US, believed by delegation leader David Scheffer to be the “judicial carpenters” of past international justice institutions, played a critical role in defining the powers and limits of the ICC in many respects,

671 Fehl, however, categorizes the Rome negotiations as a state-led project as well and argues that the NGOs have become most influential post-Rome. See, Fehl, "Explaining the International Criminal Court: A 'Practice Test' for Rationalist and Constructivist Approaches," 374.


not least of which was securing a powerful role for the Security Council. The aforementioned “like-minded” states, mostly middle powers with multilateralist foreign policies and liberal human rights policies, pushed for an international court that would be part of a broader human rights and human security framework.

During the Rome negotiations civil society actors working on human rights, justice, and conflict resolution issues also exerted considerable influence over the Court’s jurisdictional design and principles and supplemented the important role played by key states. Not unlike the successful coalition formed between “pro-ban” states and NGOs on the anti-personnel Landmines Convention, the joining of forces between states and NGOs with legal and human rights expertise proved to be an effective alliance. The influence of NGOs was facilitated by the Coalition for the International Criminal Court (CICC) – a broad coalition of NGOs that numbered in the hundreds in Rome and now includes 2,500. Both Human Rights Watch and Amnesty International, strong advocates and constructive critics of the Court, have continued to play a prominent role in the CICC and in responding to the Court’s activities in general. NGOs made their mark in Rome in two important respects. First, they strongly advocated for the need to hold elite perpetrators responsible via trial and punishment. In this vein, they opposed subordinating the power of the Prosecutor to the Security Council – a concession that, from the perspective of civil society – would place political limits on the Court ability to prosecute heads of states and political and military leaders. Second, civil society also “channelled their concerns for the addition of victims’ rights, reparation, and

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reconciliation into meetings.” The extent to which accountability would respect principles of reparations, the degree to which localization would necessitate the involvement of victims and build capacity and ownership through outreach, can be attributed in great part to the advocacy of NGOs. Moreover, international and local NGOs have been critical to the Court’s activities in the post-Rome period as they continue advocating on behalf of the Court in local communities and act as high-profile constructive critics to its activities.

Various other actors have had enormous influence on the activities of the ICC as it continues to define its principles and build legitimacy with its first cases in the post-Rome period. Most notably, the Chief Prosecutor Ocampo is the public face of the Court and his judicial and political decisions and public rhetoric have had discernible effects on the perceived legitimacy and viability of the Court as a transitional justice institution. While Ocampo’s selection as Chief Prosecutor was not initially controversial, his aggressive prosecutorial strategy, and public statements about the Court’s role in balancing international politics and justice have been contentious. As the ICC continues to evolve, Ocampo’s role in (re)defining the Court as a mechanism of both accountability and conflict resolution is increasingly significant – an issue that will be revisited at numerous points in the forthcoming analysis.

**Transitional Justice Norms: Salience and Implementation**

There is no single juncture at which one can differentiate the decision-making about the role and institutional form of the Court from its outcomes and implications for justice. It has been a dynamic process of negotiation and redefinition of principles among various actors at the international and local level that that has led to the ICC’s conformity to and reinterpretation of transitional justice norms. Given the long-standing concerns of sovereignty-conscious states that are reluctant to endorse a strong and independent Court, the controversies regarding the power of the Security Council, the independence of the Prosecutor, definitions of core crimes, and jurisdiction that plagued the Rome negotiations were not

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676 Schiff, *Building the International Criminal Court* 39.

What is surprising is that certain norms of transitional justice were deemed appropriate and achieved consensus early on in the Rome negotiations. Thus, the salience of transitional justice norms was evident in these early phases of the ICC’s institution building process. Specifically, the principle of complementarity was included in the ILC’s draft statute and was not considered to be controversial at the time; this functional principle of the Court facilitates the ICC’s conformity with transitional justice norms, mostly notably accountability and localization. Likewise, it was a uniting assumption that any international criminal court should focus its prosecutorial strategy on elite perpetrators and that a permanent court would serve both peace and justice by acting as a deterrent to such perpetrators. This speaks to both the hierarchical division of criminality and reconciliation norms. That conformity and consensus on these principles was achieved early on does not ignore the important fact that putting these principles into practice has faced institutional challenges and contestation in new contexts and with various actors, including states, civil society, and victims.

While the Court has sufficient capacity to fulfill its mandate, it is still institutionally challenged by the volume and range of situations that could potentially fall within its jurisdiction and by international and local political variables that challenge the credibility of the Court in seeking its ambitious political and judicial goals. Moreover, the various sources of contestation in the case of the ICC, as with Rwanda and East Timor, occur between transitional justice norms and between international and local interpretations of these norms in new contexts, which increasingly challenge the legitimacy of the Court. Reus-Smit reinforces this point on the relationship between interpretation, contestation, and legitimacy:

“even when an actor’s legitimacy is contested, when other actors are divided over its rightfulness, the contestation is almost always over what constitute the operative norms, and over how they should be..."
interpreted." Individually, transitional justice norms are more salient with respect to the ICC than with the previous cases. But collectively, their interrelated nature once implemented reveals both new and familiar sources of conflict. The implementation challenges of transitional justice norms weigh heavily upon the legitimacy of the International Criminal Court. Recall that accumulated sources of normative contestation, if unresolved or unaddressed, could result in a crisis of legitimacy not only for the ICC itself but for the normative structure of transitional justice as a whole, as the ICC constitutes a central organization in this structure. The extent to which the ICC will be able to resolve such sources of contestation will determine the capacity of the Court to act and the direction of change in transitional justice norms and practice.

It is important to distinguish the audiences from which to assess the ICC’s legitimacy. Identifying and distinguishing these audiences determines the extent to which contestation from them is relevant. Arguably this audience could include all states, including those who have not signed the Rome Statute as the scope and nature of their resistance would weaken the Court’s legitimacy. The most immediate audience for the ICC’s legitimacy, however, would be the States Parties to the Rome Statute; their ratification of the Rome Statute alone is not sufficient to assume the Court is legitimate, but the extent to which such states continue to cooperate with ICC is also an important measure. Therefore, it is more useful to sub-divide this audience between the States Parties that are likely to remain outside the realm of the Court’s activities, such as those developed states with low levels of violence and well developed legal systems, and those states who will be the beneficiaries, or targets, of the Court’s activities, such as those developing countries whose weak legal systems and communal divisions perpetuate impunity and cycles of violence. In theory, any state, whether democratic and developed or not, can fall within the ICC’s jurisdiction but so far the Court’s first cases do show that the latter is a distinct group of states who share

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679 Reus-Smit, "International Crises of Legitimacy," 163.

the characteristics of mass violence and a weak rule of law.\textsuperscript{681} The former audience provides both resources and political credibility to the ICC. Within the latter audience, it is necessary to further distinguish between state leaders and victim communities; the support and participation of both audiences is necessary for the ICC to act on its indictments and carry out trials respectively. To be sure, international and local civil society actors also represent an important audience from which to assess legitimacy, as they facilitate interactions between the Court and States Parties and victims, and are vocal advocates and constructive critics of its activities. These various audiences do not have a unanimous perception of the legitimacy of the Court. In fact, an increasingly prevalent source of normative contestation for the ICC is the extent to which there are disjunctures in legitimacy between States Parties outside and within the Court’s realm of political action, and between States Leaders and victim communities in countries whose “situations” have come to the ICC’s attention.\textsuperscript{682}

The remainder of this chapter will now proceed with the bulk of its analysis on how each of the four norms of the international normative structure of transitional justice both matter and are work in the case of the International Criminal Court. The salience of these norms will be assessed by the extent to which they were discussed and debated in the Rome negotiations, and the extent to which they are institutionalized in the and continue to shape the ICC’s activities as its indictments and trials progress. This analysis will be followed by identifying the institutional failures and normative contestation that have emerged and the implications for justice in the context of the Court’s first cases, while also drawing attention to how this affects the legitimacy of the Court and potential for change in the international normative structure of transitional justice.

\textsuperscript{681} There is also the potential that this distinction alone and in practice could undermine the legitimacy of the ICC. It has often been critically argued, mostly by non-Western political elites, the ICC is a neo-colonialist institution that will only target non-democratic and non-Western states. That all of the ICC’s first cases are African underscored this concern. Therefore, to be perceived as a legitimate institution the Court should also pursue cases of crimes committed by individuals in Western states whose political elites have been unwilling to prosecute, such as potential war crimes committed by the US and UK in Afghanistan and Iraq. These arguments are addressed in more detail in the subsequent sections on contestation over transitional justice norms.

\textsuperscript{682} Reus-Smit draws attention to this particularly type of disjuncture in the context of the Bush administration. See, Reus-Smit, "International Crises of Legitimacy," 164.
HIERARCHICAL DIVISION OF CRIMINALITY

The mandate of the ICC and its subsequent prosecutorial strategy is primarily concerned with elite perpetrators, and as such seeks to establish the horizontal scope of criminal responsibility in committing acts of violence. While the vertical scope of criminal responsibility is not entirely irrelevant to the ICC, the institutionalization of this norm constrains the Court from addressing low-level perpetrators apart from its capacity building functions to address “impunity gaps” (which will be addressed with respect to the localization norm). The salience of the hierarchical division of criminality norm in this case is evident in numerous respects but implementing this norm has had a number of unintended consequences, some of which are specific to the ICC and some of which are persistent challenges in transitional justice in general.

Salience: Prosecutorial Strategy and the “Big Fish”

Evidence to suggest that the hierarchical division of criminality norm is salient with respect to the ICC is found in its prosecutorial strategy, which is to hold accountable those most responsible for the most serious crimes under international humanitarian law. Statements from the OTP, the parameters of the Rome Statute, and the assumptions and influences on this strategy illustrate the strength and legitimacy of this norm. One can easily glean from the Court’s first cases and past tribunals that those considered most responsible are heads of state, leaders of non-state armed groups, and others in positions of authority that plan, organize, and sanction systematic acts of mass violence against civilians. An early policy paper issued by the OTP states indicates this as the Court’s prosecutorial strategy:

the global character of the ICC, its statutory provisions and logistical constraints support a preliminary recommendation that, as a general rule, the Office of the Prosecutor should focus its investigation and prosecutorial efforts and resources on those who bear the greatest responsibility, such as leaders of the State or organisation allegedly responsible for those crimes (my emphasis added).683

The ILC’s draft statute for the Court and the negotiators in the Prep Com process reflected agreement that this was the intended focus of the ICC.684 As such, it is not elaborated upon in the Rome Statute in great

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detail, however, there are several articles within the Statute that would suggest this direction for the prosecutorial strategy. Article 17, which defines the criteria for the admissibility of a case, stipulates that the case must be of “sufficient gravity.” The plausible intention of this Article is that the ICC would take a very “low-volume prosecutorial approach” and try a “very small number of the most culpable leaders.” Articles 25, 27, 28 of the Rome Statute on individual criminal responsibility are meant to explicitly include state leaders as culpable, regardless of immunity or positions of superiority. Notably, the Court was cognizant in its early days that its narrow focus on elite perpetrators could create an “impunity gap,” whereby low-level offenders would escape justice because of an inherent incapacity at the local level and a restricted mandate at the international level. The aforementioned 2003 policy paper addressed this concern:

the strategy of focusing on those who bear the greatest responsibility for crimes within the jurisdiction of the Court will leave an impunity gap unless national authorities, the international community and the Court work together to ensure that all appropriate means for bringing other perpetrators to justice are used. In some cases the focus of an investigation by the Office of the Prosecutor may go wider than high-ranking officers, if investigation of certain types of crimes or those officers lower down the chain of command is necessary for the whole case…

In this vein, the complementarity regime reinforces the principle that the ICC will focus on elite perpetrators as representative of the horizontal scope of criminal responsibility and, in turn, States Parties to the Rome Statute will be expected to fulfill their responsibility and build their cap1acity to hold accountable those elite and low-level perpetrators as representative of the vertical scope of criminal responsibility, that have not been tried at the ICC.

…in this context, complementarity once again may play a part in preventing impunity. If the ICC has successfully prosecuted the leaders of a State or organisation, the situation in the country concerned might then be such as to inspire confidence in the national

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685 The International Criminal Court, The Rome Statute of the International Criminal Court, Article 17(1)(d).


jurisdiction. The reinvigorated national authorities might now be able to deal with the other cases…

It is clear that lower-level offenders are not irrelevant to the purposes of the ICC. Information regarding their crimes and the knowledge produced by national courts will be of enormous benefit to establishing responsibility for those who organize and plan atrocities at a higher level. In this respect, the hierarchical division of criminality and localization norms are reinforcing.

Proponents of the ICC make several assumptions, which accord with retributive justice theories more generally, about the appropriateness of a prosecutorial strategy that focuses only on elite perpetrators. They assume that an international court, particularly the ICC as a treaty-based institution with broad international support from both states and civil society, is more neutral than domestic judicial institutions with respect to the selectivity and credibility of prosecutions. It is argued that the International Criminal Court and its Chief Prosecutor are free of politicization and act in accordance with judicial principles and priorities. The anti-politics of Ocampo’s rhetoric are notable in this regard, as he often defends his decisions as nothing short of being apolitical:

the prosecutor’s duty is to apply the law without bowing to political considerations, and I will not adjust my practices to political considerations. It is time for political actors to adjust to the law…we have no police and no army but we have legitimacy.

Roach argues that the ICC proffers legal neutrality and political legitimacy but distinguishes these characteristics from its *politicization*, which he defines as the “intrusion of geopolitical interests in the ICC’s judgment over matters related to peace and security.” Domestic courts, particularly those in countries where conflict is ongoing, abusive regimes remain in power, or there is a tenuous transition to peace and democracy, may be pressured to sacrifice justice in the interests of peace and stability. This has been an especially common argument used against the prosecution of elite perpetrators, whose potential to serve as “spoilers” justifies their impunity. Thus, the credibility of the Court is bound up with its

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“impartial and effective application of the Rome Statute” and a prosecutorial strategy that it claims is free from politicization in targeting elite perpetrators.⁶⁹³

There were several sources of influence for this prosecutorial strategy. As the Nuremberg and ad hoc tribunals are considered the institutional predecessors of the ICC, the similarities in their prosecutorial strategies are not entirely surprising. But it is important to consider the temporal order of these institutions and not overstate the influence of the ad hocs in the early days of the ICC. The ILC draft statute was completed in 1994 when the ICTY and ICTR were in their infancy. The Prep Coms and Rome negotiations took place up until 1998, when the ad hocs were still building their cases and dealing with institutional growing pains. Many of the hard-learned lessons of the ad hocs would not come to the fore until well after Rome. Nevertheless, as Schabas argues, the “Tribunals did more than simply set legal precedent to guide the drafters. They also provided a reassuring model of what an international criminal court might look like.”⁶⁹⁴ The prosecutorial strategy of these courts was determined early on and this did influence the mandate of the ICC. These international courts explicitly focused on the “big fish” responsible for atrocities and attribute individual criminal responsibility to the likes of Goring, Milosevic, Karadzic, Bagosora by way of command responsibility, conspiracy, and joint criminal enterprise. A hierarchical division of criminality norm has not always been easily realized in practice for international courts, particularly given the limitations of apprehending elite perpetrators and tendency of some prosecutorial strategies to logically build their cases by beginning with low-level perpetrators. This was a notable challenge for the Serious Crimes Regime in East Timor and continues to be a challenge for the ICTR as well. One illustrative juncture for this norm of a hierarchical division of criminality in the ad hocs, the former ICTY Prosecutor, Richard Goldstone, was heavily criticized for his initial prosecutorial strategy that focused on mid and low-level perpetrators, especially in the Tadic case. While it was the intentional strategy of Goldstone to begin with low-level perpetrators to collect evidence and eventually move up the ranks, “he was lambasted for failing early to grapple with those people at the top of the

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⁶⁹⁴ Schabas, *An Introduction to the International Criminal Court* 12.
political and military hierarchies who were most responsible for the crimes that took place in the former Yugoslavia. Notably, his successors (Arbour and Del Ponte) showed greater willingness to focus on elite perpetrators and cases for low-level prosecutors have been “dismissed, plea-bargained off the docket, or referred to newly created local tribunals” as these tribunals have neared their completion dates. To be sure, this emerging norm is evident in the expectation that international courts should focus their prosecutorial strategies on elite perpetrators, and are hastily criticized when they failed to do so, as was the case with the ad hoc tribunals and the Serious Crimes Regime in East Timor.

Another influence on the ICC’s prosecutorial strategy was related to the legalization of international institutions and overturning of persistent impunity for heads of state in the Cold War era. Support for the International Criminal Court was buoyed by the trend of increasing legalization of international institutions, which “represents the decision in different issue-areas to impose international legal constraints on governments.” This legalization trend explains why domestic governments support international tribunals that have “functional value” and embody certain international norms. One of these norms, as this dissertation contends, is a hierarchical division of criminality as evidenced in prosecutorial strategies of international courts that target only elite perpetrators. The political bargains struck with outgoing political and military elites in Latin America and an inability to hold accountable the likes of Pol Pot, Augusto Pinochet, Hissène Habré, Saddam Hussein, and others was a moral affront to the growing consensus among democracies and civil society that those most responsible for these crimes should not be protected by sovereignty or immunities, or pardoned in the name of peace. A statement by David Scheffer, leader of the US delegation at the Rome negotiations, illustrates this position:

695 Schiff, Building the International Criminal Court 117.
696 Schiff, Building the International Criminal Court 118.
697 This undoubtedly relates to the more widespread exercise of universal jurisdiction. While this is a legal trend that exists largely outside the normative structure of transitional justice, it nonetheless bolsters international expectations that elite perpetrators will be punished regardless of their presumed immunities as political or military elites. The Pinochet case, it is argued, set this trend in motion. See, Naomi Roht-Arriaza, The Pinochet Effect: Transnational Justice in the Age of Human Rights (Philadelphia: University of Pennsylvania Press, 2005).
699 Goldstein, Kahler, Keohane and Slaughter, "Introduction: Legalization and World Politics," 396.
…with the end of the Cold War and the growing number of democracies and pluralistic societies committed to the advancement of human rights and the rule of law, it simply is no longer tenable either among democratically elected political leaders or among the publics they serve to tolerate impunity for the commission of such international crimes…

This sentiment was reflected and strengthened by a growing epistemic community of international justice advocacy that was galvanized by several key development in the campaign to end impunity, namely the precedent set by Spanish Judge, Baltasar Garzón, in his indictment of Pinochet in 1998, indictments of military and political leaders in the ad hoc tribunals, and simultaneously the increasingly widespread exercise of universal jurisdiction over international crimes. The overturning of amnesties in Latin America and consensus that exercising universal jurisdiction was a useful tool to addressing the crimes of those most responsible had a “cascading” effect in international justice efforts. Herein lays an important element with respect to agency, advocacy, and institutionalizing the hierarchical division of criminality norm that defined the ICC’s prosecutorial strategy.

As was previously discussed in this chapter, the agency of international civil society actors and legal community had a notable influence on the negotiations in Rome, not least on debates about the prosecutorial strategy. As the institution-building process for the ICC progressed so did the influence of such actors, particularly human rights NGOs. These actors were vocal advocates in Rome regarding the necessity of the ICC’s focus on elite perpetrators, and advocated on behalf of victim communities who had been denied their rights to justice. This is, in part, why NGOs opposed subordinating the Court’s independence to the Security Council and lobbied in turn for an independent prosecutor that would be free from domestic political constraints and able to target state leaders and others in positions of political and military power. Moreover, certain key individuals in the legal community could be characterized as

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“moral entrepreneurs” in their fight against impunity and reputation for pursuing high-ranking perpetrators. The selection of Ocampo as Chief Prosecutor is notable in this regard; he emerged as the “consensus candidate” and was unanimously elected in 2003, five years after the Rome Treaty was created.  

There were several criteria the ASP used to select a prosecutor, but someone possessing a background with the type of prosecutorial strategy that was set out in Rome was a necessity. Ocampo’s professional career prior to his election as Chief Prosecutor demonstrated that he was “a fearless prosecutor who followed the chain of command to its zenith.” As the former assistant to the Chief Prosecutor in Argentina in the 1980s, he was instrumental in securing convictions against the military junta in the first trial of senior government officials responsible for mass killings of civilians since Nuremberg.

**Implementation: The Selectivity and Scope of Prosecutions**

The hierarchical division of criminality norm has been put into the practice with the Court’s first cases and the prosecutorial strategy of the ICC’s first cases further institutionalizes this key pillar of the normative structure of transitional justice. This strategy targets political and military elites, from state leaders and officials, commanders, to the senior leadership of non-state armed groups. In Uganda, the arrest warrants were issued only for LRA leadership and the focus of the investigations was on determining who was responsible for planning and organizing, and not on who directly participated in, attacks on civilians. In the situations for both the DRC and CAR, the OTP has indicted notorious leaders of rebel groups. In Kenya, the Prosecutor has publicly stated that the “main suspects include powerful cabinet ministers on both sides of the coalition government” and the summonses issues represent a cross section of political leadership.  

Finally, the arrest warrants for a government minister, Janjaweed leader, and sitting head of state in Sudan represent the clearest examples of the OTP targeting the highest

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704 Flint and de Waal, "Case Closed: A Prosecutor without Borders."

echelons of criminal responsibility. But several sources of contestation and institutional obstacles have arisen from the OTP’s targeting of elite perpetrators in these cases and reveal some of the problematic aspects of implementing this norm. Specifically, criticisms of selectivity and the implications for conflict resolution, and/or reconciliation, have challenged the neutrality assumptions inherent in adhering to a hierarchical division of criminality norm.

There are inherent institutional limitations on the selection of situations and cases that fall before the Court and which considerations should guide this selectivity has been subject to debate. Some have criticized the selectivity of prosecutions in the DRC by arguing that those such as Lubanga and Katanga do not represent the “biggest fish” or that the crimes for which they are being charged do not represent their “most serious” crimes. The OTP’s cases for Lubanga and Katanga were questioned by the Pre Trial Chamber and human rights groups for falling short of the “sufficient gravity” criteria required by the Rome Statute’s Article 17. When considering the OTP’s request for an arrest warrant for Lubanga, the PTC questioned: “Where is the office of the Prosecutor heading?.... Do you intend to prosecute individuals with national-level responsibility? Or do you intend to limit your action to individuals who are leaders of militias?” The PTC ultimately confirmed that the case was of “sufficient gravity.” However, despite being considered responsible for committing atrocities on a mass scale, Lubanga has only been charged with enlisting and conscripting child soldiers. International civil society actors, such as Human Rights Watch and other prominent NGOs, expressed concern regarding the narrow scope of the charges. Similarly, local civil society actors working in the Ituri region alleged that the Prosecutor was aiming too low: “investigating cases of child soldiers in Ituri is like picking a ripe mango that fell at your feet. It

706 Of course, if the ICC proceeds to investigations and indictments for the violence in Libya and Cote d'Ivoire this will also be prominent examples of pursuing current or past heads of of state (i.e. Gaddafi in Libya, and Gbagbo in Cote d'Ivoire.)

707 Schiff, Building the International Criminal Court 219.

708 Ocampo acknowledges that Lubanga is likely responsible for committing large-scale massacres of civilians, but at the time Lubanga was arrested in the DRC Ocampo did not have enough proof to move forward on such charges. He limited the charges to child soldiers so that Lubanga could be charged quickly and thus transferred into the ICC's custody.
Likewise, these criticisms were also raised with the Katanga case for which HRW and the International Crisis Group alleged that the complicity of higher government officials would have been required for Katanga to carry out his attack on an Ituri village, including the provision of arms supplies. In sum, the OTP’s prosecutorial strategy in the DRC has been criticized for being too selective and as either failing to charge those most responsible and/or failing to charge individuals with their most serious crimes.

