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# The Challenges of International Criminal Prosecutions in Africa

Okechukwu Oko, *Southern University Law Center*



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# THE CHALLENGES OF INTERNATIONAL CRIMINAL PROSECUTIONS IN AFRICA

Okechukwu Oko\*

## Introduction

Africa is a continent in perpetual turmoil.<sup>1</sup> A cursory review of the continent of Africa reveals a troubling catalogue of social maladies traceable to state failure.<sup>2</sup> Some African countries have experienced civil war, military dictatorships, massive human rights violations, and genocide.<sup>3</sup> Others are spiraling toward social disorder, roiled incessantly by corruption, weak and

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<sup>1</sup>For an interesting collection of essays examining the causes and effects of conflicts in various African countries, see CIVIL WARS IN AFRICA: ROOTS AND RESOLUTION (Tasier M. Ali & Robert O. Mathews ed., 1999).

<sup>2</sup>For an account of troubled, collapsed and collapsing states in Africa, see generally COLLAPSED STATES: THE DISINTEGRATION AND RESTORATION OF LEGITIMATE AUTHORITY (I. William Zartman ed., 1995). Zartman defines a collapsed state as:

A deeper phenomenon than mere rebellion, coup, or riot. It refers to a situation where the structure, authority (legitimate power) law and political order have fallen apart and must be reconstituted in some form, old or new. On the other hand, it is not necessarily anarchy. Nor is it simply a by product of the rise of ethnic nationalism: it is the collapse of old orders, notably the state, that brings about the retreat of ethnic nationalism as the residual viable identity.

Zartman, Introduction: Posing the Problem of State Collapse, in *Collapsed States: The Disintegration and Restoration of Legitimate Authority* 1,1; for an account of the causes and consequences of state failure, see ROBERT I. ROTBERG WHEN STATES FAIL: CAUSES AND CONSEQUENCES (2005).

<sup>3</sup>See CONFLICT IN AFRICA (Oliver Furley ed., 1995) (examining the causes of conflicts in Africa); Crawford Young, *Deciphering Disorder in Africa, Is Identity the Key?* 54 WORLD POL. 532 (2002) (examining the crisis in African countries including Algeria and Rwanda); for a discussion of state failures in Africa and the social maladies that contribute to state collapse, see Robert Kaplan, *The Coming Anarchy*, ATLANTIC MONTHLY 275(2) Feb. 1994. 44-76. The prevalence and frequency of conflicts in Africa led Robert Kaplan to predict that state collapse and ensuing anarchy may be inevitable in Africa.

ineffective institutions, ethnic hostilities, and reciprocal tribal hatreds.<sup>4</sup> Even with the reemergence of constitutional democracy, human rights violations are trending upwards in Africa.<sup>5</sup> Elected African leaders typically use extra legal and often brutal means to quell internal dissensions from disaffected citizens. Human rights violations, corruption, and inequitable distribution of the nation's resources undermine the legitimacy and effectiveness of the central government and often lead to social disequilibrium and, ultimately, state failures.<sup>6</sup> State failures provide volatile, anarchic environments in which predatory government officials, opportunistic war lords, and ambitious ethnic chieftains pursue their goals through violent means.<sup>7</sup> The failures of democracy in Africa and the resulting human rights violations, mass atrocities and genocide continue to bring into sharper focus the need to promote accountability. Africans, victims and

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<sup>4</sup>Richard Jackson, *Managing Africa's Violent Conflicts*, 25 PEACE & CHANGE, 208, 212 (2000) (stating that most conflicts in Africa have been independence or secessionist conflicts, and have involved intangible elements such as ethnicity, identity and nationalism).

<sup>5</sup>Political elites who showed remarkable courage in the fight against dictatorship often turn out to be poor democrats. Unable to meaningfully address the concerns of disaffected citizens, these leaders with intractable despotic tendencies govern by intimidation and repression. Human Rights Watch, an international human rights organization and the United States State Department continue to report human rights abuses in various African countries. See for e.g. U.S. DEP'T OF STATE: COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 2006 (2007).

<sup>6</sup>See generally WHEN STATES FAIL: CAUSES AND CONSEQUENCES Robert I. Rotberg ed., 2004) (examining the phenomenon and causes of state failure); JOHN-PETER PHAM LIBERIA: PORTRAIT OF A FAILED STATE (2004) (discussing the problems of state failure in Liberia)

<sup>7</sup>Violence in Africa stems from various sources. In some cases, violence seems to be the only available option for brutalized and marginalized citizens to draw attention to their plight. Charles Gore & David Pratten, *The Politics of Plunder: The Rhetoric of Order and Disorder in Southern Nigeria*, 102 AFR. AFFAIRS, 211, 212 (2003) (stating that violent local responses by youth groups mobilized around issues of resource control and community security are a widespread response to the "politics of plunder" and an endemic feature of the Nigerian social landscape). The authors further stated that ongoing struggles for the codification of new rights and privileges, combined with worsening inequalities and corruption lead to public and private violence that is increasingly uncontrolled." Id at 213. In some cases, some ethnic chieftains view violence as a vital means to attain power. See for example, Dennis M. Tull & Andreas Mehler, *The Hidden Costs of Power-Sharing: Reproducing Insurgent Violence in Africa*, AFR. AFFAIRS, 104/416 375, 376 (stating that "some would-be leaders have some reason to conceptualize the organization of violence as a viable path to occupying at least parcels of state power").

survivors of human rights abuses, societies sundered and wounded by brutal dictators, not only seek respect for their rights but also accountability from their leaders.<sup>8</sup>

Before the advent of international criminal prosecutions, the international community expressed vague disquiet about atrocities and massive human rights violations in the continent of Africa.<sup>9</sup> Constrained by concerns for national sovereignty and politics, the world community never seriously attempted to check the excesses of tyrannical and despotic leaders that ruled Africa.<sup>10</sup> An intensely distracted world community rightfully place more importance on issues like the Cold War and nuclear proliferation, leaving hapless African citizens to bear their fate without international assistance.<sup>11</sup> Hubristic African leaders hid behind the niceties of national sovereignty and flagrantly abused their citizens without fear of reprisals from the international community.<sup>12</sup> Vulnerable, disaffected and oppressed citizens dealt with impunity the best way

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<sup>8</sup>For an examination of various accountability mechanisms, see I TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES (Neil J. Kritz ed., 1995); STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBURG LEGACY (1997).

<sup>9</sup>Douglas Farah, *African Pillagers*, WASHINGTON POST, April 25, 2006 available online 2006WLNR 6938092 (stating that tragic style leadership prospered in Africa because of their ruthlessness, international indifference, their control of vital resources or a combination of these factors).

<sup>10</sup>HELENA COBBAN AMNESTY AFTER ATROCITY? HEALING NATIONS AFTER GENOCIDE AND WAR CRIMES 5 (2007) (hereinafter AMNESTY AFTER ATROCITY) (too often throughout the centuries past, these abusive leaders did indeed enjoy a seeming impunity from any meaningful reckoning: This impunity was upheld, on the one hand, by a version of realpolitik that often cowed critics from inside and outside the countries in question, discouraging them from confronting the malefactors openly about their misdeeds, and on the other hand - at the international level - by adherence to a long-held interpretation of the concept of sovereignty that left every national-level ruler quite free to treat his own "subjects" exactly as he pleased).

<sup>11</sup>The international community typically responded after the fact to provide humanitarian assistance and in some cases to protect minority groups from abusive despots. For a collection of essays discussing the politics, theories and practice of intervention, see HUMANITARIAN INTERVENTION AND INTERNATIONAL RELATIONS (Jennifer M. Welsh ed., 2004).

<sup>12</sup>International law norms recognized the concept of national sovereignty which generally barred states from interfering in the internal affairs of other states. Article III of the African Union Charter requires member states to

they knew: through violence in the form of coups, counter-coups,<sup>13</sup> assassinations of leaders, ethnic strife, genocide and civil war.<sup>14</sup> Lately, however, African countries, either on their own, or prodded by the West, have shown an increased capacity and willingness to promote accountability through the legal process.<sup>15</sup>

There exists in Africa a general agreement about the need for accountability, but a certain divergence exists as to how this could be pursued. Some countries use criminal prosecutions to address the aftermath of mass violence.<sup>16</sup> Others prefer non-incarcerative mechanisms, like truth

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“solemnly affirm and declare their adherence to the principle of respect for the sovereignty and territorial integrity of each state and for its inalienable right to independent existence.”

