

**Appeasing the International Conscience or Providing Post-Conflict Justice:  
Expanding the Khmer Rouge Tribunal’s Restorative Role**

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<b>I.</b>	<b>INTRODUCTION</b> .....	1
<b>II.</b>	<b>TYPES OF JUSTICE IN POST-CONFLICT SOCIETIES</b> .....	4
a.	Retributive Justice.....	7
b.	Restorative Justice .....	11
<b>III.</b>	<b>PAST TRIBUNAL EXPERIENCES</b> .....	16
a.	Alternatives to the <i>ad hoc</i> tribunals .....	19
i.	<i>The Rwandan supplement: The use of Gacaca courts in Rwanda</i> .....	21
ii.	<i>The failure of restorative mechanisms in the Yugoslav context</i> .....	23
b.	Current trends to mix restorative and retributive models .....	26
<b>IV.</b>	<b>CONCERNS FOR THE CURRENT KHMER ROUGE TRIBUNAL MODEL</b> .....	27
a.	Limited number of leaders to be tried.....	28
b.	The absence of alternative restorative mechanisms in Cambodia .....	30
c.	Public support for the Khmer Rouge Tribunal .....	32
d.	Involvement of Victims and Witnesses .....	33
i.	<i>Insufficient Participatory Rights for Victims under the EC Law</i> .....	33
ii.	<i>Inadequate institutions for victim and witness protection</i> .....	36
<b>V.</b>	<b>CONCLUSION</b> .....	39

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## ABSTRACT

Three decades after the Cambodian civil war, the leaders of the Khmer Rouge will finally be brought before an internationalized domestic tribunal. While the majority of those most responsible have died off or received immunity for their conduct, the Khmer Rouge Tribunal has the historic possibility of reaffirming the importance of international criminal justice and providing an historical narrative of the crimes committed and victims created.

This commentary evaluates the importance of restoration in transitional justice and the importance victims and witnesses play in post-conflict justice. This article will argue that previous post-conflict remedies required a balance of restorative and retribution in order to effectuate transitional justice. In turn, the incorporation and protection of witnesses and victims was vital to reconciliation.

This article summarizes the importance of victims and witnesses in the context of Cambodia and describes mechanisms the Khmer Rouge Tribunal can use to enhance their participation and protection. By expanding the Khmer Rouge Tribunal's restorative role, it can bring provide post-conflict justice rather than appease international guilt.

## INTRODUCTION

Between April 17, 1975 and January 7, 1979, the Cambodian communist movement, the Khmer People's Revolutionary Party, ruled over Cambodia.<sup>1</sup> Consistent with its policy of agrarian socialism, the Khmer Rouge deported peoples in massive numbers from urban areas into the countryside and was responsible for the deaths of over 1.5 million people, under the direction of Pol Pot, before the Khmer Rouge's military defeat by the Vietnamese.<sup>2</sup>

Thirty years after the Pol Pot regime systematically slaughtered almost one third of Cambodia's population, the majority of those responsible for the atrocities have yet to be tried.<sup>3</sup> In 2004, following immense pressure by non-governmental organizations (NGOs)<sup>4</sup>, scholars, and

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<sup>1</sup> For an account on how the Khmer Rouge rose to power *see* BEN KIERNAN, *HOW POL POT CAME TO POWER: A HISTORY OF COMMUNISM IN KAMPUCHEA, 1930-1975* (1985).

<sup>2</sup> It is also estimated that around 250,000 ethnic and religious minorities were expelled from Cambodia in 1975; *id.* at 107-09, 262-67.

<sup>3</sup> *Id.*

<sup>4</sup> *See Press release, 21 February 2002, Cambodian Human Rights Action Committee available at <http://www.licadho.org/press/files/17FEBRUARY%2021%202002.pdf>* (last visited Mar. 20, 2006); *Press release, 9 December 2002, Cambodian Human Rights Action Committee, available at <http://www.licadho.org/press/files/22DECEMBER%209%202002.pdf>* (last visited Mar. 20, 2006).

the international community, the Royal Government of Cambodia agreed with the United Nations to establish a tribunal to prosecute a select number of leaders responsible for the atrocities during the Khmer Rouge period.<sup>5</sup> The Extraordinary Chambers, or Khmer Rouge Tribunal (KRT), was established as a hybrid court composed of both national and international prosecutors and judges.<sup>6</sup>

While the creation of the KRT is yet another hallmark in the burgeoning history of international criminal law, there are numerous and sincere questions about the KRT's capacity to ensure justice in post-conflict Cambodia. Where countries emerge from such destructive and violent conflicts, such as in Cambodia, past crimes need to be reconciled in order to build for a better future. Victims of human rights abuses possess an undeniable right of reparation.<sup>7</sup> More importantly, transitional justice necessitates the integration of victims and witnesses into the peace-making process.

Although the Cambodian government, along with United Nations, agreed to create the KRT to prosecute senior Khmer Rouge officials, serious concerns have been raised about the reconciliatory role of the court. This paper does not deal with the rights of witnesses and victims

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<sup>5</sup> See generally Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea [hereinafter Cambodia-UN Agreement], available at <http://www.cambodia.gov.kh/krt/english/draft%20agreement.htm> (last visited Mar. 17, 2006)

<sup>6</sup> Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea of 2004, available at <http://www.cambodia.gov.kh/krt/pdfs/Combination%20of%20KR%20Law%20and%20the%20Amended%205%20Oct%202004%20-%20Eng.pdf> [hereinafter EC Law] (last visited Mar. 17, 2006).

<sup>7</sup> *Universal Declaration of Human Rights*, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), at art. 8 (“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”); *International Covenant on Civil and Political Rights*, Mar. 23, 1976, 999 U.N.T.S. 171, at art. 2(3)(a) (“To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy); *International Convention on the Elimination of All Forms of Racial Discrimination*, Jan. 4, 1969, 660 U.N.T.S. 195, at art. 6 (“States Parties shall assure to everyone within their jurisdiction effective protection and remedies”); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, June 26, 1987, U.N. Doc. A/39/51 (1984), at art. 14 (“Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress”); *Convention Respecting the Laws and Customs of War on Land (Hague IV)*, Oct. 18, 1907, at art.3 (“A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation”); *Rome Statute of the International Criminal Court*, July 1, 2002, 2187 U.N.T.S. 3, [hereinafter Rome Statute] at arts. 68, 75.

*per se*. Clearly, the role of victims and witnesses changes in post-conflict settings, and whether the rights owed to victims and witnesses alters from normative settings is not a matter for this paper. Rather, this paper deals less with rights than with theories of transitional justice and whether the KRT, using its existing structures, can achieve transitional justice in Cambodia. To that extent, the participation and protection of victims and witnesses in the KRT is necessary because of the central importance they take in rehabilitation, reconciliation, and restoration.

The first part of this paper will outline the contours of transitional justice by evaluating the importance of both restorative and retributive notions of justice.<sup>8</sup> Because of the breadth and depth of crimes committed during conflict setting, post-conflict societies require a balance between mechanisms which punish criminal offenders and those which contribute to community healing and reconciliation.<sup>9</sup> The failure to provide one over the other creates significant obstacles to transitioning societies in promoting peace and stability. Thus, the first part concludes that both retribution and restoration models need to be incorporated into judicial systems when dealing with past crimes and abuses in post-conflict settings.<sup>10</sup>

The second part of this paper looks at the failures of the *ad hoc* tribunals in Rwanda and Yugoslavia in emphasizing restorative notions of justice.<sup>11</sup> Because of those failures, communities in Rwanda and former Yugoslav countries have been forced to look outside of international criminal tribunals and have created separate institutions that emphasize restoration.<sup>12</sup> The second part concludes that the success, or failure, of restorative mechanisms depends fundamentally on the participation and protection of victims and witnesses.<sup>13</sup> Thus,

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<sup>8</sup> See *infra*, text accompanying notes 20-87.

<sup>9</sup> See *infra*, text accompanying notes 20-31.

<sup>10</sup> See *infra*, text accompanying notes 32-87.

<sup>11</sup> See *infra*, text accompanying notes 88-110.

<sup>12</sup> See *infra*, text accompanying notes 111-136.

<sup>13</sup> See *infra*, text accompanying notes 135-136.

institutions that promote victim and witness participation in combating past atrocities contribute greater to restorative objectives. In part, these lessons have resulted in significant roles for victims within the International Criminal Court and newly formed hybrid tribunals.<sup>14</sup>

The last part of this paper will evaluate the role of the KRT in promoting victim and witness protection and participation. The KRT will only prosecute a limited number of Khmer Rouge leaders.<sup>15</sup> Additionally, there are no alternative restorative mechanisms, as in Rwanda, South Africa, or Sierra Leone.<sup>16</sup> Because public expectations and feeling of injustice is high in Cambodia, it is necessary that the KRT expand its restorative role.<sup>17</sup> The third part will conclude that there are ample provisions within the KRT's law that judges and prosecutors can draw from which would enhance the KRT's reconciliatory role.<sup>18</sup> Only by expanding this role can the KRT contribute to community building in Cambodia.

## **I. TYPES OF JUSTICE IN POST-CONFLICT SOCIETIES**

Following a period of political rule characterized by violence, oppression, and poverty, post conflict countries are often faced with serious economic, social, and political instability.<sup>19</sup> To address the multi-faceted problems confronting post-conflict societies, a number of remedial mechanisms, both domestically and internationally, have been utilized in the pursuit of justice. While not exhaustive, a list of judicial, or quasi-judicial, mechanisms implemented to address

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<sup>14</sup> See *infra*, text accompanying notes 137-148.

<sup>15</sup> See *infra*, text accompanying notes 152-162.

<sup>16</sup> See *infra*, text accompanying notes 163-173.

<sup>17</sup> See *infra*, text accompanying notes 174-177.

<sup>18</sup> See *infra*, text accompanying notes 178-221.

<sup>19</sup> As noted by Bassiouni, "since 1945 there have been some 250 conflicts in almost every region of the world which have caused, at the low end, an estimated 70 million casualties, and at the high end, 170 million." M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 576 (2003).

widespread international crimes include the creation of international tribunals;<sup>20</sup> the establishment of truth and reconciliation commissions;<sup>21</sup> the exercise of jurisdiction by State courts on the basis of territoriality,<sup>22</sup> personality,<sup>23</sup> or universality<sup>24</sup>; and the establishment of

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<sup>20</sup> U.N. S.C. Res. 827, U.N. Doc. S/Res. 827 (1993) (establishing the International Criminal Tribunal for Former Yugoslavia); U.N. S.C. Res. 955, U.N. SCOR, 3453d mtg. (1994) (establishing the International Criminal Tribunal for Rwanda)

<sup>21</sup> A number of truth and reconciliation commissions have emerged in the past couple decades in post-conflict societies in Argentina (Comisión Nacional sobre la Desaparición de Personas); Chile (Comisión Nacional de Verdad y Reconciliación); El Salvador (UComisión de la Verdad); Fiji (Reconciliation and Unity Commission); Guatemala (Comisión para el Esclarecimiento Histórico); Peru (Comisión de la Verdad y Reconciliación); Sierra Leone (Truth and Reconciliation Commission); East Timor (Comissão de Acolhimento, Verdade e Reconciliação em Timor Leste); and the United States (Greensboro Truth and Reconciliation Commission). See United States Institute of Peace, Truth Commissions Digital Collection, available at <http://www.usip.org/library/truth.html> (last visited Mar. 6, 2006)

<sup>22</sup> *Strassheim v. Daily*, 1911, 221 U.S. 280, 285 (1911) (“Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power”)

<sup>23</sup> See *People of Israel v. Eichmann*, Supreme Court of Israel, Judgment of 29 May 1962 in ILR, Vol. 36, p. 306.

<sup>24</sup> Article 23 of the Spanish 1985 Law on Judicial Power provides that Spanish courts have jurisdiction over crimes committed outside of Spain if they constitute crimes which Spain is obligated to prosecute under custom or international treaties, Sentence of the Constitutional Tribunal of Spain in the Guatemala Genocide Case, Second Chamber of the Constitutional Tribunal, Sep. 26, 2005, obtainable at <http://www.derechos.org/nizkor/guatemala/doc/tcgtm1.html>; Decision of the Audiencia Nacional (Sala de lo penal) of 13 December 2000 (genocide in Guatemala), available at <http://www.icrc.org/ihl-nat.nsf> (last visited Feb. 21, 2006).

Article 6 of the German Penal Code, which provides for universal jurisdiction over genocide, crimes against humanity and war crimes even when the crime has been committed abroad and has no link to Germany, Code of Crimes Against International Law, sec. 153f, available at [http://www.bmj.bund.de/frames/eng/service/legislation\\_plans/10000582/index.html](http://www.bmj.bund.de/frames/eng/service/legislation_plans/10000582/index.html) (last visited Jan. 27, 2006).

Prior to legislative restrictions imposed by the Belgian legislature in 2003, the Law of 16 June 1993 permitted Belgian courts to have jurisdiction over grave breaches to the 1949 Geneva Conventions no matter where the offences were committed or by whom. See Loi relative à la repression des violations graves de droit international humanitaire, Art. 3 §§ A-B (1999), published in *Moniteur Belge*, Mar. 23, 1999. Belgium’s new law now requires either the presence of the defendant or that the victim either be Belgian or have resided in Belgium for at least three years when the alleged crimes took place. 5 August 2003 Act on Grave Breaches of International Humanitarian Law, *Moniteur Belge*, 7 Aug. 2003, pp. 40506 et. seq.