A certain degree of selectivity is, however, a functional necessity for international courts that do not have the capacity to investigate and prosecute the full scope of horizontal criminal responsibility and instead often choose to target certain individuals whose crimes must be distinguished or whose convictions set important precedents. To a certain extent these are expected and justifiable institutional limitations of the Court and selecting certain cases because they will set important precedents, have symbolic value, or simply present themselves as the most feasible among a wide variety of cases of the most serious crimes committed by those most responsible, is considered appropriate. But selectivity becomes a source of normative contestation when it is guided by political considerations. Such contestation challenges the neutrality and credibility assumptions of the ICC, and thus its legitimacy in the eyes of States Parties and victims communities upon whose support it depends for successful prosecutions.

In this vein, the implementation problem of selectivity demonstrates normative contestation in the Uganda and Darfur situations. First, there is the accusation that Uganda’s President, Yoweri Museveni has instrumentalized the Court by self-referring the case. With such a referral Museveni was directing the Court’s attention only to LRA crimes and deflecting the OTP’s gaze away from atrocities committed under his leadership. The implication is that Museveni and the Ugandan People’s Defence Force (UPDF) have thus far been able to avoid being held accountable for their own crimes. The scale of the UPDF’s attacks on civilians is low compared to that of the LRA; however, “the devastating consequences of the

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709 Schiff, Building the International Criminal Court 223-24.
710 Schiff, Building the International Criminal Court 227.
government’s policy of forced displacement are too dire to ignore…and many scholars and activists have argued that displacement clearly represents a war crime or crime against humanity.”

Both Amnesty International and Human Rights Watch also issued statements regarding their concerns about one-sided justice in Uganda. Since the Court opened investigations into Uganda, the government has repeatedly threatened to withdraw cooperation if anyone in the government is indicted. Indeed, “one can only surmise that Museveni has escaped legal scrutiny because he invited the ICC to Uganda to investigate the LRA. If the ICC were to turn its attention to him, he would likely insist that it depart.”

There has been an interesting recent development in this situation that may signal an important political change in response to this source of contestation. In response to the complaints “from affected people in Uganda and human rights activists, Ocampo announced in June, 2010 that he would investigate crimes allegedly committed by the Ugandan army. Moreover, the summonses issues for Kenyan leaders represent a cross-section of elites on both sides of its domestic political divide. It is within the ICC’s mandate to investigate both sides in the Ugandan civil war and in the post-election violence in Kenya, just as it was in the mandate of the ICTR to investigate all parties involved in the Rwandan genocide. If the ICC goes the way of the ICTR and fails to turn investigations into balanced prosecutions, then this important political change would not be realized.

Second, many also see Ocampo’s focus on President Bashir as politically one-sided and ignorant of the reality and history of the conflict. Mamdani argues that “Prosecutor speaks in ignorance of the history” and Ocampo “has uncritically taken on the point of view of one side of this conflict...and he attributes far too much responsibility for the killing to Bashir alone.” The indictment and arrest warrant of Bashir has raised the ire of those who support the Court but oppose this particular decision, criticising

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it with a range of accusations that include the alleged ignorance, arrogance, and recklessness of Ocampo. These criticisms stem from concerns that the prosecutor is biased toward one side of the conflict, that he is seeking notoriety through high profile indictments, and that this decision hinders conflict resolution in the region (to be discussed with respect to reconciliation.) That multiple states have self-referred situations to the Court underscores the possibility that the Court could be instrumentalized with the assumption that leaders of non-state armed groups, as opposed to political and military elites in legitimate positions, are targeted because they pose a challenge the latter’s rule. For example, in all three cases of self-referral (CAR, DRC, and Uganda) only leaders of non-state armed groups are indicted despite the expressed concerns from international human rights groups and local victims groups that the elected political leaders and militaries of these states are also guilty of serious human rights violations. In contrast, in the only instance in which the Prosecutor has initiated an investigation (i.e. Kenya) parties on both sides to the conflict are being targeted.

The problem of one-sided prosecutions is hardly new to international courts. The Nuremberg Tribunal, ICTY, and ICTR have all alleged to be instrumentalized and politicized because they disproportionately targeted Germans, Serbs, and Hutus respectively. These courts were nonetheless able to maintain some legitimacy by adhering to their mandate and carrying out trials that were seen as fair and effective by international standards. But it remains to be seen whether the selectivity criticisms of the OTP’s prosecutorial strategy will challenge the assumption that the Court is neutral and apolitical, and thus legitimate. There are signs that the ICC is becoming more sensitive and proactive in the need to mete accountability on both sides – not only in terms of rhetoric but also in terms of action, as we are witnessing with Kenya and potentially Cote d’Ivoire and Libya as well.

In contrast to criticism that the prosecutorial strategy has failed to focus on the biggest fish or has been one-sided with respect to high-level responsibility, some contend that the Court’s focus on only elite perpetrators is too narrow. This concern relates to the aforementioned “impunity gap” and reveals

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716The African Union's opposition to the ICC's indictment and arrest warrant of Bashir is notable in this regard, as is Flint and de Waal's criticism of Ocampo. See, "African Union in Rift with Court," BBC News July 3, 2009, Flint and de Waal, "Case Closed: A Prosecutor without Borders."
different interpretations, and thus contestation, over whether the hierarchical division of criminality norm should be implemented by prescribing an institutional division of labour and restricting the ICC’s prosecutorial strategy to elite perpetrators. As Morris states, “a problem closely related to the prosecution of too few cases is the possibility of the ICC’s failing to prosecute an appropriate array of cases.” To what extent can and should the ICC also address the vertical scope, or depth, of criminal responsibility? It is assumed that, given the aforementioned Articles in the Rome Statute and Ocampo’s stated prosecutorial strategy, the Court will only focus on elite perpetrators and leave low-level perpetrators to national courts. But it is not impossible that the Court may choose to focus on low-level perpetrators, as “such prosecutions may be necessary in order to begin to compile the judicial records with regard to higher-level offenders and develop familiarity with the facts of the atrocity.” This is one possible advantage to the ICC at least investigating the crimes of mid to lower-level perpetrators – as a means to build stronger cases against high ranking perpetrators. Moreover, Morris makes the case that it would be in the greater interests of victims (as opposed to the interests of majority states) to have the Court address a broader range of perpetrators and to include those who “personally committed the atrocities.” She remarks that, 

….obviously not all leaders and not all followers can be prosecuted in most contexts of crimes of mass violence. But a prosecutorial design that includes followers as well as leaders would serve victims interests better than would a leaders-only design.

It is worthwhile to consider whether the broader interests of justice, particularly for victims, would be better served by a prosecutorial strategy that reflected the depth of criminal responsibility. However, as will be discussed with the ICC’s adherence to the norm of localization, the complementarity principle of the Rome Statute is partly intended to ensure that national courts have the capacity to address lower-level offenders in accordance with the principles and procedures of international law. The interrelated nature of these two norms structurally constrains the ICC from shifting away from its current

718 Drumbl, Atrocity, Punishment and International Law 146.
prosecutorial strategy. Localization attempts to resolve the aforementioned “impunity gaps” and this source of normative contestation over the depth of criminal responsibility.

These institutional limitations and sources of contestation over the hierarchical division of criminality norm are problematic precisely because they have the potential to undermine the legitimacy of the ICC among several audiences. For proponents of the Court, particularly for States Parties and civil society that advocated for this sort of prosecutorial strategy, and victim communities that the ICC seeks to act on behalf of, failing to prosecute those perceived as “most responsible” would be an abrogation of its internationally sanctioned mandate and would render it a hypocritical construct in the eyes of war-affected communities. Moreover, this contestation would strengthen critical voices of the ICC that seek to undermine its legitimacy by highlighting its institutional limitations in prosecuting elite perpetrators given their protection among sovereign states, and the political calculus that guides selectivity and one-sided prosecutions.

In sum, the institutionalization of the Rome Statute and the institutional predecessors to the Court clearly structure the prosecutorial strategy towards addressing the horizontal scope of criminal responsibility, with the assumption that a permanent international court will offer greater neutrality and legitimacy to such cases and possibly deter future crimes. Chief Prosecutor Ocampo has stated that because there is a lack of consensus on international law (unlike domestic law), the Court must build its consensus with its first cases.\textsuperscript{721} The ICC’s prosecutorial strategy has thus far conformed to the norm of a hierarchical division of criminality in that high ranking rebel leaders and even a head of state have been targeted. However, the Prosecutor’s selectivity, criticized as not sufficiently high-ranking for the Court or that their most serious crimes are unaddressed, have left some critics wondering if the Prosecutor is attempting to build consensus with easily winnable cases, thus detracting from the legitimacy of this norm. More importantly, but less surprising to the phenomena of international courts, is the accusation that the ICC is pursuing one-sided justice. But the unanticipated development in this regard is that this has occurred by the Court leaving itself open to instrumentalization by states that, by way of self-referral,

\textsuperscript{721} \textit{The Reckoning: The Battle for the International Criminal Court}, dir. Yates.
obscure their own criminal responsibility. These issues arising in the DRC, Uganda, and Sudan situations pose a challenge to the Court’s neutrality and thus its legitimacy as an appropriate institution to hold elite perpetrators accountable. It is important not to lose sight, however, of the fact that this set of circumstances could only have come about to the extent that the normative structure of transitional justice, as institutionalized in the ICC, has taken on a degree of social reality. These salient norms have therefore re-structured the strategic manoeuvrings of states, their leaders, and those who contest their right to rule, and who are embroiled in or emerging from situations of violent conflict of sufficient gravity to warrant the attention of the agents that perpetuate these norms and the structure as whole.

ACCOUNTABILITY

The International Criminal Court is first and foremost a formal, retributive judicial institution that seeks to punish perpetrators in defiance of a legacy of impunity for atrocities. Indeed, the anti-impunity rhetoric has a pervasive presence among the Court’s advocates, staff, and States Parties. Yet, the Rome Statute signals multiples avenues for the Court to embrace a broader notion of accountability and work with non-judicial mechanisms and lends legitimacy to restorative justice principles. Recalling that the norm of accountability is inclusive of both punitive and non-punitive sanctions, the analysis in this section will establish how the International Criminal Court adheres to and is constitutive of this norm and address some of the debates that have arisen in its first cases with regard to the complementarity regime and competing conceptualizations of accountability.

Salience: The Range of Retribution and Restoration

As Schabas explains, the “the Rome Statute has virtually nothing to say about the purposes of sentencing, as if this question is so obvious as to require no comment or direction.”

Legal theories, particularly in its application to international criminal law, commonly cite the range of the purposes of punishment to include retribution, general or individual deterrence, rehabilitation, and reconciliation.

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722 Schabas, An Introduction to the International Criminal Court 139.

Despite the precedents set by previous international courts there was some debate over the penalties regime for the ICC. During the Prep Coms and Rome Negotiations, many delegations stressed the importance of severe penalties given the gravity of the crimes under the Court’s jurisdiction, including “supporting the inclusion of the death penalty, or in some cases life imprisonment, as a prerequisite for the credibility of the Court and its deterrent function.”

Other delegations and civil society underscored the necessary limitations on penalties derived from human rights laws and the need to treat individual criminals humanely with the hope of rehabilitation. The death penalty debate “threatened to undo” the negotiations and such debates mirrored those in the decision making process for the International Criminal Tribunal for Rwanda.

In the end there was consensus on a penalties regime, at least among parties consenting to the establishment of the ICC, which is articulated in Article 77 of the Rome Statute. This Article empowers the Court to impose penalties ranging from imprisonment of a specific number of years (not to exceed thirty years) or a life imprisonment if this is justified by the gravity of the crime and the individual circumstances of the convicted person. This Article also allows the Court to order a fine (in accordance with the criteria set out in the Rules of Procedure and Evidence) and the “forfeiture of proceeds, property, and assets derived directly or indirectly from that crime.” Penalties, such as acts of lustration and disenfranchisement, were raised in the Prep Com, but the opinions of delegations were divided as to whether this should be left up to national courts and such penalties were not included in the Rome Statute. While these aspects of the penalties regime are not dissimilar to those of the ad hoc tribunals, “the significance of this consensual solution is underscored by the number of delegations who had

725 Fife, "Penalties," 322.
726 Schabas, An Introduction to the International Criminal Court 139.
727 The International Criminal Court, The Rome Statute of the International Criminal Court, Article 77(1).
728 The International Criminal Court, The Rome Statute of the International Criminal Court, Article 77(2).
emphasized the relevance of appropriate penalties to the credibility as well as the fairness of the Court.”

Furthermore, as Schabas argues, “the exclusion of the death penalty from the Rome Statute can be nothing but an important benchmark is an unquestionable trend towards the universal abolition of capital punishment.”

A significant aspect of the salience of the accountability norm for the ICC is the extent to which it incorporates and legitimizes non-punitive sanctions and non-judicial mechanisms – something that past tribunals had either dismissed or failed to effectively implement. As such, the Rome Statute departs significantly from the models of the ad hoc tribunals with respect to the scope and institutionalization of a reparations regime. Reparations as a form of accountability in transitional justice have been traditionally left to the purview of restorative justice institutions, such as the Gacaca courts in Rwanda and the CAVR truth commission in East Timor, and the more recent hybrid tribunals such as the one for Cambodia. The initial suggestion that the Court should award reparations was met with scepticism from states who believed it would detract from the ICC’s main purposes of retribution, that reparations orders would be made against states, and the formulas for determining such reparations would be too complex.

Nevertheless, as the negotiations progressed a consensus developed among the delegations under the leadership of NGOs, and the UK and French delegations.

A Court whose exclusive focus was purely retributive would lack a dimension needed to deliver justice in a wider sense. There was a gradual realization that there had to be a recognition in the Statute that the victims of crimes not only had (as they undoubtedly did) an interest in the prosecution of offenders but also an interest in restorative justice, whether in the form of compensation or restitution or otherwise.

The possibility for the Court to order reparations is laid out in Article 75 of the Rome Statute:

The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, the Court may…determine the scope and extent of any damage, loss and injury to, or in respect of, victims…

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731 Schabas, An Introduction to the International Criminal Court 139.


733 The International Criminal Court, The Rome Statute of the International Criminal Court, Article 75(1).
the Court may make an order directly against a convicted person specifying appropriate reparations….where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79…..734

The Trust Fund for Victims (TFV) referenced above is managed by the Assembly of States Parties, “for the benefit of victims of crimes…and the families of such victims” and the “Court may order money and other property collected through fines or forfeiture to be transferred… to the Trust Fund.”735 States Parties are also obligated to carry out reparations orders from the Court, if so requested.

The challenge before the Court with respect to reparations is to determine “whether particular forms of harm can be causally attributed to a specific perpetrator…and if attributable to a perpetrator, can be quantified for the purposes of compensation or other forms of reparation.”736 Therefore, reparations can be ordered of a convicted perpetrator in addition to his/her punitive sentence of incarceration, but not as a substitute. Interestingly, the Rome Statute addressed reparations separately from penalties, such as those punitive sanctions previously listed. One can glean from this distinction and the wording of the relevant Articles that the purpose of reparations is intended to benefit victims, less to punish perpetrators, and is indicative of restorative justice principles that constitute a norm of accountability. This is an important institutionalization, then, of an emerging international norm regarding compensation for past wrongs that to date has been more moral than legal in character, and is part and parcel of what Torpey characterizes as the “worldwide spread” of “reparations politics.”737

While the Rome Statute offers very little guidance on the victim-oriented goals of the Trust Fund for Victims – the Assembly of States Parties was instead tasked with clarifying the mandate and determining how the TFV would operate. The recently launched website and first report of the TFV in the

734 The International Criminal Court, The Rome Statute of the International Criminal Court, Article 75(2).


spring of 2010 has clarified the purpose of reparations and the institutional framework. The TFV has a two-fold mandate. The first is to implement reparations (i.e. restitution, compensation, and rehabilitation) ordered by the Court from a convicted perpetrator, which can only benefit victims affected directly or indirectly by the conflict by the crimes of that perpetrator. This first type of reparations is largely symbolic but importantly recognizes that accountability, even for elite perpetrators, constitutes more than strictly incarceration as punishment. Orders of reparations will signal the ICC’s understanding of accountability as addressing the various types of harm inflicted on victims and a forward-looking goal of healing relationships between victims and perpetrators. In theory, reparations from individual perpetrators are not a significant change in transitional justice practices, but if they are actually widely implemented by the ICC with judgments and distributed the TFV then this will mark an important development.

The second part of the TFV’s mandate is general assistance (such as physical rehabilitation, material support, and/or psychological rehabilitation) to victims and their families more broadly defined as affected by a conflict. General assistance is funded by voluntary contributions and can be provided before the trials related to a particular conflict have ended. The TFV states that this kind of assistance is “key in helping repair the harm that victims have suffered” and “ensures that assistance is provided to those that were not able to participate in the judicial process directly.” This part of the TFV’s mandate is an important development in the accountability norm in two respects. First, it signals that the international community recognizes a collective responsibility to address and repair the harm in societies affected by mass violence, underscored by the fact that voluntary donations from states support this

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738 The TFV cites its income by November 2009 as 4.5 million Euros, most of which is allocated to approved projects for the DRC, Uganda, and CAR, with 1 million Euros remaining for future potential reparations projects. See the website for the TFV at www.trustfundforvictims.org for more information.

739 The TFV states that these reparations are not limited to individual monetary compensation, and came come in the form of "collective forms of compensation and symbolic or other measures." Note, however, that in the event that a perpetrator is head of state, or crimes were committed by a perpetrator in a position of political or military authority, there is nothing in the Rome State of the TFV’s framework to indicate that the state itself would be collectively held responsible and made to pay reparations. See, Trust Fund for Victims (TFV), Recognizing Victims and Building Capacity in Transitional Societies (The Hague: International Criminal Court, 2010), 3.


741 Trust Fund for Victims (TFV), Recognizing Victims and Building Capacity in Transitional Societies, 3.
mandate. Second, it links the purpose of reparations to other transitional justice norms, namely localization and reconciliation. The TFV’s spring 2010 progress report explicitly identifies victims as “stakeholders” and that its assistance is goal oriented toward building local capacity and reconciliation.\(^{742}\)

This “novel development” of a reparations scheme for the International Criminal Court, therefore, accords generally to victim-oriented restorative justice principles.\(^{743}\) Schiff also argues that various aspects of the Rome Statute with respect to the inclusion of gender crimes, victim and witness participation, and the reparations scheme, reflects the Court’s orientation toward both retributive and restorative justice principles, which he equates with “old and new justice paradigms” respectively.\(^{744}\) Civil society has been at the forefront of this normative shift in perceptions of accountability. The specialized knowledge and experiences provided by NGOs and legal practitioners who had been working in local contexts of transitional justice was one of the driving forces behind the inclusion of these restorative justice principles in the Rome Statute. Indeed, some have gone so far as to claim that the status granted to victims and their right to reparations represents a “victory for NGOs.”\(^{745}\) International civil society “channeled their concerns for addition of victims’ rights, reparation, and reconciliation into meetings that considered the objectives of the planned Court.”\(^{746}\) But individual states were not ignorant of the need for restorative justice for victims either. Another important influence came from “post-transition governments, such as South Africa’s, that sought to emphasize victims’ rights and reparative justice, along with civil-law states (such as France) that had, during the recent past, elevated victim’s rights in their own system’s priorities.”\(^{747}\) Finally, the failures of the ad hoc tribunals with regard to the inclusion of victims and reparations were duly noted. Recall that the ICTR only belated and ultimately

\(^{742}\) Trust Fund for Victims (TFV), Recognizing Victims and Building Capacity in Transitional Societies.


\(^{744}\) Schiff, Building the International Criminal Court 10, 85.


\(^{746}\) Schiff, Building the International Criminal Court 39.

\(^{747}\) Schiff, Building the International Criminal Court 85.
unsuccessfully implemented a program to include victims in the process, that the tribunal was criticized as insensitive to victims of sexual violence, and reparations were never meted out. The ICC has sought to improve upon these failures by incorporating victim-oriented principles into its mandate. The appropriateness of including restorative justice principles via a reparations scheme in the Rome Statute was never seriously questioned and this, in and of itself, is significant as an indicator of the increasing salience of this aspect of the norm and the crystallization of certain boundaries of international expectations from a context of a variety of different approaches. As Schiff explains,

> concern for victims and the connection of trials to social healing became so accepted by the international justice community that the question of whether to include victim-oriented innovations into the Statute was not controversial: The question was how these concerns should be included.  

It is clear the reparations scheme is legitimized by restorative justice principles, and combined with the punitive sanctions more commonly awarded by the Court, demonstrates that these principles underlying the norm are not only salient but mark a significant shift in international perceptions and parameters of accountability. While references to the need for reparations was largely rhetorical and symbolic in past tribunals, the specific institutionalization of this aspect of accountability in the ICC renders it both a moral and legal necessity for transitional justice practices. That is not to say, however, that such expectations for reparations have been easily realized in practice; reparations face daunting obstacles in implementation as part of accountability, which will be addressed in the subsequent section. Nonetheless, two aspects of accountability remain to be addressed and provide further opportunities and challenges for the Court’s ability to adhere to this norm: amnesties as non-punitive sanctions and truth commissions as non-judicial mechanisms of accountability.

The Court’s institutional design and trial processes are largely indicative of a formal retributive justice institution, and one that is notably different than restorative justice institutional designs and processes (community led, victim oriented, and so on), such as truth commissions. But this does not preclude the possibility that the Court will work in conjunction with national truth commissions and more controversially, the Court needs to determine if a national truth commission in a case it is considering is

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748 Schiff, *Building the International Criminal Court* 128.
to be regarded as a “genuine” investigation, therefore nullifying the ICC’s jurisdiction. The issues of truth commissions and amnesties intersect in that such non-judicial mechanisms often function by offering non-punitive sanctions, such as amnesties, to encourage perpetrators and victims to participate.

Determined how the ICC would deal with truth commissions and amnesties was left largely undefined by the Rome Statute. On the one hand, amnesties are often viewed as a form of impunity and thus at odds with the ICC’s explicit purpose of ending impunity. Truth commissions are sometimes viewed as an inappropriate non-judicial mechanism given the gravity of the crimes they address. However, the “creative ambiguity”749 of the Statute does leave the door open for the Court to respect a truth commission as a “genuine” investigation, and thus render a case inadmissible under the Court’s jurisdiction, and to respect domestic amnesties in certain circumstances, particularly if it is considered in the “interests of justice” and peace.

There are several indicators in the language of the Statute and its specific Articles that provide some direction to the Court in this regard. Here the complementarity regime plays an important role. As Drumbl states, “differences in punishment also might run afoul of the complementarity regime…this could be because punishment is viewed as too harsh (i.e. the death penalty) or too lenient (i.e. community service, reparations, or apology instead of the internationalized norms of incarceration in distant prisons).”750 Recall that in addition to meeting the Rome State’s national and territorial jurisdictional requirements, a case may only be deemed “admissible” if a state is incapable and/or unwilling to carry out a “genuine” investigation and prosecution. Defining “inability” and “unwillingness” was taken up at the August 1997 Prep Com. Determining “inability” was less controversial, as the total or partial collapse of a State’s national judicial system would render trials or truth commissions unlikely. Defining “unwillingness” has been the key focus of the controversy, and speaks to both issues of truth commissions and amnesties. It is not clear whether the Statute’s provisions require a criminal investigation by the state


750 Drumbl, Atrocity, Punishment and International Law 142.
with jurisdiction over the crime(s). Nor is there any criteria within the Statute or Rules of Procedure and Evidence (RPE) to determine whether a truth commission would constitute a criminal investigation and, if not, if this would be considered an indicator of “unwillingness.” The complementarity regime introduces a degree of subjectivity and interpretation that the primacy of jurisdiction accorded to the ad hoc tribunals did not. With primacy of jurisdiction, the ICTY and ICTR could take a case regardless of national mechanisms of accountability, trials or otherwise. Complementarity requires the Court to assess the legality and appropriateness of amnesties and truth commission as accountability.