<sup>13</sup>For an interesting study of coups in Africa, see Patrick J. McGowan, *African Military Coups de'etat 1956-2001: Frequency, trends and distribution*, 41 J. MODERN AFRICAN STUDIES 339 (2003); SAMUEL DECALO, *COUPS AND ARMY RULE IN AFRICA: STUDIES IN MILITARY STYLE* (1976).

<sup>14</sup>For a general discussion of civil conflicts in Africa, see Paul Collier & Anke Hoefler, *On the Incidence of Civil War in Africa*, 46 J. CONFLICT RES. 13 (2002).

<sup>15</sup>Craig Timberg, *Ex- African Leaders Face Courts not Guns*, PITTSBURGH POST-GAZETTE, May 7, 2006, A4 (despite the political flavor of many of the cases, however, analysts, legal experts and human rights activists say that the court's actions mark a new era, in which African disputes increasingly are being resolved by judges rather than soldiers); For an examination of various accountability mechanisms in different countries, see TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES (Neil J. Kirtz ed., 1995).

<sup>16</sup>African countries that have used domestic courts to address the ills of the past include Ethiopia, Rwanda and Nigeria. David Stoelting, *Enforcement of International Criminal Law*, 34 INT'L LAW. 669 (2000) (listing Rwanda and Ethiopia as countries that have used domestic courts to try operatives of past regimes). For a general discussion of prosecutions before domestic courts, see Ruth Wedgwood, *National Courts and the Prosecution of War Crimes*, in 1 SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW: THE EXPERIENCE OF INTERNATIONAL AND NATIONAL COURTS, 389. Some nations try ex leaders for acts that violate the criminal or penal code. In Nigeria, for example, some operatives of the former military junta are currently on trial for violation of the criminal and penal codes. See Okechukwu Oko, *Confronting Transgressions of Prior Military Regimes: Towards a More Pragmatic Approach*, 11 CARDOZO J. OF INT'L & COMP. L. 89 (2003); Other countries like Rwanda try them pursuant to new legislation specifically dealing with certain enumerated acts, especially genocide and crimes against humanity. Rwandan courts have tried several cases emanating from the genocide. See *Organic Law on the Organization of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes Against Humanity Committed Since Oct. 1, 1990*. No. 08/96 available at [www.rwandemb.org/prosecution/law.htm](http://www.rwandemb.org/prosecution/law.htm); Ethiopia, after the fall of dictator Mengistu tried officials of the Mengistu regime on charges of war crimes and genocide. Former head of state and despot Mengistu was tried in absentia following unsuccessful attempts to secure his extradition from South Africa. See Firew Kebede, *The Mengistu Genocide Trial in Ethiopia*, 5 J. INT'L CRIM. JUST. 513 (2007); the former president of Equatorial Guinea, Macias was tried for a variety of crimes, including genocide. He was convicted and executed. See Leo Kuper, *THE PREVENTION OF GENOCIDE* 16 (1985); Fredrick Chiluba, the former President of Zambia, is battling corruption charges before a domestic court. See Craig Timberg, *In Cases of Africa's Ex-leaders, Justice Shifts From Soldiers to Courts*, WASH. POST, May 2, 2006.

commissions<sup>17</sup> and amnesty,<sup>18</sup> as alternatives to criminal prosecutions. Others use truth commissions in combination with criminal trials to address the aftermath of impunity.<sup>19</sup> Lately, traditional methods of conflict resolution feature prominently in the anti-impunity arsenal of some African countries.<sup>20</sup> It appears, however, that the dominant mechanism adopted by the international community to address impunity is criminal prosecution.<sup>21</sup> Currently, investigations and prosecutions of serious crimes are taking place in post conflict African societies before the ad hoc international tribunals in Rwanda,<sup>22</sup> the Special Court for Sierra Leone<sup>23</sup> and lately, the International Criminal Court at the Hague.<sup>24</sup>

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<sup>17</sup>See PRISCILLA B. HAYNER UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY (2001) (presenting detailed analysis of truth commissions in different post conflict societies) Some countries, like South Africa, use truth commission as an alternative to criminal prosecutions. See RICHARD J. GOLDSTONE, FOR HUMANITY: REFLECTIONS OF A WAR CRIMES INVESTIGATOR 59-73 (2000) for an excellent collection of essays examining the values and shortcomings of truth commissions, see TRUTH V JUSTICE: THE MORALITY OF TRUTH COMMISSIONS (Robert I. Rotberg & Dennis Thompson eds., 2000).

<sup>18</sup>HELENA COBBAN AMNESTY AFTER ATROCITY? HEALING NATIONS AFTER GENOCIDE AND WAR CRIMES (2007) (discussing the use of amnesty by post conflict-societies to achieve the goals of reconciliation and consolidation of rule of law).

<sup>19</sup>Others, like Sierra Leone, use truth commissions in combination with criminal trials to address the aftermath of impunity. See William A. Schabas, *A Synergistic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone*, 15 CRIM. L.F. 3 (2004); Carsten Stahn, *Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission in East Timor*, 95 AM. J. INT'L L. 952, 953 (2001) (noting that the East Timor Truth and Reconciliation Commission was designed to complement . . . criminal proceedings).

<sup>20</sup>For an examination of traditional justice mechanisms in different parts of Africa, see TRADITIONAL CURES FOR MODERN CONFLICTS: AFRICAN CONFLICT MEDICINE (I. William Zartman ed., 2000).

<sup>21</sup>JACKSON NYAMUYA MAOGOTO WAR CRIMES AND REAL POLITIK 8 (2004) (international tribunals... have become the international community's primary response to humanitarian crisis . . .).

<sup>22</sup>Statute of the International Tribunal for Rwanda, [hereinafter referred to as ICTR] available at [www.ictor.org](http://www.ictor.org), adopted by S.C. Res. 955. U.N. SCOR. 49<sup>TH</sup> Sess., 3453 mtg. At 3. U.N Doc. S/res/955 (1994).

<sup>23</sup>The Special Court for Sierra Leone, which commenced operations in 2002 was established by an agreement between the United Nations and the government of Sierra Leone. See S.C. Res. 1315, U.N. SCOR, 55<sup>th</sup> Sess. U.N. Doc S/RES/1315 (2002) available at [www.sc-sl.org/scsl-statute.html](http://www.sc-sl.org/scsl-statute.html) The jurisdiction of the court is limited to

This paper evaluates the problems and challenges of international criminal prosecutions in Africa. It examines whether international criminal prosecutions can be used as a vehicle to contribute to national reconciliation and to “the restoration and maintenance of peace.”<sup>25</sup> I concede that punishing perpetrators of evil is definitively a viable mechanism for combating

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events that occurred after Nov. 1996. For an interesting analysis of the Special Court for Sierra Leone, see Vincent O. Nmehielle & Charles Chernor Jalloh, *The Legacy of The Special Court for Sierra Leone*, 30 FLETCHER F. WORLD AFF. 107 (2006); John Cerone, *The Special Court for Sierra Leone: Establishing a New Approach to International Criminal Justice* 8 ILSA J. OF INT. & COMP. L. 378 (2002); J. Peter Pham, *A Viable Model for International Criminal Justice: The Special Court for Sierra Leone*, 19 N.Y. INT’L L. REV. 37 (2006).