The French, under the French Code de Procédure Pénale, requires passive personality in order to exercise extra-territorial jurisdiction. CODE DE PROCEDURE PENALE [C. PR. PEN.] art. 689-1 [Penal Code] (1988) (“Any foreigner who, outside the territory of the Republic, commits a felony, either as perpetrator, or as accomplice, may be prosecuted and tried according to French law, when the victim of this felony is of French nationality.”) translated in THE FRENCH CODE OF CRIMINAL PROCEDURE (Gerald L. Kock & Richard S. Frase trans., rev. ed.) (1988); see also Consideration of Reports Submitted by States Parties Under Article 19 of the Convention (France), Committee Against Torture, at 17-18, U.N. Doc. CAT/C/17/Add.18 (1997). Austria, however, requires extradition to be impossible before exercising universal jurisdiction. See A. Marschik, *European National Approaches to War Crimes*, in THE LAW OF WAR CRIMES, NATIONAL AND INTERNATIONAL APPROACHES 79, 79-81 (T. L. H. MCCORMACK & G. J. SIMPSON ed., 1997).

For more cases and discussion on the application of universal jurisdiction see also Gabriel Bottini, *Universal Jurisdiction After the Creation of the International Criminal Court*, 36 N.Y.U. J. INT’L L. & POL. 503 (2004); Bartram S. Brown, *The Evolving Concept of Universal Jurisdiction*, 35 NEW ENG. L. REV. 383, 321-92 (2001);

hybrid, or internationalized courts.<sup>25</sup> The responses to atrocities can be loosely categorized into mechanisms of retributive and restorative justice.<sup>26</sup>

Given the widespread nature of international crimes and the significant sectarian divides that characterize many post-conflict societies, both the notions of restoration and retribution are critical components to transitional justice.<sup>27</sup> Retributive justice emphasizes the need for punishment and deterrence<sup>28</sup> while restorative justice focuses on reconciliation, rehabilitation and the rebuilding of society.<sup>29</sup>

However the two are not mutually exclusive, nor can be considered as competing alternatives.<sup>30</sup> As the next two sections indicate, both retributive mechanisms are necessary but insufficient to individually result in transitional justice. In many cases, States are left with a stark conflict between “peace” and “justice.” The creation of institutions that solely focus on one or the other fall short in light of the benefits and problems each provide. Thus, the process of

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Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L. J. 183 (2004); Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785 (1988); Naomi Roht-Arriaza, *The Pinochet Precedent and Universal Jurisdiction*, 35 NEW ENG. L. REV. 311 (2001).

<sup>25</sup> See S.C. Res. 1315, P 1, U.N. Doc. S/RES/1315 (Aug. 14, 2000); Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, Aug. 10, 2001, available at [http://www.cambodia.gov.kh/krt/pdfs/KR%20Law%20as%20promulgated%20\(Eng%20trans%206%20Sept%202001\).pdf](http://www.cambodia.gov.kh/krt/pdfs/KR%20Law%20as%20promulgated%20(Eng%20trans%206%20Sept%202001).pdf) (English translation) (last visited Mar. 5, 2006); Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone P 1, U.N.-Sierra Leone, Jan. 16, 2002, available at <http://www.sc-sl.org/scsl-agreement.html> (last visited Mar. 5, 2006); S.C. Res. 1272, U.N. Doc. S/RES/1272 (Oct. 25, 1999) (creating the hybrid court in East Timor); Paul Bremer, III, Administrator, Coalition Provisional Authority, Iraq, Order No. 48, Delegation of Authority Regarding Establishment of an Iraqi Special Tribunal (Dec. 10, 2003), available at [http://www.iraqcoalition.org/regulations/20031210\\_CPAORD\\_48\\_IST\\_and\\_Appendix\\_A.pdf](http://www.iraqcoalition.org/regulations/20031210_CPAORD_48_IST_and_Appendix_A.pdf) (last visited Mar. 5, 2006) (creating the internationalized Special Court in Iraq).

<sup>26</sup> See HOWARD ZEHR, CHANGING LENSES 63-82 (1990).

<sup>27</sup> See generally Jeremy Sarkin & Erin Daly, *Too Many Questions, Too Few Answers: Reconciliation in Transitional Societies*, 35 COLUM. HUMAN RIGHTS L. REV. 661 (2004).

<sup>28</sup> See David A. Crocker, *Democracy and Punishment: Punishment, Reconciliation, and Democratic Deliberation*, 5 BUFF. CRIM. L. R. 509, 536 (2002) (“The deterrent effect of prosecution and punishment is weakened when people believe they can break the law and get away with it.”)

<sup>29</sup> See generally *id.* (outlining the general theories and philosophies relating to retributive justice)

<sup>30</sup> See M. Cherif Bassiouni, *Combating Impunity for International Crimes*, 71 U. COLO. L. REV. 409, 409 (2000) (stating “policies and practices of accommodation in the pursuit of political settlement conflict with legal accountability in the pursuit of retributive and restorative justice”); see also RUTI G. TEITEL, TRANSITIONAL JUSTICE 51-59 (2002); ANDREAS O'SHEA, AMNESTY FOR CRIME IN INTERNATIONAL LAW AND PRACTICE (2002).

reconciliation requires retribution and retribution can not stand without reconciliation. Peaceful and just transition in Cambodia necessitates that the ideals of retribution and restoration are balanced in the prosecution of leaders before the Khmer Rouge Tribunal.<sup>31</sup>

### a. Retributive Justice

The idea of retributive justice (or *lex talionis*) stems from the theoretical view that social equality, or fairness, can only be achieved through punishment.<sup>32</sup> The notion of “punishment” incorporates certain historical practices implemented to address acts that constitute “crimes.”<sup>33</sup> Subsequently, our notions of “retribution” and justice are derived from historical acts intended to restore social equality.<sup>34</sup> From a practical point of view, retribution is important in order to prevent people from escaping punishment (impunity)<sup>35</sup> and also to act as a deterrent for future crimes.<sup>36</sup> By determining individual responsibility and punishing individuals, retributive mechanisms prevent guilt from being assigned to a collective group of people in society.<sup>37</sup> Thus, it can assist in the process of rebuilding society by preventing further social division and alienation.

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<sup>31</sup> For a general understanding of principles of transitional justice, including a more specific explanation of retributive and restorative forms of justice see Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J. 39 (2002).

<sup>32</sup> See Jennifer J. Llewellyn & Robert Howse, *Institutions for Restorative Justice: The South African Truth and Reconciliation Commission*, 49 UNIV. OF TORONTO L.J. 355, 376 (1999).

<sup>33</sup> See generally Frederick Nietzsche, *On the Genealogy of Morals II*, in ON THE GENEALOGY OF MORALS AND ECCE HOMO 8 (W. Kaufman ed., W. Kaufmann & R.J. Hollingdale trans., 1967).

<sup>34</sup> See J. LLEWELLYN & R. HOWSE, RESTORATIVE JUSTICE: A CONCEPTUAL FRAMEWORK 39 (1998).

<sup>35</sup> See generally IGOR PRIMORATZ, JUSTIFYING LEGAL PUNISHMENT (1989).

<sup>36</sup> See BASSIOUNI, INTERNATIONAL CRIMINAL LAW, *supra* note 20, at 696-97 (“Rather, [retribution] can produce utilitarian results and achieve humanistic goals, such as deterrence and rehabilitation”); Crocker, *supra* note 29, at 536.

<sup>37</sup> See Lode Walgrave, *Restoration in Youth Justice*, 31 CRIME & JUST. 543, 558 (2004) (“In retributive justice, this [moral balance of rights and wrongs] is achieved by imposing suffering on the offender that is commensurate to the social harm he caused by his crime”).



In part, retribution is instinctively attractive.<sup>38</sup> Communities expect law-breakers to be punished for their crimes. Similarly, the international community expects that perpetrators of atrocities will face judgment and punishment. Conversely, there is a sense of injustice when persons who perpetrate crimes are not punished.<sup>39</sup> For example, it is thought that injustice occurs when a person receives immunity after committing harm.<sup>40</sup> This is not to say that retribution and revenge are synonymous.<sup>41</sup> Retribution is the unbiased act of punishing criminal conduct, rather than the emotional act of inflicting pain for personalized attacks like insults or

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<sup>38</sup> See *Gregg v. Georgia*, 428 U.S. 153, 237-38 (1976) (“The instinct for retribution is part of the nature of man”). In part, the instinctive attractiveness of retributive justice can be traced back to the integration of religious law into communities. A number of passages, at least in popular Western religions, contain elements of retribution for criminal conduct. For example, the Old Testament describes that God stated, “Whoever sheds the blood of man, by man shall his blood be shed, for God made man in His own image.” *Genesis* 9:6; Similar elements are continued in the New Testament and Islamic Law, both of which prescribe *specific* punishments for criminal conduct. *John 19:11* (King James) (Jesus’ recognition that God has given man the power to punish); *Sura al-Baqarah*, 2:178-179, *Sura al-Ma’ida*, 5:45, *Sura al-Nisa*, 4:92 (outlining *Qu’ranic* prescriptions for penalty and victim rights.) See also TAHIR MAHMOOD ET AL., *CRIMINAL LAW IN ISLAM AND THE MUSLIM WORLD: A COMPARATIVE PERSPECTIVE* (1996); M. Cherif Bassiouni, *Qesas Crimes, in ISLAMIC CRIMINAL JUSTICE SYSTEM* 203 (M. Cherif Bassiouni ed., 1982). A number of scholars have also posited that from a biological perspective retributive emotions are more basic and easy to understand whereas the concept of reconciliation or restoration is much more rationalist. DANIEL VAN NESS & KAREN STRONG, *RESTORING JUSTICE* 27-28 (1997).

<sup>39</sup> See IMMANUEL KANT, *THE CATEGORICAL IMPERATIVE* (1797) (theorizing that the failure to punish is an injustice to society and is the essence of the social contract.)

<sup>40</sup> The South African Truth and Reconciliation Commission, which is highly regarded as a “restorative mechanism” similarly does not completely disregard the need for retribution. In justifying the license of impunity, Archbishop Desmond Tutu, whom chairs the TRC, argues that the granting of amnesty does not forego retributive justice. Rather, the perpetrators punishment is that he must “admit responsibility for the act for which amnesty is being sought” and that the perpetrator must face the “full glare of publicity.” Desmond Tutu, ‘Chairperson’s Foreward’ in Report of the Truth and Reconciliation Commission, *presented to President Nelson Mandela on Oct. 29, 1998* at vol. 1, 8.

<sup>41</sup> This argument has been thoroughly rejected by retributive theorists. See generally ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 366 (1981) (“retribution is done for a wrong, while revenge may be done for an injury or slight and need not be done for a wrong.”) Crocker, *supra* note 29, at 517 (“Retribution provides both a sword to punish wrongdoers and a shield to protect them from more punishment than they deserve. In contrast to punishment, revenge is wild, ‘insatiable,’ and unlimited. After killing his victims, an agent of revenge may mutilate them and incinerate their houses.”); Dan Markel, *The Justice of Amnesty? Towards a Theory of Retributivism in Recovering States*, 49 UNIV. OF TORONTO L.J. 389, 419-20 (1999) (noting the five primary differences between retribution and revenge).

taunts.<sup>42</sup> Unlike revenge, retribution seeks to not simply punish, but punish justly with punitive limitations.<sup>43</sup> Retribution is about “just deserts” and not simply “deserts.”

Traditional national criminal trials, at least in North America and Europe, tend to emphasize the retributive aspect of justice. Criminal trials are mechanisms for punishing the perpetrator for committing a wrong rather than for restoring peace between communities.<sup>44</sup> Similarly, the Nuremberg and Tokyo trials, following the Second World War, were constructed for the explicit purpose of punishing criminal offenders rather than creating reconciliation between the warring powers or their communities.<sup>45</sup>

Given the complex and widespread violence that characterize States in conflict, there are numerous shortcomings that accompany the sole use of retributive mechanisms. First, if the punishment is to be equal to the crime, then no punishment can ever address the gravity of widespread, mass atrocities like genocide, terrorism, or crimes against humanity.<sup>46</sup> For example, would exercising the death penalty on Adolf Hitler, Saddam Hussein, or Slobodan Milosevic really be proportional to their participation in the killing of millions of people? If justice is based on the equity of the punishment, then no punishment can be equitable to the severity of the

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<sup>42</sup> THOMAS HOBBS, *LEVIATHAN* 230-31 (M. Oakeshott ed., 1975) (“From the definition of punishment, I infer, first, that neither private revenges, nor injuries of private men, can properly be styled punishment; because they proceed not from public authority”).

<sup>43</sup> IMMANUEL KANT, *THE PHILOSOPHY OF LAW* 194-204 (W. Hastie trans., 1974) (1887) (punishment is not arbitrary but equitable to the nature of the crime); NOZICK, *supra* note 42, at 366.

<sup>44</sup> See DESMOND TUTU, *NO FUTURE WITHOUT FORGIVENESS* 54 (1999) (“the ‘chief goal’ of ‘retributive justice’ is ‘to be punitive’”).