Other Articles in the Rome Statute would permit the Prosecutor and the UNSC to discontinue an investigation and justify a truth commission or some kind of amnesty as a substitute. Article 53(1)(c) permits the Prosecutor to discontinue his/her investigation if it is not “in the interests of justice” (with considerable oversight and review from the Pre-Trial Chamber). While there is much debate and confusion regarding the interpretation of “interests of justice,” this provision affords the Prosecutor some discretion when determining the appropriateness of accountability in the form of truth commissions or amnesties, and therefore not pursuing criminal trials through the ICC.751 In a similar manner, Article 16 allows the Security Council to defer an investigation with a Chapter VII resolution, i.e. in the interests of international peace and security. This provision would allow the Council to “facilitate the negotiation of an amnesty-for-peace deal or a process of national reconciliation.”752 The power of the Security Council in this regard is particularly relevant for the ICC’s interventions in cases of ongoing conflict, such as Sudan and Uganda, and reflects arguments that truth commission and amnesties may be better suited to delivering peace than trials (a debate which will be taken up with respect to the reconciliation norm). These references to the “interests of justice” and “interests of peace and security,” as defining the appropriate circumstances in which the ICC can act, indicate that the normative structure of transitional justice is not simply about accountability as narrowly reducible to punishment. Thus while much of this dissertation’s argument reflects the infusion of law into politics, so have political consideration been

751 Drumbl, Atrocity, Punishment and International Law 142.
infused into what is considered just action by the Court. The individual experiences of countries responding to violence through accountability highlight that the principles underlying such interrelated transitional justice norms, such as local ownership, social harmony, and reparations, are balanced against trial and punishment in the “interests of justice.”

Past practices of the international community, and the specifically the United Nations, showing tolerance of amnesties and legitimizing truth commissions also indicate that the ICC might carry on in this vein. The United Nations has played a more active role in recent years in setting up truth commissions, notably in East Timor and Sierra Leone, and considers truth commissions to be a an appropriate mechanism of transitional justice.753 Notably, both of these commissions included non-punitive sanctions akin to an amnesty program, reflecting my contention that the evolving international structure of justice now includes the possibility of amnesty in a way that transcends the previous dichotomous debate which pitted amnesty, as politicized impunity, against justice. It is a specific evolution, however, since the United Nations does not officially accept amnesty clauses in peace treaties for international core crimes. But the UN has taken part in several negotiations in which amnesties were on the table, such as Cambodia, El Salvador, Guatemala, Haiti, Sierra Leone, and South Africa, and “thus given such amnesties a kind of international legitimacy.”754 Moreover, an oft-cited “non-paper” on amnesties circulated by the US delegation in 1997 suggested that the ICC should take amnesties into account in the interests of peace and reconciliation; the proposal was criticized but, as Scharf argues, the “final text of the Rome Statute potentially could be interpreted as codifying the US proposal.”755

Here it is worth recalling that blanket and self-granted amnesties, especially for core crimes, have not been officially tolerated by the international community, and legal practitioners and scholars who

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As has been argued in the previous chapters on Rwanda and East Timor, and with brief reference to South Africa, the use of limited and conditional amnesties is further legitimized if done so in conjunction with a truth commission. This is true to the extent that there are “practical, legal and moral justifications for dealing with lesser offenders through truth commission and conditional amnesties, whereas the persons most responsible….should still be held criminally accountable.”\footnote{Robinson, "Serving the Interests of Justice: Amnesties, Truth Commissions, and the International Criminal Court," 494.} For example, the international community represented in Rome accorded different degrees of legitimacy to the blanket amnesties in Chile versus the limited and conditional ones in the South Africa TRC; however, “drafting a provision that would legitimate the South African experiment yet condemn the Chilean one proved elusive.”\footnote{Schabas, \textit{An Introduction to the International Criminal Court} 69.} As a result, no reference to amnesties was included in the Rome Statute. The manner in which the hierarchical division of criminality and accountability intersect resolves this omission to some degree. Given that the ICC’s prosecutorial strategy is directed at elite perpetrators, it can therefore de facto accommodate and sanction a broader range of accountability mechanisms for lower-level perpetrators. Truth commissions and amnesties may even be useful to the ICC in that they can provide an “effective source of evidence that can be used against the worst perpetrators,” and thus reducing conflict between the jurisdictions and prosecutorial strategies of different transitional justice institutions.\footnote{Roach, \textit{Politicizing the International Criminal Court: The Convergence of Politics, Ethics, and Law} 44.} In the emergent international structure of transitional justice, this also represents the synthesis of conceptions of justice and order among the international justice and diplomatic communities, and domestic considerations of stability and justice.
In sum, the mandate and principles of the International Criminal Court reflect the salience of the accountability norm as subsuming both punitive and non-punitive sanctions. First, in addition to punitive sanctions, the reparations scheme laid out by the Rome Statute is legitimized by restorative justice principles that are victim-oriented and focus on non-punitive sanctions. This is the most obvious manner in which the Court adheres to this norm. Determining how the ICC will judge the appropriateness of truth commission and amnesties is less clear, primarily because the Statute provides few criteria with which to evaluate their appropriateness. But various articles within the Statute and the UN’s past practices with truth commissions and amnesties reveal that there are avenues for the Court to be permissive of such accountability mechanisms for low-level perpetrators instead of a trial and in a manner that may even benefit the Court’s trials for elite perpetrators. While there is considerable scope for agency on these matters in terms of how this norm will continue to evolve and be implemented, it is clear that international expectations have evolved beyond the point where they were but a decade ago, when amnesties were seen by proponents and opponents alike as impunity and trial and punishment alone were considered sufficient.

**Implementation: Interpretations of (In)Justice**

As the Court continues to be presented with new situations and challenges to its jurisdiction, implementing the accountability norm has revealed challenges that are familiar to international courts in general and some that are new and specific to the ICC. First, as the Court has yet to complete a trial or establish a conviction, issues with reparations have not yet fully come to the fore. Nevertheless, the Trust Fund for Victims has begun reparations and assistance projects in both the DRC and Uganda, and there are calls for assistance for victims in the CAR. The institutional challenges to implementing a robust reparations scheme have been daunting. Second, the complementarity regime is being severely tested and contested in the Uganda and Colombia situations. Much controversy exists over how the ICC will handle Uganda’s amnesty law and local demands among the Acholi for restorative justice mechanisms. These political and normative conflicts have damaged the Court’s legitimacy among the Acholi and challenged the Court’s assumptions about the necessity of trial and punishment. Similarly, Colombia’s amnesty laws have been viewed as too lenient and bordering on blatant impunity. Even though Colombia has a capable
judicial system and vibrant civil society, impunity for war crimes and crimes against humanity is persistent. The amnesty law may be viewed as the government’s unwillingness to carry out a genuine prosecution and therefore this situation may be deemed admissible under the Rome Statute. Conflicts over these amnesty laws in Uganda and Colombia have revived political debates that dichotomize peace and justice. As such, the interrelated nature of the accountability norm and that of reconciliation is underscored here in situations where the ICC is intervening in situations of ongoing conflict and normative conflict is between international and local actors is intensified.

Orders of reparations from individual convicted perpetrators to victims that are directly or indirectly affected by their crimes have yet to be realized as the ICC has not completed any trials. But the general assistance activities of the TFV are now underway. The Trust Fund for Victims has only been operational for a little over a year, but currently has thirty-four approved projects (sixteen for the DRC and eighteen for Northern Uganda) and thirty-one are operational. This projects fall under its mandate for general assistance, and the TFV employs two strategies to identify victims that fall within the ICC’s jurisdiction: “assistance to victims of specific crimes, including sexual violence and conscription of child soldiers; and assistance to communities victimized by pillage, massacre, and/or displacement.” As of December 2010, the TFV claims that it has made “concrete differences in the lives of an estimated 42,300 direct and 182,000 indirect beneficiaries” (from projects in Uganda and DRC). Those in the Central African Republic are awaiting their expected first round of assistance as of December 2010. With the completion of cases, such as Bemba’s (CAR) and Lubanga’s (DRC), it is possible that a conviction will include an order of reparations from these individuals. Bemba in particular is widely known to be extremely wealthy and Central Africans want to be compensated out of his own personal wealth. For Sudan, a recent opinion survey of Darfuri victims living as refugees in neighbouring Chad demonstrated that reparations were viewed as an important precondition for both peace and justice, reporting that

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760 Trust Fund for Victims (TFV), Recognizing Victims and Building Capacity in Transitional Societies, 5.


“nearly all” victims believed that individuals should be compensated for their losses and most respondents agreed that such compensation should come from the government in the form of money.\textsuperscript{763} Given this survey also found that victims viewed the Government of Sudan and President Bashir as “most responsible,” supported such trials at the ICC, and that the international community should be trusted to determine compensation, there is an important role for the Court in this case to facilitate this demand.

The TFV’s preliminary activities and the lack of trial completion in the Court’s first cases leave little insight into implementing this “novel development” of the ICC’s reparations scheme. Nevertheless, it is clear that the TFV will have the means and the mandate to offer more than token gestures to victims and their communities. The ability of the ICC to mete out this form of accountability has the potential to strongly resonate with local conceptions of justice in post-conflict societies, which often highly value reparations in addition to prosecutions. Conversely, some have raised concerns that such a wide-reaching reparations scheme may conflict with the work of humanitarian organizations, be perceived by victims as a form of long-term support, or that the distribution of reparations may prove divisive among ethnically divided societies.\textsuperscript{764} Distribution of reparations, even minimal material compensation can prove divisive or, if insufficient, can erode the legitimacy of justice measures that claim restorative principles and reconciliatory potential. While reparations, as a form of non-punitive sanctioning, have not yet been fully realized by the ICC, the Court is facing a great deal of contestation with respect to how it will accommodate certain types of amnesties and non-judicial mechanisms.

The ICC’s activities and political challenges in Uganda represent the most difficult test of the complementarity regime, with respect to both the appropriateness of amnesties and the accommodation of local dispute resolution mechanisms as a form of restorative justice. With this analysis I do not intend to duplicate or challenge the extensive and excellent scholarship and advocacy work on the Ugandan


\textsuperscript{764} See, McCarthy, "Reparations under the Rome Statute of the International Criminal Court and Reparative Justice Theory," 268-70.
conflict and the ICC’s involvement in this situation.\textsuperscript{765} I instead seek to broadly identify some of the normative conflicts inherent in the Court’s implementation of the accountability norm with respect to Uganda’s Amnesty Act and local traditional justice, and work through the implications of these conflicts for the accountability norm and the legitimacy of the ICC.

The Uganda situation has achieved notoriety because of opposition among Acholi communities and local civil society to the ICC’s indictments of LRA leaders. These opponents argue that the ICC’s indictments have delegitimized local alternatives to justice, specifically the amnesty law and traditional justice mechanisms, that are expected to facilitate the demobilization of former LRA and give them incentives to negotiate for peace. In this matter, the debate is over the most appropriate balance and sequencing of pursuing both accountability and conflict resolution, thus demonstrating contestation between the accountability and reconciliation norms that will be more fully addressed in a subsequent section. The Uganda government passed an Amnesty Act into law in 2000 that extends an amnesty to all individuals who have taken part in a rebel insurgency against the government.\textsuperscript{766} A commission was established to address amnesties for returning rebels who, if they denounced the conflict and disarmed, would be given reintegration packages and resettled into displacement camps. The amnesty procedures were met with some initial success and “by mid-2004 over five thousand adult former LRA fighters had surrendered and applied for it.”\textsuperscript{767} The offer of amnesty has been particularly appealing for addressing the unprecedented number of child soldiers in the LRA, many of whom were abducted into the rebel group and forced to participate in atrocities.


\textsuperscript{766} Allen, Trial Justice: The International Criminal Court and the Lord’s Resistance Army 74-78.

\textsuperscript{767} Allen, Trial Justice: The International Criminal Court and the Lord's Resistance Army 75.
The Court has also had to contend with local traditional justice practices in Northern Uganda. The Acholi have a variety of dispute resolution traditions to deal with communal harms and individual acts of violence (such as Mato Oput and Gomo Tong), traditions which ascribe to restorative justice principles of truth-telling, community participation, reintegration, compensation, and reconciliation. These traditional justice processes have been mediated by community elders and used to welcome back former LRA and sanction their reintegration into the community. These traditions are legitimized by the Acholi in many of the same ways as the Amnesty Act, as communally led and culturally appropriate. Indeed, those who have taken advantage of this government sanctioned amnesty can be required to engage in such traditions in their communities or camps.

The distinction between LRA leadership and lower-level perpetrators here is the key to determining the appropriateness of amnesties and traditional justice as accountability. Divisions between the international community, the Ugandan government, and local Acholi are notable in this instance. There is much greater contestation between the international community and Ugandans over the appropriateness of amnesties for LRA leaders as opposed to low-level perpetrators, and especially child soldiers. While the international community maintains that amnesties for elite perpetrators are never permissible, President Museveni has been inconsistent on this issue. He initially opposed allowing the Amnesty Act to apply to the LRA in general and has stated his desire to exclude LRA leadership from the Act. But the subsequent ICC arrest warrants nullified the effectiveness of the Amnesty Act in encouraging LRA rebels to return and took away whatever bargaining chips peace negotiators had with its leadership. As a key indicator of contestation, the Chief Prosecutor views this amnesty as a political tool and not as an expression of local conceptions of justice. As Branch argues though, “the ICC irresponsibly frames the Amnesty Act not as the product of mobilization by the Acholi…but as a gift from the Ugandan executive, to be withdrawn by the President Museveni at his convenience.”

In contrast with the ICC’s view,

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768 Baines, "The Haunting of Alice: Local Approaches to Justice and Reconciliation in Northern Uganda.", Branch, "International Justice, Local Injustice: The International Criminal Court in Northern Uganda."

Acholi notions of communal justice, forgiveness and reconciliation are incorporated into the amnesty law and there has been substantial support among Acholi opinion for the Amnesty Act.

Many scholars and advocates of peace and justice in Northern Uganda have cited the significance and complexity of Acholi opinion on the ICC’s intervention and the necessity of amnesty and traditional justice. On the one hand, the Acholi Religious Leaders Peace Initiative (ARLPI), an important focal point of civil society in Northern Uganda, claims to speak on behalf of the Acholi people and has been an outspoken critic of the ICC’s intervention. And Baines notes that “the Acholi are one of the first victim populations in the world to lobby their government for the creation of a blanket amnesty.” The Refugee Law Project cites Acholi concerns that the ICC’s activities will undermine the Amnesty Act and local conflict resolution mechanisms; the majority of those interviewed by the Refugee Law Project in northern Uganda “see amnesty as the most feasible option to ending the conflict and ensuring that their abducted children can be persuaded to come home…(and) as being compatible with the people’s existing traditional system of justice and dispute resolution mechanisms.” It may be in the “interests of justice,” therefore, for the ICC to respect local traditions and norms of dealing with violence and communal harm in certain contexts, particularly if these traditions have the support of victims.

On the other hand, many have found reasons to doubt the supposed consensus among Acholi for traditional justice and amnesty. A survey conducted by the International Center for Transitional Justice and the Human Rights Center at the University of California, Berkeley revealed responses favouring both prosecution and conciliation, and more than majority support for amnesty if the process was reformed. Allen points to the self-serving interests of the ARPLI and Acholi male elders to use traditional justice to

reassert their authority in communities. The assumptions about universal support for traditional justice and amnesty among the Acholi is also challenged with reference to those living in the IDP camps who want to see the LRA punished, “born-again” Christians who view traditional justice practices as “satanic”, and those who stress the importance of regional and national reconciliation over local reconciliation. Acholi opinion on peace versus justice, and whose justice is best, is considerably complex and underscores the point that it indeed may not be viewed as simply a choice between international versus local justice nor punishment versus impunity.

The “disjuncture” between international and local conceptions of justice is both a practical and legal issue that the “drafters and supporters of the Rome Statute never envisaged and which undermine(s) the legitimacy of the ICC at the grassroots level.” Nevertheless, the complementarity regime of the ICC provides an opportunity for the Court to resolve these issues in the “interests of justice.” Some have argued that such local traditional justice in Northern Uganda may meet justice standards set out by the Rome Statute and the International Covenant of Civil and Politics Rights (ICCPR) if the practice is “sufficiently prosecutorial.” Furthermore, the Amnesty Act combined with traditional justice has various conditions that may satisfy the Court. The Amnesty Act has been amended to bring the law into conformity with the obligations of a State Party to the ICC, and Museveni announced that those indicted by the ICC would not be eligible for amnesty. The ICC has been solely focused on the LRA top leadership, and while their singling out may be perceived as an impediment to peace, the ICC does not need to stand in the way of local traditions and amnesties for low-level perpetrators. International norms of transitional justice have clearly permeated local Ugandan conceptions of appropriate strategies here, though not in a uniformly accepted way, but in a way that has in fact unsettled neat distinctions between

773 Allen, Trial Justice: The International Criminal Court and the Lord's Resistance Army.
775 Refugee Law Project, ICC Statement, 2.
776 Hovil and Quinn, Peace First, Justice Later: Traditional Justice in Northern Uganda.
777 Schiff, Building the International Criminal Court 207.
local and international conceptions of accountability. Absent the international normative structure, and the
intervention of the ICC, it is likely that an amnesty for LRA leadership would have been upheld as a
pragmatic solution to end the conflict. But the interrelated nature of transitional justice norms, particularly
the hierarchical division of criminality and accountability, has allowed for a justice solution that is both
pragmatic and appropriate. As such, while local traditional justice and non-punitive sanctions may be
tolerated by the Court, a blanket amnesty for elite perpetrators certainly will not. And the ICC is similarly
cconcerned about such forms of impunity in Colombia.

As was previously mentioned, the ICC is looking into allegations of crimes committed by
paramilitaries and rebel groups (primarily FARC) in Colombia’s civil war. In the Court’s technical terms,
the situation in Colombia is under “official observation” and this is “the only country in the region with
an ongoing armed conflict (and) presents the most complicated case and most likely for imminent ICC
action in Latin America.” In 2003, President Uribe proposed an amnesty law for paramilitary forces
who would receive reduced sentences (or no prison terms) in return for renouncing armed conflict,
demobilization, contributing to reparations for victims, and cooperating in the peace process. Alternative
sentences, such as acts of lustration and restitution, were also proposed. Human Rights Watch issued a
strong criticism against the proposed bill in 2003:

there are no provisions in the bill to ensure impartial investigations or serious
prosecutions. There are no incentives that would compel the accused to tell the truth
about crimes, particularly if government officials or military officers still on active duty
are implicated. There are no mechanisms proposed that would allow victims of atrocities
to appeal the President’s decision to designate who would qualify for release from any
sentence.

The initial proposal was revised and adopted by Congress in 2005 as the “Justice and Peace Law” and
with the aim of demobilization and facilitating the peace process. Subsequent laws institutionalizing

778 Margaret Popkin, “Latin America: The Court and the Culture of Impunity,” The International Criminal Court: An
End to Impunity? (Crimes of War Project) (December 2003).

779 Human Rights Watch (HRW), Colombia's Checkbook Impunity: A Briefing Paper (New York: Human Rights
Watch, September 22, 2003), 2.

780 See, Maria Jose Guembe and Helena Olea, ”No Justice, No Peace: Discussion of a Legal Framework Regarding
the Demobilization of Non-State Armed Groups in Colombia,” Transitional Justice in the Twenty-First Century:
Beyond Peace Versus Justice, eds. Naomi Roht-Arriaza and Javier Mariezcurrena (Cambridge: Cambridge
amnesty for paramilitaries continue to be criticized by the international community. In 2009, Amnesty International reacted to what they perceive as persistent impunity in Colombia, arguing:

around 90% of paramilitaries who supposedly demobilized in a government-sponsored process that began in 2003, and who were not under investigation for human rights violations, escaped effective criminal investigation for such crimes and were granted *de facto* amnesties.\(^7\)

Given the limited number of prosecutions of paramilitary and FARC activities and the widely held belief that Colombians in the highest positions of political power are at least complicit, if not guilty of international crimes, international and Colombian civil society has pressed for greater accountability and welcomed the ICC’s initial forays into this case. The amnesties granted to paramilitaries are largely considered inappropriate because they are too broad in scope and many of the conditions attached to them and alternative sentences have not been born out. They are therefore the sort of blanket amnesties that the international community has traditionally rejected. Moreover, the ICC is not only concerned with war crimes and crimes against humanity committed by paramilitary groups, but also with the complicity and involvement of political elites in such crimes. The ICC will be required to determine whether the aforementioned amnesty laws constitute a “genuine” investigation and prosecution of international crimes and whether the Colombian judicial system will be able to exert enough independence to identify high-ranking officials for their crimes. This is a very new set of circumstances for the ICC, and transitional justice mechanisms as a whole, as the Colombian situation is unlike others before the Court. The Colombian state, while in a de facto state of civil war, is not a weak state and has a strong civil society. Pursuing accountability in this context will raise new issues of contestation when supranational efforts of justice are potentially imposed on strong, sovereignty conscious states. As the Court continues to engage with and exert pressure on the Colombian government, this case will prove to be an instructive test of the complementarity regime.

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In review, the ICC is informed by and constitutes a norm of accountability first and foremost by combining punitive sanctions with a reparations scheme, the latter representing a significant institutional shift in the normative structure of transitional justice. The reparations scheme demonstrates the Court’s acknowledgement of the importance of other forms of sanctions and accountability for victims, apart from the predominantly punitive forms long advocated for by the international justice community. This specific aspect of institutionalizing accountability demonstrates this dissertation’s argument about the international-local dynamic in the international normative structure of transitional justice. Given the Trust Fund for Victims is in its infancy and many projects have yet to get off the ground, the implications of such a scheme for justice in the local context is yet unknown. But given what transitional justice scholars have established about the importance of reparations for post-conflict societies who are victimized by both violence and poverty, the material and psychological support provided by the ICC is likely to enhance its legitimacy among victim communities. Second, the complementarity regime set out in the Rome Statute will face its greatest implementation challenge with respect to local forms of traditional (often restorative) justice and amnesties. As many traditional forms of restorative justice are used for lower-level offenders, and the Court’s prosecutorial strategy is focused on elite perpetrators, it is likely that the Court will not impede such mechanisms of accountability. Moreover, the international community’s increasing tolerance and participation in truth commissions lends credence to the possibility that the Court will find a way to complement, and not compete, with such institutions. The issue of amnesties has proven to be much more contentious, as the cases of both Uganda and Colombia have indicated contestation resulting from disputes between international and local expectations, new contexts, and inter-normative conflict with reconciliation (as will later be shown). In both cases, the Court is primarily concerned with amnesties for those in positions of leadership whereas local constituencies have expressed arguments that amnesties are necessary for an efficient and peaceful resolution of conflict. Ocampo has nonetheless stood firm on amnesty:

they (states) cannot offer impunity to those who are willing to negotiate…as negotiators have told me, we took away tools from their tool kit such as amnesty, immunity. But such tools just did not work. And we offered new ones. They can and they must use them.  