<sup>24</sup> The International Criminal Court (the ICC) was established on July 1, 2002 and is located at the Hague, The Netherlands. See Rome Statute of the International Criminal Court, U.N. GAOR, U.N. Doc. A/CONF. 183/9 (1998) (entered into force July 1, 2002) (hereinafter ICC Statute). The statute establishing the ICC and other documents concerning the operation and activities of the court can be found at its web site [www.icc-cpi-int](http://www.icc-cpi-int) African countries, most of which supported the creation of an international criminal court have shown remarkable interest in using the court to redress impunity. Thomas Lubanga, a Congolese warlord is the first African to be arraigned before the ICC for charges of war crimes consisting of enlisting and conscripting under-aged children. See 2006 wlnr 19521224. For example, the President of Central African Republic, Bracois Buzize, asked the court to investigate the atrocities of his predecessor, Ange-felix Patasse; See Timberg, *supra* note Similarly, the Presidents of Ivory Coast, Congo and Uganda have requested the court to investigate the activities of armed groups operating in their respective countries. *Id.* Charles Taylor, former war lord and President of Liberia is currently on trial before the ICC. He is charged with multiple crimes, including dragooning of children into combat, the hacking off of limbs and the killing of thousands of civilians in the 1990s. See Marlise Simons, *Europe: The Hague, April Trial for Charles Taylor*, NEW YORK TIMES Sept. 26, 2006. The International Criminal Court prosecutor is currently investigating top Sudanese government officials accused of complicity in the genocide in Darfur, Sudan. Nora Broustany & Stephanie McCrummen, *Sudan Official Accused of War Crimes*, WASH. POST, Feb. 28, 2007 (reporting that the ICC prosecutor has named a member of the Sudanese President’s inner circle as a suspect in the atrocities in Darfur).

<sup>25</sup> The objectives of the ICTR are clearly stated in the preamble of the Security Council resolution that established it. The Security Council:  
Expressing once again its grave concern at the reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda,  
Determined to put an end to such crimes and to take effective measures to bring to justice the persons responsible for them,  
Convinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for genocide and the above-mentioned violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace,  
Believing that the establishment of an international tribunal for the prosecution of persons responsible for the above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed....  
S.C Res. 955 U.N. SCOR, 49<sup>th</sup> Sess., Preamble, U.N. Doc. S/RES/955 (1994)

impunity.<sup>26</sup> In appropriate cases, the criminal process can be deployed to engineer compliance with the law and to deter would be perpetrators of evil.<sup>27</sup> I argue, however, that the objectives of using criminal prosecution to reestablish social equilibrium and promote reconciliation, though laudable and rhetorically inspiring, are simply unattainable.<sup>28</sup> The hope that international criminal prosecutions will reconcile mutually distrustful ethnic groups with a long history of

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<sup>26</sup>Several definitions of impunity abound in academic literature. I however adopt the definition suggested by Mr. Joinet in his 1996 report to the U.N. Sub-Commission on Prevention and Protection of Minorities. He stated that “impunity means the possibility, *de jure* or *de facto*, of bringing the perpetrators of human rights violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to them being accused, arrested, tried and, if found guilty, convicted.” See U.N. Econ. & Soc. Council, Sub-Comm. On Prevention of Discrimination & Prot. Of Minorities, Questions of the Impunity of Perpetrators of Violations of Human Rights (Civil and Political Rights), U.N. Doc. E/CN.4/Sub.2/1996/18 (June 29, 1996) (prepared by Louis Joiner) at 9. For an interesting analysis of empirical conceptualization of the concept of impunity, see Jorge E. Vinuales, *Impunity: Elements For an Empirical Concept*, 25 LAW & INEQ. 115 (2007).

<sup>27</sup>Michael P. Sharf & Nigel Rodley, *International Principles on Accountability*, in POST CONFLICT JUSTICE, 89, 90 (Cherif M. Bassiouni ed., 2002) (arguing that prosecutions deter future perpetrators, curtail resort to self-help and foster respect for the rule of law); MARTHA MINOW BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 122 (1998) (stating that trials may convert the impulse for revenge into state-managed truth seeking and punishment); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2542 (arguing that criminal punishment is the most effective insurance against future repression); Neil Kritz, *Progress and Humility: The Ongoing Search for Post-Conflict Justice*, in POST CONFLICT JUSTICE, Id., 55, 58 (arguing that trials communicate that the culture of impunity that permitted heinous abuses to be perpetrated in the first place is being replaced by a “culture of accountability,” providing some degree of security to victims while at the same time admonishing and deterring potential future abusers); Chandra Lekha Sriram, *Revolutions in Accountability: New Approaches to Past Abuses*, 19 AM. U. INT’L L. REV 301, 382 (2003) (stating that in enshrining the rule of law and rights in the new society, prosecutions may aid social peace by preventing a potential cycle of violence perpetrated by those seeking vengeance for prior wrong).

<sup>28</sup> Criminal prosecution has become such an overwhelming objective that the tribunals appear to have abandoned the broader and more grandiose ambition of “contributing to national reconciliation” and “the restoration and maintenance of peace.” A 2001 study by the International Crisis Group found that “the tribunal’s contribution to national reconciliation was non-existent as long as it was still perceived as delivering victor justice” see International Crisis Group, *Justice Delayed* 18; Adama Dieng, then United Nations Assistant Secretary General and Registrar of the International Criminal Tribunal for Rwanda expressed the prevailing sentiments regarding the abandonment of its other objectives by the ICTR. He stated that:

[p]roviding external assistance to national justice systems, or undertaking any other activity other than the pursuit of justice through the criminal process has been generally deemed ultra vires in respect of the mandate of the International Criminal Tribunal for Rwanda, notwithstanding its preamble, which might indicate such needs.

Adama Dieng, *International Criminal Justice: From Paper to Practice - A Contribution from the International Criminal Tribunal for Rwanda to the Establishment of the International Criminal Court*, 25 FORDHAM INT’L L.J. 688, 698 (2002).



reciprocal hatred is quaint, perhaps even naive.<sup>29</sup> International criminal prosecutions launched in Africa amidst much publicity and high expectations are on the verge of oblivion, perhaps irrelevance.<sup>30</sup> After more than ten years of international criminal prosecutions in Africa, it is becoming increasingly obvious that criminal prosecution is a weak reed on which to hoist the strategy of reestablishing social equilibrium and reconciling intergroup hostilities in post-conflict African societies. A confluence of systemic and environmental factors have undermined the hoped for influence of international criminal prosecutions in Africa.

First, efforts to use criminal prosecution to modify behavior and contribute to social equilibrium rest on a failure to appreciate that causes of conflict in Africa cannot be resolved through the criminal process.<sup>31</sup> The overarching goal of criminal prosecution is to apportion blame and punish the guilty.<sup>32</sup> Criminal prosecutions are not designed to and can neither address

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<sup>29</sup>The idea of using criminal prosecution to reestablish social equilibrium after mass violence has been severely and rightly criticized by several scholars. See note 305 *ante*.

<sup>30</sup>Kingsley Moghalu, former spokesperson for the International Criminal Tribunal for Rwanda, provided a scathing but accurate indictment of international criminal tribunals. He stated:

[m]ore than a decade of international war crimes later, the jury is in: these tribunals are out of touch with the societies for which they were ostensibly created, and their achievements and impact have been stunted by this fundamental disconnect.

Kingsley Chiedu Moghalu, *Saddam Hussein's Trial Meets the "Fairness" Test*, 20 ETHICS & INT'L AFFAIRS 517 (2006).

<sup>31</sup>O.G. PRUNIER THE RWANDA CRISIS: HISTORY OF A GENOCIDE 265 (1995). (discussing the genocide in Rwanda, the author stated that "the immensity of the crime cannot be dealt with through moderate versions of European criminal law made for radically different societies."). Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?* 95 AM. J. INT'L. 7, 31 (2001) (noting that achieving prevention against an entrenched culture of impunity and fostering inhibitions against widespread rape, pillage, and murder in a context of habitual violence cannot be realized through the efforts of a few ad hoc tribunals and national trials here and there).

<sup>32</sup>See generally WAYNE R. LAFAVE CRIMINAL LAW 25-30 (4<sup>th</sup> ed. 2003).

nor alleviate the underlying social problems that lead to and perpetuate violence.<sup>33</sup> Violence may be more pronounced in some parts of Africa, but its causes remain the same in virtually every African country: ethnic distrust, corruption, marginalization of ethnic groups and inequitable allocation of a nation's resources.<sup>34</sup> The frequency, resilience and indeed the incentive to resort to violence will shrink by addressing the underlying causes of violence.<sup>35</sup> These problems cannot be addressed by or through the prosecution of selected perpetrators of evil.<sup>36</sup> The culture that sustains social disequilibrium must be counteracted if accountability is to take roots in Africa.<sup>37</sup>

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<sup>33</sup>Professor Mark Drumbl, who spent some time in Rwanda, stated that "trials alone will not reconstruct shattered societies. Trials will not thwart the hatreds that give rise to sectarianism. Trials do not create socioeconomic stability." Transcript of Recording, Nuremburg's Legacy 60 years later (NPR 2006).