<sup>45</sup> See *id.* at 19; DAVID LUBAN, *THE LEGACIES OF NUREMBERG IN LEGAL MODERNISM* 335-37 (1994); ARYEH NEIER, *WAR CRIMES: BRUTALITY, GENOCIDE, TERROR, AND THE STRUGGLE FOR JUSTICE* 15-18 (1998).

<sup>46</sup> See Aukerman, *supra* note 32, at 39 (“true retributive justice is almost always unachievable in the wake of radical evil... it is often impossible even in prosecutions to impose a punishment that is proportional to the crime”); MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* 121 (1998) (“[massive human rights atrocities] call for more severe responses than would any ordinary criminal conduct, even the murder of an individual . . . And yet, there is no punishment that could express the proper scale of outrage”).

crimes committed by these persons. Subsequently, justice can never be served when viewed from a purely retributive position.<sup>47</sup>

Second, the sheer numbers of those persons who generally participate in widespread atrocities means that only the top leaders or only the low-level officers, but not all persons responsible, can be prosecuted and punished.<sup>48</sup> Transitional societies lack the institutional capacity to punish all responsible persons.<sup>49</sup> Post-conflict societies often suffer from insufficient judicial resources to confront both ordinary crimes, which rise during transitional periods,<sup>50</sup> as well as the number of acts committing during the conflict.<sup>51</sup> Therefore, a society that only values retribution for transition, can never effectively achieve justice in post-conflict states.<sup>52</sup>

Lastly, retributive mechanisms can potentially create greater rifts between communities. If only members of one ethnic, religious, or national group are prosecuted for committing offenses, the perpetrator will be perceived as the victim and thus justify further actions against the other community. For example, prosecution of all Hutus responsible for the Rwandan

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<sup>47</sup> DONALD SHRIVER, AN ETHIC FOR ENEMIES: FORGIVENESS IN POLITICS 82 (1995) (“Justice falls limp before monster-sized evil”).

<sup>48</sup> See *Prosecutor v. Delalic et al*, Case No. IT-96-21-T, Decision, Feb. 20, 2001, ¶ 602 (Appeals Chamber, ICTY) (“In the present context, indeed in many criminal justice systems, the entity responsible for prosecutions has finite financial and human resources and cannot realistically be expected to prosecute every offender which may fall within the strict terms of its jurisdiction. It must of necessity make decisions as to the nature of the crimes and the offenders to be prosecuted.”); Aukerman, *supra* note 32, at 61-62 (“Such selective, limited prosecutions--the only kind possible in transitional justice--fail to meet the basic requirements of retributive justice.”) Aukerman also notes “Selective prosecution further undermines retributive goals because prosecutors rarely succeed in targeting only the most culpable.”

<sup>49</sup> See Impact of Armed Conflict on Children, Report of the Expert of the Secretary-General, Ms. Graca Machel, U.N. Doc. A/51/306, P116 (1996) (“Following the conflict in Rwanda, for example, only 20 percent of the judiciary survived, and the courts lacked the most basic resources”); Laura A. Dickinson, *Transitional Justice in Afghanistan: The Promise of Mixed Tribunals*, 31 DENV. J. INT’L L. & POL’Y 23, 36-37 (2002) (“In post-conflict situations, the need to develop local capacity in the justice sector is often an urgent problem. Kosovo and East Timor provide extreme examples. In both cases, the conflict virtually eliminated the physical infrastructure of the judiciary; court buildings, prisons, and equipment [\*37] were destroyed”).

<sup>50</sup> See Charles Villa-Vicencio, *Why Perpetrations Should Not Always Be Punished: Where the International Criminal Court and Truth Commissions Meet*, 49 EMORY L.J. 205, 214 (2000) (“The escalation of crime in countries moving away from repressive rule indeed tends to undermine the democratic attempts to resolve past conflicts to which some within opposing political camps may be ready to recommit themselves”).

<sup>51</sup> *Id.*

<sup>52</sup> See Aukerman, *supra* note 32, at 61; Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina*, 100 YALE L.J. 2619, 2620 (1991).

genocide could do more to strengthen differences between the two ethnic groups, rather than reconcile them.<sup>53</sup> Similarly, many Germans viewed the Nuremberg trials as “victors’ justice” for failure to prosecute British officials responsible for atrocities in Germany.<sup>54</sup> Thus, greater prosecution in post-conflict societies can do more to inhibit peaceful transition than to further it.

## **b. Restorative Justice**

Restorative justice is equally important because it emphasizes the reconstruction and rehabilitation of a divided society and it involves perpetrators meeting their victims.<sup>55</sup> Restorative theorists view the criminal justice system as a community-building process.<sup>56</sup> Rather than viewing criminal justice as a conflict between the state and the perpetrator, restorativists view criminal justice as a conflict between the perpetrator, victim and the community.<sup>57</sup> Subsequently, retributive justice emphasizes community building, rehabilitation, restitution, and reintegration rather than punishment.<sup>58</sup>

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<sup>53</sup> See Jose E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT’L L. 365, 466 (1999) (“At present, criminal processes in Arusha and within Rwanda are likely to generate radically different reactions along ethnic lines. For many Hutus, both international and national criminal processes appear skewed against them since the ICTR’s temporal limits mean that its indictments and trials will focus on offenses committed by Hutus and ignore most violence committed by Tutsis, while Rwanda’s present courts are more likely to be unfair to Hutu defendants and less likely to pursue charges against Tutsi offenders”).

<sup>54</sup> LYAL S. SUNGA, *INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW FOR SERIOUS HUMAN RIGHTS VIOLATIONS* 19 (1992)

<sup>55</sup> See generally RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES (Burt Galaway & Joe Hudson eds., 1996); Daniel Van Ness & Pat Nolan, *Legislation for Restorative Justice*, 10 REGENT U.L. REV. 53, 66 (1998) (detailing principles of restorative justice); John Braithwaite, *A Future Where Punishment Is Marginalized: Realistic or Utopian?*, 46 UCLA L. REV. 1727, 1743-44 (1999) (“Restorative justice is a process of bringing together the individuals who have been affected by an offense and having them agree on how to repair the harm caused by the crime”).

<sup>56</sup> See Elizabeth Latif, Note, *Apologetic Justice: Evaluating Apologies Tailored Toward Legal Solutions*, 81 B.U.L. REV. 289, 292-94 (2001)

<sup>57</sup> RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES 2 (Burt Galaway & Joe Hudson eds., 1996)

<sup>58</sup> See Adriaan Lanni, *The Future of Community Justice*, 40 HARV. C.R.-C.L. L. REV. 359, 375 (2005) (“Restorative justice is a reform movement that emphasizes restitution and rehabilitation over punishment and mandates that all those affected by the crime”); John Braithwaite, *A Future Where Punishment Is Marginalized: Realistic or Utopian?*, 46 UCLA L. REV. 1727, 1743 (1999) (“Restorative justice is a process of bringing together the individuals who have been affected by an offense and having them agree on how to repair the harm caused by the crime.”); Ellen A. Waldman, *Healing Hearts or Righting Wrongs?: A Meditation on the Goals of “Restorative Justice”*, 25 HAMLINE J. PUB. L. & POL’Y 355, 359 (2004) (“Rather, restorativists are primarily concerned with meeting victim needs, which they understand to include redress and repair, rather than revenge and retaliation.”)

The argument for restorative justice is greater emphasized in post-conflict societies. Civil conflicts are usually the result of internal domestic ethnic, religious, or national divisions, which erupt into military confrontations, massacres, or even genocide. They can involve thousands to millions of victims and perpetrators. Restorative justice therefore aims to consider the impact justice can have on the future of a society and its social classes.<sup>59</sup>

In order to create convergences in divided societies, retributive mechanisms generally give prominent roles to victims and the community in addition to the defendant.<sup>60</sup> These mechanisms include mediations, conferencing groups, truth and reconciliation commissions,<sup>61</sup> and other programs that integrate victims and perpetrators.<sup>62</sup> The most notable restorative mechanism is the South African Truth and Reconciliation Commission (TRC).<sup>63</sup> The South African TRC was created to determine what happened during South Africa's apartheid period, rather than punish guilty individuals.<sup>64</sup> Thus, the TRC provided victims, witnesses, and the

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<sup>59</sup> TUTU, *supra* note 45, at 54-55.

<sup>60</sup> In its 1998 report, the South African Truth and Reconciliation Commission found that restorative justice "seeks to redefine crime: it shifts the primary focus of crime from the breaking of laws or offences against a faceless state to a perception of crime as violations against human beings ... [and] encourages victims, offenders and the community to be directly involved in resolving conflicts." 1 South Africa's Truth and Reconciliation Commission, Final Report of the Truth and Reconciliation Commission, ch. 5, 82 at 126 (1998)

<sup>61</sup> See generally PRISCILLA HAYNOR, UNSPEAKABLE TRUTHS: THE PLACE FOR TRUTH COMMISSIONS IN A CHANGING WORLD (2000).

<sup>62</sup> See MARK S. UMBREIT, VICTIM MEETS OFFENDER: THE IMPACT OF RESTORATIVE JUSTICE AND MEDIATION 2 (1994)

<sup>63</sup> The Promotion of National Unity and Reconciliation Act, No. 34 of 1995, available at <http://www.doj.gov.za/trc/legal/act9534.htm> [hereinafter Amnesty Act] (last visited Mar. 2, 2006); See also RICHARD WILSON, THE POLITICS OF TRUTH AND RECONCILIATION IN SOUTH AFRICA: LEGITIMIZING THE POST-APARTHEID STATE (2001); JILLIAN EDELSTEIN, TRUTH & LIES: STORIES FROM THE TRUTH AND RECONCILIATION COMMISSION IN SOUTH AFRICA (2002); KADER ASMAL ET AL., RECONCILIATION THROUGH TRUTH: A RECKONING OF APARTHEID'S CRIMINAL GOVERNANCE (1996). Shortly after the TRC was established, the constitutionality of the amnesty provisions were challenged in the Constitution Court and were unanimously upheld. *Azanian People's Organisation (AZAPO) & Others v. The President of the Republic of South Africa & Others*, 17 CC 96 (S. Afr).

<sup>64</sup> Archbishop Desmond Tutu noted that the South African TRC was based on the theory of retributive justice which has historical roots in African culture: "Retributive justice - in which an impersonal state hands down punishment with little consideration for victims and hardly any for the perpetrator - is not the only form of justice. I contend that there is another kind of justice, restorative justice, which was characteristic of traditional African jurisprudence. Here the central concern is not retribution or punishment but, in the spirit of ubuntu, the healing of breaches, the redressing of imbalances, the restoration of broken relationships. This kind of justice seeks to rehabilitate both the victim and the perpetrator, who should be given the opportunity to be reintegrated into the community he or she has injured." TUTU, *supra* note 45, at 54-55.

perpetrator the opportunity to tell their stories in return for amnesty and immunity from criminal prosecution.<sup>65</sup> In part, the TRC was a political compromise.<sup>66</sup> Rather than risking a further racial divide in South Africa, the TRC promoted participation by perpetrators. On the other hand, to prevent perpetrators from receiving complete impunity for their acts, the TRC required that the crimes were politically motivated and the person seeking amnesty told the entire and whole truth.<sup>67</sup>

In transitional societies, employing restorative mechanisms, as evidenced in South Africa, is crucial because there are a large number of victims and perpetrators.<sup>68</sup> In the context of prolonged widespread conflict, it is impossible for all victims and witnesses to be heard and for all offenders to be prosecuted in war and genocide tribunals.<sup>69</sup> It is then very likely that victims and their perpetrators will be living in close proximity and must learn to live with deep-seated animosity and the painful memories of the past. Thus, restorative mechanisms shift the perspective of justice by encouraging truth telling instead of punishment, vengeance, or revenge.<sup>70</sup>

In a number of cases, restorative mechanisms have been utilized to encourage despotic leaders to transfer authority to emerging democratic efforts by granting amnesty from

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<sup>65</sup> See Amnesty Act, *supra* note 63, at art. 20 (listing the conditions for amnesty).

<sup>66</sup> See Alex Boraine, *Truth And Reconciliation in South Africa*, in TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS, 141, 143 (Robert I. Rotberg & Dennis Thompson eds., 2000) (the outcome in South Africa was “a negotiated settlement, a political compromise,” and it was “the only one possible in the conditions of transition in 1994.”); Suzanne Daley, *Official Urges New Amnesty to Erase Scar of Apartheid*, N.Y. TIMES, Feb. 26, 1999, at A10.

<sup>67</sup> See Amnesty Act, *supra* note 63, at art. 20 (listing the conditions for amnesty).

<sup>68</sup> See Villa-Vicencio, *supra* note 51, at 209 (“Nation-building clearly requires the voice of victims and survivors to be heard”).

<sup>69</sup> See *infra*, text accompanying notes 89-93.