This issue will be taken up further with respect to the reconciliation norm, however, it underscores the obstacles inherent in the ICC exercising its jurisdiction over cases in ongoing conflict wherein there is no discernable transition within which to mete out justice. This analysis will not turn to the third norm of localization in the international normative structure of transitional justice, which has had surprisingly causal effects on the mandate and structure of the ICC.

LOCALIZATION

One could assume that the localization norm would have little salience for the International Criminal Court, as it is a purely international judicial institution. But a significant evolution in the normative structure of transitional justice is that international tribunals are increasingly enabled and constrained by this norm, and seek to build local capacity and foster local ownership as a means to greater effectiveness and legitimacy. The ad hoc tribunals, especially the ICTR, were disengaged from the local context and the relevance and legitimacy of these institutions among local communities suffered as a result. This disengagement was initially purposeful as the ad hoc tribunals sought neutrality and freedom from politicization through isolation and distance. It is notable that belated efforts by the ad hocs to engage with the national justice system (in order to transfer remaining accused near the completion date) and implement modest outreach programs (to engage victim communities and foster a sense of ownership) demonstrates that a norm of localization was emerging even with respect to international courts. The justifications and institutional design of hybrid tribunals also underscores this trend. Thus, the salience of the localization norm for the ICC reflects an evolution in this regard and its implications for justice are made all the more relevant when its principles are put into practice.

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784 The hybrid courts of the Extraordinary Chambers in the Courts of Cambodia and the Special Court for Sierra Leone benefitted from the lessons learned from the ad hocs and engaged in more extensive outreach efforts.
Salience: A Court of Last Resort

Owing in large part to the advocacy and assistance of both international and local civil society, the ICC reflects and constitutes the localization norm in several ways. First, the nature of the complementarity regime and obligations of States Parties to the Rome Statute carries with it the expectation of capacity building. For example, the Court will serve to not only supplement national judicial systems but also upgrade them. Second, the ICC has several mechanisms at its disposal with which it can build local ownership of its activities, predominantly through victims’ participation in trials and outreach programs and recognizing them as stakeholders in international justice.

The complementarity regime is a more restrictive kind of primacy compared to the primacy of the ad hoc tribunals’ jurisdictions. Put simply, the ICC can only exercise its primacy under specific circumstances (defined by admissibility criteria) and thus is a supplement to national courts. Complementarity, combined with the fact that the Rome Statute is a treaty in which states have certain obligations upon becoming a party, also means that the ICC is expected to have the effect of upgrading national judicial systems (as will be discussed below) in addition to merely supplementing them. This is a critical dimension of the constitutive effects of transitional justice norms when converging with domestic understandings and practices of justice. There is some inconsistency, however, among proponents of the Court over capacity building expectations. In 2003, Ocampo controversially stated that “the absence of trials before this Court, as a consequence of regular functioning of national institutions, would be a major success.” He has since “conceded that his organization is not designed nor funded to aid in such capacity building.” But the fact that its cases are only admissible if states that are unable or unwilling to investigate and prosecute suggest that a measure of the Court’s success would be to enhance national judicial systems to the point where the Court would not be required to intervene.

785 As stated in 2003 at his swearing in ceremony as Chief Prosecutor and quoted in Schiff, Building the International Criminal Court 113.

786 Smith, After Genocide: Bringing the Devil to Justice 189.

787 Alternatively, other agents of international justice, such as the Coalition for the International Criminal Court, Human Rights Watch, the International Centre for Transitional Justice, etc. assist national institutions with capacity building and institutional design regardless of whether a state's situation falls under the Court's jurisdiction.
The most obvious manner in which the Court contributes to capacity building, that is the key constitutive institutional mechanism of the localization norm, is with respect to the obligations of States Parties. Among the many treaty obligations, not least of which is enabling the creation of legislation on core crimes, States Parties are required to make a number of changes to their national judicial system:

a) Remove any provision of amnesty or special immunity from the constitution, which could be used to unlawfully shield a perpetrator;
b) Maintain extradition treaty law consistent with the absolute obligation to surrender a national to the ICC; and
c) Eliminate any provision on the death penalty.\textsuperscript{788}

International civil society organizations, primarily through the Coalition for the International Court, has taken up the task of ensuring that state signatories to the Treaty effectively ratify and implement changes to their domestic systems, and that States Parties cooperate with and enforce the Court’s activities. The CICC notes that ratification and implementation of the Rome Statute “are by far the most successful campaigns NGOs have supported to date” and consider its activities in this regard to be essential for effective complementarity.\textsuperscript{789}

The ICC’s staff has suggested that perhaps the Court should be seeking to build capacity by sharing information, training staff, and providing other forms of assistance.\textsuperscript{790} This kind of “positive complementarity,” as opposed to the “negative complementarity” of simply taking over prosecutions where national systems are incapable or unwilling to do so, would entail the Court communicating its concerns about crimes, assisting in setting up functional and appropriate institutions, and monitoring.\textsuperscript{791}

Moreover, once the Court has announced its intention to pursue a case in a given situation, national authorities are then granted six months in which to address such crimes with a genuine process that would render the case inadmissible for the court. This time period could be used to engage in such forms of positive complementarity. These developments are now becoming relevant in the Kenya and Uganda

\textsuperscript{788} Roach, Politicizing the International Criminal Court: The Convergence of Politics, Ethics, and Law 54.

\textsuperscript{789} Coalition for the International Criminal Court (CICC), A Universal Court with Global Support (New York: Coalition for the International Criminal Court, 2009).

\textsuperscript{790} Schiff, Building the International Criminal Court 116.

\textsuperscript{791} Schiff, Building the International Criminal Court 117.
situations now before the Court. In both cases political elites in both cases have suggested using national courts to ward off the ICC’s judicial intervention, which would require upgrading the professionalism and criminal law standards of judicial institutions to meet international standards. Moreover, the ICC has made efforts to train and hire local staff to engage with victim communities and assist in investigations – not only as a means to bolster the Court’s credibility in the eyes of victim communities but as a practical necessity. The Rome Statute did not envision this kind of complementarity, but some have come to argue that, given the Court’s limited resources, enhancing national capacities to hold perpetrators accountable is the Court’s best option for ending impunity. 792

The Court then has the potential to create what Drumbl calls “legal mimicry,” wherein “national institutions model themselves along the lines of the ICC in order to maximize their jurisdiction.” 793 The implications for the ICC’s complementarity at the local level, therefore, “may encourage heterogeneity in terms of the number of institutions adjudicating international crimes, but homogeneity in terms of the process they follow and the punishment they mete out.” 794 But Drumbl also cautions that not all states will pursue legal mimicry and such forms of complementarity may crowd out local practices. Similarly, Morris identifies several disadvantages to this form of complementarity, in which she distinguishes between the Court’s “sole active jurisdiction” and “concurrent (stratified) jurisdiction.” 795 The latter scenario deters capacity building by creating anomalies of inversion (whereby the prosecution of leaders is on more “favourable” terms than for followers), impeding national plea-bargaining arrangements, and most importantly, undermining national judicial authorities who will lack an opportunity to prosecute


793 Drumbl, Atrocity, Punishment and International Law 143.

794 Drumbl, Atrocity, Punishment and International Law 143. This notion of "legal mimicry" is suggestive of what IR scholars would identify as an emulation mechanism of socialization. See, Finnemore and Sikkink, "International Norm Dynamics and Political Change," 902-03.

795 Sole active jurisdiction is a situation in which the Court bears exclusive responsibility for international prosecutions (likely in cases where national systems are "incapable" of investigations and prosecution). Concurrent (stratified) jurisdiction is where international prosecutions are carried out concurrently with national jurisdiction; the stratification represents the ICC's limitation of prosecution to high-ranking officials, and national courts to low-ranking perpetrators. See, Morris, "Complementarity and Conflict: States, Victims and the ICC."
high-ranking officials. Nevertheless, the capacity building potential of the ICC has been institutionalized; one could argue that for complementarity to be effective, and the Court to be successful, it should engage in such activities to a greater degree. Such understated developments in increasing local capacity for justice are not likely to attract quite the scholarly or public attention of the ICC’s high profile cases, but would in fact constitute even more powerful evidence for the argument advanced here about the constitutive effects of the normative structure on domestic legal mechanisms for atrocities, and as such is an issue that deserves to be revisited more thoroughly in further research.

The second manner in which the International Criminal Court has institutionalized the localization norm and demonstrated its salience is by building local ownership of its activities, particularly among victims and local communities affected by violence. The Court seeks to engage victims in the investigations and trials to a greater degree than previous international courts and has created an outreach program that is also unprecedented in scope. The ICC’s attention to victims and witnesses is, in part, bound up with the norm of accountability (as inclusive of victim-oriented restorative justice principles) and also reflects the growing emphasis on victims in international human rights and humanitarian law. Procedurally, victims and witnesses can participate in the ICC’s investigations and trials in a number of different ways. First, they can intervene before the Pre-Trial Chamber when the Prosecutor is seeking authorization for an investigation, presumably most often in support of prosecution. Second, victims are essential witnesses in the trial process. During both investigations and trials, the Prosecutor and Trial Chambers are required to take “appropriate measures to protect their safety, physical and psychological well being, dignity and privacy of victims and witnesses,” particularly with respect to children and victims of sexual violence. Finally, victims are permitted to intervene in the trial when their “personal interests” are affected, regardless of whether these individuals are

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797 Schabas, An Introduction to the International Criminal Court 146-47.
798 Schabas, An Introduction to the International Criminal Court 147.
799 Schabas, An Introduction to the International Criminal Court 148, The International Criminal Court, The Rome Statute of the International Criminal Court, Article 54(1)(b); Article 64(6)(e).
witnesses. To these ends, a Victims and Witnesses Unit has been established by the Registry with the mandate to “provide protection, support, and other appropriate assistance to victims and witnesses who appear before the Court.” The role for victims and witnesses, in addition to the reparations scheme previously discussed as part of an accountability norm, has a much broader scope than the Court’s institutional predecessors. The Victims and Witnesses Unit is tasked, under the Rules of Procedure and Evidence, with protecting and assisting those who testify before the Court and anyone whose testimony puts them in a situation of risk. A roundtable was held in January, 2009 in The Hague to flesh out how the protection system would work and brought together international and local civil society actors and those with experience in other international courts. The Bemba trial will be a key test for the implications of victims participating in proceedings, as his trial will involve extensive witness testimony regarding his alleged crimes of sexual violence.

In order to facilitate local ownership over the ICC’s activities, the Registry also manages outreach programs. The Registry defines it outreach program as:

a process of establishing sustainable, two-way communication between the Court and communities affected by the situations that are subject to investigations or proceedings, and to promote understanding and support of the judicial process at various stages as well as the different roles of the organs of the ICC. Outreach aims to clarify misperceptions and misunderstandings and to enable affected communities to follow trials.

The outreach program carries out its activities through various field offices in countries whose situations are before the Court. In Rome, NGOs were the driving force behind incorporating victim-oriented principles into the Statute and victim-oriented activities into its institutional design. The importance of

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800 Schiff, Building the International Criminal Court 87.


803 International Criminal Court, Outreach (The Hague, Netherlands: The Registry, The International Criminal Court, 2009). The Registry carries out various external communications activities in addition to outreach: external relations (constructive dialogue between the Court and States Parties, Non-States Parties, international organizations, non-governmental organizations, etc.); and public information (delivering accurate and timely information).
NGOs in this respect has increased exponentially as the Court has progressed; they are important providers of information and referrals for initial investigations, provide contact with local populations, and advocate on the Court’s behalf. Local civil society has been the key to the ICC’s achievement in outreach thus far as

NGOs can be advocates for the Court in ways that Court officials can’t. NGOs thus bear the organization’s burden for sponsoring and organizing such meetings, and ICC officials can appear as providers of information rather than as advocates.\textsuperscript{804}

The Assembly of States Parties also recognizes the important role of NGOs in the Strategic Plan for Outreach:

they may hold considerable influence and constitute key channels of communication to and from affected communities. Civil society groups with a broad grassroots base may also assist the Court in reaching out to broader networks.\textsuperscript{805}

In its first cases, civil society has been shown to play an important role in expanding the activities of the outreach program and connecting the Court with victims and communities affected by violence. Thus, the agency of civil society with respect to propagating and institutionalizing transitional justice norms extends well beyond its initial role in the Rome negotiation. Civil society’s continuous advocacy for and constructive criticism of the Court facilitates and shapes the acceptance of these norms and the Court’s activities at the local level.

To review, the norm of localization prescribes that transitional justice institutions, including international ones such as the ICC, seek to lend legitimacy to and institutionalize mechanisms to build local capacity and foster local ownership. The complementarity regime of the Rome Statute encourages “legal mimicry” in which national judicial system will not only be supplemented but also upgraded by the Court’s statute and activities. The extent of accommodation and involvement of victims and witnesses and an extensive outreach program hopes to build local ownership over the Court, so that justice is not only done, but \textit{seen} to be done.

\textsuperscript{804} Schiff, \textit{Building the International Criminal Court} 152-53.

Implementation: The Local Politics of International Justice

In many respects, it is far too early in the ICC’s development to determine what long term effects it will have on local capacity building and ownership. While in the previous cases of Rwanda and East Timor this norm primarily faced institutional challenges, the ICC has notably faced a few expected and unexpected sources of contestation over localization, namely the local level resistance in some cases to the Court’s activities and attempts by national officials to upgrade their traditional justice mechanisms and construct hybrid or local mechanisms that could possibly negate the ICC’s jurisdiction. With respect to local ownership, the ICC’s outreach has expanded into all of the situations facing the Court with successes and failures.

There have been some discernable effects of the Court’s ability to enhance, or merely affect, local capacity with respect to the complementarity regime and the obligations of States Parties to the Rome Statute. In Uganda, steps have been taken to reform local traditional justice mechanisms and establish a national process to deal with LRA crimes. In Sudan, the government’s rejection of ICC jurisdiction was followed up with the establishment of a national process to address Darfur crimes. Furthermore, subsequent to the African Union’s opposition to the ICC’s indictments of Bashir, Harun and Kushayb, the African Union High-Level Panel on Darfur (AUPD) has recommended that a hybrid tribunal be set up for Darfur crimes. While these recommendations from the AU do not contest the underlying principles of the localization norm, they do represent a reinterpretation of the Court’s purpose and circumstances under which it should defer to the local jurisdiction. Finally, while the Kenyan government initially accepted the ICC’s jurisdiction over cases emanating from its post-election violence, national debates have intensified as to whether Kenya can and should address these crimes with its own judicial system. These local responses in Uganda, Sudan, and Kenya challenge the admissibility of the identified cases under the ICC’s jurisdiction, reveals reluctance to accept international trials at the expense of local accountability,

806 The ICC’s existence does not necessarily negate the necessity of hybrid tribunals, nor do the principles underlying the Court contradict those of hybrid courts. If anything, hybrid courts may serve to “complement” the ICC in the way it has envisioned localization. However, if hybrid courts are proposed as a means to put on sham trials then the Court would still exercise its jurisdiction.
and provide insights into the capacity building potential of the complementarity regime.\textsuperscript{807} These responses would not have been likely in the absence of the normative structure of transitional justice and the ICC’s intervention, nor is it simply an expression of local politics and pragmatism. National responses to provide a mechanism of accountability that would satisfy the international community, and the ICC, demonstrate the salience of transitional norms, albeit there is contestation over how and where they should be implemented. These responses will now be explained in more detail.

Ugandan authorities, including President Museveni, have put forward an array of responses and modifications to national justice institutions in response to the ICC’s activities in this situation. It was previously mentioned that the Amnesty Act was amended to conform to Uganda’s State Party obligations to the Rome Statute, and LRA leaders were excluded from amnesty as a result. At the local level in Northern Uganda, “Acholi parliamentarians have drafted an addendum to the ICC bill, the implementing law, to attach penalties to their traditional justice mechanism in an effort to fall within the complementarity principle and prevent criminal prosecution of such cases.”\textsuperscript{808} Furthermore, a 2008 annex to the \textit{Agreement on Accountability and Reconciliation} provides for the establishment of a special division of the High Court “to try individuals who are alleged to have committed serious crimes during the conflict.”\textsuperscript{809} It has been seriously questioned whether the situation in Uganda has ever met the Court’s admissibility criteria, irrespective of the self-referral.\textsuperscript{810} The Uganda national judicial system is, in many ways, capable and willing to prosecute the LRA but has been unable to physically apprehend LRA leadership; ICC arrest warrants may prove to be a useful tool in this respect as the LRA continues to be on the move throughout central Africa, including into other territories that are States Parties to the Rome Statute and thus arrests are treaty obligation (if not a practical difficulty).

\textsuperscript{807} It should be noted, however, that none of the states that have self-referred their situation to the ICC have so far enacted complementarity provisions in their national legislation (and only four African states have done so, including Kenya). See, Olivier Kambala wa Kambala, "International Criminal Court in Africa: "Alea Jacta Est"," \textit{African Arguments} July 13, 2010.

\textsuperscript{808} Drumbl, \textit{Atrocity, Punishment and International Law} 145.

\textsuperscript{809} Akhavan, "Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism," 645.

\textsuperscript{810} Branch, "Uganda's Civil War and the Politics of ICC Intervention," 187.
As a non-State Party to the Rome Statute, the Government of Sudan swiftly rejected the jurisdiction of the ICC following the Court’s indictments and arrest warrants for the Darfur situation. Nevertheless, the government did subsequently establish the Darfur Special Court in June, 2005 and then two additional institutions (the Judicial Investigations Committee and a Special Prosecution Committee) to mete out accountability for international crimes committed in Darfur. The “Sudanese Minister of Justice, Ali Mohamed Osman Yassin, publicly asserted that the Sudanese domestic courts would be a ‘substitute to the International Criminal Court’…in an effort to block the admissibility of cases pursuant to Article 12 through a domestic prosecution.” The creation of a national capacity and supposed show of “willingness” to prosecute such crimes challenged the admissibility of the case under the ICC’s jurisdiction. These moves can only be understood in a global context in which the legitimacy of at least perceptions of justice represents no small amount of political currency. The credibility and legitimacy of these national courts has, however, been widely criticized since. In 2005, Amnesty International expressed

the fear that the establishment of the special court may just be a tactic by the Sudanese government to avoid prosecution by the International Criminal Court…On the one hand, the Sudanese government is claiming that it is able to punish the crimes it is accused of condoning for the last two years; on the other hand, it continues to crack down on those who expose or criticise such human rights violations.  

In 2007, Human Rights Watch argued, “the continuing failure of Sudanese court to bring justice for crimes in Darfur makes ICC prosecutions essential.” By 2008, Burke-White notes that “the Darfur Special Court has ‘conducted six trials of less than thirty suspects,’ with charges limited to armed robbery, possession of stolen goods, and illegal possession of a firearm.” While the OTP initially took this admissibility issue seriously, the lack of genuine investigations and prosecutions in these courts and

the restriction of cases to lesser perpetrators and lesser crimes have reaffirmed the necessity of ICC intervention.

The Sudanese government was not without support in its rejection of the ICC’s jurisdiction. The African Union stated in July 2009 that it would halt cooperation with the Court unless the arrest warrant against Bashir was deferred, citing the immunity of a head of state and the Court’s proclivity to interfere in African affairs. The AU’s Peace and Security Council had already set up a High-Level Panel on Darfur, chaired by former South African President, Thabo Mbeki, with the mandate to examine the situation in Darfur and make recommendations for accountability, peace, healing and reconciliation. The AUPD recommended the following with respect to justice and reconciliation:

- a) Measures to expand and strengthen the system of Special Courts…;
- b) The establishment of a Hybrid Court to deal particularly with the most serious crimes, to be constituted by Sudanese and non-Sudanese judges…;
- c) Measures to strengthen all aspects of the criminal justice system…;
- d) Introduction of legislation to remove all immunities of State actors suspected of committing crimes in Darfur;
- e) Establishment of a Truth, Justice, and Reconciliation Commission (TJRC) to promote truth telling and appropriate acts of reconciliation and to grant pardons as considered suitable.

The AUPD report was lauded for being unexpectedly comprehensive, robust, and squarely placing responsibility on the Sudanese government for resolving the conflict in Darfur. Bashir’s government has been the strongest critic of the AUPD report, and initially flatly rejected the idea of a hybrid tribunal. The government has since softened its position on this and indicated that it would accept a hybrid tribunal under certain conditions and if it does not violate the sovereignty of Sudan.

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815 "African Union in Rift with Court."


818 For an in-depth and lively discussion of reactions to the AUPD report, see Alex de Waal's Social Science Research Council blog "Making Sense of Darfur", under the thread of "Reading the Responses to the AUPD Report": http://blogs.ssrc.org/darfur/2009/11/12/reading-the-responses-to-the-aupd-report/


Finally, the case of Kenya presents a combination of national acceptance and politically motivated reticence regarding the ICC’s jurisdiction over cases relating to post-election violence. The lack of accountability since the 2007 violence and Kenya’s acceptance of ICC jurisdiction seemingly presents this as an easy case for ICC jurisdiction and admissibility. But since the OTP’s announcement that it had begun investigations into the violence, Kenyan authorities have been scrambling to pass legislation for a Special Tribunal, which is likely to be a hybrid tribunal of Kenyan and international judges. Some suggest that the proposed tribunal would not necessarily negate the ICC’s jurisdiction, as it would focus on lower-level perpetrators and Ocampo has already announced that his focus is on a few key government officials, already identified as instrumental in organizing the violence. Kenyan officials were initially publicly cooperating with the Court, but powerful forces within Kenyan parliament (including its Foreign Minister) oppose its jurisdiction and continue to seek ways to set up a “local solution.” Kenya was recently successful in gaining the support of the African Union to request a deferral (unsuccessfully) from the United Nations Security Council of the ICC’s activities.

The responses of national governments to the ICC, and subsequent recommendations for local solutions, are significant in that they generally accord to how we would expect norms to diffuse and socialize actors, and the international-local dynamics of this process (as described in Chapter One). Instead of outright rejecting transitional justice norms or adhering to them for self-interested purposes, these actors have accepted but reinterpreted how to implement the accountability and localization norms in this instance to suit their own context. The end result is not that African governments have opted for impunity, but rather hybrid courts, truth commissions, and limited and conditional amnesties that are in


823 For example, the scholarship of Acharya, Risse and Sikkink, Finnemore and Sikkink, and others that address localization, different mechanisms and stages of socialization, and norm diffusion, respectively. See, Acharya, "How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism.", Risse and Sikkink, "The Socialization of International Human Rights Norms into Domestic Practice.", Finnemore and Sikkink, "International Norm Dynamics and Political Change."
accordance with transitional justice norms, albeit in a different institutional form than what is offered by the ICC alone.

In sum, there are a number of observable effects of the ICC’s ability to affect local capacity. Confusion and disagreement over issues of admissibility have created a number of unexpected scenarios that challenge the ICC. In all of these cases, local solutions are being put forward as a means to supplement or negate the Court’s jurisdiction. One the one hand, the upgrading of national judicial systems and proposals for hybrid courts could be viewed as a form of “positive complementarity”, or “legal mimicry”, and thus a desirable effect of complementarity. On the other hand, these developments have raised more questions about how the ICC will address the plurality of accountability mechanisms available at the local level. Despite these varied responses, the developments in these cases underscore that justice is expected but its institutional forms are not pre-determined. The ICC is, thus, just one institutional manifestation of transitional justice and proposals by local actors and authorities to construct justice mechanisms on different principles will continue to reshape political expectations in this area.