<sup>34</sup>See K.Y. Amoako, The Economic Causes and Consequences of Civil Wars and Unrest in Africa, Address to the 70<sup>th</sup> Ordinary Session of the Council of Ministers of the Organization of African Unity, Algeria, July 8, 1999. Available at [www.africaeconomicanalysis.org/articles/gen/Africawarhtm.html](http://www.africaeconomicanalysis.org/articles/gen/Africawarhtm.html). K.Y. Amoako, the U.N. Undersecretary of Economic Commission for Africa, offers four hypotheses why civil wars occur in Africa: (1) innate ethnic and religious hatred, where hatred is exposed by ambitious leaders; (2) national grievance, where the performance of a government is held to be against the national interest; (3) distributional grievance, where government performance is held as having been particularly discriminatory against a given group or groups in society; and (4) employment, where rebellion is an employment choice motivated by the opportunity cost of employment and the prospective gains from capturing the state and its resource base.

<sup>35</sup>In reviewing the operations of the International Criminal Tribunal in Rwanda, Professors Howland and Calathes stated:

if the ideal is to facilitate positive social change in Rwanda that brings about reconciliation and the respect for human rights, a system based on ill-thought-out symbolic justice or attainable mass retribution must be scrapped and replaced with a more thought-out and creative strategy regarding the structure and operation of the ICTR.

Todd Howland & William Calathes, *The U.N.'s International Criminal Tribunal, Is it Justice or Jingoism for Rwanda? A Call for Transformation*, 39 VA. J. INT'L L 135, 165 (1998).

<sup>36</sup>Makau Mutua, *Never Again: Questioning the Yugoslavia and Rwanda Tribunals*, 11 TEMP. INT'L & COMP. L.J. 167, 168 (1997) (arguing that criminal prosecutions will only have relevance if they are part of a broader strategy to deal with the foundational problems).

<sup>37</sup>Rosanna Lipscomb, *Restructuring the International Criminal Court Framework to Advance Transitional Justice: A Search for a Permanent Solution in Sudan*, 106 COLUM. L. REV 182, 195 (2006) (stating that while punishing the perpetrators and preventing future atrocities are important goals of the system, other objectives linked to transitional justice and long-term economic, social and legal development may prove even more valuable in the prevention of these crimes) (footnotes omitted).

Addressing impunity in Africa will “require more than legal deterrence; it will require painstaking social and economic development.”<sup>38</sup>

Second, criminal prosecution is a poor vehicle for restoring social equilibrium in increasingly fragmented societies balanced on the edge of anarchy where violence is viewed as a legitimate means to attain desired objectives.<sup>39</sup> In a fledgling democracy fractured along ethnic lines with a history of mutual ethnic hostilities and reciprocal hatreds, international criminal prosecutions may end up becoming an impetus for, not a deterrent to, extra legal violent conduct.<sup>40</sup> Some war lords have apocalyptic goals and readily resort to violence to mold the society according to their image. Faced with the threat of prosecution, and sensing their inability to negotiate with a determined world community, war lords with everything to lose, may decide that it is in their best interest to fight till the end.<sup>41</sup> The consequences of prosecuting determined war lords “may be continued tyranny or bloodshed.”<sup>42</sup> Also, criminal trials have adverse impacts

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<sup>38</sup>Alex de Waal, *Tragedy in Darfur: On Understanding and Ending the Horror*, Boston Review, available at [www.bostonreview.net/BR29.5/dewaal.html](http://www.bostonreview.net/BR29.5/dewaal.html) .

<sup>39</sup>See pages 70-74 of text *infra*.

<sup>40</sup>Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?* Hofstra University School of Law Legal Studies, Research Paper Series No. 06-22, p4 (arguing that in certain circumstances, International Criminal Tribunals might actually exacerbate humanitarian atrocities by prosecuting individuals whose political cooperation is critical to a successful peace negotiation in weak states).

<sup>41</sup>Another incentive for the war lords to continue with their insurgency is that if they survive initial condemnation by the world community and hold their grounds, the international community will encourage the ruling government to negotiate with them. See Tull & Mehler, *supra* note 7 at 376 (Over the past fifteen years, power-sharing agreements between embattled incumbents and insurgents have emerged as the West’s preferred instrument of peace-making in Africa. In almost every country in which insurgent leaders mustered sufficient military power to attract the attention of foreign states, they were included in “government of national unity.”). For an excellent analysis of power sharing with war lords in Africa, see Jeremy I. Levitt, *Illegal Practice: An Inquiry into the Legality of Power Sharing With War Lords and Rebels*, 27 MICH. J. INT’L L. 495 (2006).

<sup>42</sup>Eric Blumenson, *The Challenges of A Global Standard of Justice: Peace Pluralism and Punishment at the International Criminal Court*, 44 COLUM. J. TRANSNAT’L L. 801, 803 (2006).

on relationships. They often involve accusations and counter accusations, rehashing of facts that rekindle old hostilities and reigniting passions that ultimately make reconciliation difficult.<sup>43</sup>

Third, the causes of violence in Africa are considerably different from what leads to deviant behavior in developed societies and are more difficult to address via criminal trials.<sup>44</sup> The dynamics of violence in Africa challenge the expectations of a Western-type criminal justice system and raise serious questions about the assumptions that undergird criminal prosecution.<sup>45</sup> Violence in Africa is the product of a different phenomenon. Violence that has disfigured Africa, the kinds witnessed in Rwanda, Sudan and Sierra Leone, for example, result not from deviant behavior of citizens but from tensions at the armature of the society: ethnic distrust. Its dynamism is sustained by the belief that violence in defense of ethnic interests is a moral imperative, even a legal obligation.<sup>46</sup> Decades of ethnic distrust and rivalries coupled with the central government's inability to deal fairly with the ethnic groups provide further impetus for the apocalyptic dynamism of violence.<sup>47</sup> Traditional notions of the criminal process fail to address the broad range of ways in which situational cultural pressures exacerbate violence. Violence created by underlying social problems and perpetrated by several citizens with varying degrees of culpability

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<sup>43</sup>Jason Benjamin Fink, *Deontological Retributivism and the Legal Practice of International Jurisprudence: The Case of the International Criminal Tribunal For Rwanda*, 49 J. AFR. L. 101 (2005) (noting that international criminal jurisprudence often sacrifices the possibility of reconciliation for the normative framework entailed by retribution).

<sup>44</sup>See pages 55-62 of text *infra*.

<sup>45</sup>See Howland & Calathes, *supra* note 35 (discussing the relevance of traditional theories of punishment in the context of the International Criminal Tribunal for Rwanda).

<sup>46</sup>See pages 66-68 of text *infra*.

<sup>47</sup>William R. Ochieng, *Foreward*, CONFLICT IN AFRICA i (P. Godfrey Okoth & Bethwell A. Ogot eds., 2000) (the flare-ups into violence that sometimes end up in coups and rebellion in Africa, are often attempts by class or nationality to expropriate the little wealth that exists and to deprive others).

cannot be addressed by criminal prosecution designed to address individual misconduct.<sup>48</sup> The Western type criminal process is scarcely appropriate in cases where “hundreds or thousands of people participate in an orgy of mass violence”<sup>49</sup> and where the causes of deviant conduct reside not at the individual level but at the communal level.<sup>50</sup> Moreover, whether international criminal prosecution actually serves as a deterrence is unclear because its effect cannot be empirically verified.<sup>51</sup>

Fourth, the effectiveness of international criminal prosecutions depends on support both from the public and state governments. Public support has been low because of negative attitudes towards the West shaped by historical circumstances, especially the adverse effects of colonialism.<sup>52</sup> Public support continues to dwindle because of prevailing attitudes which view

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<sup>48</sup>Erin Daly, *Transformative Justice: Charting a Path to Reconciliation*, 12 INT’L LEGAL PERSP. 73, 79 (2002) Professor Daly advances two reasons why criminal prosecution cannot adequately deal with wrongs in post conflict societies. “First the nature of injustice in these contexts is not necessarily conducive to correction by retribution or punishment. Second, the need for justice may be felt throughout the society at large and not just in the isolated arenas that are the locus of retributive justice.”