<sup>70</sup> See Villa-Vicencio, *supra* note 51, at 215 (“Retributive justice affirms the place of *lex talionis* (“an eye for an eye and a tooth for a tooth”) as an alternative to unbridled revenge”); TUTU, *supra* note 45, at 58 (“the solution arrived at was not perfect but it was the best that could be had in the circumstances - the truth in exchange for the freedom of the perpetrators”).

prosecution.<sup>71</sup> Subsequently, immunity from prosecution is granted in order to avoid the continuation of “massive bloodshed” by bargaining for the removal of dictatorships.<sup>72</sup> In Argentina, President Saul Menem pardoned all officers and leaders responsible for human rights abuses committed by the preceding military juntas in fear of a military coup.<sup>73</sup> The Chilean government, under Augusto Pinochet, passed self-amnesty laws before giving power to the civilian government.<sup>74</sup> Military dictator Idi Amin also conceded power only by receiving amnesty from Uganda.<sup>75</sup> Lastly, Haitian General Raoul Cedras was given amnesty in exchange for passing over political and military authority to Haiti’s new democratic government.<sup>76</sup>

Moreover, amnesty and immunity are granted in order to address emerging geopolitical realities. For example, the Allies granted impunity to Turkish officials from being prosecuted for the killing of Armenians during World War I, in order to create an alliance against the Soviet Union.<sup>77</sup> Similarly, Saddam Hussein was offered amnesty by the United States, prior to the start of the 2003 Iraqi war, in exchange for abdication of power, partially in order to avoid the destruction of thousands of lives and homes.<sup>78</sup>

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<sup>71</sup> In order to negotiate peaceful transition and prevent the possibility of a coup, newly formed governments in Uganda, Argentina, Uruguay, and Chile agreed to grant amnesties to predecessor governments, including grave violations of human rights.

<sup>72</sup> President Bill Clinton, Remarks at White House Press Conference (Sept. 19, 1994), in *The Crisis in Haiti*, U.S. Department of State, Sept. 19, 1994 (justifying the amnesty deal with the Haitian government on the basis that it avoid “massive bloodshed and perhaps an extended period of occupation that could have been troubling to our country and to the world.”)

<sup>73</sup> See generally CARLOS S. NINO, *RADICAL EVIL ON TRIAL* (1996)

<sup>74</sup> On Aug. 8, 2000, Chile’s highest court stripped Pinochet of his immunity and ordered him to stand trial for murder. See Clifford Krauss, *Chile’s Effort to Try Pinochet Is Running Out of Steam*, N.Y. TIMES, June 25, 2001, at A3.

<sup>75</sup> See Bernard Levin, *Darkness and Devils*, THE TIMES, Sept. 8, 1995.

<sup>76</sup> See generally Michael P. Scharf, *Swapping Amnesty for Peace? Was There a Duty to Prosecute International Crimes in Haiti?*, 31 TEX. INT’L L.J. 1 (1996)

<sup>77</sup> Bassiouni, *Combating Impunity*, *supra* note 31, at 414; see Treaty of Peace with Turkey, signed at Lausanne, July 24, 1923, 28 L.N.T.S. 11.

<sup>78</sup> See Remarks of President in Address to the Nation, March 17, 2003 (on file with author); M. Cherif Bassiouni, *Post-war Justice, Justifying War*, CHI. TRIB, Mar. 17, 2003, at p. 1.

From a theoretical standpoint, restorative mechanisms run contrary to obligations every nation has to prosecute or extradite (*aut dedere, aut judicare*) perpetrators of grave human rights violations.<sup>79</sup> There is a general rule in international law prohibiting specific crimes which have acquired the nature of peremptory norms (*jus cogens*) from receiving impunity.<sup>80</sup> *Jus cogens* crimes create legal interests within all states (obligations *erga omnes*)<sup>81</sup> and prevents states from using legislative fiat or political compromises to avoid fulfillment of such obligations.<sup>82</sup> The realizations of obligations are weakened every time a state utilizes immunities and amnesties to shield perpetrators from accountability.<sup>83</sup> While amnesties can deliver the short-term benefit of

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<sup>79</sup> See generally M. CHERIF BASSIOUNI & EDWARD M. WISE, *AUT DEDERE AUT JUDICARE: THE OBLIGATION TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* (1995); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2599 (1991) (“The duty to punish human rights crimes imposed by customary law can readily accommodate the constraints faced by transitional societies.”); Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CALIF. L. REV. 451 (1990) (“Therefore, both policy and legal arguments support the conclusion that while a state may permissibly pass amnesties for some offenses in response to a perceived emergency, no amnesty may preclude investigation and prosecution of those responsible for offenses that violate non-derogable rights -- including freedom from torture, forced disappearances, and extrajudicial executions”).

<sup>80</sup> See *Arrest Warrant of 11 April 2000* (Congo v. Belg.), 2002 I.C.J. 1 (Feb. 14) (there are no exceptions to immunity from criminal inviolability when the alleged crime are crimes against humanity); *Prosecutor v. Furundzija*, Case No. IT-95-17/1, Decision, Dec. 10, 1998, ¶ 155 (Appeals Chamber, ICTY) (holding that states can not use the legislative process to absolve perpetrators of torture through an amnesty law because torture is a peremptory norm of international law.); *Union Progresista de Fiscales de Espana et al. v. Pinochet*, Audiencia Nacional, Nov. 5, 1998 (Spain), at <http://www.derechos.org/nizkor/chile/juicio/audi.html> (amnesty laws can not be enforced against *jus cogens* crime); *General Comment No. 20 on Article 7*, U.N. Human Rights Committee, 44th Sess., U.N. Doc. HRI/GEN/1/Rev.1 (1994) (“The Committee has noted that some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible”).

<sup>81</sup> See *Case Concerning Armed Activities on the Territory of the Congo* (D.R.C. v. Rwanda), 2006 I.C.J. 126 (Feb. 3) at ¶ 60 (*jus cogens* obligations create obligations *erga omnes*.); *Barcelona Traction, Light and Power Co. Ltd.* (Belg. v. Spain), 1970 I.C.J. 3 (Feb. 5) at ¶ 42 (holding that obligations *erga omnes* are binding on all States and opposable against any State).

<sup>82</sup> *Nuremburg International Military Tribunal: Judgment and Sentence*, 41 A.J.I.L. 172, 221 (1947) (“individuals have international duties which transcend the national obligations of obedience imposed by the individual State”).

<sup>83</sup> See Scharf, *International Crimes in Haiti*, *supra* note 77, at 12 (“impunity breeds contempt for the law and encourages future violations.”). As Scharf also notes the United Nations Commission on Human Rights and its Sub-Commission on Prevention of Discrimination and Protection of Minorities as well as fact-finding missions to Chile and El Salvador “impunity is one of the main reasons for the continuation of grave violations of human rights throughout the world...[and] led to an increase in abuses in those countries.” See *id*; United Nations Commission on Human Rights: Report on the Consequences of Impunity, U.N. Doc. E/CN.4/1990/13; United Nations, General



democracy and peace, they create the long-term problem of encouraging dictators by removing the deterrent effect of retribution.<sup>84</sup> The failure to prosecute also prevents victims and witnesses from reconciling their feelings with the past by perpetuating a sense of injustice.<sup>85</sup> Victims may feel that even the emerging political institution has cheated them out of justice and thus continue to harbor emotions and feelings antithetical to the goals of transition.<sup>86</sup> Thus, the feeling of discontent may eventually re-create the type of discord and anger which fueled the initial conflict.<sup>87</sup>

## II. PAST TRIBUNAL EXPERIENCES

In confronting the problems for transitional justice left by prolonged conflict or, widespread violence, the experience of the two *ad hoc* tribunals in Rwanda and Yugoslavia illustrate the need to balance retributive and restorative considerations. The 1994 Rwandan genocide left approximately one million people dead.<sup>88</sup> It is estimated that tens of thousands of

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Assembly, Report of the Economic and Social Council, U.N. Doc. A/38/385 at 146 (1983). Following the amnesty agreement with Turkish officials, Adolf Hitler was recorded for justifying the invasion of Poland partly on the idea that human tragedies in the past have often been neglected by emphatically stating “Who now remembers the Armenians?” See Bassiouni, *Combating Impunity*, *supra* note 31 at 414.

<sup>84</sup> Scharf, *International Crimes in Haiti*, *supra* note 77, at 39 (“Instead...Haitian amnesty is likely to serve as a beacon of hope for those accused of some of history's most shocking atrocities in Bosnia, Iraq, and Cambodia. In other parts of the globe, future dictators will be encouraged by the Haitian amnesty to commit new atrocities with impunity.”)

<sup>85</sup> In the cases cited above, the passage of amnesty laws were met with massive popular protests calling for the overture of such laws. See Roht-Arriaza, *supra* note 79, at 458-62.

<sup>86</sup> The International Criminal Tribunal of Yugoslavia's failure to prosecute a number of key figures to the Yugoslav civil war, including President Slobodan Milosevic, has led much of the affected population in a sense of injustice. See Michael P. Scharf, *The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslavia Tribunal*, 49 DEPAUL L. REV. 925, 977 (2000); see also Paul H. Robinson, *The Virtues of Restorative Processes, the Vices of “Restorative Justice,”* 2003 UTAH L. REV. 375, 380 (2003).

<sup>87</sup> See Neil Vidmar, *Retribution and Revenge*, in HANDBOOK OF JUSTICE RESEARCH IN LAW 43, 47-49, 56 (Joseph Sanders & V. Lee Hamilton eds., 2000) (providing studies which conclude that non-punishment of an offender is likely to promote aggression toward others.)

<sup>88</sup> Report on the Situation of Human Rights in Rwanda submitted by Mr. R. Degni-Segui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of Commission Resolution E/CN.4/S-3/1 of 25 May 1994, U.N. ESCOR, Comm'n on Hum. Rts., 51st Sess., Prov. Agenda Item 12, P 24, U.N. Doc. E/CN.4/1995/7 (1994).

people participated in the genocide.<sup>89</sup> The conflict in the former Yugoslavia left almost 200,000 Muslims dead<sup>90</sup> and created approximately 2 million refugees.<sup>91</sup> It is also estimated that hundreds of thousands of civilians and soldiers were responsible for Milosevic's campaign of ethnic cleansing in Yugoslavia.<sup>92</sup>

Following the conflicts in Rwanda and the former Yugoslavia, the United Nations (UN), under the Security Council's Article VII powers to "maintain or restore international peace and security",<sup>93</sup> created two international tribunals to prosecute persons most responsible in the Rwandan and Yugoslav conflicts.<sup>94</sup> In establishing two special tribunals, the Security Council was "convinced that ... the prosecution of persons responsible for such acts and violations ... would contribute to the process of national reconciliation and to the restoration and maintenance of peace."<sup>95</sup> The two *ad hoc* tribunals, the International Criminal Tribunal of former Yugoslavia and the International Criminal Tribunal of Rwanda, were ostensibly modeled after the Nuremburg and Tokyo military courts created following World War II.<sup>96</sup>

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<sup>89</sup> The number of people who participated in Rwanda's genocide is debatable. Some studies have even held that approximately 200,000 people were directly or indirectly involved in the genocide in some way. See Scott Straus, *How many perpetrators were there in the Rwandan genocide? An estimate*, 6 J. OF GENOCIDE RESEARCH 85 (2004).

<sup>90</sup> Report of the Secretary-General pursuant to General Assembly Resolution 53/35, The fall of Srebrenica, UN SECRETARY-GENERAL, G.A. 54th Session, at 8, U.N. Doc. A/54/549, (1999).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> Charter of the United Nations, 26 June 1945, Can. T.S. 1945 No. 7, at art. 39.

<sup>94</sup> See U.N. S.C. Res. 827, U.N. Doc. S/Res. 827 (1993) (establishing the International Criminal Tribunal for Former Yugoslavia); U.N. S.C. Res. 955, U.N. SCOR, 3453d mtg. (1994) (establishing the International Criminal Tribunal for Rwanda)

<sup>95</sup> UN document S/RES/955 of 8 November 1994; see also Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, U.N. SCOR, 49th Sess., at 12, U.N. Doc. A/49/342 (1994) where ICTY President, Antonio Cassese specifically stated that "the Yugoslav Tribunal is a tool for promoting reconciliation."

<sup>96</sup> See RUTI TEITEL, TRANSITIONAL JUSTICE 31-39 (2001).

Both *ad hoc* tribunals were designed to only meet the retributive needs of prosecution and punishment, rather than restoration *and* retribution.<sup>97</sup> Reconciliation, was more of a secondary purpose intended to be an indirect result of the tribunal.<sup>98</sup> The ICTR and ICTY only aimed to provide reconciliation by giving victims a sense of justice that the main perpetrators of the crimes would be punished.<sup>99</sup>

Since the ICTY and ICTR functioned under the belief that prosecution was a foundation for reconciliation, witnesses and victims did not play a major role in trial proceedings.<sup>100</sup> While both *ad hoc* tribunals provide extensive laws on the protection of witnesses and victims,<sup>101</sup> neither the ICTY and ICTR provided the right of victims to be represented and heard during criminal proceedings.<sup>102</sup> That exclusion has since fueled severe criticism by the international community as to the effectiveness of both institutions in providing for post-conflict

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<sup>97</sup> ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 376-87 (2003) (stating that the *ad hoc* tribunals mirrored the Nuremberg and Tokyo proceedings which sought to punish offenders rather than reconcile communities).