The ICC has been commended for its involvement and protection of victims and witnesses. Human Rights Watch, in their 2008 evaluation of the Court, state: “protection and support for witnesses and victims has consistently received high-level attention…. (and) the court can be proud of the protection and support programs that it has developed.” But both advocates and critics of the Court are well aware that frictions between the ICC and victims and witnesses will likely increase as more trials commence and verdicts are determined. The institutional challenges are but one important consequence of implementing the localization norm. One such consequence was the visceral reaction of victims and their representatives when Lubanga’s case was almost thrown out due to violations of due process. Indeed, the interests of the Courts, its States Parties, and the victims in whose name the Court is acting may not always converge. Divergent interests and expectations have come to the fore more clearly with respect to the ICC’s outreach program.

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824 Human Rights Watch (HRW), Courting History: The Landmark International Criminal Court’s First Years (New York: Human Rights Watch, 2008), 150.

Initially the outreach program was quite limited in activities but “NGOs pressed hard for an improvement in the Court’s outreach activities” and by 2006 the outreach program has grown considerably with regards to its financial resources, coordination, and frequency with which it travelled to situation areas.\textsuperscript{826} The 2008 Outreach Report from the ICC shows that the program has increased the number of activities and people reached, identified and engaged new target groups, developed new and refined existing tools.\textsuperscript{827} The outreach program is involved: in Uganda, where 201 activities were carried with over 32,000 people reach; in the DRC where 116 outreach activities have reached nearly 18,000 people; in Chad, in connection with Darfur, reaching over 2,000; and finally in CAR where 93 individuals were engaged with the outreach program.\textsuperscript{828} Outreach tools include radio programs and community meetings, which range in formal to informational meetings, debates, video screenings, and dramatic performances. The program utilizes surveys, evaluation forms and a variety of qualitative and quantitative data collection tools are used to assess its impact and needs.

Criticisms of the ICC’s outreach programs have been strongest with respect to the DRC and CAR, and not coincidentally because the Court’s first trials are of perpetrators involved in these conflicts and it is essential that the Court engage with local communities to ensure an effective trial and build ownership over the outcomes.\textsuperscript{829} In 2007, the ICTJ criticized the outreach program in the DRC for falling short of reaching out effectively to victims; the report finds that

the Court’s presence in the DRC has met with mixed reaction because of its lack of transparency. The ICC also faces criticism for failing to inform victims about how they might participate in the trial and why the Court’s focus has been limited thus far to the Lubanga case and to Ituri province.\textsuperscript{830}

\textsuperscript{826} Schiff, \textit{Building the International Criminal Court} 134.


\textsuperscript{828} International Criminal Court, \textit{Outreach Report 2008}.

\textsuperscript{829} See, \textit{Victims and the ICC: Still Room for Improvement}: Redress, Human Rights Watch (HRW), \textit{Courting History: The Landmark International Criminal Court's First Years}.

The continuous delays in the Lubanga trial and reactions to the recent Katanga and Ngudjolo trials have begun to reveal new frictions with local communities in Ituri. The security of witnesses have been threatened, there is disappointment that Ntaganda has not been arrested (but has instead been rewarded for helping to end the conflict), and frustration over a lack of systematic investigation into the massacres in favour of only apprehending the “big fish.”

In the Central African Republic, Glasius cites the ICC’s meagre outreach as a long-term challenge for the Court to meet local expectations of justice. NGOs were instrumental in referring this situation to the Court and providing the necessary information to carry out investigations and indictments. But the strength and local legitimacy of civil society, particularly religious organizations, in the CAR has not been fully utilized by the Court. What meagre outreach there was prior to 2008 was only modestly accelerated thereafter and no outreach activities were accompanied with the arrest of Bemba. A great deal of outreach effort has been expended in Uganda to counter opposition and misinformation about the Court in Acholi communities. Outreach to victims of the Darfur conflict has been limited by the Court’s lack of access to Sudan, and thus restricting its activities to neighbouring areas in Chad. The lack of interviews and investigations with victims and witnesses in Darfur itself has also been a major source of criticism of the Office of the Prosecutor.

To conclude this analysis of the salience and implementation of the localization norm with respect to the International Criminal Court, there are institutional mechanisms of the Court that signal its intention and ability to build local capacity and local ownership. The complementarity regime is principled on the reality that the capacity and/or will to investigate and prosecute atrocities is absent in many post-conflict environments. This is the mantra of the ICC as a designated “court of last resort.”

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832 Glasius, "Global Justice Meets Local Civil Society: The International Criminal Court's Investigation in the Central African Republic."


834 See, Flint and de Waal, "Case Closed: A Prosecutor without Borders."
Alternatively, this regime also has the possibility of enacting positive complementarity by building local capacity through “legal mimicry” and the obligations of States Parties to the Rome Statute. These are potentially important constitutive and socialization effects of transitional justice norms and institutions, and ones that have been overlooked by traditional realistic critiques that explain state behaviour with respect to accountability as purely pragmatic. To date, the Court’s complementarity regime has been tested and contested as it moves forward with its first cases. In Uganda, Sudan and Kenya, the Court’s jurisdiction has been challenged by preferences for local courts, traditional justice, and amnesty laws. In contrast, building local ownership of the ICC’s activities has been a relative success despite the expected institutional challenges. The Rome Statute and the Victims and Witnesses Unit ensure that individuals victimized by violence can participate in and have access to investigations and trials, and that they are physically, psychologically, and materially supported by the Court in doing so. The Outreach Program, facilitated by the connections and knowledge of international and local civil society, is intended to provide the kind of knowledge and interest in the Court that is necessary to build local ownership.

**RECONCILIATION**

The reconciliation norm reflects expectations about the outcomes of transitional justice practices, and its appropriateness and efficacy is very much interrelated with the previous norms of a hierarchical division of criminality, accountability, and localization. It was previously discussed, in the analytical framework laid out in Chapter One and with the subsequent case studies of Rwanda and East Timor, that reconciliation plays an important discursive role in transitional justice and but can still take on various meanings depending on the institutions and actors defining it. Specifically, both minimalist and maximalist conceptualizations of reconciliation are often employed in transitional justice. With respect to the International Criminal Court, both conceptualizations of this norm are salient, but not equally so, and evidence to this effect is found in its policies, institutional design and discursive justifications for its activities. Issues of contestation arise with respect to whether the ICC can seek mutually compatible outcomes of accountability and conflict resolution; these issues have become more significant for the ICC than any other transitional justice institution thus far and revived the persistent and dichotomizing debate
of peace versus justice. Many of the Court’s first cases are interventions in situations of ongoing conflict and this diverges from the practice of most other contemporary transitional justice institutions seeking accountability in contexts where conflict has ended and there is a discernible transition from conflict to peace.\(^{(835)}\) I will proceed with an analysis of how peace, security, and reconciliation expectations are framed in the Rome Statute and the logic behind the deterrence and reconciliation assumptions of the Court. There have already been some observable effects in the ICC’s first cases from the manner in which the Court has implemented the reconciliation norm, most notably in Uganda, Sudan, and to a lesser extent in Kenya.

### Salience: “A New Model to Control Violence”

One the one hand, reconciliation is often equated with minimalist conceptions of national security and communal co-existence and the International Criminal Court is no exception to this trend. The Rome Statute itself is not as explicit about this kind of reconciliation as the mandates for the ad hoc tribunals were; however, the negotiators in Rome and the Court’s present day proponents espouse bold assumptions about the ICC’s ability to deter future atrocities and contribute to peace and security as reconciliation. As such, the Court’s primary references to peace and security are indicative of a minimalist definition of reconciliation at the state and inter-state levels. On the other hand, it should not be ignored that the Court also seeks to affect, to a lesser extent, a more maximalist kind of reconciliation that is conceptualized as communal harmony and societal healing.

The ICC’s stated peace and security goals reflect the assumption that it can mutually contribute to accountability and conflict resolution. The Rome Statute makes several mentions of peace and security as an expected outcome of the International Criminal Court. Its preamble provides the first mention of deterrence: “recognizing that such grave crimes threaten the peace, security and well-being of the world….Determined to put an end to impunity for the perpetrators of these crimes and thus contribute to the prevention of such crimes.”\(^{(836)}\) As previously discussed, peace and security considerations can prevent

\(^{(835)}\) The one notable exception to this trend is the ICTY, which was established in 1993 while the conflict in Bosnia was still underway. As a result, the ICTY temporal jurisdiction was open ended.

the Chief Prosecutor from pursuing an investigation or prosecution in two ways. First, under Article 16 the Security Council can defer an investigation or prosecution for a renewable twelve months period with a Chapter VII mandate.\footnote{The International Criminal Court, The Rome Statute of the International Criminal Court, Article 16.} Second, under Article 53 the Prosecutor may determine a case is not in the “interests of justice,” “taking into account the gravity of the crime and the interests of victims.”\footnote{The International Criminal Court, The Rome Statute of the International Criminal Court, Article 53(1)(c).} The criteria for Article 53 were not well defined in the Statute and there has since been much debate over its interpretation. One such interpretation is that the Prosecutor, in accordance with the complementarity regime, would defer a case where national authorities are genuinely capable providing accountability by judicial or non-judicial means. Also, the Prosecutor may determine that an investigation or prosecution is not in the “interests of justice” if it threatens and peace, security and reconciliation.\footnote{See, Human Rights Watch (HRW), The Meaning of The "Interests of Justice" In Article 53 of the Rome Statute (New York: Human Rights Watch, June 2005).} Ocampo has referenced these interpretations when he claimed that “if a solution to ending the violence was found, and continuing the investigation did not serve the interests of justice, then the ICC would stop the probe.”\footnote{As quoted in Smith, After Genocide: Bringing the Devil to Justice 219.}

The prominence of peace and reconciliation as an expected outcome of the ICC has become more apparent in the post-Rome period, and reinforces the extent to which the norms of a hierarchical division of criminality, accountability, and localization are interrelated with reconciliation. In the ICC’s first report to the Security Council in 2005, it stated “by punishing individuals who commit these crimes, the Court is intended to contribute to the deterrence of such crimes as well as to international peace and security and respect for international justice.”\footnote{United Nations General Assembly, Report of the International Criminal Court (United Nations A/60/177, August 1, 2005), 2.} This stated intention of the Court is repeated in subsequent reports to the Security Council and in statements by former President of the ICC, Philippe Kirsch.\footnote{See, Philippe Kirsch, Address to the United Nations General Assembly (New York: Presidency, International Criminal Court, November 8, 2005).} The logic of the Court’s deterrence function is related to the ICC’s prosecutorial strategy of focusing on elite perpetrators, principles of accountability as punitive sanctions, and its ability to build local capacity to
prevent crimes in the future. Contrary to those who view elite perpetrators as “spoilers” that should thus be accommodated with political bargains, proponents of the Court assume holding elite perpetrators accountable is essential to deterrence. Here it is necessary to make a distinction between indictments/arrest warrants and trials and between the ICC’s intervention in ongoing conflicts versus post-conflict states. First, the assumption that the ICC can *quell ongoing conflict* relates to the indictment and arrest of elite perpetrators, and thus their removal from the conflict. Even mere indictments can alter the cost-benefit calculus of perpetrators. This was seen in the case of Milosevic in Serbia, initially perhaps with the short-term cost of further instability resulting from his actions in Kosovo, but in the longer run marginalizing him in the domestic Serbian context and facilitating his removal from power. Second, the assumption that the ICC *prevents future crimes* relates to the ability of the ICC to credibly try and to punish elite perpetrators, and thus deter future crimes committed by such leaders. In these veins, Ocampo has argued that “the Statute ensures that the law will guarantee lasting peace, and that impunity for the worst perpetrators is no longer an option…a *new model to control violence* is being tested.” It is also the permanence of the Court that is expected to serve this deterrence function, as the selectivity and inconsistency of international tribunals in the past assured elite perpetrators that their chances of punishment were slim. As Goldstone (former ICTY prosecutor) and Scharf have explained,

> it is impossible to prove that war crimes prosecutions deter future atrocities. Yet evidence presented at the recent tribunals suggests that the failure to prosecute perpetrators such as Pol Pot, Idi Amin, Saddam Hussein, Augusto Pinochet, and Papa Doc Duvalier convinced the Serbs and Hutus that they could commit genocide with impunity. That the ICC has institutionalized the accountability norm primarily with punitive sanctions also speaks to it deterrent function and highlights the important debate over whether amnesties are perceived as a tool of conflict resolution. The US “non-paper” on amnesties presented at the 1997 Prep Com argued

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that amnesties may sometimes be necessary for reconciliation but no agreement was reached on whether amnesties should ever be considered a mechanism for peace. The ICC’s mandate and prosecutorial strategy in its first cases, however, have made clear that amnesties for elite perpetrators is not an option if the Court is to affect peace and security. Finally, recall that the norm of localization in part reflects the need to build local capacity to investigate and prosecute crimes. The enhancement of local capacity by building the rule of law and credible judicial institutions contributes to deterrence by raising the expectation that perpetrators can be held accountable internationally or locally.

While the deterrence function of the Court has been linked with its indictments and prosecutions, its maximalist conceptualization of reconciliation function has been linked to its more restorative justice processes – especially its contact with victims, the reparations scheme, and accommodation of non-judicial mechanisms of accountability. The 2009 OTP Prosecutorial Strategy report states that “the Office’s work must be relevant to the victims, the directly affected communities, and more broadly to all the relevant communities in order to foster reconciliation and deter future crimes.” With respect to reparations, Muttukumaru explains that in the Rome negotiations “it was increasingly recognized that reparations could contribute to a process of reconciliation.” Finally, if the Court proves to be not only permissive but welcoming of complementary traditional and restorative justice processes at the local level, it may contribute to societal reconciliation indirectly by legitimizing such processes. Even the Security Council’s referral of the situation in Darfur to the ICC references these linkages between justice and reconciliation:

(the Security Council) also emphasized the need to promote healing and reconciliation, as well as the creation of institutions, involving all sectors of Sudanese society, such as truth and/or reconciliation commissions, in order to complement judicial processes and thereby reinforce the efforts to restore long-lasting peace. 849


848 Muttukumaru, "Reparations to Victims " 264.

Even the limited salience of this aspect of the reconciliation norm is significant for the normative structure in that it demonstrates a shift in expectations that international courts, and not only local level restorative justice institutions, should also seek such a socially transformative outcome for post-conflict states.

**Implementation: Irreconcilable Differences of Justice and Peace**

On the final night of the Rome negotiations, preceding the vote, the Indian delegation expressed strong reservations about the ICC’s effects on peace and security, particularly if the Court were to be subjected to the political will of the United Nations Security Council:

on the one hand, it is argued that the ICC is being set up to try crimes of the gravest magnitude. On the other, it is argued that the maintenance of international peace and security might require that those who have committed these crimes should be permitted to escape justice, if the Council so decrees. The moment this argument is conceded, the conference accepts the proposition that justice could undermine international peace and security.  

Reflected in the above statement is an ongoing debate of dichotomizing peace versus justice, a debate which has been revived by the ICC’s mandate and first cases and reflects a great deal of contestation over the minimalist conceptualization of the reconciliation norm. Proponents of the Court, including Secretary-General Ban Ki-Moon, have since argued along the lines that “justice is a condition of peace” and “peace and justice are indivisible.” But there are conflicting interpretations of the empirical significance of this debate in the Court’s first cases. Much of the contestation over the reconciliation norm has only yet come to the fore with respect to peace and security issues, although if the Court proves to be exacerbating insecurity this would most definitely affect its ability to affect a deeper level of communal healing and social harmony in communities seeking both justice and peace.

Chief Prosecutor Ocampo has had a notable influence on shaping international expectation about the Court’s contribution to reconciliation, and already made some bold claims about the ICC’s deterrence effects. In a 2009 interview, Ocampo was asked whether “the court is a deterrent to those committing war crimes” and he responded:

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850 As quoted in Schabas, *An Introduction to the International Criminal Court* 66.

the legal advisor of NATO (North Atlantic Treaty Organisation), the most important military organisation, told me that they told their staff to imagine: in 15 years you are retired as a two-star general, on the beach with your family. Suddenly you’re surrounded by policemen who handcuff you and you go to the ICC and the evidence is documentation from NATO. You have to be aware that if you commit crimes, you could be prosecuted. So that’s it. Armies all over the world are adjusting to this.  

In a 2008 article Ocampo also stated:

one of the most interesting achievements of the Rome Statute is that armies of the world are adjusting their regulations to avoid the possibility of committing acts falling under the ICC jurisdiction….Political leaders and negotiators in the context of international conflicts are learning – not without reluctance – to manage international conflicts and to demobilize violent groups, thereby respecting the new framework established by the Rome Statute.  

International legal scholar, Payam Akhavan, has made the case for the ICC’s positive contributions to peace and security in the cases of Côte d’Ivoire, Uganda, and Sudan. In Côte d’Ivoire, Akhavan argues that “the mere threat of an ICC investigation contributed to preventing escalation of an inter-ethnic war by putting an end to state-sponsored incitement to hatred.” For Uganda, the ICC’s intervention altered the cost-benefit calculus of support for the LRA and it responded to the ICC indictments by withdrawing its support and provision of a safe haven for the LRA. In Sudan, Akhavan argues that “following the ICC’s investigation, accountability has become an important factor in Khartoum’s political calculus” and the effects of stigmatization and political isolation have created “pressures and exacerbated internal divisions among perpetrators.”

There is, however, by no means a consensus on the ICC’s peace and security effects in Sudan and Uganda.

But several developments emanating from the Court’s first cases challenge the assumption that targeting elite perpetrators is an effective tool of conflict resolution. Certainly, implementing the reconciliation norm faces the institutional challenges of requiring state cooperation to turn over indicted individual to the Court. This has proven difficult for several cases, regardless of whether the relevant

states are parties to the Rome Statute, as Sudanese leaders and LRA rebels have not been apprehended. But developments in these cases also reveal contestation between the reconciliation norm and that of a hierarchical division of criminality and accountability, and contestation between the international and local level actors regarding the appropriateness of the Court’s activities in contexts of on-going conflicts or political crisis. Indeed, these sources of contestation have emerged signal potential political hazards for the Court.

The first potential hazard is that ICC intervention can exacerbate conflict, revealing inter-normative conflict. The indictment of President Bashir in Sudan provoked a number of unintended consequences at the local level in Sudan and regional level in Africa. Both the Arab League and the African Union criticized the arrest warrant and the AU has pledged not to cooperate with it. While “support from African Union leaders for Bashir is clearly not as solid or and unanimous as portrayed by Khartoum,” the mere fact that a host of other African leaders have challenged the appropriateness of the Court’s decision to issue an arrest warrant for a sitting head of state does not bode well for the expectation that the Court will deter future crimes amongst such leaders.856 One of the justifications for this opposition is shared by members of international civil society and some notable scholars and activists who reference the tangible and devastating implications of the Bashir arrest warrant for civilians in Darfur. Immediately following the arrest warrant, Bashir’s government expelled more than a dozen humanitarian aid organizations, leaving Darfuris without access to food, water, medical supplies and protection, and threatening at least seventy per cent of the humanitarian aid to 4.7 million people.857 Interestingly, the AUPD’s report offers an alternative strategy for using justice to affect peace and reconciliation in Sudan. The AU’s recommendation for a hybrid tribunal, a truth and reconciliation commission, and reparations explicitly argues for the potential for these institutions to contribute to peace


and reconciliation.\footnote{African Union Peace and Security Council, Report of the African Union High-Level Panel on Darfur.} Much of the rationale behind the AUPD’s recommendation is to provide alternatives to the ICC that can better ensure peace, security and reconciliation.

In the Uganda situation, the peace versus justice debate is being played out from the local to the international level. It is widely acknowledged that the Court’s indictments of LRA leaders was met with a notable increase in attacks against Acholis in the North and the LRA has since refused to negotiate an end to the conflict unless the arrest warrants are dropped. Few dispute whether LRA leadership should be held to account, but many question the timing of the ICC’s intervention, indicating contestation over whether the Court can provide for peace and reconciliation in contexts of on-going conflict.\footnote{Timing has also been an important factor in the ICC’s response to the situation in Kenya, where it seeks ‘speedy trials’ so that accountability is meted out prior to the forthcoming 2012 election.} In this manner, the ICC is perceived to be one potential spoiler of peace by impeding negotiations. But Ocampo questions this logic by asserting:

> What peace? …Kony is using the same trick. When he’s weak, he calls for peace. Kony uses the peace process to get money, weapons, food, to strengthen and then to attack again….Kony has to be arrested and we have to mobilise efforts to arrest him because Kony has forcibly displaced more than 200,000 people. Kony is very dangerous.\footnote{Smith, "Interview: Luis Moreno-Ocampo, ICC Prosecutor."}

Arguments have been made, particularly by local leaders and civil society, that the Prosecutor should use his discretionary power to defer the cases in the “interests of justice,” not only in deference to the importance of peace negotiations but to legitimize local justice mechanisms and give them an opportunity to end conflict and hold accountable LRA crimes.\footnote{See, Refugee Law Project, ICC Statement.}

The second potential hazard is that the ICC’s judicial interventions are a substitute for humanitarian and/or military intervention. Judicial intervention is comparable to humanitarian intervention in that they both “expose the conflict between order and justice on a concrete level because state sovereignty (international order) is comprised to protect human rights (individual justice).”\footnote{Judicial intervention is the "application of international law through either national or international courts" as an alternative means to the use of military force to resolve conflict and mete out accountability. See, Andrea Birdsall, The International Politics of Judicial Intervention: Creating a More Just Order (London, UK: Taylor and Francis,}
Certainly President Bashir and his supporters in the African Union have decried the ICC’s actions as an excuse for the Western world to intervene in the affairs of Africa; this source of contestation stems from the perception of that the court is a neo-colonial construct that is also at odds with local norms of justice and conflict resolution. The more likely concern is that the international community will use the ICC as a substitute form of international engagement and a less costly means to end conflict, as in the case of Darfur, as a substitute for the costly efforts of military or humanitarian intervention. Such an assertion has been challenged by studies which suggest that countries supporting the ICC have historically been willing to militarily intervene in conflicts and thus the ICC is expected to be a complement, not substitute, for intervention. But if these states that are historically willing to intervene see the ICC as a means of conflict prevention and deterrence to escalation, as opposed to an institution that is used in post-conflict contexts, then it would be more likely that the Court would be used as a substitute for military intervention. The Court’s approach to Darfur, and the international community’s reticence to intervene by other means, certainly lends credence to this view.

The final potential hazard is that the Court is being instrumentalized by states to achieve political and military objectives, particularly in situations of self-referral. This is, in part, an institutional challenge that has resulted from implementation. The Court’s eagerness to assert its legitimacy by proceeding with cases that have the sanctioning of its States Parties and the institutionalized trigger of self-referral opens the door to its politicization. As was referenced earlier, this kind of political instrumentalization may lead to one-sided justice and the possibility that vengeance by one side will take priority over reconciliation and peace negotiations. This charge has been made in the case of Uganda, where the government is accused of instrumentalizing the Court to prolong the war with the LRA and distract the international community from its own alleged war crimes and crimes against humanity. Given that Uganda is a


situation of ongoing conflict, this “raises the possibility that the ICC was being enlisted on one side of the internal conflict.” As Branch has argued,

it can be plausibly maintained that the Uganda government called in the ICC against the LRA not to help bring the war to an end but to entrench it. In so doing, the government has acquired resources, legitimacy for its militarization, its increase of executive authority, its suppression of democracy, and its destabilizing foreign adventures. While the Ugandan government’s crimes should not be equated with the scope or gravity of LRA crimes, the allegations of forced displacement and massacres that have been previously discussed have not been met with any sustained attention from the International Criminal Court. Even though the self-referral permitted the ICC to address crimes anywhere in the territory of Uganda, the government only cited LRA crimes. Moreover, the ICC was looking for its first case to be a strong case and thus did not want to risk losing the support and cooperation of Museveni by expanding the scope of responsibility for crimes in Northern Uganda to his government. President Kabila’s government in the DRC has also been accused of instrumentalizing the Court. Schiff has suggested that Kabila has used the Court to eliminate his adversaries, including vice presidents and ministers, whose involvement in the ongoing conflict and being subject to the Court’s jurisdiction and indictments would remove them from political competition.