<sup>49</sup>Mark R. Amstutz, *Is Reconciliation Possible After Genocide: The Case of Rwanda*, 48 Journal of Church & State 541 (2006).

<sup>50</sup>Todd Howland & William Calathes, *The U.N.’s International Criminal Tribunal, Is it Justice or Jingoism for Rwanda? A Call for Transformation*, 39 VA. J. INT’L L 135, 158 (1998).

The ICTR ‘s attempt to apply individual level justice to promote social order will not and can not work. Individual level punishments can only affect a permanent change if the cause of the deviant behavior resides solely with the individual. In Rwanda, however, it is impossible to conclude that the causes of deviance reside with the individual. As the ICTR is focusing its attention on individual deviants, it is presenting the world, and the Rwandans, with the image of a person who needs correcting through punishment instead of a social system that needs reorganization (footnotes omitted).

<sup>51</sup> An assessment of the deterrent values of international criminal prosecutions can only be made by conjecture or speculation. As Professor Blumenson observed “it is notoriously difficult to determine whether a past regime of punishment had subsequent deterrent effects.” Blumenson, *supra*, note 42 at 822.

<sup>52</sup>A justice system functions optimally when it enjoys the support, confidence and respect of the citizens. See REPORT OF THE REDESIGN PANEL ON THE UNITED NATIONS SYSTEM OF ADMINISTRATION OF JUSTICE U.N.A/61/205 (2006) p. 5 (stating that a justice system is only as good as the level of respect and confidence it commands)

international criminal tribunals as agents and symptoms of imperialism, and as attempts by the West to reestablish its surezainity over Africa.<sup>53</sup> The effectiveness of international criminal prosecutions also depends on support from state governments which has been less than enthusiastic.<sup>54</sup> African leaders are reluctant to support the prosecution of their benefactors, tribesmen or war lords who have the capacity to cause troubles for their fledgling government.<sup>55</sup> Whether ad hoc or permanent, international criminal tribunals based on Western notions of justice, operating under the fog of skepticism, increasing popular dissatisfaction, and mounting hostility from state governments, can do very little to reestablish social equilibrium and arrest the advancing decrepitude threatening to engulf Africa.

For all these reasons, or in some combination, international criminal prosecutions have neither delivered on the promise of social equilibrium nor served as a chastening influence on impunity in Africa.<sup>56</sup> Ralph Zacklin, Assistant Secretary-General for Legal Affairs, United Nations, expressed the views widely shared by scholars and human rights practitioners when he stated that “the ad hoc tribunals have been too costly, too inefficient, and too ineffective. As a mechanism for dealing with justice in post-conflict societies, they exemplify an approach that is no longer politically or financially viable.”<sup>57</sup>

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<sup>53</sup>The hybrid tribunal in Sierra Leone did not adequately counter public perception that international criminal prosecutions represent attempts by the West to impose its preferences on Africa.

<sup>54</sup>See pages 42-49 of text *infra*.

<sup>55</sup>See pages 43-46 of text *infra*.

<sup>56</sup>ICTR has its fair share of critics. See Allison Corey & Sandra F. Joireman, *Retributive Justice: The Gacaca Courts in Rwanda*, 103 FOREIGN AFFAIRS, 73, 81 (2004) (the failures of the tribunal far outweigh its benefits. Its goal is only to prosecute the leaders of the genocide, but the process has been so excruciatingly slow and the mandate so narrow that it is an insufficient and inadequate response to the need for justice).

<sup>57</sup>Ralph Zacklin, *The Failings of AD Hoc International Tribunals*, 2 J. INT’L CRIM. JUST. 541, 542 (2004)

This paper is divided into two broad parts. Part I examines the values of criminal prosecution. It acknowledges that international criminal prosecution can play significant roles in promoting accountability in Africa, so long as it is properly structured and undertaken with some sensitivity to the sentiments and feelings of Africans who live with the painful realities of violence.<sup>58</sup> Wholesale adoption of Western models of justice will not work in Africa given the prevailing social, political and cultural realities.<sup>59</sup> Concerns for accountability offer no licence for the international community to arrogate to itself the right to determine what is best for Africa.<sup>60</sup> It argues that imposing the preferences of the international community without due consultations with affected African nations will revive poignant painful memories of colonialism and reignite negative sentiments that will ultimately undermine efforts to promote accountability.<sup>61</sup>

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<sup>58</sup>In a case study of the accountability mechanisms set up to deal with Rwandan genocide, Philip Drew advised that:

It must be kept in mind that not all societies are the same. International (and national) responses to issues such as those in Rwanda need to be sensitive to both the differences and commonalities between various societies and their concepts of law.

Philip Drew *Dealing with Mass Atrocities and Ethnic Violence: Can Alternative Forms of Justice be Effective? A Case Study of Rwanda*, available at [www.cfcj-fcjc.org/full-text/rwanda.htm](http://www.cfcj-fcjc.org/full-text/rwanda.htm) .

<sup>59</sup> As Gerald Prunier admonished in the Rwandan context “the immensity of the crime cannot be dealt with through moderate versions of European criminal law made for radically different societies.” O.G. PRUNIER *THE RWANDA CRISIS: HISTORY OF A GENOCIDE* 265 (1995).

<sup>60</sup>Miriam Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice* 15, HARV. HUM RTS J. 39, 46 (2002). (Arguing that “those who have not suffered cannot presume to determine for those who have what should be attempted through transitional justice”).

<sup>61</sup>Fink, *supra* note 43 at 124-5 (discussing the unsuitability of western justice system to Rwanda, the author noted that “one could argue that the international community has committed itself to a model of legal imperialism).

Part II examines the limitations of criminal trials. This portion presents a clear and rich exploration of the causes of violence in Africa and explains why international criminal law has not delivered as promised. It offers some explanations of factors that undermine the effectiveness of international criminal prosecutions, namely attitudinal, environmental factors, lack of cooperation from state governments, and limits of criminal prosecution. It urges all those involved in the fight against impunity in Africa to rethink the deeply flawed assumptions about the capacity of international law to bring about transformative changes in the conduct of citizens and group relations in Africa. Violence is so interwoven with the maladies in the continent - corruption, poverty, ethnic tensions - that it is doubtful if criminal prosecutions alone can serve as a chastening influence on the behavior of the leaders or the citizens trapped within the society. Building an effective strategy to reestablish social order in post-conflict African societies requires an understanding of the idiosyncratic environmental factors that animate violence, as well as a recognition that criminal prosecutions cannot address the social pathologies that have disfigured Africa. It is these pathologies that will define and shape Africa's future, not the legacy of criminal prosecutions.

This paper concludes that a single minded pursuit of criminal prosecutions as the sole panacea to impunity in Africa, regardless of the anguishing realities, carries the dangerous and unacceptably high risk of further deterioration, anarchy and blood shed in Africa.<sup>62</sup> It is important, therefore, to construct a strategy that can simultaneously promote accountability and address the social pathologies that undermine efforts to reestablish social equilibrium and reconciliation.

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<sup>62</sup> Adam Smith, *Transitional Justice in Iraq: The Iraqi Special Tribunal and the Future of a Nation*, 14 INTERNATIONAL AFFAIRS 5, 6 (2005) (noting that the international community has become enthralled with criminal justice as the solution to atrocity crimes and in so doing has lost sight of the inherent risks and difficulties, logistical and otherwise of running such tribunals).