<sup>98</sup> *See id.* at 6. Jaya Ramji similarly notes, international trials are intended to deter future crimes and provide retribution for victims. However, reconstruction, rehabilitation, and reconciliation are ancillary effects which may indirectly result. Alternatively, many scholars also argue that there is a duty to prosecute human rights offenders, regardless of how it effects political and social transition. Jaya Ramji, *Reclaiming Cambodian History: The Case for a Truth Commission*, 24 FLETCHER F. WORLD AFF. 137 (2000). *See also* M. Cherif Bassiouni, *Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights*, in POST CONFLICT JUSTICE 3, 26 (M. Cherif Bassiouni ed., 2002); Orentlicher, *supra* note 79, at 2548.

<sup>99</sup> As the first President of the ICTY, Antonio Cassese, explained “Far from being a vehicle for revenge,” the ICTY individualizes guilt by prosecuting leaders that bear collective responsibility thus making the “Yugoslav Tribunal is a tool for promoting reconciliation.” Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, U.N. SCOR, 49th Sess., at 12, U.N. Doc. A/49/342 (1994).

<sup>100</sup> *See* Press Release, Security Council Meets To Discuss International Tribunals for Former Yugoslavia and Rwanda (Nov. 21, 2000), U.N. Doc. SC/6956, available at <http://www.un.org/News/Press/docs/2000/20001121.sc6956.doc.html> (last accessed Mar. 23, 2006).

<sup>101</sup> Statute of the International Tribunal for the Former Yugoslavia, art. 22, annexed to Report of the Secretary-General Pursuant to Paragraph 2 of U.N. Security Council Resolution 808, U.N. GAOR, May 19, 1993, U.N. Doc. S/25704, reprinted in 32 I.L.M. 1159, 1193-97 [hereinafter ICTY Statute]; Statute of the International Tribunal for Rwanda, art. 21, adopted at New York, Nov. 8, 1994, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994), reprinted in 33 I.L.M. 1598; BASSIOUNI, INTERNATIONAL CRIMINAL LAW, *supra* note 20, at 649-52 (detailing the rules and procedures in the ICTY and ICTR relating to victim and witness protection).

<sup>102</sup> *See* Press Release, *supra* note 100; RICHARD MAY & MARIEKE WIERDA, INTERNATIONAL CRIMINAL EVIDENCE 14 (2002).

reconciliation.<sup>103</sup> Most affected populations feel disconnected from international tribunal proceedings and judgments, as the courts do not publish individualized accounts of victims' suffering.<sup>104</sup> The *ad hoc* tribunals instead focus only on facts relevant to the charges against the respective defendants, leaving victims and witnesses feeling neglected and undermined.<sup>105</sup> Subsequently, one commentator was left to note that "international and foreign tribunals are far less likely to promote reconciliation insofar as the trials are not of and do not speak directly to the troubled society."<sup>106</sup>

#### a. Alternatives to the *ad hoc* tribunals

For a country to transform into a state of increased prosperity and stability, the past conflicts must be reconciled between the two sides. Without reconciliation, deeply divided sectors of society will not shed their tensions. Therefore, restorative mechanisms are one way that victims can find a sense of justice. Without specific mechanisms that listen to individual grievances of victims, victims can feel left out of the peace process and further alienated.

The ICTY and ICTR failed to incorporate provisions that would enable victims to appear before the *ad hoc* tribunals or to claim compensation. The prevalence of the adversarial model on international legal institutions<sup>107</sup> has not boded well for the involvement of witnesses and victims. As a result, various "alternative" adjudicatory models have recently emerged to address

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<sup>103</sup> See Neil Kritz, *Progress and Humility: The Ongoing Search for Post-Conflict Justice*, in POST CONFLICT JUSTICE 59 (M. Cherif Bassiouni ed., 2002).

<sup>104</sup> See The Human Rights Center and the International Human Rights Law Clinic, University of California, Berkeley, & the Centre for Human Rights, University of Sarajevo, *Justice, Accountability, and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors*, 18 BERKELEY J. INT'L L. 102, 144-47 (2000).

<sup>105</sup> See Michael P. Scharf & Paul R. Williams, "The Role of Justice in Building Peace": The Functions of Justice and Anti-Justice in the Peace-Building Process, 35 CASE W. RES. J. INT'L L. 161, 175 (2003).

<sup>106</sup> Sarkin & Daly, *supra* note 27, at 718; see also Todd Howland & William Calathes, *The International Criminal Tribunal, Is It Justice or Jingoism for Rwanda? A Call for Transformation*, 39 VA. J. INT'L L. 135 (1998).

<sup>107</sup> While there are elements of the inquisitorial model incorporated into the international criminal courts, the defining structures, institutions, and guiding theories for the *ad hoc* tribunal are highly adversarial. See CASSESE, *supra* note 97, at 376-87.

widespread crimes. These “alternative” models have either sought to completely incorporate restorative theories of justice, or balance them with retributive notions. As one former justice of the ICTY notes, “[the modern trend] is the forceful emergence of individuals on the international level, either as the authors of international crimes or of gross and large-scale breaches of human rights, or as the victims of those crimes and breaches.”<sup>108</sup> Through this process, an individual history is developed and recorded; rather than a collective generalization of events that international courts often create through retributive mechanisms of justice. Where accounts are accurate and comprehensive, victims and witnesses feel that their victimization has been acknowledged.<sup>109</sup> Through acknowledgement of their injuries, the victims are often more capable of recovering from their injuries in order to lead more productive lives in society.<sup>110</sup>

In response to the ICTR and ICTY’s apparent failure to individualize victim participation, separate institutions have been created in Rwanda and former Yugoslavia in attempts to “bridge the gap” between individual perpetrators, victims, and witnesses and the adjudicatory process. As will be seen, the success, or failure, of these supplemental models hinges on how broad and expansive communal participation is.

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<sup>108</sup> CASSESE, *supra* note 97, at 450.

<sup>109</sup> See Sven Alkalaj, in THE SUNFLOWER 101, 103 (Henry J. Cargas & Bonny V. Fetterman eds., 1997); Michael P. Scharf & Nigel Rodley, *International Law Principles on Accountability*, in POST CONFLICT JUSTICE 90 (M. Cherif Bassiouni ed., 2002).

<sup>110</sup> Many have argued that retributive mechanisms are dominated by judges and lawyers and neglect the individualized history of victims and witnesses. Therefore, instead of contributing to reconciliation by compiling a history of abuse, the tribunals could contribute to greater resentment and a sense of injustice by neglecting individual experiences. See Erin Daly, *Transformative Justice: Charting a Path to Reconciliation*, 12 INT’L LEGAL PERSP. 73, 103 (2002); Donald W. Shriver, *Truth Commissions and Judicial Trials: Complementary or Antagonistic Servants of Public Justice?*, 16 J.L. & RELIGION 1, 8-9 (2001).

*i. The Rwandan supplement: The use of Gacaca courts in Rwanda*

In 2000, the Rwandan government approved legislation to complement the ICTR and domestic criminal proceedings with state-run Gacaca courts.<sup>111</sup> The courts were set up in response to the severe strains faced by Rwanda's judicial and prison systems in housing and prosecuting thousands of accused perpetrators.<sup>112</sup> Gacaca courts are community-based systems of dispute resolution with pre-colonial roots.<sup>113</sup> Over hundred of thousands of civilians are utilized as judges and witnesses to process thousands of accused.<sup>114</sup> While the majority of judges and witnesses have no formal legal training, the Gacaca courts are based on traditional dispute mechanisms familiar to most Rwandan communities.<sup>115</sup> In Gacaca courts, offenders are required to recount their wrongdoing in the presence of their victims and other affected parties.<sup>116</sup> The victim is also given the right to challenge the perpetrator's story and in some circumstances can receive monetary compensation.<sup>117</sup> By bringing the two parties together, the offender is required

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<sup>111</sup> See Loi Organique No. 40/2000 du 26/01/2001 Portant Creation des 'Jurisdictions Gacaca' et Organisation des Poursuites des Infractions Constitutives du Crime de Genocide ou de Crimes contra L'Humanite, Commises enter le 1 Octobre 1990 et Le 31 Decembre (French text), available at <http://www.minijust.gov.rw> (last visited Mar. 20, 2006).

<sup>112</sup> As Carroll notes, "If the Rwandan courts continued at their current pace, it would take 150 years to try all the accused." Christina M. Carroll, *An Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing with the Mass Atrocities of 1994*, 18 B.U. INT'L L.J. 163, 190 (2000).

<sup>113</sup> See generally Maya Goldstein-Bolocan, *Rwandan Gacaca: An Experiment in Transitional Justice*, 2004 J. DISP. RESOL. 355 (2004); Erin Daly, *Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda*, 34 N.Y.U. J. INT'L L. & POL. 355 (2002); Jessica Raper, *The Gacaca Experiment: Rwanda's Restorative Dispute Resolution Response To The 1994 Genocide*, 5 PEPP. DISP. RESOL. L.J. 1 (2005); Jeremy Sarkin, *The Tension Between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of the Gacaca Courts in Dealing with the Genocide*, 45 J. AFR. LAW 143 (2001); L. Danielle Tully, Note, *Human Rights Compliance and the Gacaca Jurisdictions in Rwanda*, 26 B.C. INT'L & COMP. L. REV. 385 (2003); Leach Werchick, *Prospects for Justice in Rwanda's Citizen Tribunals*, 8 HUM. RTS. BR. 15 (2001); Aneta Wierzynska, Note, *Consolidating Democracy Through Transitional Justice: Rwanda's Gacaca Courts*, 79 N.Y.U.L. REV. 1934 (2004).

<sup>114</sup> Sarkin, *supra* note 114 at 159, 162.

<sup>115</sup> Daly, *supra* note 114 at 356 ("These tribunals are derived from traditional Rwandan community courts, in which the elders would sit on the grass - gacaca is the Kinyarwandan word for grass - and resolve community conflicts").

<sup>116</sup> Loi Organique No. 40/2000 du 26/01/2001, *supra* note 112, arts. 72-73

<sup>117</sup> Stef Vandeginste, *Victims of Genocide, Crimes against Humanity, and War Crimes in Rwanda: The Legal and Institutional Framework of Their Right to Reparation*, in *POLITICS AND THE PAST* 249, 258, 263 (John Torpey ed., 2003) (detailing the compensatory framework for victims under the Gacaca law).

to seek forgiveness.<sup>118</sup> In turn, the offender can reduce their sentencing by half by pleading guilty and confessing fully.<sup>119</sup>

The Gacaca process integrates different sectors of society by mediating disputes between members of the community within their community. Rather than segregate victims and witnesses from the trial, the Gacaca process does exactly the opposite. In fact, it allows the community, in its entirety, to participate in the trials. Gacaca courts also allow the victim to hear the confession first-hand. Local NGOs work closely with the Gacaca courts to ensure that more Rwandans participate and that the rights of citizens rights are protected.

However, as a result of their non-judicial nature and informal structure, Gacaca courts have come under intense criticism for their lack of due process of law.<sup>120</sup> Because Gacaca courts are not purely restorative mechanisms, but allow for the courts to punish perpetrators, standards of due process are needed to vitiate the defendant's legitimately guaranteed rights. Nevertheless, despite these criticisms, the Gacaca courts demonstrate the essential need to mix restorative and retributive theories of justice. While the ICTR solely addressed retributive needs, albeit under the theory that retribution leads to reconciliation, the Gacaca courts have to date filled in the void needed for community development and peaceful integration.<sup>121</sup>

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<sup>118</sup> Pernille Ironside, *Rwandan Gacaca: Seeking Alternative Means to Justice, Peace and Reconciliation*, 15 N.Y. INT'L L. REV. 31, 49 (2002).

<sup>119</sup> Loi Organique No. 40/2000 du 26/01/2001, *supra* note 112, at arts. 68-71.

<sup>120</sup> See Werchick, *supra* note 113, at 16-28 (outlining how the Gacaca courts violate a number of due process rights guaranteed under international law); Sarkin, *supra* note 113, at 147, 164-66; Goldstein-Bolocan, *supra* note 113, at 385.

<sup>121</sup> See Goldstein-Bolocan, *supra* note 113, at 380.

ii. *The failure of restorative mechanisms in the Yugoslav context*

In over 13 years, the ICTY has prosecuted a relatively few number of people<sup>122</sup> and has generally been discredited amongst the concerned populations.<sup>123</sup> Milosevic's death has created even greater disapproval by affected populations on the ICTY's perceived failure to provide post-conflict justice. This failure is justified in part on the general perception that ICTY proceedings take a considerable amount of time without providing much perspective on the victims as opposed to the accused.<sup>124</sup> Regardless of how impartial and accurate the ICTY's findings are, its failure to establish credibility has affected its ability to develop consensus and reconciliation amongst the concerned group and thus risks perpetuating the same stigmas, divergences, and conflicts that created the initial aggressions to begin with. In order to combat these perceived inadequacies, Serbia and Montenegro (the Federal Republic of Yugoslavia) established the Yugoslav Truth and Reconciliation Commission (YTRC)<sup>125</sup> in 2001 to compensate for the ICTY's perceived bias and ineffectiveness. The YTRC was eventually dissolved within two years without accomplishing much, if any, of its mandate.<sup>126</sup>

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<sup>122</sup> ICTY Fact Sheet on ICTY Proceedings, available at <http://www.un.org/icty/glance/procfact-e.htm> (last visited Mar. 18, 2006) (as of October 17, 2003 only 41 persons has been tried and 41 others were currently in proceedings).