All of the aforementioned potential hazards may damage the ICC’s legitimacy as a judicial institution that can affect both accountability and conflict resolution. This loss of legitimacy is most notable among victim communities, who suffer the consequences of increased hostilities if ICC indictments raise the ire of warlords and state leaders who target them, and African heads of state that have sought to subvert the Court and institutionalize transitional justice norms in a manner that would not exacerbate conflict. In both cases, these audiences for the Court’s legitimacy have not sought blanket amnesties for perpetrators, as would be the case in the absence of the normative structure of transitional justice, but instead have proposed the use of non-judicial mechanisms that have a local legitimacy or proposed the justice wait until conflict has ceased. Moreover, if the escalation or prolongation of conflict

864 Schiff, Building the International Criminal Court 200.
866 Schiff, Building the International Criminal Court 213.
can be attributed to the Court’s activities, it may also lose some legitimacy among supporting states that are not within the realm of its activities (but it lend it material and political currency) and strengthen the claims of the ICC’s critics who see it as a tool of Western colonialism or, at least, ineffectual. The response of the UN Security Council to the Court’s activities will be an important focal point in this regard as its members, a mix of pro- and anti-ICC states, have the power to restrain the Court if its activities threaten international peace and security. The extent to which it will do so will be a key barometer of legitimacy in the future and may force the ICC’s focus away from cases of ongoing conflicts.

In sum, the International Criminal Court instantiates the reconciliation norm with respect to its institutionalized and discursive expectation that it will contribute to peace, security, and reconciliation in many forms. The Court’s logic of deterrence as a minimalist form of reconciliation, which underlies these expectations, reveals the assumption that targeting and punishing elite perpetrators can quell ongoing violence and prevent future leaders from committing atrocities. To date, the ICC’s first cases have reignited the contentious peace versus justice debate among transitional justice scholars and practitioners. On the one hand, the Court has actively sought to affect peace and security by intervening in cases of ongoing conflict and targeting elite perpetrators. On the other hand, the potential political hazards of exacerbating conflict, substituting for humanitarian and military intervention, and instrumentalization, may damage the legitimacy of the Court and its ability to achieve these expected outcomes. These institutional obstacles and contestation raises the prospect that the international normative structure of transitional justice, as it has been institutionalized in the ICC, is at odds with the normative structure of conflict resolution. The implementation of the reconciliation norm with the Court has shown that accountability and conflict resolution are not always mutually reinforcing or compatible. To be sure, this is an issue deserving of further sustained research.

CONCLUSIONS

The International Criminal Court represents the permanent international institutionalization of the criminalization of atrocities. But the Court does not stand as an organization that simply replicates its
tribunal predecessors. The ICC reflects and constitutes the international normative structure of transitional justice that represents an emerging consensus on a wide range of judicial and non-judicial, retributive and restorative, international and local principles and practices. Individual states, leaders and civil society have played a key role in diffusing these transitional justice norms prior to and following their institutionalization in the ICC. The norms identified as part of the international normative structure have proven themselves to be individually salient and highly interrelated at the decision-making stages and in the manner in which they have been implemented. Akin to its tribal predecessors, it was expected that the ICC would develop a prosecutorial strategy that targeted elite perpetrators for trial and punishment as accountability. But in accordance with the normative structure of transitional justice, the Court has also sought a range of non-punitive goals, to affect local capacity and ownership more significantly than past tribunals, and simultaneously pursue both accountability and conflict resolution. The demonstrated salience of emerging transitional justice norms, however, should not obscure the extent to which these norms face institutional challenges and contestation when put into practice by the ICC. The extent to which the Court will be able to resolve issues such as the selectivity of prosecutions, accommodation of non-judicial mechanisms, and most notably its effects on the local dynamics of peace and reconciliation, will not only determine the future viability of the ICC but also the perceived appropriateness of transitional justice norms in this institutionalized form. As such, both normative salience and contestation speak to issues of legitimacy for the ICC, particularly among audiences that are most affected by its activities such as state leaders and victims communities in the developing world. In all these respects, the International Criminal Court should be viewed as an important institutional benchmark for international transitional justice practices.
CHAPTER FIVE

CONCLUSIONS

The policy and scholarly literature on transitional justice is characterized by a plethora of empirically rich analyses of different transitional justice processes and an empirical landscape that has grown geographically and reflects the diversity in institutions. The field almost universally rejects “cookie-cutter” approaches to transitional justice as a response to atrocities; however, it has struggled to move beyond dichotomizing debates of trials versus truth commissions, or justice versus impunity. These dichotomies do not reflect realistic choices in transitional contexts. Nor do these dichotomies sufficiently account for transitional justice as an increasing a norm-driven practice and not predetermined institutional designs. The field would benefit from a more systematic identification of where there has been normative consensus and consistency and a shifting in boundaries of what is considered to be appropriate in practice; the concept of a normative structure has unique benefits for doing so. But the mere identification of these individual norms is not expected to be novel for transitional justice scholars. Thus, the primary contribution of this dissertation is to explain the effects of the international normative structure of transitional justice across diverse cases and over a time period of two decades; this entails a comparative analysis of each norm’s salience, in discourse, institutions, and policies, and identifying and distinguishing between institutional challenges and contestation when implementing these norms. Moreover, this dissertation’s analysis seeks to make theoretical and empirical contributions by building on the concept of normative structures and combining what is the relatively new empirical field of research on transitional justice with the rich theoretical scholarship on the importance of social norms in international relations.

THE INTERNATIONAL NORMATIVE STRUCTURE

This dissertation uses the concept of a normative structure to provide the analytical framework for an empirical analysis of transitional justice practices. By combining various references to it in constructivist scholarship, I define a normative structure as a systemic and systematic collection of norms that constrains and enables the decision makers of transitional justice, and importantly, though
exclusively, constitutes the corresponding institutional designs and outcomes. My definition and empirical application of normative structure is one of the theoretical contributions of this study, as I contend that it is infrequently used but is nevertheless an analytically useful framework with which to describe a field of practice that is determined by interrelated social norms that cross-cut international and local domains. There are, therefore, several notable characteristics of a normative structure. First, it entails a collection of interrelated norms and as such a normative structure exists at a higher level of abstraction than an institution and exhibits a greater degree of aggregation than a norm. Conceptualizing transitional justice as a normative structure is in contrast to arguments that suggest this field is characterized by a single meta-norm of accountability or anti-impunity, which obscures the diversity of institutions and the complex causal effects of a multitude of interrelated norms. Second, structures have constraining and enabling effects on agents. In the context of transitional justice, this is most evident in the decision-making phases of institutional design. The normative structure frames the range of appropriate options. Various influences, such as reports commissioned by international and human rights organization to investigate the violence and make justice recommendations and the past practices of other transitional justice institutions, all serve to reinforce this range of appropriate options. Finally, a normative structure takes seriously the dynamic relationship between the international and local levels, which has typically been a neglected element of structural approaches in international relations theories such as structural realism and systemic approaches to constructivism. This aspect is particularly important to the study of transitional justice, which is a phenomenon that has become increasingly institutionalized at the international level, yet the measure of its success is often determined by local outcomes and perceptions and the extent to which it builds local ownership and capacity.

How Transitional Justice Norms Matter and Work

I use measures of the norms’ salience to demonstrate the effects of the normative structure on the range of institutional designs and content of the transitional justice discourse. This approach draws directly on the constructivist literature on norms and their diffusion and makes a contribution to it with this empirical analysis of how norms have influenced the institutional trajectories of transitional justice across cases and time. Recall that salience goes beyond establishing if certain norms merely exist and
establishes whether and how norms matter, as is evidenced by their role in shaping discourse, institutions and policies in given issue area. It is shown empirically here with an analysis of the decision-making phases of transitional justice and the initial institutional designs. As opposed to the simplistic dichotomies of whether emerging norms are either international or domestic, and diffuse in a linear fashion from one level to another, the arguments in this analysis show that transitional justice norms have emerged and evolved according to a more dynamic and nuanced international-local dynamic. Moreover, whether or not transitional justice norms are salient cannot be explained by decisions that are influenced by principles or pragmatism, but rather a combination of both for international and local actors seek to find a balance between expectations of what is appropriate and what is possible amidst a variety of contextualized political variables.

Following upon establishing the norms’ salience, I address how such norms are implemented, that is to say, how they work and their implications once institutionalized. As an additional theoretical contribution, I contend that it is important to distinguish between implementation challenges that are institutional failures, such as a lack of capacity to implement or politicization of the process, and that which is normative contestation, such as reinterpretations and challenges over how and whether a norm should be implemented in a certain context. While both forms of implementation challenges can affect the credibility and legitimacy of transitional justice institutions and the norms themselves, contestation in particular carries with it the possibility for change and evolution in the norms. Therefore, assessing contestation is important to the study of structures and the diffusion of individual norms. Contestation can occurs in a variety of circumstances, but notably those which prompt conflict between norms and other normative structures and those which challenge the appropriateness of the norm in a given context or time period, such as situations of crisis or a cultural mismatch. The resulting reciprocal interaction of redefining these norms is more aptly revealed with a social structural approach that considers the dynamics of norm diffusion. The empirical evidence for this is partly found in institutional designs, but primarily in the implementation outcomes in post-conflict contexts. It is important to note that contestation does not negate the existence of the normative structure or constitute violation of the individual norms. Indeed, contestation over norms is necessary for political change and an inherent part of
what has been identified as the norm “life cycle.” The existence of the normative structure, in and of itself, represents a political change from previous generations of transitional justice that were an ad hoc collection of competing principles and inconsistent practices. The crux of my argument then is explaining and tracing the institutional trajectories of a collection of transitional justice of norms across the cases and over time, and revealing the dynamic relationship between international expectations for transitional justice practices and contextual variables that have produced the variety of institutional designs in Rwanda, East Timor and the International Criminal Court.

With the above framework, the introductory chapter set out to identify how this normative structure, as emerging in the early 1990s, is a departure from past practices and the various events and institutions that helped define it. I subsequently defined and identified the principles underlying the four norms that constitute this normative structure: a hierarchical division of criminality, accountability, localization, and reconciliation. The analysis in the subsequent chapters provided a comparison of the salience of these norms and their implementation challenges by drawing on empirical evidence from Rwanda, East Timor, and the International Criminal Court. The analysis shows a remarkable consistency with respect to the salience of the norms that is also increasing over time - particularly as it is across cases that are varied in the nature of their violence and subsequent judicial institutions. Therefore, this demonstrates that despite what appears to be ad hoc and pragmatic responses to atrocities and institutional trial and error, transitional justice is a norm-driven practice and this is evidenced in the notions of appropriateness, but are not ignorant of consequences, and that shape its discourse, institutions and policies at both the international and local level. The remainder of the empirical analysis demonstrates how these norms are implemented and the observable effects of their institutional challenges and normative contestation. Here as well, one can see a degree of cross-case consistency in many respects. The greater the consistency across the cases the more likely these source of contestation will create changes in the normative structure of transitional justice.

867 Finnemore and Sikkink, "International Norm Dynamics and Political Change."
The case studies selected for this analysis proved to be fruitful for balancing contextual variables with the broader international structural context in which transitional justice decisions are made. Individually, the case studies each provide rich contextual detail on how the various norms shaped decision-making processes and institutional design and with contentious implications for justice. When combined, they represent a range of transitional justice institutions over a period of twenty years, giving an indication of the extent of both change and consistency across cases. Post-genocide justice in Rwanda was characterized by two nearly ideal-types of justice: an international court characterized by retributive justice processes, the first since Nuremberg, and a local traditional court system that predominantly uses restorative justice processes. The temporal significance of this case study is that these institutions were set up in the early 1990s, precisely when what we recognize as the field of transitional justice was emerging. Thus, the lessons learned from the ICTR and Gacaca are instructive for understanding transitional justice cases that were to follow. East Timor presents us with the first hybrid tribunal, a temporarily popular solution to the perceived failures of the ad hoc courts, and a UN mandated truth commission. The latter is significant to the extent that it represents an international acceptance of the appropriateness of restorative justice in the aftermath of atrocities. Unlike Rwanda, these justice processes were intended to be complementary in terms of their prosecutorial strategy and ascribing to a broad scope of accountability principles. The ICTR and Gacaca in Rwanda are finally nearing completion and, with the notable exception of persistent calls for an international tribunal, justice institutions in East Timor have all reached the end of their mandates. Therefore, this dissertation offers a timely comparative evaluation of their successes and failures. Finally, the case of the International Criminal Court was selected for a somewhat different set of reasons. One way to frame the significance of the ICC is that it represents the ultimate international institutionalization of transitional justice norms. But a direct comparative analysis to the cases of Rwanda and East Timor is methodologically awkward because it is a single international institution that is designed to address a range of atrocities cases, irrespective of their contextual variables. For all these reasons, the ICC presents a challenging but useful case to assess the salience and consistency of transitional justice norms. Now that the ICC has begun investigations and trials, this analysis fills an empirical gap by moving analysis of the Court beyond its emergence phase and is inclusive of how
transitional justice principles are being put into practice and the extent to which institutional challenges and contestation stemming from the ICC’s activities are significant for the normative structure. What follows is a synthesis of what constitutes the individuals norms and a systematic cross-case comparison of their salience and implementation in the case studies.

HIERARCHICAL DIVISION OF CRIMINALITY

A hierarchical division of criminality is perhaps the most basic and obvious norm in the international normative structure of transitional justice; however, the significance of the principles behind it and its functional importance cannot be underestimated. This norm reflects two core assumptions about the empirical realities of atrocities and post-conflict societies. First, mass atrocities are often systematically and systemically organized from the top and sanctioned by elite perpetrators, such those in positions of political, military, religious, and media authority. But those in positions of local authority facilitate the extensive popular participation required to carry out crimes on a mass scale and coerce many ordinary civilians into committing acts of violence against both neighbours and strangers. This hierarchical ordering logic of violence carries over to define the nature of post-conflict societies. In both Rwanda and East Timor, victims and civilian perpetrators must coexist in the same social and communal spaces, irrespective of whether justice has been meted out, and the social distinctions between types of perpetrators are as important as the legal ones. Second, there is a lack of capacity at both the international and local level to hold accountable such a large number of perpetrators with formal judicial and retributive justice institutions alone. Distinguishing between degrees of criminality and assigning a corresponding range of sanctions has therefore become an organizing principle in the institutional design of transitional justice. In this vein, I have made distinctions in this analysis between the horizontal versus vertical scope of criminal responsibility that differentiate prosecutorial strategies between transitional justice norms. The former references the breadth of the perpetration of atrocities at the elite level whereas the latter references the depth of perpetration in society and is inclusive of local authorities and ordinary civilians whose participation is essential for crimes to be committed on a mass scale. The hierarchical
division of criminality norm, therefore, prescribes an institutional division of labour between different
types of justice mechanisms that reflects the legal and social distinctions between perpetrators.

**Salience: The Organizing Logic of Prosecutorial Strategies**

Evidence to support the high degree of salience of the hierarchical division of criminality norm is
found in the decision-making phases and institutional designs for Rwanda, East Timor and the
International Criminal Court. The investigations and reports commissioned by the United Nations and
human rights NGOs serve to demonstrate the influence of this norm in the early phases of transitional
justice decision making. In both Rwanda and East Timor, the Special Rapporteurs and Commissions of
Experts were dispatched to determine the nature and extent of criminal responsibility and make
recommendations for the most appropriate type of justice institution to address such crimes; their reports
identified that elite perpetrators, such as the FAR, MRND, and *Interahamwe* in Rwanda and TNI in East
Timor, were “most responsible” for organizing, facilitating, and inciting mass atrocities. Ultimately, the
reports in both cases recommended that an international tribunal was the most appropriate institution to
hold elite perpetrators accountable. The identification of those “most responsible” not only reflects the
common organization logic in the commission of atrocities but also that international courts should focus
on only this upper tier of criminals. Similarly, the original ILC draft and subsequent negotiations in Rome
for the International Criminal Court revealed the assumption that the ICC’s mandate would focus on those
most responsible for the most serious crimes in violation of international humanitarian law. The
documented prosecutorial strategy of the OTP and Ocampo’s statements reinforces this focus on elite
perpetrators as the expressed purpose of the ICC. Furthermore, that the ICC’s institutional predecessors of
Nuremberg and the ad hocs focused exclusively on the “big fish” cannot be underestimated as an
influence on this norm. That this assumption was never seriously questioned in ICC negotiations
underscores this norm’s salience. Moreover, it is instructive to note that other international and hybrid
courts, such as the ICTY, the Special Court for Sierra Leone, and the Extraordinary Chambers for the
Courts in Cambodia also pursue this prosecutorial strategy.
Why is it that the international community, specifically the United Nations in these contexts, often assumes responsibility for the trial and punishment of elite perpetrators in the form of an international tribunal? First, international fora are assumed to more legitimate, neutral, and to possess a greater professional capacity than national courts. Rwanda’s local capacity in the mid to late 1990s was virtually non-existent and the post-genocide political and military dominance of the RPF ensured that genocidaires and former elite could not be fairly prosecuted in a national court. That post-conflict East Timor was under the trusteeship of the United Nations is a key indicator that its lack of indigenous local capacity, combined with pressure and threats from Indonesia, elevated concerns about the neutrality and capability of national courts in Jakarta or Dili. The ICC’s preconditions for jurisdiction, i.e. national courts must be proven to be incapable or unwilling to investigate or prosecute, demonstrates the assumption that the ICC can promise neutrality and capacity in contexts where local courts cannot. Second, one of the most prominent and pervasive aspects of transitional justice discourse, at both the international and local levels, is the assumption that persistent impunity is likely to cause vengeance and a resurgence of violence. In Rwanda, East Timor and the first cases facing the ICC, those in support of international tribunals for elite perpetrators often cite a history or culture of impunity that was a cause of the violence in the first place. The espoused links between impunity and violence are also often expressed in the institutional mandates of transitional justice as a justification for their existence and as a barometer for effectiveness.

A hierarchical division of criminality is equally relevant to the accountability of non-elite perpetrators and requires that the vertical scope of criminal responsibility also be addressed. The Rwanda and East Timor investigations acknowledged the secondary responsibility and important contextual circumstances of the vast number of middle-ranking (e.g. local militias, community leaders, etc.) and low-level perpetrators (e.g. ordinary civilians) whose crimes in local communities have been a profound obstacle to post-conflict political and social reconstruction. Much of the decision-making regarding institutional responses to middle and low-level perpetrators occurred at the national level in Rwanda and East Timor. For Rwanda, the post-genocide conferences in Kigali were the clearest indication of the salience of this norm at the national level. At these conferences, various Organic Laws were drafted that
established categories of criminal responsibility and determined which courts (national courts and Gacaca courts) would have jurisdiction over such crimes. Similarly, the East Timorese solution was to distinguish between “serious” and “less serious” crimes – the former under the jurisdiction of a hybrid tribunal and the latter under the jurisdiction of a truth commission.

The primary manner in which the hierarchical division of criminality norm is put into practice is with an institutional division of labour: elite perpetrators are prosecuted through international courts and middle to low-level perpetrators through judicial and non-judicial institutions at the local level. The variety of transitional justice institutions in Rwanda, East Timor, and the ICC and its “complementary” national counterparts, have all reflected this institutional organizing logic, but Rwanda was notably the first case which reflected this complementarity. For Rwanda, the prosecutorial strategy of the ICTR has focused on demonstrating the horizontal scope of criminal responsibility for the genocide, ranging from government ministers, military leaders, religious authorities, media personalities, and so on. The Tribunal was given a Chapter VII mandate and primacy of jurisdiction to ensure that it would have the authority to apprehend such elite perpetrators. Indeed one of the ICTR’s few successes has been the prosecution of the “big fish.” To this end, the prosecutorial strategy has consciously attempted to establish that the genocide was an organized, systemic, and systematic attempt to eliminate Tutsis, dispelling any notion that the violence was sporadic and merely a component of a broader civil war. The Gacaca courts in Rwanda have been responsible for the remainder of the perpetrators, numbering as high as one million by some estimates. The Gacaca courts are the most visible measure of justice for local communities where perpetrators and victims continue to co-exist. Governed by the Organic Laws categorizing criminal responsibility, the institutional scope of Gacaca has been a pragmatic solution to dealing with such a high number of perpetrators.

For East Timor, the Ad Hoc Court in Indonesia, a politically negotiated substitute for an international tribunal, was expected to hold accountable senior TNI officials for their crimes. A weak prosecutorial strategy, limited jurisdiction, and political interference meant that very few individuals were held to account and those that were received weak sentences. Despite the failings of the Ad Hoc Court, the threat of an international tribunal has never come to fruition. The Serious Crimes Regime managed to
prosecute a large number of perpetrators, albeit many of them just middle-ranking militia and paramilitary figures. As a hybrid tribunal, the SCR did have the support of the United Nations and included local laws and participants, however, its inability to apprehend those most responsible for serious crimes, mostly protected by and residing in Indonesia, has marred it successes. Alternatively, the CAVR is regarded as a successful truth commission in so far as it convened a significant number of hearings for perpetrators of less serious crimes and its final report clearly outlines both the breadth and depth of criminal responsibility. While this norm was not well implemented, its salience is evident in the decision-making and institutional design stages of transitional justice. Finally, ICC’s first cases reveal the Court’s low-volume and narrow prosecutorial strategy by focusing on elite perpetrators, including a head of state and a number of militia and paramilitary leaders whose crimes are notorious in their national contexts. Thus far, only Uganda has begun to address the remainder of perpetrators, mostly through local transitional justice mechanisms for returning LRA. Countries such as Kenya, Sudan, the DRC, and CAR are still negotiating and drafting legislation for national courts and truth commissions to handle the bulk of their cases.

The institutional division of labour that this hierarchical division of criminality norm prescribes has a high degree of salience, as made clear in the aforementioned empirical evidence. The salience of this norm is also evident across other cases of transitional justice, such as in the Former Yugoslavia, Sierra Leone, and Cambodia, among others, where international courts have restricted their prosecutorial strategies to elite perpetrators, leaving national courts to slowly address the rest. But various implementation challenges have emerged that are consistent across the cases. Therefore, while this norm may have a “taken for granted” status with respect to transitional justice discourse, institutions and policies, its meaning-in-use reveals that local and international expectations may conflict when principles are put into practice.

**Implementation: Selectivity and Impunity Gaps**

One of the most pervasive institutional limitations on this norm is the inherent selectivity of prosecutorial strategies. This challenge stems from prosecutorial strategies that either fail to broaden the scope of criminal responsibility to all sides of the conflict or fail to apprehend and prosecute those most responsible. Interestingly, the international investigations and reports commissioned for atrocities
committed in Rwanda and East Timor stress that crimes were committed by all parties to the conflict. The reports on Rwanda in 1994, and many international civil society reports since then, have charged and provided evidence that the RPF committed war crimes and crimes against humanity, that while not to be equated with the scale or significance of the genocide against Tutsis, were nonetheless violations of international humanitarian law that should be prosecuted by an international tribunal. Both the ICTR and Gacaca courts have, largely for political reasons, not prosecuted RPF crimes and this failing has undermined the legitimacy of these transitional justice institutions in the eyes of the victims of these crimes and the broader international human rights community. In East Timor, the Serious Crimes Regime was criticized for not prosecuting crimes committed by pro-independence leaders and for focusing exclusively on those supported by the TNI. With respect to the ICC, even though the Court has the mandate to address crimes committed by any party committed in the territory of the state under its jurisdiction (either by way of self-deferral or Security Council referral), it has ignored the crimes committed by Museveni’s government in Uganda and crimes committed by local militias in Darfur who opposed the government. In several of these cases, notably Rwanda, Darfur and Uganda, one-sided prosecutions follow from a political preference to focus on the context of a genocide or mass crimes against humanity, at the expense of crimes committed in the broader context of civil war in which genocides always take place. Indeed, the crimes committed by the RPF, Museveni’s government and Darfuri rebels have been minimized or justified by these parties as necessary in times of war. These parties do not present themselves as opponents of justice nor do they advocate for impunity, but instead strategically manipulate the international community’s focus on elite perpetrators toward their adversaries and thereby deflect their own responsibility. While the hierarchical division of criminality norm prescribes that both elite and low level perpetrators be held accountable, albeit in different forms, different interpretations of this norm has arisen over the extent to which the breadth of criminal responsibility among elite perpetrators should be held accountable.