## Part I

### Values of International Criminal Prosecution

Proponents of international criminal trials contend that prosecutions are pertinent to efforts to restore social equilibrium and are even more vital to the international community's efforts to deal with the culture of impunity that threatens to disfigure Africa.<sup>63</sup> Protagonists of international criminal prosecutions and those affiliated with the ICTR recite four main reasons for international criminal prosecutions: deterrence, incapacitation, moral education, and substitution for vigilantism.<sup>64</sup>

Jack Snyder and Leslie Vinjamuri present an admirable summary of the three reasons endlessly advanced by the proponents of international criminal trials to justify the need for international criminal prosecutions:

First, trials send a strong signal to would-be perpetrators of atrocities that they will be held individually accountable for their actions. . . . Second, trials strengthen the rule of law by teaching both elites and masses that the appropriate means of resolving conflict is through impartial justice. . . . Third, trials emphasize the guilt of particular

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<sup>63</sup>The preamble to the ICC statute captures the reasons for the establishment of the court. It states inter alia "determined to put an end to impunity for the perpetrators of these crimes and thus contribute to the prevention of such crimes." See Rome Statute of the International Court. Several scholars have offered different perspectives on the need for criminal trials. See for e.g. Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2542 (1991) (arguing that trials may "inspire societies that are reexamining their basic values to affirm the fundamental principles of respect for the rule of law and for the inherent dignity of individuals.").

<sup>64</sup>MARTHA MINOW BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 122 (1998) (stating that trials may convert the impulse for revenge into state managed truth-seeking punishment). *The Promises of International Prosecution*, 114 Harv. L. Rev 1957, 161 (2001). Michael P. Sharf & Nigel Rodley, International Law Principles on Accountability, in Post Conflict Justice 89, 90 (Cherif Bassiouni ed., 2002) (prosecutions for gross human rights abuses "can discourage future human rights abusers, curtail vigilante, retaliatory justice, and foster respect for the rule of law and the new democratic order) Mark A. Drumbl, *Law and Atrocity: Settling Accounts in Rwanda*, 31 OHIO N.U. L. REV 41 (2005) (noting that criminal trials aspire to exact retribution, promote reconciliation, deter future violence, express victim's outrage, maintain peace, and cultivate a culture of human rights); ARYEH NEIER WAR CRIMES 81-84 (1998) (listing deterrence, retribution and incapacitation as the purposes of criminal punishment).

individuals and thereby diffuse the potential of future cycles of violence between ethnic groups.<sup>65</sup>

International criminal prosecutions underscore the need for accountability in a culture mired in impunity.<sup>66</sup> Scholars, human rights advocates, and United Nations officials all seem to agree that the future stability of Africa, deepening the rule of law, and eradicating the culture of impunity, can only be guaranteed by holding perpetrators of evil accountable for their transgressions.<sup>67</sup> The nature of some crimes and the circumstances of their commission demand the attention and involvement of the international community.<sup>68</sup>

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<sup>65</sup>Jack Synder & Leslie Vinjamuri, *Trials and Errors: Principles and Pragmatism in Strategies of International Justice*, 28 INTERNATIONAL SECURITY, 5,17 (2003).

<sup>66</sup>Chris Maina Peter, *The International Criminal Tribunal for Rwanda: Bringing the Killers to Book*, International Review of the Red Cross No 321 p. 655 available at [www.icrc.org/Web/Eng/siteeng0.nsf/html](http://www.icrc.org/Web/Eng/siteeng0.nsf/html) . Extolling the creation of the International Criminal Tribunal for Rwanda, Professor Chris Peter stated:

The establishment of the Rwanda Tribunal is even more significant in Africa, where its presence on the continent will help raise people's awareness of the importance and value of human life. Serious crimes have been committed against the African people by all sorts of dictators, and so far they seem to be getting away with it . . . The establishment of the Rwanda Tribunal in Arusha has thus come as an unpleasant surprise for the power-hungry leadership in Africa. It is a clear signal from the international community that human life is precarious, that it should be respected and protected, and that those who abuse it will be held responsible and be sought wherever they are hiding

<sup>67</sup>See e.g. Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2542 (1991) (arguing that criminal prosecution is the most effective insurance against future repression); Antonio Cassese, *On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, 9 EUR. J. INT'L L. 1, 3-4 (1998); Chris McMorran, *International War Crimes Tribunals*, available at [www.beyondintractability.org/essay/int\\_war\\_crime\\_tribunals](http://www.beyondintractability.org/essay/int_war_crime_tribunals) (stating that for a country attempting to make a transition from a repressive regime to a democracy, war crimes tribunals offer citizens and leaders the opportunity to put their faith in an equitable rule of law); David Dyzenhaus, *Debating South Africa's Truth and Reconciliation Commission*, 49 U. TORONTO L.J. 311 (1999) (the pursuit of retributive justice in a transition to democracy is thought to be important, not only because of the intrinsic worth of doing justice, but also because the enactment by the courts of the rituals of retributive justice will educate society in the practices of the rule of law that are crucial to the stability of democracy); SANDRA DAY O'CONNOR, FOREWARD, RICHARD GOLDSTONE, FOR HUMANITY: REFLECTIONS OF A WAR CRIME INVESTIGATOR xi (2000) ('The rule of law is generally vindicated by holding transgressors accountable for their actions through prosecution and punishment).

<sup>68</sup>Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT'L L. 383, 401 (1998) (stating that one circumstance necessitating creation of an ad hoc tribunal is that "in which national court proceedings would not lead to an impartial trial for serious international crimes.").

The conditions in Africa - weak and dysfunctional institutions, ethnic tensions, corruption, and a central government unable or unwilling to address the atrocities of former leaders - make the establishment of international criminal tribunals justified, and perhaps necessary.<sup>69</sup> Most post-conflict societies are wistful about prosecuting evildoers but the reality is that “many fledgling democracies have simply not had the power, popular support, legal tools, or conditions necessary to prosecute effectively.”<sup>70</sup> Post-conflict societies, for a variety of reasons ranging from lack of political will, security concerns, dysfunctional judicial infrastructure<sup>72</sup> to corruption, are either unable or unwilling to prosecute perpetrators of evil.<sup>71</sup> Even when they can prosecute, scholarship and research show that governments in those states are afflicted with corruption and a lack of basic

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<sup>69</sup>Danilo Zolo, *Peace Through Criminal Law?* 2 J. INT’L CRIM. JUST. 727, 730 (2004) (most serious war crimes and crimes against humanity tend to remain unpunished because of the connivance, ineptitude, or the lack of concern of the national courts); Jane E. Stromseth, *Pursuing Accountability After Conflict: What Impact on Building the Rule of Law*, 38 GEO. J. INT’L L. 251, 252 (2007) (noting that in the wake of violent conflicts, national justice systems, if they function effectively at all, usually have only limited ability to render fair justice. Indeed, in many post-conflict societies, citizens view existing legal institutions skeptically because of corruption, systematic bias, association with abusive past regimes, failure to effectively address past grievances or severe shortfalls in human and other resources).

<sup>70</sup>Stephan Landsman, *Alternative Response to Serious Human Rights Abuses: Of Prosecution and Truth Commissions*, 59 LAW & CONTEMP. PROBS. 81, 84 (1996).

<sup>72</sup>In Rwanda, for example, the genocide decimated the legal and judicial infrastructure. See for example, Christina Carroll, *An Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing With Mass Atrocities of 1994*, 18 B.U. INT’L L.J. 163, 172 (2000) (stating that it was discovered that “out of the 800 lawyers and judges of the national and provincial courts, only 40 were alive and in the country after 1994); Pernille Ironside, *Rwandan Gacaca: Seeking Alternative Means to Justice, Peace and Reconciliation*, 15 N.Y. INT’L L. REV. 31, 37 (2002) (noting that Rwanda’s judicial sector was virtually annihilated by the genocide, in both structural and human terms). See also H. Strohmeyer, *Collapse and Reconstruction of a Judicial System: The United Nations Mission in Kosovo and East Timor*. 95 AM. J. OF INT’L L. 46 (2001) (describing the destruction of the judicial system by the crisis in Kosovo).