<sup>123</sup> A survey conducted in January and February 2002, revealed that trust and approval of the ICTY was roughly around 51% in the Bosnian Federation, 24% in Montenegro, 21% in Croatia, 6% in Serbia, and 4% in the Republika Srpska. The same study showed that trust was relatively high in Kosovo (83%). International IDEA, "South East Europe Public Agenda Survey" (2002), available at [www.idea.int/press/pr20020404.htm](http://www.idea.int/press/pr20020404.htm) (last visited Mar. 18, 2006); see also Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 A.J.I.L. 7, 16-17 (2001) (describing general Serbian disapproval of the ICTY); Jelena Pejic, *Legal Perspectives and Analyses the Yugoslav Truth and Reconciliation Commission: A Shaky Start*, 25 FORDHAM INT'L L.J. 1, 3-4 (2001) (noting the general perception by many Serbians do not believe the ICTY is very credible); The Human Rights Center and the International Human Rights Law Clinic, *supra* note 104, at 136-40.

<sup>124</sup> Stephen Castle, *He mocked the court and made the world forget those who suffered*, THE INDEPENDENT, Mar. 12, 2006, at p. 45 ("By the way he conducted himself, Milosevic succeeded in one of his objectives. For most of the time the focus of attention was on him, not his victims").

<sup>125</sup> *Decision on the Establishment of the Truth and Reconciliation Commission*, Official Gazette of the Federal Republic of Yugoslavia, No. 15/2001 (Mar. 30, 2001) [hereinafter Decision on Establishment].

<sup>126</sup> Very little academic work within the legal community has actually been done on the YTRC's failures, although it is worth noting that the majority of journalists and insiders have categorically found that the YTRC was overall ineffective in achieving any form of significance. See Dejan Ilic, *The Yugoslav truth and reconciliation*



The YTCR failed to meet its objectives for a number of reasons. First, the YTCR's limited mandate only concerned the causes of war<sup>127</sup> and was inadequately funded.<sup>128</sup> Instead of determining who committed heinous crimes and who did not, the YTCR mandate required it to draw a historical account of the causes of the Yugoslav civil wars. However, the purposes of truth and reconciliation are not so much about historical causes of wars as they are an account of the atrocities committing during the conflict.<sup>129</sup> To that extent, the YTCR failed to provide one of the basic objectives of restoration, which is recognition of the crimes committed.<sup>130</sup> Moreover, the fundamental purpose of the YTCR was significantly weakened by its own apparent bias.<sup>131</sup> The YTCR was not designed to represent the various ethnic groups that were affected by the Yugoslav conflict. Rather it was composed purely of Serbians, in Serbia, by the Serbian president. Thus, its perceived subjectivity greatly inhibits its receptivity amongst the affected populations.

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*commission: Overcoming cognitive blocks*, EUROZINE, Apr. 4, 2004, available at <http://www.eurozine.com/articles/2004-04-23-ilic-en.html> (last visited Mar. 21, 2006).

<sup>127</sup> According to its mandate the YTRC's purpose was to: a) organize research work on the uncovering of evidence on the social, inter-ethnic and political conflicts which led to the war and to shed light on the causal links among these events; b) to inform the domestic and international public about its work and results, and c) to achieve cooperation with similar commissions and bodies in neighboring countries and abroad with the aim of exchanging experiences. Decision on Establishment, *supra* note 126; see also Pejic, *supra* note 123, at 9-13.

<sup>128</sup> See International Center for Transitional Justice, *Serbia and Montenegro: Selected Developments in Transitional Justice*, Oct. 2004, at p. 8, available at [http://www.ictj.org/downloads/ICTJ\\_Serbia.pdf](http://www.ictj.org/downloads/ICTJ_Serbia.pdf) (last visited Mar. 17, 2006) [hereinafter ICTJ Report] ("Commissioners received no salaries and none was able to work on a full-time basis. Moreover, there was insufficient funding to hire a full professional staff or carry out any serious research, let alone conduct any on-site investigations").

<sup>129</sup> See Amnesty Act, *supra* note 63 (stating the purpose of TRCs is to complete an historical picture of crimes perpetrated during the conflict).

<sup>130</sup> Following his appointment as a commissioner to the YTRC, Vojin Dimitrijevic and Latinka Perovic submitted their resignation because of the commission's limited mandate. In particular, Dimitrijevic stated: "There are many reasons and causes of wars, but there is only one international humanitarian law that ought to be respected by both aggressors and defenders, being a lawyer...I am mostly interested, as it is to be expected, in brutalities of our wars. I am afraid of big truths and explanations: in the name of these truths severe violence was done. The reconciliation might start with more modest aims and goals. It is not the matter of who was right and who was wrong, but who behaved as a human being and who did not." See Ilic, *supra* note 126.

<sup>131</sup> See Pejic, *supra* note 123, at 12 ("It is difficult to imagine how a Commission based in one of the five countries that came out of the SFRY's collapse can hope to objectively assess - and present the "truth" - on events about which each of the five States continue to have differing views").

Second, the YTCR was established without public consultation or debate.<sup>132</sup> The Gacaca courts, by comparison, were only formulated after significant community and public involvement. By not engaging NGOs and victims before and during the YTCR's operation, the Commission lacked credibility.<sup>133</sup> It failed in the fundamental role of incorporating the community into its developmental and reconciliatory process. Without the support of NGOs and civil society, the YTCR was unable to reach out to victims and witnesses. The Gacaca courts and the International Criminal Court (ICC) depend on NGOs to communicate between and integrate victims and witnesses. Lastly, the YTCR was handicapped by a mandate that provided no investigative powers and strict three-year time period.<sup>134</sup> Without the support of civil society and such operational limitation, the YTCR was rendered irrelevant to witnesses, victims and perpetrators alike.

While the ICTY has received extensive criticism for failing to prosecute many of the conflicts top leaders,<sup>135</sup> equally important is the failure on part of legislatures in affected communities to develop legitimate restorative mechanisms. The YTCR provides important lessons as to the importance of participation, credibility, and state support in promoting restorative mechanisms. The development of a TRC is insufficient by itself. Rather, the relevant components for restorative justice are the incorporation of victims and witnesses, the participation of civil society, and direct address of human rights abuses committed during the

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<sup>132</sup> See ICTJ Report, *supra* note 128, at 7.

<sup>133</sup> See *id.* (“The more damaging claim, however, was that the Commission was just a weak attempt to placate the U.S. and the international community, which had been pushing Kostunica to address the legacy of the Milosevic era. The fact that the TRC was established on the eve of a U.S. certification decision only reinforced this perception”).

<sup>134</sup> Maryann Bird and Sue Cullinan, *Serbia Commission Falters*, TIME, Apr. 30, 2001, at p. 16

<sup>135</sup> Scharf, *Lessons from the Yugoslavia Tribunal*, *supra* note 87, at 977 (nothing how the ICTY's failure to apprehend and prosecute many of the Yugoslav conflicts leaders has significantly affected its credibility).

course of the conflict.<sup>136</sup> Without these elements, *any* restorative mechanisms are meaningless in effectuating reconciliation and rehabilitation.

#### **b. Current trends to mix restorative and retributive models**

In response to Rwandan and Yugoslavian experiences, the legal experts behind the Rome Statute to the International Criminal Court and the Special Court for Sierra Leone included extensive measures to ensure the participation and protection of victims and witnesses. The Rome Statute allows victims to participate in pre-trial procedural hearings<sup>137</sup> and submit observations to the Court's jurisdiction or admissibility of the case.<sup>138</sup> This effectively allows victims to share their personal perspective and history with the ICC. The Prosecutor is required to take into consideration the interests of the victims when determining whether to initiate an investigation<sup>139</sup> and in prosecuting crimes.<sup>140</sup> Similarly, the Trial Court may allow representatives of the victim to present their views where their interests are concerned.<sup>141</sup> As such, victims may question witnesses,<sup>142</sup> make opening and closing statements,<sup>143</sup> and obtain financial assistance for legal representation.<sup>144</sup> Lastly, the ICC has the power to order reparations for the victims including restitution, compensation by the convicted person, and rehabilitation,<sup>145</sup> and allow victims to appeal reparation decisions by representation.<sup>146</sup>

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<sup>136</sup> See ICTJ Report, *supra* note 128, at 8-9.

<sup>137</sup> Rome Statute, *supra* note 7, at art. 15(3).

<sup>138</sup> *Id.* at art. 19(3).

<sup>139</sup> *Id.* at arts. 53(1)(c); 53(2)(c).

<sup>140</sup> *Id.* at art. 54(1)(b).

<sup>141</sup> *Id.* at art. 68(3).

<sup>142</sup> International Criminal Court, *Rules of Procedure and Evidence*, U.N. Doc. PCNICC/2000/1/Add.1 (2000) [hereinafter ICC Rules of Procedure and Evidence], at R. 91(3).

<sup>143</sup> *Id.* at R. 89.

<sup>144</sup> *Id.* at R. 90(5), R. 92.

<sup>145</sup> Rome Statute, *supra* note 7, at arts. 75, 79.

<sup>146</sup> *Id.* at art. 82(4).

Recognizing the importance of restorative mechanisms, the Lome Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, required the establishment of a Truth and Reconciliation Commission to work in conjunction with the Special Court.<sup>147</sup> While the Special Court is responsible for prosecuting persons most responsible for heinous crimes committed during the civil war, the TRC is separately responsible for creating “an impartial historical record of violations and abuses of human rights and international humanitarian law . . . , to address impunity, to respond to the needs of the victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered.”<sup>148</sup>

The experiences of the ICTR, ICTY, ICC and Special Court for Sierra Leone indicate modern trends to incorporate restoration and retribution either through the creation of separate institution, or their merger into one criminal process. While there is no single methodology to incorporate restoration and retribution, it is clear that both elements must be balanced for transitional justice. How the KRT effectively incorporates these models, therefore, is fundamental to the question of justice in Cambodia.

### **III. CONCERNS FOR THE CURRENT KHMER ROUGE TRIBUNAL MODEL**

Recognizing the importance of witnesses and victims to the process of reconciliation, both the Law on the Establishment of the Extraordinary Chambers (“EC Law”) and the agreement between the United Nations and Cambodia have explicit provisions requiring the

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<sup>147</sup> See Peace Agreement, July 7, 1999, Government of the Republic of Sierra Leone-Revolutionary United Front of Sierra Leone (1999), available at <http://www.usip.org/library/pa/sl/sierraleone07071999.html> (last visited Mar. 4, 2006).

<sup>148</sup> Truth and Reconciliation Commission Act, art. 6(1), available at <http://www.sierra-leone.org/trcact2000.html> (last visited Mar. 17, 2006).

KRT “to provide for the protection of victims and witnesses.”<sup>149</sup> However, existing legislation inside Cambodia makes it ambiguous, at best, as to the degree of victim and witnesses participation and protection proffered by the KRT or the Cambodian government. While it is reasonably likely that the KRT itself will read into its provisions a more substantiated roles for victims and witnesses, a number of institutional problems currently facing the KRT make it less reasonable that it will “produce anything but a few symbolic trials, if any.”<sup>150</sup> Thus, the true strength of the KRT will not be found in its prosecutorial power, for it is clear that the majority of the Khmer Rouge leadership will not be tried, but rather in its role in creating an authoritative history of the Khmer Rouge period.<sup>151</sup>

The critical nature of victim and witnesses participation in the KRT is greater enhanced by a number of observations concerning the number of leaders tried, the lack of alternative mechanisms, and public perception of the KRT’s role and functions.

**a. Limited number of leaders to be tried**

Article 1 of the EC Law allows the KRT only to exercise personal jurisdiction over the most “senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations” committed during the Khmer Rouge period.<sup>152</sup> Thus, mid to low-level officials cannot be tried under EC Law. However, most of the former Khmer Rouge senior leaders have either died or have been granted amnesty from prosecution. Only two former

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<sup>149</sup> EC Law, *supra* note 6, at art. 33; Cambodia-UN Agreement, *supra* note , at art. 23.

<sup>150</sup> BASSIOUNI, INTERNATIONAL CRIMINAL LAW, *supra* note 20, at 552.

<sup>151</sup> See Ramji, *supra* note 98, at 137 (“In order for Cambodian society to heal, the full truth about the Khmer Rouge regime must be examined and disseminated, creating a history that Cambodians can teach to their children”).

<sup>152</sup> EC Law, *supra* note 6, at art. 1; *see also id.* at art. 2 (“Extraordinary Chambers shall be established...to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes” committed during the Khmer Rouge period).

Khmer Rouge officials, Kaing Khek Iev (a.k.a. Deuch)<sup>153</sup> and Ta Mok,<sup>154</sup> are currently in custody. Other senior leaders like Ieng Sary,<sup>155</sup> Khieu Samphan,<sup>156</sup> and Nuon Chea<sup>157</sup> live comfortable lives in Cambodia's capitol, Phnom Penh, and provincial towns.<sup>158</sup> Many Khmer Rouge leaders, including the movement's supreme leader Pol Pot, and senior cadre, such as Son Sen,<sup>159</sup> Yun Yat,<sup>160</sup> and Ke Pauk,<sup>161</sup> have died since the 1975-1979 genocide. Unlike Chile's stripping of Pinochet's immunity, there is no indication that the Hun Sen government in Cambodia has any inclination to strip Ieng Sary or other leaders of their amnesty.