Distinguishing between types of implementation challenges for this norm is complex. One the on hand, this is an institutional failure if there is an intention to pursue perpetrators on both sides of the conflict but capacity and political interference prevent courts from doing. For example, all the
aforementioned courts have faced institutional obstacles in apprehending elite perpetrators, particularly those that are still in positions of power. Moreover, there is little political will in the international community to prosecute those who characterize themselves as representing the victims in conflict. One the other hand, this challenge represents normative contestation if there is disagreement over the contexts in which perpetrators on both sides should be held accountable. For example, both Rwandan and East Timorese political elites cite stability concerns and different understandings of the causes of the violence as reasons for international courts to turn a blind eye to RPF and TNI crimes respectively. Similar claims have been made in the Darfur and Kenya situations before the ICC. A prescient concern is that the institutional failure to ensure balanced prosecutions and contestation over whether this is even appropriate will create the perception of victor’s justice and will damage the legitimacy of these institutions among several audiences.

A second implementation challenge is the contestation between international and local parties as to who constitutes those most responsible and whether the institutional division of labour prescribed by this norm is in the interests of justice. First, international courts are commonly evaluated with respect to the extent to which they get the “big fish,” and prosecutors who have pursued middle-ranking perpetrators have been criticized for doing so. The Serious Crimes Regime and Indonesian Ad Hoc Court for East Timor were both criticized by the international community for not pursuing enough TNI, and Ocampo has been scrutinized for choosing to prosecute Lubanga and Katanga, whose cases are arguably not of “sufficient gravity” for the Court. Second, is has rarely been questioned that there may be some value to international courts including middle and low-ranking perpetrators in their prosecutorial strategy. As was discussed in the chapter on the International Criminal Court, the Court may find that it can build stronger cases against elite perpetrators by first establishing the criminal responsibility of their subordinates and/or offer symbolic value to victims by demonstrating the depth of criminal responsibility. Victim communities may be more invested in the proceedings and outcomes of international courts if a broader range of perpetrators are prosecuted. Conversely, there may also be some benefit to local courts prosecuting elite perpetrators and thereby enhancing the constitutive effects of the hierarchical division of criminality norm in post-conflict states. Doing so would build confidence in the rule of law in post-
conflict peacebuilding, allowing national courts to build evidence for cases for middle and low-ranking perpetrators, and act as a deterrent to future violators of international humanitarian law.

The accumulation of these implementation challenges is significant for the legitimacy of international courts. There is however, increasing international pressure from victim communities and civil society for the ICC to ensure balanced prosecutions; the Chief Prosecutor’s summonses for Kenyan perpetrators and indictments for Sudanese suggest that the OTP is seeking such balance. Moreover, calls for the international community, by scholars and human rights activists, to hold the RPF and TNI accountable have not ceased and while this is unlikely to result in an international tribunal directing its attention their way, the pressure in and of itself is an important direction of change.

ACCOUNTABILITY

The accountability norm frames the range of appropriate punitive and non-punitive sanctions. While punitive sanctions, meted out through formal trial and tribunals, are most often associated with accountability, transitional justice practices also commonly include non-punitive sanctions, such as reparations and limited and conditional amnesties, which are typically meted out through non-judicial and community based institutions. What is significant about this norm is that it now defies a simplistic dichotomy of punishment versus impunity, which was persistent up until the mid-1990s, and has engendered a more complementary relationship among transitional justice institutions that are guided by different principles and processes. Furthermore, that this norm correlates with the hierarchical division of criminality norm, whereby a select few elite perpetrators are tried and punished and non-punitive sanctions are considered for the masses of low-level perpetrators, is what facilitates this change in notions of appropriateness for accountability.

Accountability is often, and mistakenly, conflated with only punishment. The justifications for punishing perpetrators who violate international humanitarian laws are numerous, ranging from the egregious nature of the crimes, a state’s legal obligation to punish, and the aforementioned assumption that a legacy of impunity will cause or be permissive of a resurgence of violence and thus punishment acts as a deterrent. The notion that elite perpetrators must be punished is a defining feature of transitional
justice. The reactions by human rights activists to the pervasive impunity for political and military elites in Latin America and elsewhere in past generations transitional justice practices has been a driving force for change since the early 1990s. It is now assumed that such elite perpetrators can and should be held accountable, however, the debates of past decades regarding the political and security implications of doing so and jurisdictional obstacles have not been fully resolved.

Non-punitive sanctions have become increasingly common for practical and principled reasons. Sanctions such as reparations and limited and conditional amnesties are more commonly associated with restorative justice processes, and promise to better meet the needs of victims and achieve other justice goals, such as truth, reintegration, and reconciliation. Reparations in particular are accorded a high priority by victim communities who believe that the state and individuals should compensate them for the loss of life, property, and livelihood in the aftermath of atrocities. While the principle that reparations are an important component of transitional justice is not contested, devising a reparations scheme and obtaining the funds required for it to be meaningful is a daunting institutional challenge. Limited and conditional amnesties have been much more contentious, particularly when cast as impunity. In contrast to blanket or self-accorded amnesties, those amnesties limited to low-level perpetrators and conditioned upon truth-telling or reparations have become politically palatable to the international community and increasingly accepted by victim communities as a pragmatic and, at times, culturally appropriate form of accountability. The internationalization of restorative justice as an appropriate mechanism for accountability is no small change in the evolution of the normative structure of transitional justice. The pragmatic justifications hinge on the lack of local capacity to try and punish so many perpetrators, a nuanced understanding of the different motivations and circumstances under which ordinary civilians commit atrocities, and the promise of amnesty as a useful political bargaining chip in conflict resolution. When linked to the principles of restorative justice, we find that limited and conditional amnesties, particularly when facilitated by a truth commission or community-based dispute resolution process, can engender a degree of truth-telling and healing that limited trials and swift punishment cannot. Undoubtedly, the perceived success of the South African Truth and Reconciliation Commission did much to legitimate the use of limited and conditional amnesties. The international community’s increasing
acceptance of this practice as an appropriate form of accountability represents a change from past practices, when impunity and amnesty were considered synonymous. As such, a significant claim among this dissertation’s findings is that the parameters of this accountability norm are consistent across the cases and constitutes an important part of the international normative structure of transitional justice.

**Salience: Anti-Impunity and the Scope of Sanctions**

There are many parallels across the cases of Rwanda, East Timor, and the ICC’s first cases which demonstrate the strength and legitimacy of the accountability norm as inclusive of both punitive and non-punitive sanctions. In the decision-making phases for the transitional justice institutions in these cases, the extent and need for punitive sanctions for elite perpetrators was hardly up for debate. The appropriateness of this principle underlying the accountability norm is strengthened by the assumption that a culture and legacy of impunity among elite perpetrators was a causal factor in the violence. This assumption was consistent across the cases. For example, ordinary Rwandans and political elites often cite the decades of impunity for Hutu hardliners and extremists as an explanation for the boldness and scale of the genocide. Similarly, that the internationally community was largely permissive of Indonesia’s occupation of East Timor for decades and ignored the many abuses under this regime, no doubt emboldened the TNI and strengthened calls for a process that would target those specific perpetrators. Finally, the anti-impunity narrative is very prevalent in Ocampo’s statements and the scholarly and policy literature on the ICC - so much so that it has come to be an overarching and unquestioned mantra for the Court. This assumption about the relationship between impunity of elite perpetrators and causes of atrocities coincides with the human rights community’s persistent calls for international tribunals as a mechanism to prevent a resurgence of violence. Therefore, at least with respect to elite perpetrators, any type of amnesty for those who planned and organized atrocities was off the table and was equated with impunity. In principle, this aspect of the accountability norm has remained unchanged over the decades, but in practice transitional justice institutions are only more recently and increasingly holding such elite perpetrators to account through trial and punishment.

In most post-conflict contexts, the volume of middle and low-level perpetrators is considerable and overwhelms national judicial systems characterized by a lack of capacity, expertise, and
independence. Therefore, the decision to use non-punitive sanctions with non-judicial institutions is in part a practical one, as cases can be processed more quickly and penal systems will not be overcrowded. Decision-makers for Rwanda and East Timor’s institutions initially considered South Africa’s model of a truth commission; however, an exact replication of this process was ultimately rejected in both cases. For some, the contexts of the violence were much different than South Africa’s and for others the amnesty process was viewed with scepticism as disguised impunity. In both cases, decision-makers turned to reinventing traditional, and culturally relevant, dispute resolution mechanisms as a means to incorporate restorative justice principles and efficiently address such a high volume of perpetrators and victims (i.e. Gacaca in Rwanda and adat in East Timor, as incorporated into the CAVR). Similarly, in the ICC’s cases in Uganda, Sudan, and Kenya, local and regional decision-makers have also referenced such cultural traditions as a justification for community-based ceremonies of reintegration and reconciliation (i.e. mato oput and gomo tong in Northern Uganda) and to design truth commissions (i.e. AUPD recommendations for Darfur and truth commission recommendations in Kenya). The ICC accepts these processes as appropriate to address the vast majority of cases, but not as a sufficient measure of accountability for elite perpetrators. All these recommendations emphasized the victim-centred benefits of restorative justice, such as truth-telling and reparations, and the communal benefits of locally derived and participatory justice, such as reintegration and reconciliation. Negotiations in Rome for the ICC also showed the extent to which these communal and restorative justice principles are becoming more highly valued beyond the local level, as human rights advocates strongly and successfully pushed for victim-centred principles and process to be incorporated into the Court.

The institutionalization of this norm has demonstrated a considerable degree of variance, although this does not detract from its salience. The principled logic whereby a broader range of punitive and non-punitive sanctions is justified for different types of perpetrators, and to achieve transitional justice goals beyond retribution, is consistent. There are similar retributive justice processes for elite perpetrators among the international courts in these cases; this is not only true for the cases analyzed here but also for the international and hybrids courts that were outside the scope of this analysis. One progressive change, however, is the incorporation of restorative justice principles and processes into
international courts and increasing complementarity with non-judicial institutions, particularly with respect to hybrid courts. The ICC provides the most remarkable evidence of this change with respect to a more expansive norm of accountability. Despite its billing as the pinnacle of international courts and its retributive justice mandate, it has given institutional support to a significant reparations scheme (i.e. the Trust Fund for Victims). This is also a notable institutional component of the ECCC in Cambodia, which has the potential to offer the most extensive reparations scheme and victim involvement of any internationalized court to date. Furthermore, as the ICC’s complementarity regime suggests, it is likely that the Court has shown its willingness to cooperate with truth commissions and traditional justice processes at the local level even though the Rome Statutes did not explicitly define this relationship. Given the overlapping timelines of these institutions it is difficult to firmly make the case that this has been an entirely linear process of institutional learning. Nevertheless, the empirical evidence from Rwanda, East Timor, and the International Criminal Court accords with the broader universe of transitional cases in which a purely retributive and judicial response to atrocities that targets a narrow range of perpetrators is not sufficient for accountability.

At the local level, there are similarities among the non-judicial institutions and non-punitive sanctions used for low-level perpetrators in Rwanda and East Timor. The plea-bargaining system in Gacaca and the Community Reconciliation Agreements and Processes in the CAVR were similar in that their purpose was to encourage confessions, public apologies, and provide for modest and symbolic reparations in return for reduced sentences or release and reintegration. These processes, effectively constituting limited and conditional amnesties, were meant to benefit victims, inter-personal healing between victim and perpetrators, and communal reconciliation. But neither of these institutions conformed to an ideal-type of restorative justice. The Gacaca courts provided a mix of punitive and non-punitive sanctions, becoming increasingly punitive over the years, and became increasingly centralized and controlled by national authorities. The CAVR, significant as the first UN mandated truth commission, was made to be a quasi-judicial institution so that it could benefit from a complementary relationship with the Serious Crimes Regime.
In sum, international courts are increasingly incorporating non-punitive justice principles and sanctions in an effort to achieve transitional justice that goes beyond retribution. The end result is that is the salience of a norm of accountability, while varied in institutional practices, is high with respect to its inclusion of punitive sanctions for elite perpetrators and a range of non-punitive sanctions, often with restorative justice, for the vast majority of non-elite perpetrators and to the expressed benefit of victim communities.

**Implementation: International and Local Interpretations of (In)Justice**

One implication of the inclusive nature of this norm of accountability is that there are various standards by which one can measure the successes and failures of transitional justice institutions. International courts are commonly evaluated by whether the court was able to apprehend and indict those most responsible and the extent to which fair trials result in guilty convictions and severe punishments. In these respects, the ICTR is considered a success as it apprehended and tried many of the genocide’s most notorious perpetrators, representing a broad spectrum of criminal perpetration, and meting out lengthy sentences. The Ad Hoc Court and Serious Crimes Regime for East Timor did not fare as well in this regard. Both were criticized for failing to indict senior TNI officials, as was previously discussed, and subsequently handing out weak sentences or acquittals for middle-rank perpetrators.

The international human rights community was initially critical of the Gacaca courts and sceptical of the CAVR out of concern for fair trial standards and weak sanctions that bordered on impunity. For Gacaca in particular, there was a genuine concern that a mere confession and apology was not sufficient for those who perpetrated a crime as serious as genocide. Furthermore, despite Gacaca’s characterization as indigenous, culturally appropriate, and supported by ordinary Rwandans, limited public consultations and the authoritarian nature of post-genocide Rwandan governance make it difficult to discern whether these courts are considered legitimate by ordinary citizens. Gacaca experienced many institutional obstacles to truth-telling and community participation over the years; however, one of the biggest challenges for accountability in Rwanda has been a lack of reparations. Similar demands for reparations have been made in East Timor, although the CAVR made more effort to incorporate symbolic reparations into the CRA process than Gacaca did with its plea-bargaining system. The CAVR was,
however, widely lauded as a successful truth commission with respect to accountability. Finally, it
remains to be seen whether the local alternatives to the ICC proposed by authorities in Kenya, Sudan and
Uganda will be considered a sufficient measure of accountability. Nevertheless, if the transitional justice
decision-makers for these cases have suggested truth commissions as a means to subvert the Court’s
jurisdiction and not to complement it then this defies the symbiotic relationship between punitive and non-
punitive sanctions that lends this norm of accountability its appropriateness and would signal a source of
contestation to be watched in the future.

A source of normative contestation remains, however, over what constitutes an amnesty and in
what contexts they are necessary and appropriate. In the end, the limited and conditional amnesties that
were incorporated into the CAVR and Gacaca courts were appropriate given the contexts of the violence,
lack of local capacity, and because the restorative justice principles evoked to justify them were culturally
relevant. Interestingly, these limited and conditional amnesties can be juxtaposed to the inappropriate de
facto and blanket amnesties for elite perpetrators, such as those for the RPF in Rwanda and TNI in East
Timor respectively. The ICTR has been reluctant to pursue RPF indictments because doing so would
have undoubtedly compromised its working relationship with the RPF-led government and possibly
exacerbated fragile stability in Rwanda and the surrounding region. Political elites in East Timor, namely
Gusmao and Ramos-Horta, blatantly cite concerns over regional stability as a reason for not pursuing the
TNI through an international tribunal and one can only discern that United Nation’s failure to follow up
on its threat to establish ones hinges on the same concern. But unlike in some of the ICC’s first cases,
conflict in both Rwanda and East Timor has ended and there is a tentative transition to peace. The anti-
politics rhetoric of the Court and from Ocampo clearly indicates that amnesties for elite perpetrators are
not considered justifiable, even as a means to end ongoing conflict. Nevertheless, the Court is struggling
to successfully exercise its jurisdiction in such cases where amnesties have been offered to militia and
paramilitary leaders, (Uganda and Colombia) and where pursuing elite perpetrators could result in
endangering more civilian lives (Darfur and Uganda). Herein lays the most significant source of
contestation for this norm of accountability, clearly showing this inter-normative conflict between
accountability and reconciliation – when political and security contexts demand that those most
responsible for the most serious crimes not be indicted and punished. This is not to say, however, that political elites and transitional justice decision must choose between justice and peace. There are a range of sanctions available for transitional justice that defy these simplistic dichotomies and, as one should recall, conceptualizations of peace and reconciliation are equally varied.

LOCALIZATION

The localization norm primarily relates to institutional design, as it demands that transitional justice institutions involve local participants and incorporate local laws and customs into their processes, and mandates that the court be situated in the physical territory affected by the violence. While these forms of localization accord generally with restorative justice principles that are community-based, there is no straightforward correlation between international and local transitional justice institutions as ideal type retributive and restorative justice processes respectively. Functionally, this norm then correlates to those of a hierarchical division of criminality and accountability as the former considers it appropriate for local institutions to address low-level perpetrators and the latter suggests that one means to do so is with non-punitive sanctions, which are often facilitated by restorative, community-based justice processes. A secondary implication of this norm is that it also reflects new standards by which to judge the effectiveness of these institutions – namely, the extent to which they build local capacity and foster local ownership over the justice process and its outcomes. In this manner, the norm of localization correlates with that of reconciliation, as the prevailing assumption is that local victim communities and perpetrators need to participate and be engaged with the justice process if reconciliation is to be achieved and if strengthening the rule of law will prevent a recurrence of violence. Finally, the significance of localization is that demonstrates the possible constitutive effects of transitional justice norms on states in transition from violence; by building local capacity and ownership through institutional designs, outreach programmes, upgrading national court systems, etc. such states will be socialized by international conceptions of justice and the rule of law with the expectation that it will prevent a recurrence of violence.
The emergence of the localization norm is evident in the changes in institutional design since the mid-1990s and the dynamic relationship between the international and local level. With respect to the former, international courts have increasingly adhered to this norm. This has not been an entirely linear process, as was the case with accountability, but does represent an important juncture in institutional learning regarding the effectiveness of international courts and their impact on the local level. An equally important manifestation of this is a more dynamic and complementary relationship between international and local transitional justice institutions, specifically between judicial and non-judicial institutions. Finally, the localization norm has meant that local institutions are now considered the ideal, and sequentially the first option for transitional justice, whereas international institutions are considered a last resort. Local “grassroots” justice mechanisms are therefore considered appropriate but have been subject to scrutiny in so far as they adhere to international standards. Essentially the localization norm reflects two trends: the internationalization of “grassroots” justice and the localization of “international” justice.

**Salience: International Expectations and Local Realities**

To determine the salience of this norm with the empirical evidence, one would look to the differences in institutional designs of the ICTR, Serious Crimes Regime, and ICC with respect to how they incorporated local participants and processes, the extent to which these institutions have a complementary relationship with their non-judicial counterparts at the local level, and the extent to which they have mechanisms to build local capacity and foster local ownership.

The localization norm has become progressively more salient as the international normative structure of transitional justice has evolved. As was previously referenced, there is considerable variation in the international courts for Rwanda, East Timor, and the ICC but these variations represent the progress of institutional learning. The ICTR was deliberately designed to preclude localization. Situating the Tribunal outside of Rwanda and staffing it with international judges and lawyers were intended to insulate the court from political interference and ensure neutrality. The mandate of the Tribunal gave it primacy of jurisdiction and while the early investigative reports indicated a need for local capacity building in Rwanda, the ICTR was not tasked or expected to facilitate this. After growing consensus that the Tribunal was too isolated from Rwanda, particularly from victim communities, and was viewed with disinterest
among ordinary Rwandans, the Registrar’s office took important steps to increase local ownership over the ICTR’s trials and outcomes. While the subsequent assistance to victims and local outreach programs were modest and mostly unsuccessful, these efforts represent an important change in transitional justice practices, specifically that international court could and should seek to have a local impact.

The significant feature of East Timor’s transitional justice framework of institutions is the decision to use a hybrid court, modeled after those being negotiated for Kosovo and Cambodia, and the benefits of which would be to improve upon some of the localization failures that characterized tribunals like the ICTR. The Special Rapporteurs’ and Commission of Experts’ reports for Timor explicitly referenced the desire to use transitional justice institutions to build local capacity and engage local communities in the process. In accordance with the logic of hybrid courts, it was assumed that locating the Serious Crimes Regime in Dili, using a combination of international and local expertise and laws, and greater accommodation of victims and witnesses would accomplish these goals. The same logic has been applied to the institutional designs of the hybrid courts for Sierra Leone and Cambodia.

Finally, the ICC presents a compelling case for the increasing salience of this norm. One would expect to see resistance to the idea that such an international institution should engage with the local level and put its principles of retributive justice, neutrality, and adherence to fair trial procedure at risk by incorporating local laws and expertise (as was the concern of policy makers when designing the ad hoc tribunals). But with respect to localization, the ICC departs significantly from the models of the ad hoc tribunals, which are its institutional predecessors in many other respects. There is no absolute consensus that the ICC can successfully, or should, engage in local capacity building and the Rome Statute does not explicitly reference this as part of the Court’s mandate. But as the ICC continues to frame its policies and agendas, the notion of “positive complementarity” has been associated with situations whereby the Court and NGOs can contribute to building national judicial capacity in order to preclude its jurisdiction and reinforce the ICC’s status as a court of last resort. Furthermore, the obligations of States Parties to the ICC entails an “upgrading” of national judicial systems that has also come to be included in this notion of positive complementarity, or legal mimicry. Building local ownership of the ICC is another aspect of localization that was not given much consideration in the Rome Statute, but continues to evolve out of the
ICC’s recent policies. As both the ICTR and Serious Crimes Regime modestly attempted to do, the ICC has established a victims and witnesses assistance unit and outreach programs to engage the local level and build ownership. Both types of victim-centred justice were strongly advocated for by NGOs in the Rome Negotiations, and these actors have proven crucial to its implementation now that the Court’s main activities of investigations and trials have begun.

The norm of localization is more obviously salient in national and community-based justice institutions. Despite their local character, these institutions constitute the normative structure of transitional justice as much as international courts do. For many of the same reasons that national decision-makers opted for restorative forms of accountability, so too did they opt for these processes to occur in fora that would require extensive community participation and be physically located where the crimes took place. The Village Urugwiro negotiations in Rwanda in the late 1990s built on earlier proposals and set the stage for retaining traditional Gacaca’s characteristics of a community-based court, specifically one that would be moderated and judged by respected elders, and dependent on the participation of ordinary civilians. Recognizing the extreme lack of capacity in the national judicial system, the institutional scope of Gacaca is quite impressive and by all accounts has been efficient. Similarly, the CAVR’s primary form of accountability, the Community Reconciliation Agreements and Processes, entirely depends on community participation and is also mediated by respected members of the community as judges. In several of the ICC’s first cases, such as Kenya, Sudan, and Uganda, the local alternatives of truth commissions and hybrid courts have been recommended. Some of the reasoning behind this recommendation is to negate the ICC’s jurisdiction over certain types of perpetrators, however, the investigations and reports making such recommendations also reveal a desire to engage victim communities and build national judicial systems with these institutions. The range of communal justice institutions, however, are not entirely indigenous in character and important modifications had to be made for them to meet international standards – particularly given the gravity of the crimes they address are much greater than what their original purpose was for. Nevertheless, the intense international scrutiny and engagement with Gacaca, the UN’s role in constructing the CAVR, and the acknowledged
complementarity between local processes and the ICC all signify that these “grassroots” mechanisms are becoming increasingly internationalized.