<sup>71</sup>Ivan Simonovic, *Attitudes and Types of Reaction Toward Past War Crimes and Human Rights Abuses*, 29 YALE J. INT’L L. 343, 356-357 (stating that in post-conflict and transition societies, it is often very difficult to reestablish the rule of law - and especially to start the process with national proceedings for past war crimes and human rights abuses. In some cases political will is lacking, while in other cases, the justice system itself has been involved in oppression, infrastructure has been destroyed, or qualified personnel have been killed or have left the country); KINGSLEY CHIEDU MOGHALU RWANDA’S GENOCIDE: THE POLITICS OF GLOBAL JUSTICE 37 (2005) (hereinafter RWANDA’S GENOCIDE) (in the former Yugoslavia, it would have been inconceivable in 1993 that any national court would put senior political or military figures on trial for the crimes that accompanied the break up of the country. In Rwanda, the infrastructure for such an effort simply did not exist. Rwandan government’s willingness to put members of its own forces on trial for committing mass atrocities was debatable.)

infrastructure that disable them from administering justice that meets universally accepted standards of a fair trial.<sup>73</sup> Government officials who make the decisions whether or not to prosecute perpetrators of evil tend to be indulgent toward their friends and supporters and easily manipulate the legal process to achieve pre-ordained outcomes.<sup>74</sup> Attempts by such states to prosecute perpetrators of evil often elicit complaints and criticisms, especially from defendants and their supporters who accuse the government of using the machinery of justice to settle old scores, and to intimidate political opponents.<sup>75</sup> In some cases, top government officials bear some complicity in the violence that compromises their ability to fairly and objectively deliver justice to the society.<sup>76</sup> Efforts to promote accountability often lead to “sham trials by insincere regimes implicated in the

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<sup>73</sup> AMNESTY INTERNATIONAL RWANDA: THE TROUBLED COURSE OF JUSTICE 2 (2000) (examining and detailing problems encountered by Rwandan courts trying defendants charged with genocide); L. Danielle Tully, *Human Rights Compliance and the Gacaca Jurisdictions in Rwanda*, 26 B.C. INT’L & COMP. L. REV 385, 402 (2003) (stating that the utter devastation of the genocide has made adhering to international fair trial standards “nearly impossible”).

<sup>74</sup> The group of U.N. experts’ assessment of the legal sector in Liberia in 2003 is typical of the judiciary in post conflict African societies. The group found that:

. . . public confidence in the judiciary is extremely low . . . courts were extremely reluctant to rule against the government and “telephone justice was said to be common. By all accounts, Taylor’s domination of the judiciary was far reaching and extreme

U.N. DPKO LIBERIA: LEGAL AND JUDICIAL PLANNING ASSESSMENT AND CONCEPT OF OPERATION, Sept. 19, 2003 quoted by Richard Sannerholm, *Legal, Judicial and Administrative Reforms in Post-Conflict Societies: Beyond the Rule of Law Template*, 12 J. CONFLICT & SECURITY L. 65, 71 (2007).

<sup>75</sup> David Wippman, *Atrocities, Deterrence and the Limits of International Justice*, 23 FORDHAM INT’L L.J. 473,483 (1999) (noting that some may perceive national trials as illegitimate and “a case of victor’s justice.”); Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 DUKE J. COMP. & INT’L L. 349, 371 (1997) (noting that defendants in national courts will have more reason than defendants tried before an international tribunal to fear bias in the form of victor’s justice or of personal partiality); Louise Arbour, *The Legal Profession and Human Rights: Progress and Challenges in International Criminal Justice* 21 FORDHAM INT’L L.J. 531, 534 (1997) (noting that in both Rwanda and Yugoslavia, the national justice system was too incapacitated to deal with atrocities); Stromseth, *supra* note 69 at 252 (even when criminal trials are initiated against perpetrators, those facing trial and their political allies may view the proceedings as illegitimate forms of “victor Justice”).

<sup>76</sup> Patricia M. Wald, *International Criminal Courts – A Stormy Adolescence*, 46 VA. J. INT’L L. 319, 331 (2006) (“Recent experiences in other benighted countries recovering from civil wars give little cause for optimism that states can be counted on to vindicate war crimes on their own. The leaders in such countries are usually partisans of the winning side and have little impetus to go after their own friends and followers”).

very atrocities adjudicated or political show trials by successor regimes bent on vengeance instead of justice.”<sup>77</sup>

An international tribunal far removed from the cultural synthesis that led to atrocities is in a better position than domestic courts to hold accountable “violent aggressors who fall through the cracks (or gaping holes) of national justice systems because their governments are either unwilling or unable to pursue criminal sanctions.”<sup>78</sup> Also, an international tribunal is better able to effectively address the aftermath of mass violence, especially the prosecution of high-level perpetrators of evil.<sup>79</sup> An international tribunal is more cognizant of prevailing human rights norms and is able to conform these norms to the realities of a highly dynamic and volatile environment like Africa.<sup>80</sup> For example, the ICTR’s successful prosecution of rape as a crime against humanity attests to the creative use of existing human rights norms to promote decency in the continent of Africa.<sup>81</sup> The judgments of international criminal tribunals enjoy greater credibility and respect than judgments of

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<sup>77</sup>Jose E. Alvarez, *Crimes of State/Crimes of Hate; Lessons From Rwanda*, 24 YALE J. INT’L L. 365 (1999).

<sup>78</sup>Jamie Mayerfield, *Ending Impunity*, 20 ETHICS & INT’L AFFAIRS 361 (2006).

<sup>79</sup>Zolo, *supra* note 69 at 728. Comparing international tribunals to domestic courts, he stated: international tribunals can prosecute war crimes and crimes against humanity more effectively. For domestic tribunals are not willing to act against crimes lacking relevant national or territorial links with the state. Moreover, international courts are technically more skilled than domestic courts in ascertaining and construing international law, are more impartial in trying crimes and more likely to apply uniform judicial standards. In addition, as international trials are more visible in the media, they are more effective in expressing the will of the international community to punish those guilty of serious international crimes, and their sentences perform a clearer function as a public reprimand of those convicted.

<sup>80</sup>Moghalu, *RWANDAS GENOCIDE*, *supra* note 71 at 29 (noting that an international tribunal would have a better familiarity with the techniques and substance of international law).

<sup>81</sup>The Prosecutor v Jean-Paul Akayesu, Case No. ICTR-96-4-T; Judgment 85 available at [www.ictor.org/english/cases/Akayesu/judgment/akay001.htm](http://www.ictor.org/english/cases/Akayesu/judgment/akay001.htm) The court held in Akayesu’s case that rape could come within the definition of genocide. For a detailed analysis of the Akayesu case, see Margeret A. Lyons, *Hearing The Cry Without Answering the Call: Rape, Genocide, and the Rwandan Tribunal*, 28 SYRACUSE J. INT’L & COM. 99 (2001).

domestic courts.<sup>82</sup> An international criminal tribunal may be capable of administering justice shorn of the problems faced by domestic courts.<sup>83</sup> It is impartial, often better financed and staffed, and generally, has more resources than domestic courts to bring perpetrators of evil to justice.<sup>84</sup> More importantly, an international tribunal is better able to apprehend or demand the apprehension of criminals who flee to other countries.<sup>85</sup>

International criminal prosecution, therefore, serves as a viable, effective and “a plausible backdrop when national justice fails or the perpetrators flee.”<sup>86</sup> Michael Ignatieff’s *raison d’etre* for international criminal tribunals bears repeating:

[T]he best rationale for international justice is that it steps in when national justice faces a crime that is too political, too massive, too difficult to try in its own court. International justice should be a default jurisdiction whose legitimacy depends entirely on the inability or incapacity of a national court to take on its obligation.<sup>87</sup>

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<sup>82</sup>Maya Goldstein-Bolocan, *Rwanda Gacaca: An Experiment in Transitional Justice*, 2004 J. DISP. RESOL. 355, 359 (2005) (justice dispensed through international forums will also have a broader, more powerful impact than a domestic process).

<sup>83</sup>Describing the advantages of international tribunals over domestic courts, Antonio Cassese stated: [T]hey are less destabilizing to fragile governments, are less likely to cede to “short-term objectives of national politics,” can count on the expertise of jurists who are better qualified and able to progressively develop international law, are more impartial than proceedings adjudicated by judges “caught up in the milieu which is the subject of trials,” are more likely to be respected by national authorities, can investigate crimes with ramifications in many states more easily, and can tender more uniform justice.

Antonio Cassese, *On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, 9 EUR. J. INT’L L 2, 9-10 (1998).

<sup>84</sup>Wald, *supra* note 76 at 329 (“the hard facts are that most war-torn countries, especially those whose citizens live in abject poverty, do not have the will or resources to bring the worst wartime violators to justice promptly and fairly”).