Therefore, the KRT's number of potential defendants is extremely limited and the vast majority of perpetrators will not face justice for their crimes. The prosecution of so few leaders means that individual historical accounts are unlikely to be recorded into case history, thus restricting the creation of a comprehensive historical account of the Cambodian genocide.

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<sup>153</sup> Kaing Khek Iev was the former chief of a Khmer Rouge torture center, at Toul Sleng. *See Justice in the Killing Fields*, L.A. TIMES, Aug. 18, 2001, at 18.

<sup>154</sup> Ta Mok, also known as the "Butcher" controlled the northern area of the Khmer Rouge territory and referred to himself as supreme commander. *See Rajiv Chandrasekaran, Trial for Khmer Rouge in Doubt; Discord Between U.N., Cambodia Imperils Possible Tribunal*, WASH. POST, Mar. 26, 2002, at A10.

<sup>155</sup> Ieng Sary was the deputy prime minister under Pol Pot and led a guerrilla war against the Cambodian government after the Vietnamese had pushed the Khmer Rouge out. He was convicted in absentia and sentenced to death but was later granted amnesty in 1996. *See Thomas Hammarberg, Efforts to Establish a Tribunal Against KR Leaders: Discussions Between the Cambodian Government and the U.N.*, PHNOM PENH POST, Sept. 14-17, 2002, at 24.

<sup>156</sup> Khieu Samphan was the president of the Khmer Rouge but granted immunity from prosecution by the Hun Sen government, Cambodia's current prime minister. *See Steven Erlanger, U.S. Wants to Try Khmer Rouge Leaders*, N.Y. TIMES, Apr. 18, 1998, at A5.

<sup>157</sup> Nuon Chea was Pol Pot's chief lieutenant and Deputy General Secretary of the Communist Party. Hun Sen similarly guaranteed Chea immunity from prosecution. *See Evan Osnos, A chilling visit with Pol Pot's 'brother': 27 years after Cambodia's genocide, court hopes leaders will explain terror*, CHI. TRIB., Feb. 17, 2006, at 1.

<sup>158</sup> *See Seth Mydans, As Cambodia Prepares to Try Khmer Rouge Leaders for Massacres, They Deny Guilt*, N.Y. TIMES, Aug. 21, 2001, at A9; Matt McKinney, *After Talks Break, Tribunal for Cambodia is Put in Doubt*, BOSTON GLOBE, Feb. 17, 2002, at A20.

<sup>159</sup> Son Sen was the Khmer Rouge defense minister and Pol Pot's right hand. *See Ben Kiernan, Obituary: Son Sen: Genocide's First Lieutenant*, THE GUARDIAN, June 21, 1997, at 21.

<sup>160</sup> Yun Yat was Son Sen's wife and in charge of propaganda and education inside and outside of the country. She was also responsible for eradicating Buddhism in Cambodia. *See Matthew Lee, Guerillas Accuse Cadres of Treason*, THE AUSTRALIAN, June 12, 1997 at 6.

<sup>161</sup> Ke Pauk was party secretary of the northern zone and responsible for massacring hundreds of people. *See Ben Kiernan, Ke Pauk: One of Pol Pot's Leading Military Commanders, He was Responsible for the Murders of Many Thousands of Cambodians, but Escaped Justice*, THE GUARDIAN, Feb. 21, 2002, at 20.

In addition, key perpetrators will not be held responsible because of their legal immunity from prosecution. This could be severely detrimental to the KRT's public credibility. The ICTY suffered a similar fate for its failure to capture and prosecute Radovan Karadžić and Ratko Mladic and for failing to prosecute Milosevic before his death. The lack of high profile leaders which could be suspect to prosecution increases the importance of victim and witnesses involvement. If the KRT does not prosecute those leaders which have received immunity, the greater narrative of the atrocities will be lost. To that extent, the KRT in its current form is unlikely to satisfactorily promote retribution.<sup>162</sup>

#### **b. The absence of alternative restorative mechanisms in Cambodia**

A number of scholars have suggested that Cambodia should develop its own TRC in order to provide victims a conduit for their past abuses.<sup>163</sup> To date, however, no Cambodian TRC has been proposed or developed to record individual complaints from victims.<sup>164</sup> It is very unlikely that Cambodia will construct its own TRC for a number of political and economic reasons. First, the Cambodian government only agreed to the KRT after extensive political pressure was exerted by the international community and NGOs. Given the less intuitive nature of restorative mechanisms,<sup>165</sup> it is even less unlikely that international or domestic forces will exert enough political pressure necessary for the construction of an additional institution. In fact, previous

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<sup>162</sup> It is worth noting that Cambodia's King Sihanouk officially took a stance against the KRT because so few will be prosecuted. The King does not believe that the KRT can provide justice for the people nor for his family, whom were killed in the Bang Trapiech camp. It is believed that the chief of camp, Hor Nam Hong, gave the orders but Hong won two trials (first against Sihanouk in 1999 when a French court turned down Sihanouk's accusation because no witnesses appeared at the trial in Paris, second against the Cambodia Daily as no witness came to the trial when called.)

<sup>163</sup> See generally Ramji, *supra* note 98, at 137; Matthew J. Soloway, *Cambodia's Response to the Khmer Rouge: War Crimes Tribunal vs. Truth Commission*, 8 APPEAL 32 (2002).

<sup>164</sup> In 2002, Khieu Samphan, one of the leaders of the Khmer Rouge who continues to reside in Cambodia, argued that considerations for a KRT should be replaced with a truth commission. Samphan's demands were eventually rejected by the Cambodian government. See *Khmer Rouge Trial Advocates Reject Khieu Samphan's Call for Truth Commission*, Associated Free Press, Dec. 2, 2002 (on file with author).

<sup>165</sup> See *supra*, text accompanying note 4.

efforts to develop a TRC similar to the South African version were rejected by the United States and local advocacy groups in Cambodia.<sup>166</sup>

Second, a TRC implicates low to mid-level officials by allowing victims to dictate crimes that were perpetrated against them.<sup>167</sup> The majority of Cambodia's political elite, including its powerful prime minister, Hun Sen, were former low to mid level Khmer Rouge officials.<sup>168</sup> In fact, it is precisely because of their roles during the Khmer Rouge period that the Cambodian government has extensively restricted the number of potential defendants<sup>169</sup> that would be subject to the KRT and have demanded the central role of the Cambodian judiciary.<sup>170</sup>

Third, even if the Cambodian government were to decide to establish a TRC that would involve victims it would most likely be ineffective. When the South African TRC and various others were established, they immediately followed the period of conflict.<sup>171</sup> Victims, witnesses, and offenders had vivid images of the atrocities and were more willing to engage with each other. A Cambodian TRC, on the other hand, would be developed almost 30 years later. Many of the low to mid level Khmer Rouge officials have since moved on and integrated themselves deeply into society. They have also aged or died away, much like many of the victims. Therefore, the construction of a TRC could actually have negative repercussions to the stability

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<sup>166</sup> See Peter Alford, *Hun Sen Truth Trial Rejected*, THE AUSTRALIAN, Mar.5, 1999, at 10.

<sup>167</sup> Lisa Clausen, *Slow Road to Justice*, TIME, Mar 24, 2003, at 48. See also MICHAEL HUMPHREY, THE POLITICS OF ATROCITY AND RECONCILIATION, FROM TERROR TO TRAUMA 106 (2002).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> Interestingly, the majority, if not all, of judges proposed by the Cambodian government for the KRT are also on the Ministry of Justice's list of "corrupt officials." The government's recommendation of these officials certainly indicates its perspectives on the process, but also its interest in maintaining significant control over the judgments and opinions likely to be issued.

<sup>171</sup> See Education Reform will Ensure Cambodian Students Learn about Khmer Rouge Regime, Morning Edition (National Public Radio, Nov. 16, 2004) (transcript on file with author).



of Cambodian life by re-creating the perpetrator/victim relationship within Cambodian society.<sup>172</sup>

Lastly, the KRT has suffered from insufficient financial support and the government's reluctance to provide the necessary funds for its development.<sup>173</sup> Given the abovementioned political reasons, it is far less likely that either the international community or the Cambodian government will allocate funds toward the creation of a Cambodian TRC or for the purposes of community development.

### **c. Public support for the Khmer Rouge Tribunal**

Because of structural and procedural inadequacies, most Cambodians are skeptical about the KRT. While the vast majority of Cambodians still desire that high-level officials be prosecuted,<sup>174</sup> Cambodians have emphasized the need for an impartial and objective tribunal, some Cambodians would even prefer no trial be conducted if the trial had to be sub-standard.<sup>175</sup> Such preferences could stem from concerns that government agents will manipulate the proceedings to serve their own political needs.

Cambodians are conscious about the survival and empowerment of low-level Khmer Rouge agents in society. The individuals who actually carried, planned, or directed the atrocities during the Khmer Rouge period were mostly low-ranking officials in remote districts. While many of low-level officials received direct orders from the central Khmer Rouge leadership,

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<sup>172</sup> One of Hun Sen's main arguments in support of a Cambodian TRC was that a criminal trial could "panic other Khmer Rouge officers and its rank-and-file who have already surrendered, into turning back to the jungle and renewing guerilla war." Peter Alford, *Hun Sen truth trial rejected*, THE AUSTRALIAN, Mar.5, 1999, at 10.

<sup>173</sup> See Amy Kazmin, *Cambodians Called on to Fund Khmer Rouge Tribunal*, June 7, 2005, FIN. TIMES, at 5 (outlying funding problems facing the KRT)

<sup>174</sup> Khmer Institute for Democracy, *Survey on the Khmer Rouge Regime and the Khmer Rouge Tribunal*, 2004, at 12, available at <http://www.bigpond.com.kh/users/kid/KRG-Tribunal.htm> [hereafter KID Survey] (96.8% of persons surveyed expressed wanted perpetrators to be brought to trial.)

<sup>175</sup> *Id.* at 13 (44.1% of persons interviewed held that they would prefer no trial as compared to a sub-standard trial).

numerous murders were also committed purely without order. As such, there are significant grievances by Cambodians that even low-level officials be prosecuted in some way.<sup>176</sup>

There is a common misconception by Cambodians that the KRT will prosecute all persons responsible for crimes committed under the Khmer Rouge, including low-level agents.<sup>177</sup> Most Cambodians see the top three people to be tried as being Ieng Sary, Khieu Samphan, and Ta Mok. Given that Ieng Sary and Samphan were granted immunity from prosecution, even if Ta Mok and a few others are prosecuted and convicted, then the majority of Cambodians probably still will not feel that justice has been delivered. Assuming the KRT does not adjust its mandate and only prosecutes 5-7 individuals within the Khmer Rouge leadership, victims and witnesses to the genocide will suffer the loss of law and justice.

#### **d. Involvement of Victims and Witnesses**

The participation of victims and witnesses is an indispensable aspect of transitional justice. As noted above, the experiences of the ICTR and ICTY have demonstrated that prosecution without the direct involvement and participation of witnesses and victims severely affects the credibility of the courts and by extension their effectiveness. The non-participation of witnesses not only impact the credibility of trials, but also the effectiveness of the prosecution.<sup>178</sup> A number of aspects affect the involvement of victims and witnesses: the existence of restorative mechanisms, extensive participatory rights before the criminal court or tribunal, and protection from physical and psychological harm.

##### *i. Insufficient Participatory Rights for Victims under the EC Law*

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<sup>176</sup> *Id.* at 14.

<sup>177</sup> *Id.*

<sup>178</sup> Rape cases before the ICTY and ICTR have been inhibited by the non-participation of witnesses. *See Prosecutor v. Tadic*, Case No. IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, Aug. 10, 1995 (Appeals Chamber, ICTY).

While the EC Law has no provisions creating a separate “truth telling” institution, there are a number of provisions which could provide victims the right to become parties in KRT trials. Pursuant to Article 36, the EC Law allows the KRT to hear appeals filed by victims, as well as the accused or the co-prosecutors.<sup>179</sup> By incorporating provisions of Cambodia’s domestic criminal code, the EC Law also leaves the possibility open for victims and witnesses to participate in the KRT. Under the EC Law, the co-prosecutors, trial chamber and co-investigating judges must work in accordance with “existing procedures in force.”<sup>180</sup>

A number of provisions in Cambodia’s domestic criminal code provide for victim and witness participation. First, under Cambodia’s Law on Criminal Procedure, a victim may either propose that the prosecutor initiate an investigation or appeal to the Supreme Court, if the prosecutor declines to prosecute, for prosecution.<sup>181</sup> Victims may also join cases initiated by other parties as long as a final judgment has not been reached.<sup>182</sup> Second, Cambodian criminal codes accord victims the same participatory rights as the defendants and prosecutor. The

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<sup>179</sup> EC Law, *supra* note 6, at art. 36 (“The Extraordinary Chambers of the Supreme Court shall decide appeals made by the accused, the victims, or the Co-Prosecutors against the decision of the Extraordinary Chamber of the trial court”).

<sup>180</sup> See EC Law, *supra* note 6, at art. 20 (“The Co-Prosecutors shall prosecute in accordance with existing procedures in force.”); EC Law, *supra* note 6, at art. 23 (“All investigations shall be the joint responsibility of two investigating judges...and shall follow existing procedures in force.”); EC Law, *supra* note 6, at art. 33 (“The Extraordinary Chambers of the trial court shall ensure that trials are fair and expeditious and are conducted in accordance with existing procedures in force, with full respect for the rights of the accused and for the protection of victims and witnesses”).