**Implementation: Contentious Complementarity and Idealizing the “Local”**

Implementing the localization norm is primarily challenged by institutional limitations. The ICTR did not have the requisite funding or political will to successfully implement programs for victims and witness support and outreach programs. Hostility from the Rwandan government toward any ICTR activities in the country exacerbated this problem. While the Serious Crimes Regime and CAVR in East Timor had more explicit policies of localization, as a hybrid court the Serious Crimes Regime was hampered by a lack of funding and administrative support. The ICC is gradually building up its Victim and Witnesses Unit and outreach program but has been inconsistent throughout its first cases. Much of the attention to these programs has been focused on Uganda where the ICC is facing a great deal of opposition, and less in places such as the DRC and CAR where the Court’s jurisdiction has been accepted as appropriate and necessary. This trend runs the risk of turning the implementation of the localization norm into a practice of self-advocacy on behalf of the Court.

What differentiates these cases, and represents another challenge of poor institutionalization, is the degree of complementarity between international, national, and local, community-based courts. The *Gacaca* courts were in no way complementary to the ICTR and the latter struggled to deal with the administrative obstacles of transferring cases between it and the national level. Indeed, the deliberately different justice processes between *Gacaca* and the ICTR and the Rwandan government’s diplomatically tenuous relationship with the Tribunal ensured that *Gacaca* and the ICTR could not work to each other’s mutual benefit. East Timor’s transitional justice decision-makers deliberately sought complementarity between the Serious Crimes Regime and the CAVR, and achieved some moderate successes in this regard. This was assisted by a clear hierarchical division of criminality that was matched with appropriate sanctions and administrative cooperation that enabled evidence sharing. The Serious Crimes Regime was located in Dili and staffed in part by East Timorese; but that both institutions were overseen and mandated by the United Nation no doubt facilitated this complementarity. And complementarity is a guiding principle and mechanism for the ICC as it determines the jurisdiction of the Court, admissibility
of cases, and the prosecutorial strategy. To date, complementarity has also been one of the most significant institutional challenges to the Court’s legitimacy. Recall that the Rome Statute lacked clarity on how the ICC would and could complement local courts and non-judicial mechanisms. It is evident now that the alternatives of hybrid courts and truth commissions have been recommended at times by some as a means to challenge the Court’s jurisdiction and legitimacy, and not as complementary mechanisms of justice meant to build capacity and local ownership. Therefore, the challenge for the Court, and for the appropriateness of the localization norm, is to recognize when local institutions are credible alternatives to the ICC or whether they are political smoke screens to ensure impunity and block out foreign interference.

One source of contestation to localization norm is that which challenges the interpretation that local solutions are the ideal and international courts as a last resort. One must question whether localization curries a false sense of legitimacy among victim communities and international observers, and facilitates unrealistic expectations about the outcomes of local institutions, such as capacity-building, local ownership, and even reconciliation. In many of the aforementioned cases, critics of community-based justice processes have accused national authorities of distorting the cultural relevance of traditional justice for political purposes and abusing the appeal of “grassroots” justice for the benefit of the international community, and as a means to enforce communal participation and impose social control. For example, the Gacaca courts for genocide are, in many important ways, unlike their traditional namesake. While the courts do take place in local communities at various administrative levels, Gacaca is heavily centralized, monitored, and infiltrated by national authorities, civilians are forced to participate, and victims are often re-traumatized by attending and are fearful of the form of social and political control it represents. Many have accused the RPF government of using Gacaca’s grassroots appeal and supposed cultural relevance to heavy-handedly impose its unity and reconciliation agenda, establish social control over the population, and eliminate political opposition. For East Timor, many questioned the significance of the adat process as appropriate for the nature of the crimes the CAVR was addressing and whether such a truth commission was merely an adjunct to the Serious Crimes Regime, meant to satisfy the consensus for something local. Despite the impressive scale of both Gacaca and CAVR processes and the
volume of perpetrators they have addressed, they have not had a discernible impact on capacity-building and the degree of local ownership has been challenged by the distrust among ordinary civilians regarding the political intentions behind these justice institutions.

The localization norm is progressively salient with respect to the decision-making and institutional design of transitional justice. The various negotiations and reports emanating from the international community show a growing concern for the impact of justice at the local level, and particularly a desire to improve the effectiveness of international courts with regard to capacity building and local ownership. In practice, the institutional obstacles to engaging the local level and ensuring complementarity among varied institutions have been a challenge. But this is not a source of contestation over the principles behind a localization norm. The one source of contestation that does undermine the principle that transitional justice institutions should build local capacity and ownership is when national authorities press for local solutions that are inappropriate for the crimes or serve political ends.

RECONCILIATION

The reconciliation norm is indicative of a discursively defined goal and measure of success for transitional justice institutions. Evidence of the salience of this norm is largely found in institutional mandates, the discourse of political elites who design and justify these institutions, and human rights advocates who monitor and evaluate them. But many legal and political scholars disagree that this is an appropriate standard by which to evaluate transitional justice institutions and the empirical evidence suggests this to be a credible concern. Nevertheless, reconciliation is so commonly cited by decision-makers and advocates of transitional justice that it has come to be a defining feature of the scholarly field and practice.

Conceptualizations of reconciliation range from minimalist ones, such as mere co-existence and stability, to maximalist ones, such as requiring social and community healing and harmony between victims and the perpetrators. Precisely who is to be reconciled is largely determined by the nature of the violence itself, and the context specific political and social demographics of post-conflict societies. Reconciliation has been most commonly associated with restorative justice practices, which outwardly
seek inter-communal and inter-personal reconciliation. International institutions have also cited reconciliation as a goal, however, in these cases it is often unclear who is to be reconciled or by what means an international court can do so.

Critical analysis of reconciliation, in theory and in practice, is frequently put forward by scholars who stress the difficulties of its measurement, conceptual confusion, and politicization. Putting aside issues of measurement, the political mis-conceptualization of reconciliation as nothing more than non-violent coexistence, and thus equating it with political and stability, has presented a significant challenge for transitional justice. Such minimalist conceptualizations allow political elites to claim that a transitional justice institution is successful regardless of the extent to which it has actually provided a measure of inter-personal healing or communal harmony. Alternatively, a maximalist conceptualization of reconciliation, which would require much more of both victims and perpetrators, is an unrealistic goal for transitional justice institutions - particularly for those who believe that reconciliation is personal or spiritual, and thus not the stuff of politics or institutionalized justice. Nevertheless, the expectation that justice can affect reconciliation, defined either as stability or healing, is appealing to the international community and thus its normative value is rarely questioned.

The norm of reconciliation is unlike the others in the international normative structure of transitional justice in several respects. For one, it represents an expected outcome whereas the others represent the appropriate range of processes and institutional design designed to serve this outcome. Many of the justifications espoused for a hierarchical division of criminality, accountability, and accountability are done so in the name of reconciliation and therefore this norm is highly interrelated to the others. Furthermore, this norm demonstrates a high level of salience in transitional justice discourse, institutions, and policies, but its meaning-in-use is the most contested. The empirical evidence suggests that not only is reconciliation an impractical goal for these institutions, but it is an inappropriate goal and thus its functional and normative significance should be re-evaluated. The increasing politicization of this norm to serve international and domestic political agendas at the expense of victims’ rights and institutional legitimacy, and its equation with peace and security has rendered this norm nearly impossible to implement and thus its normative value questionable.
Salience: The Spectrum of Stability to Healing

The salience of the reconciliation norm is most evident in institutional mandates and the discourse of transitional justice, as espoused by political elites, legal practitioners and scholars working in the field, and other decision-makers. When determining the nature and scope of transitional justice institutions for Rwanda and East Timor, international decision-makers explicitly linked justice to reconciliation and did not limit the expected outcome of reconciliation to restorative justice institutions. For Rwanda, while the ICTR was the first international court to explicitly state reconciliation, the prior reports and mandate itself left who was to reconciled and by what means undefined. Various factors, including the Chapter VII mandate, nature of the atrocities, and timely influence of the South Africa TRC, undoubtedly influenced the expectation that justice should foster reconciliation. Decision-makers for East Timor were explicit in acknowledging the various levels of reconciliation and parties to be reconciled. The CAVR was framed most deliberately as an institution that would foster inter-personal and intra-communal reconciliation via restorative justice, just as was the case with Gacaca. Alternatively, the Serious Crimes Regime and Commission for Truth and Friendship were framed in terms of contributing to national and regional levels of reconciliation with Indonesia.

Within these countries the concept of reconciliation has had a hegemonic presence in post-conflict policies related to justice, security and governance. “Unity and reconciliation” has been the defining feature of post-conflict governance in Rwanda, as part of the GOR’s political and social agenda, and the justifications for re-inventing Gacaca were framed by the expectation that restorative justice would facilitate healing and harmony at the communal level. East Timor elites, such as Ramos-Horta and Gusmao, regularly and publicly stated reconciliation as a priority above all else and have ironically justified both the CAVR’s Community Reconciliation Agreements and Processes, loosely based on the adat traditions, and the de facto amnesties of the CTF as a means to reconciliation.

The International Criminal Court has framed its reconciliation goals in various ways and much of the political discourse with respect to this norm has developed since the Rome negotiations as civil society and local victim communities has sought to shape how the Court’s principles and goals are implemented on the ground. One the one hand, statements from the prosecutor’s office and from other
advocates for the Court explicitly demonstrate that the ICC seeks to affect peace and security, as in minimalistic conception of reconciliation that conflates it with stability, in two ways. First, the ICC can quell ongoing conflicts with its judicial interventions of indictments and arrests of elite perpetrators. Second, the permanence of the Court, its trials and convictions, and local capacity building will serve as a deterrent to future violators of international humanitarian law. Furthermore, the institutional design of the Court suggests that it also seeks to affect a more maximalist conception of reconciliation that addresses communal healing and harmony, via its outreach and reparations programs that are principled on restorative justice processes. The ICC may even prove to affect such reconciliation indirectly if it encourages and legitimizes the types of local traditional justice and truth commissions that have been proposed by Kenya, Sudan and Uganda.

What these three cases have in common is they utilize both minimalistic and maximalist conceptions of reconciliation. But this does not necessarily strengthen the salience of this norm. As the various implementation challenges will show, the confusing conceptual spectrum of and inappropriate use of reconciliation as a goal for institutions that cannot realistically achieve it have rendered this norm devoid of any real meaning. Moreover, the deliberate misuse of reconciliation to serve political ends and perceived absence of a causal relationship between justice and reconciliation hurts the legitimacy of institutions that espouse it as a goal for post-conflict societies.

Implementation: The Misuse and Abuse of Reconciliation

With respect to international courts, their physical distance from local communities and justice processes that are often at odds with local conceptions of justice prevents them from affecting the kinds of socially transformative processes of communal healing and harmony that are indicative of a maximalist conceptualization of reconciliation. The ICTR provides the clearest example of this institutional limit on reconciliation, and despite the hybridity of the Serious Crimes Regime in East Timor it did not fare much better. It remains to be seen whether the ICC, with its extensive local outreach programs, can improve upon this. Moreover, it is significant that national and regional decision makers in Africa have recommended truth commissions and national courts as alternatives to the ICC and justified these
alternatives by explicitly citing their potential to contribute to reconciliation. This gives further credence to the notion that reconciliation is simply an unrealistic goal for international courts.

The security implications of justice institutions are indicative of an important source of contestation, emanating from the incompatibility between transitional justice norms in certain contexts. If transitional justice institutions, whether international or local, retributive or restorative, exacerbate insecurity then they could not possibly be expected to affect communal healing and harmony. Stability is at least a precursor to this kind of maximalist conceptualization of reconciliation. The Gacaca courts in Rwanda have created a climate of fear in local communities, incited episodic population displacement, and threats and revenge killings have resulted from witness testimony and trials. These security implications have all combined to reinforce a popular perception that Gacaca is less an institution of justice and path to unity and reconciliation, than a politically motivated strategy to establish repressive social control and deter anyone who may challenge the government. The ICC’s activities have also been linked to exacerbating insecurity, particularly in cases of ongoing conflict. Controversy continues over whether the ICC is to blame for the short term increase in LRA attacks and Bashir’s removal of aid agencies following ICC indictments. While Ocampo dismisses that “peace versus justice” is a real choice and factor in his prosecutorial strategy, the ICC’s judicial interventions have nevertheless been cast within this dichotomy.

These conceptual and measurement issues have allowed political elites to abuse and misuse reconciliation to justify political bargains and human rights violations in the name of reconciliation. Recall that politicization is one of the primacy causes of institutional failure when a norm is implemented. The Government of Rwanda’s human rights violations and semi-authoritarian political structure have been justified in this manner and much of the international community has overlooked these blights in the interests of ensuring stability in the country and region. In East Timor, political elites have justified the CTF, despite it characterization as an institution to grant blanket amnesties for the TNI, as a means to reconciliation with Indonesia and preserving regional stability. The international community clearly shares this concern as the threat of an international tribunal has never materialized. The aforementioned alternatives proposed to the ICC in Kenya, Uganda and Sudan have been justified as a means to
reconciliation, but the Court’s advocates and the human rights community are sceptical of these institutions as disguised impunity. Alternatively, the indictments and trials that are being pursued by the ICC have been subject to criticism as a means by which national elites have instrumentalized the Court to pursue political and military ends, and thus risking more instability and insecurity in these cases. Ultimately, if unmeasurable or unachievable reconciliation is cited as a goal of transitional justice then its normative value is reduced by its inability to be implemented to a sufficient degree. Furthermore, when its discursive use is so heavily politicized and abused, the transitional justice institutions that are justified as a means to reconciliation cannot help but suffer a loss of legitimacy as a result. To be sure, other transitional justice norms of accountability and localization are also ideals in that they cannot be fully realized or meet all expectations. But the reconciliation norm is distinct in that it is the only norm in the normative structure whose value and salience has become eroded because of the increasingly realization that its implementation is unrealistic and politicized.

The norm of reconciliation is a defining one in the normative structure of transitional justice because it frames the expected outcomes of the other procedural norms and its salience is high in both discourse and institutions. But its significance also lies in extent to which it is increasingly incompatible with other transitional justice norms once implemented. Given the implementation challenges revealed with the empirical analysis of Rwanda, East Timor, and the ICC, one possible and desirable direction of change in transitional justice would the identification of a more realistic set of goals for transitional justice institutions and a much more selective use of reconciliation for institutions that can actually affect victim-perpetrator relationships.

FUTURE RESEARCH

There are various possible new directions for this research. One direction would be to further build on the concept of normative structure, both in terms of its theoretical distinctions from individual norms and institutions and with its application to new issues areas. Another possibility would simply be a more systematic (large N) data set and analysis of the universe of cases to substantiate the claims made here on the development of the norms. Such cases would include the Extraordinary Chambers in the
Courts of Cambodia (ECCC), the Special Court for Sierra Leone, and the ICTY, new situations before the ICC, and a larger universe of cases that encompasses mass violations of international humanitarian law. Other directions stem from new empirical trends in transitional justice and from the need to fill in the theoretical and empirical gaps that became evident in my research but were beyond this scope of this dissertation’s analysis. First, my research on the International Criminal Court revealed a new dilemma for transitional justice – namely, its cases of judicial intervention that have raised the ire of some of the Court’s past advocates and threatened its legitimacy at the local level. Another issue in need of further study is the moral economy of justice, specifically because of the persistent calls for socio-economic and redistributive forms of justice have not been sufficiently addressed. Both possible research projects are addressed below in more detail.

The International Criminal Court and Judicial Intervention

The International Criminal Court’s recent activities reveal new and complex areas of conflict, namely political contestation over “judicial intervention,” and raise questions about how the normative structure has legitimized new directions in the global governance of justice. Judicial intervention requires the “application of international law through either national or international courts” as an alternative means to the use of military force to resolve conflict and mete out accountability. It is the use of juridical power to achieve military and political objectives. As such, judicial intervention has refuelled the dichotomizing “peace versus justice” debate among scholars and practitioners. The concept and practice of judicial intervention is particularly salient for the ICC’s first cases in Uganda and Sudan and potential forays into Colombia, Afghanistan, Kenya, and Libya. Thus what renders the ICC’s actions

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870 I do not include the ICC’s cases in the Democratic Republic of Congo (DRC) or Central African Republic (CAR) as cases of judicial intervention. In both these cases the referrals were made by the states themselves, and unlike in Uganda, the ICC continues to have a cooperative relationship with them.
contentious, and frames the primary question for this direction of research, is whether accountability and conflict resolution work at cross-purposes.

Three interrelated empirical trends motivate and underscore the importance of this research project, and frame the questions it seeks to address. First, the ICC’s first cases are primarily for crimes committed in ongoing conflicts. This diverges from the practice of other contemporary transitional justice institutions seeking accountability in contexts where conflict has ended and there is a discernible transition from conflict to peace. The ICC’s indictments and trials, in contrast, precede any transition and have prompted accusations that its activities are hindering conflict resolution and further subjecting civilians to violence. In the broader normative structure of transitional justice, the ICC’s forays into ongoing conflicts may force a significant reinterpretation of the relationship between accountability and reconciliation norms. How have the ICC and its proponents sought to justify judicial intervention as mutually beneficial for both conflict resolution and accountability in these contexts?

Second, African leaders increasingly resist “international justice” and have stated preferences to mete out accountability for atrocities in regional, national or local forums. This has been evident in a renewed push for hybrid courts, the AU’s refusal to cooperate with the ICC’s arrest warrant for President Bashir of Sudan, and Uganda and Kenya’s preference for national and culturally derived accountability mechanisms. This opposition has been exacerbated by divisions among international and local human rights advocates who either view the ICC’s actions as ignorant of the politics of conflict resolution and local expectations of justice, or as a necessary substitute for national inaction.\(^{871}\) Ironically, at the ICC’s inception in Rome in 1998, there was broad support among developing countries, and Africa in particular, for a strong and independent Court. What explains this recent turn against the ICC by communities and actors that were once its biggest supporters?

Finally, in a variety of issue areas that straddle both international law and international security, ranging from the pursuit of Al-Qaeda, to torture at Guantanamo, conflict resolution in the Middle East, and to the criminalization of mass violence, there is an increasing interest and debate over the use of

\(^{871}\) Branch, "Uganda's Civil War and the Politics of ICC Intervention.", Flint and de Waal, "Case Closed: A Prosecutor without Borders."
“lawfare” as an alternative means to achieve military ends. The concept of lawfare explicitly links the ICC’s juridical power to its political goal of conflict resolution via an end to impunity. Given the Ugandan government’s request for ICC action and the Security Councils’ request for ICC investigations in Sudan, is there credence to the idea that judicial intervention is lawfare, and thus a substitute for military intervention? If likened to “judicial warfare,” then the legitimacy of the ICC among sovereignty-conscious states and victim populations will be increasingly eroded. Alternatively, if likened to “judicial welfare,” then the ICC’s legitimacy will be bolstered by perceptions that it is a morally preferable alternative to conflict.

The Moral Economy of Transitional Justice

The notion that atrocities could somehow be compensated for, and that value could be assigned to the loss of human life and livelihood, is beyond comprehension and measure. Yet, the global and local practices of transitional justice routinely do so in a manner that is considered necessary and even just by victims and perpetrators. Throughout my doctoral research I have been struck by how politics is exercised through transitional justice institutions, and specifically how power and wealth are selectively redistributed to those who are collectively identified as victims, and within victim groups as well. The research project that follows from this would build on my doctoral research and would be carried out with an analysis of the justifications and implications of the moral economy that governs these redistributive mechanisms of justice.

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872 A notable conference on the concept of "lawfare" is sponsored by the Frederic K. Cox International Law Center at the School of Law at Case Western Reserve University on September 10, 2010. The conference covers a range of issues, including war crimes tribunals, the Israel-Palestine conflict, the "War on Terror," etc. See also, Charles J. Jr Dunlap, Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts (Cambridge, MA: Carr Center for Human Rights Policy, Harvard University, 2001), American Non Governmental Coalition for the International Criminal Court (AMICC), Lawfare and the International Criminal Court: Questions and Answers (United Nations Association of the United States of America, 2008), Lawfare: The Latest in Asymmetries, (Council on Foreign Relations, March 18, 2003).

873 In an interview with CBC Radio's "As It Happens," Louise Arbour (former Chief Prosecutor of the ICTY/ICTR and current President of the International Crisis Group) insightfully argued that lawfare could just as easily, and less pejoratively, be likened to judicial "welfare." The question put to her about the rise of lawfare was in the context of the Goldstone Report questioning of Israeli war crimes, and the response from critics that this report is part of the international community's waging of lawfare against Israel. See, Carol Off, "As It Happens: Interview with Louise Arbour," 21 April 2010.
This “moral economy” of transitional justice is the relationship between the moral and cultural notions of accountability and the nature and distribution of the “spoils” of justice among victims and perpetrators. These “spoils” can be material gains of compensation for the loss of life or property, or less tangible gains such as positions of political power. In essence, this is a kind of redistributive justice between victims and perpetrators that works in conjunction with the punitive and rehabilitative functions one often associates with tribunals and truth commissions. Starting from this premise, the research project would address three sets of questions. First, through which practices is the moral economy of transitional justice carried out, the symbolic and material forms of compensation, memorials, and so on? Second, for what purpose(s) does this moral economy exist and to whose benefit? Third, while there are undoubtedly individual and collective economic benefits to redistributive justice, what are its political implications for post-conflict societies, particularly for those where communal and socio-economic divisions are reinforcing?

I hypothesize that the moral economy of transitional justice manifests itself in post-conflict societies in two ways: material reparations that are collectively and individually granted to victims of mass violence; and vetting and security sector reform among political and military elites. Backward-looking perspectives on transitional justice suggest that these mechanisms are a means to punish individuals and groups responsible for atrocities and rehabilitate victim-perpetrator relationships. But a forward-looking perspective reveals that these mechanisms can also be used to reconstruct the post-conflict society at the state and communal level by collectivizing guilt and innocence. The political implications are the redistribution of power to the victims and the political institutions that represent them. This kind of redistributive justice can be volatile in post-conflict societies that continue to be divided by identities that are associated with the violence, and where persistent poverty and structural violence highlight inequalities among these divided groups.

An important corollary to this hypothesis is that the victims are frequently considered to also be the victors of a wider war in which the atrocities took place. Additionally, the identity of “victim” can also be easily applied to many of the perpetrators whose perceived collective victimization was an impetus to the violence. A consideration of these complex and dualistic identities then alters what is considered a just measure of accountability into victor’s justice. While victims are indeed entitled to rehabilitation, compensation, and ultimately justice, an analysis of these accountability mechanisms require careful and contextual consideration of the nature of victim/perpetrators identities.

This research project would address several gaps found in the interdisciplinary literature on transitional justice. There has been a great deal of excellent scholarly analysis of reparations that has focused on the justifications for and against them, and grappled with the complexities of compensating for mass violations of human rights. The political implications of reparations have rarely been assessed. There is great need for further study on how these international and nationally sanctioned mechanisms related to the redistribution of power at the local level. Likewise, given that the international institutionalization of transitional justice is expanding and deepening at a rapid pace, it is important to address these research gaps.

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