<sup>181</sup> Royal Government of Cambodia, Law on Criminal Procedure [hereinafter Law on Criminal Procedure], Art. 10 (on file with author) (“In case when the complaint of any plaintiff, believing to be injured by an act that he/she thinks consisting a criminal offence and the representative of the prosecution office does not respond or file it without follow-up, the plaintiff may submit the case to the appellate court, Law on Criminal Procedure, *supra* note 181, at art. 56 (“The prosecutor has the duty: - to receive the complaint and the denunciation related to the crime or the misdemeanor even though the complaint is from any person”).

<sup>182</sup> Law of Criminal Procedure, *supra* note 181, at 131 (“The injured party may always become a plaintiff as long as the judge has not yet issued a judgment”); Royal Government of Cambodia, Criminal Code of Cambodia [hereinafter Criminal Code], at art. 27 (on file with author) (“Victims or their beneficiaries may directly or through counsel bring a civil action in a criminal case during the preliminary investigation, or during the sentencing hearing”).

victim's attorney may file appeals following final judgment by the trial chamber<sup>183</sup> or issuance of pre-trial detention,<sup>184</sup> call<sup>185</sup> or examine witnesses,<sup>186</sup> testify at trial,<sup>187</sup> have access to the trial transcript,<sup>188</sup> request closing statements,<sup>189</sup> or even propose interlocutory judgments.<sup>190</sup>

Whether or not provisions of Cambodia's domestic code relating to victim participation are read into the EC Law depends significantly on the flexibility of the respective judges and prosecutors. It is just as likely that the judges and prosecutors will not utilize these provisions. The aforementioned criminal codes relate to the victim's ability to file companion civil claims to criminal cases.<sup>191</sup> Thus, unlike US cases, both the civil and criminal damages would be awarded by the same court and be heard through the same judicial proceeding. The EC Law, however, only provides for criminal sanctions<sup>192</sup> and does not explicitly give rise to separate civil actions. If the KRT adopts a narrow interpretation of its provisions under the EC Law, it could reject broader participatory rights granted to victims under Cambodia's criminal codes and only grant the right of appeal as guaranteed under the EC Law.<sup>193</sup> A broader interpretation, however, comports more logically with EC Law's provisions on victim participation. It is difficult to understand how victims can appeal decision if they are not parties to a law suit. To do so, would

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<sup>183</sup> Law on Criminal Procedure, *supra* note 181, at art. 161; Criminal Code, *supra* note 182, at art. 4.

<sup>184</sup> Law on Criminal Procedure, *supra* note 181, at art. 79; Criminal Code, *supra* note 182, at art. 14(3).

<sup>185</sup> Law on Criminal Procedure, *supra* note 181, at art. 133.

<sup>186</sup> Criminal Code, *supra* note 182, at art. 24.

<sup>187</sup> Law on Criminal Procedure, *supra* note 181, at art. 132.

<sup>188</sup> Law of Criminal Procedure, *supra* note 181, at art. 110; Criminal Code, *supra* note 182, at art. 27.

<sup>189</sup> Criminal Code, *supra* note 182, at art. 23.

<sup>190</sup> Law on Criminal Procedure, *supra* note 181, at art. 140.

<sup>191</sup> See Law on Criminal Procedure, *supra* note 181, at art. 2 ("Any criminal offence may give rise to two separate legal actions: public action and civil action."); Law on Criminal Procedure, *supra* note 181, at art. 5 ("The civil action is for the purpose, shall receive award proportionate to the damages incurred to him/her"); Law on Criminal Procedure, *supra* note 181, at art. 9 ("The person who believes to be injured by an infraction may lodge a complaint along with the prosecution proceedings in order to obtain award").

<sup>192</sup> EC Law, *supra* note 6, at art. 38 ("All penalties shall be limited to imprisonment"); EC Law, *supra* note 6, at art. 39 ("In addition to imprisonment, the Extraordinary Chamber of the trial court may order the confiscation of personal property, money, and real property acquired unlawfully or by criminal conduct. The confiscated property *shall be returned to the State*") (emphasis added).

<sup>193</sup> See EC Law, *supra* note 6, at art. 36.

be a serious violation of the defendant's rights to due process. At least in theory, therefore, victims have the right to participate in the KRT in the same way as they have the possibility to be joined in as civil parties in a criminal case in Cambodia.

*ii. Inadequate institutions for victim and witness protection*

Integral to the success of tribunals in reconciling communities is the protection of victims and witnesses from reprisals.<sup>194</sup> Protection gives witnesses and victims a sense of security and encourages their participation in trials. Thus, without personal security, witnesses and victims are more likely to disassociate with criminal proceedings.<sup>195</sup>

The EC Law, on the other hand, fails to adequately ensure witness and victim protection. Article 33 of the EC Law requires the court to provide measures, which protect the security and confidentiality of victims and witnesses.<sup>196</sup> However, the EC Law creates no independent witness protection programs, like the Victim and Witness Protection Unit in the ICC, which specifically help witnesses and victims. Rather, the Cambodian witness and victim protection unit is staffed jointly by Cambodian officials, leaving security to Cambodian police.<sup>197</sup> The failure to create an independent security unit is likely to deter witnesses from testifying.

The Cambodian people, at large, continue to believe in the need for and power of justice to provide some closure for this terrible period in Cambodian history.<sup>198</sup> However, the majority

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<sup>194</sup> In its first annual report, the ICTY similarly found witnesses are generally reluctant to testify in post-conflict society because of their negative experience with governmental institutions. ICTY First Annual Report (1994), at ¶¶ 75, 78.

<sup>195</sup> See BASSIOUNI, *INTERNATIONAL CRIMINAL LAW*, *supra* note 20, at 649 (noting the problems inhibiting general witness participation in international criminal trials).

<sup>196</sup> EC Law, *supra* note 6, at art. 33 (“The Court shall provide for the protection of victims and witnesses. Such protection measures, shall include, but not be limited to, the conduct of in camera proceedings and the protection of the victim's identity”).

<sup>197</sup> *Id.* at art. 33.

<sup>198</sup> Surveys conducted by the Khmer Institute of Democracy (KID), Center for Social Development (CSD), and the Documentation Center of Cambodia (DC-Cam) revealed that the overwhelming majority of Cambodian citizens were victims of the Khmer Rouge regime and wanted a tribunal to prosecute their leaders. See generally KID Survey, *supra* note 174.

of potential witnesses do not trust officials in the current government given that many officials, including top leaders, were junior members of the Khmer Rouge.<sup>199</sup> Witnesses fear potential reprisals because the witness and victim protection units are composed purely of Cambodian police officials with direct links to government authorities.<sup>200</sup> Witness protection units similar to the ICC and ICTY, on the other hand may ease some fears as they are composed of international observers and workers.

Overall, common concerns and misunderstandings about the KRT are likely to fuel continuing discontent and feelings of injustice if victims and witnesses are not actively engaged, protected and integrated. Unless the KRT is adjusted to meet Cambodian perceptions of justice and their concern for impunity, the tribunal will carry the stigma of politicizing the genocide rather than accounting for it.

The EC Law contains provisions that would enable the trial court to integrate international legal standards on the protection of victims and witnesses. The EC Law allows the trial courts to seek guidance “in procedural rules established at the international level” where there are no provisions on the topic or uncertainty.<sup>201</sup> In the preparatory debates leading up to the EC Law, Deputy Prime Minister, Sok An, noted that Article 33 was specifically designed to give the trial chamber broad discretion in utilizing international standards and procedures when providing for the protection of witnesses and victims.<sup>202</sup>

The *United Nations Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power*, establishes the most fundamental rights relating to victim protection and

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<sup>199</sup> See Education Reform will Ensure Cambodian Students Learn about Khmer Rouge Regime, Morning Edition (National Public Radio, Nov. 16, 2004) (transcript on file with author).

<sup>200</sup> KID Survey, *supra* note 174, at 15 (Indicating that over 71.2% of persons interviewed worried that participation before the KRT would jeopardize their personal security).

<sup>201</sup> EC Law, *supra* note 6, at art. 33.

<sup>202</sup> See The First Session of the Third Term of Cambodian National Assembly, October 4-5, 2004, Debate and Approval of the Agreement between the United Nations and the Royal Government of Cambodia (on file with author).

participation.<sup>203</sup> In particular, the Declaration requires that victims be treated with compassion and dignity,<sup>204</sup> their views should be considered at appropriate stages of proceedings,<sup>205</sup> victims should be provided with proper assistance throughout the legal process;<sup>206</sup> measures should be taken to ensure their safety from intimidation and retaliation,<sup>207</sup> and procedures should be put in place to ensure that victims have access to restitution,<sup>208</sup> compensation,<sup>209</sup> and medical, psychological, and social assistance.<sup>210</sup> These principles have been re-articulated in the *Basic Principles and Guidelines on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*<sup>211</sup> and incorporated in the constitutive treaties for the ICC,<sup>212</sup> European Court on Human Rights,<sup>213</sup> Inter-American Court on Human Rights,<sup>214</sup> and African Commission on Human and People's Rights.<sup>215</sup>

In conformity with these principles, substantial measures are taken by the ICC to protect them, including the creation of a Victim and Witness Unit.<sup>216</sup> The Unit is responsible for protecting the security and well being of victims and witnesses by providing for their protection,

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<sup>203</sup> *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, G.A. 40/34, annex, 40 U.N. GAOR Supp. (No. 53) at 214, U.N. Doc. A/40/53 (1985).

<sup>204</sup> *Id.* at ¶ 4.

<sup>205</sup> *Id.* at ¶ 6(b).

<sup>206</sup> *Id.* at ¶ 6(c).

<sup>207</sup> *Id.* at ¶ 6(d).

<sup>208</sup> *Id.* at ¶¶ 8-11.

<sup>209</sup> *Id.* at ¶¶ 12-13.

<sup>210</sup> *Id.* at ¶¶ 14-17.

<sup>211</sup> *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Apr. 19, 2005, U.N. Doc. E/CN.4/2005/L.10/Add.11.

<sup>212</sup> Rome Statute, *supra* note 7, at art. 68, 75.

<sup>213</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, 213 U.N.T.S. 222, at art. 13.

<sup>214</sup> American Convention on Human Rights, July 18, 1978, 1144 U.N.T.S. 123, at art. 25.

<sup>215</sup> African Charter on Human and Peoples' Rights, Oct. 21, 1986, 21 I.L.M. 58, at art. 7.

<sup>216</sup> Rome Statute, *supra* note 7, at art. 43(6) (setting up the Victims and Witnesses Unit within the Registry); *see also* ICC Rules of Procedure and Evidence, *supra* note 142.

medical and psychological needs.<sup>217</sup> Accordingly, the ICC can prohibit public disclosure of the victim or witness's name or location.<sup>218</sup> The ICC can also ensure that all testimony is given in closed sessions and that the victim or witness is given a pseudonym or that their voice or image is altered.<sup>219</sup> Most importantly, the ICC relies on local and international NGOs to protect the confidentiality of witness's identities and ensuring that the Court, itself, respects its own rules.<sup>220</sup> Similarly, both *ad hoc* tribunals provided extensive protections for victims and witnesses.<sup>221</sup> In order to meet international standards and requirements, the KRT needs to take greater measures to protect witnesses and victims and encourage their participation.

## CONCLUSION

The record of accomplishment of the ICTR, ICTY, and ICC indicate that the participation and protection of witnesses and victims serves a fundamental, if not necessary, component for reconciliation. The current model for the KRT arguably fails to adequately assure the protection and participation of victims and witnesses. However, the EC Law theoretically allows judges to expand the scope of the KRT's mandate by integrating international standards and provisions of Cambodia's law which could expand the role and protections for victims and witnesses. Without an expanded focus on restorative justice, it is unlikely that individualized accounts of victimization and offenses will be developed and along with it, the building blocks to reconciliation.

Rather than repeating the mistakes of the past, it is important that the KRT consider the following steps to satisfy the need for the tribunal's reconciliatory role:

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<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at art. 69(2); R. 67.

<sup>220</sup> See ICC Rules of Procedure and Evidence, *supra* note 142, at R. 17(2)(v); R. 18(e).

<sup>221</sup> See Statute of the ICTY, *supra* note 101, at rule 69.



1. Utilize NGOs to ensure the full participation and protection of victims and witnesses in trials, if they wish, pursuant to Cambodian law
2. Create additional legislative measures which guarantee the security of witnesses and victims before, during, and after the trial
3. Create a separate witness and victim unit using international monitors and domestic police agents in order to prevent acts of reprisal.
4. Develop a comprehensive history, which includes individual accounts of victimization.
5. Draft legislation making it explicitly clear that victims have the right to fully participate in trials.

Failure to consider these or similar measures may prevent the KRT from emerging as an independent judicial body that can bring justice and reconciliation to Cambodia. An ineffective tribunal would only encourage the perpetrators of genocide in their belief in impunity and give them cause to commit further crimes. The KRT's success will depend on its ability to adapt to the need and hopes of the Cambodian people. Without required changes promoting protection and integration, the KRT will serve as nothing more than a \$56 million dollar institution created to appease the international conscious.