<sup>85</sup>Moghalu, *RWANDAS GENOCIDE*, *supra* note 71 at 153-6 (providing a detailed account of the hot pursuit and extradition of fugitives by international criminal tribunals).

<sup>86</sup>Reed Brody, *Justice: The First Casualty of Truth?* Nation April 30, 2001 available at [www.hrw.org/editorials/2001/justice0430.htm](http://www.hrw.org/editorials/2001/justice0430.htm).

<sup>87</sup>Michael Ignatieff *We Are Not The World*, The New Republic, 13 Aug., 2001.

Similar sentiments were expressed by Adama Dieng, former Registrar of the ICTR, who urged the world to respond “where a country in which mass crimes occur is not able or is unwilling to render justice, for lack either of strong judicial institutions or of political will because the crimes were perpetuated by the authorities in power.”<sup>88</sup>

Other ambitious aims of international trials include using prosecution of selected perpetrators of evil to facilitate reconciliation.<sup>89</sup> The International Criminal Tribunal for Yugoslavia Trial Chamber stated in *Prosecutor v Erdemovi*<sup>90</sup>:

The International Tribunal, in addition to its mandate to investigate, prosecute and punish serious violations of international humanitarian law, has a duty, through its judicial functions, to contribute to the settlement of the wider issues of accountability, reconciliation and establishing the truth behind the evils perpetrated in the former Yugoslavia. Discovering the truth is the cornerstone of the rule of law and a fundamental step on the way to reconciliation: for it is the truth that cleanses the ethnic and religious hatreds and begins the healing process.<sup>91</sup>

A significant achievement of international criminal prosecutions is the erosion of the concept of head-of-state immunity, a fulcrum on which African tyrants and despots luxuriate.<sup>92</sup> The

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<sup>88</sup> Adama, Dieng, *Africa Needs the Laws and Courts to Punish Their War Lords*, HERALD INT’L TRIBUNE, Aug. 21, 2001 at 6.

<sup>89</sup> Alexander K.A. Greenawalt, *Justice Without Politics? Prosecutorial Discretion and the International Criminal Court*, 39 N.Y.U. J. INT’L & POL. 583, 601 (2007) (advocates hope that by exposing the truth about atrocities, subjecting a select group of perpetrators to highly public criminal trials whose procedures reflect fair and impartial process, and providing some measure of justice to victims while emphasizing individual over collective responsibility, tribunals will help break cycles of violence, delegitimize criminal regimes, and promote transitions to peaceful liberal societies rooted in the rule of law).

<sup>90</sup> Case No. IT-96-22-T, 29 November 1996

<sup>91</sup> *Id.* at para 21.

<sup>92</sup> Erik M, *Main Achievements of the ICTR*, 3 J. INT’L CRIM. JUST 920 (2005) (discussing the achievements of ICTR and stating that the ICTR reaffirmed the principle that no individual enjoys impunity on account of an official position).

international community, through the criminal tribunals, sent a clear and emphatic message to heads of state, tyrants, and would-be dictators in Africa, that they cannot hide behind the niceties of sovereignty to engage in atrocious crimes against their fellow citizens. It made it tolerably clear that genocide, war crimes and crimes against humanity are forms of evil that transcend national sovereignty.<sup>93</sup>

As demonstrated by the ICTR's conviction of former Rwandan Prime Minister, Jean Kambanda,<sup>94</sup> and the recent indictment of Charles Taylor,<sup>95</sup> official positions will not and do not absolve presidents and senior government officials of criminal responsibility for certain crimes. Because of the work of the ICTR and lately the ICC, national leaders, war lords, and would be tyrants now operate with a heightened awareness of their criminal responsibility for crimes against humanity, war crimes and genocide. The existence of a mechanism with global reach sends powerful messages to African despots and tyrants that never again "will a torturer or genocidal head of state assume that violations of international criminal law will go unpunished."<sup>96</sup>

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<sup>93</sup>Richard Goldstone, former prosecutor of ICTR offers a compelling reason why the world must respond to atrocities committed by the state and its officials. He stated that

[A] new species of criminal offence - crimes against humanity - gave birth to universal jurisdiction. It was a new idea that some crimes were so horrendous that they were crimes not only against the immediate victims or solely the people who lived in the country in which they were committed; they were truly crimes against all mankind.

Richard J. Goldstone, Forward: *The Role of Law and Justice in Governance: Regional and Global*, in FROM SOVEREIGN IMPUNITY TO INTERNATIONAL ACCOUNTABILITY: THE SEARCH FOR JUSTICE IN A WORLD OF STATES viii-ix (Ramesh Thakur & Peter Malcontent eds., 2004).

<sup>94</sup>See *Prosecutor v Jean Kambanda*, ICTR-97-23-S (May 1, 1998) available at <http://www.ictor.org> (last visited June 26, 2007). This judgment was upheld by the ICTR Appeals Chambers. See *Jean Kambanda v the Prosecutor*, ICTR-97-23-A (Oct. 19, 2000), available at <http://www.ictor.org> (Last visited June 26, 2007).

<sup>95</sup>Simmons, *supra*, note 24.

<sup>96</sup>Reed Brody, *One Year Later, The Pinochet Precedent Puts Tyrants on Notice*, THE BOSTON GLOBE, Oct. 14, 1999 at A19; Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 555 (1995) (noting that no matter how many atrocities cases these tribunals may eventually try, their very existence sends a powerful message).



It has been argued that without criminal prosecutions, tyrants and would be perpetrators would have no incentive to constrain their conduct.<sup>97</sup> Inaction or indifference will further embolden tyrants and expose helpless citizens to the predations of their rulers.<sup>98</sup> Successfully prosecuting past violators helps to bolster the government's legitimacy, reassures its citizens, and helps deepen the rule of law.<sup>99</sup> Kofi Annan, the then Secretary General of the United Nations, following the first genocide conviction by the ICTR, reflected optimistically on the role of international criminal prosecutions in post conflict societies:

I speak for the entire international community when I express the hope that this judgment will contribute to the long-term process of national reconciliation in Rwanda. For there can be no healing without peace; there can be no peace without justice; and there can be no justice without respect for human rights and rule of law.<sup>100</sup>

## **Problems of International Criminal Prosecutions in Africa**

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<sup>97</sup>Tull & Mehler, *supra* note 7 at 395 (“efforts to promote accountability and legitimacy in the field of conflict resolution will not prevent violent entrepreneurs from conquering state power, but they are at least a step to limiting the lawlessness and impunity that characterize insurgency-affected countries even after the insurgency is terminated”).

<sup>98</sup>Urging the criminal prosecution of those responsible for the atrocities in Darfur, Human Rights Watch stated that the “threat of serious criminal prosecution would send a powerful message to those responsible for the atrocities in Darfur . . . and help deter attacks on civilians.” HUMAN RIGHTS WATCH, *UN: Pass Resolution to Refer Darfur to ICC*, *Human Rights News*, March 25, 2005, available at [hrw.org/english/docs/2005/03/25/sudan1037.htm](http://hrw.org/english/docs/2005/03/25/sudan1037.htm).

<sup>99</sup>Donald Hafner & Elizabeth King, *Beyond Traditional Notions of Transitional Justice: How Trials, Truth Commissions and Other Tools for Accountability Can and Should Work*, 30 B.C. INT’L & COMP. L. REV. 91, 92 (2007) discussing the values of prosecuting those who took part in genocide and war crimes, the authors stated that “criminal prosecutions of crimes of this magnitude not only punish the individual who committed them, demonstrating that impunity does not exist, but also help to restore dignity to the victims . . . By holding individuals responsible for their misdeeds, criminal trials may also deter the commission of abuses in the future. Moreover, if conducted in strict accordance with legal due process, criminal prosecutions of war crimes can help to strengthen the rule of law and establish the truth about the past through accepted legal means.”

<sup>100</sup>Message from Secretary General Kofi Annan, available at [www.icttr.org](http://www.icttr.org)

The objectives of criminal prosecutions are worthy, indeed laudable goals, because in appropriate cases, punishing evildoers is a prerequisite for the establishment of the rule of law.<sup>101</sup> This portion of the paper evaluates the effectiveness of international criminal prosecutions against the purposes stated above. I argue that though the ICTR has made significant contributions to the search for accountability in Africa, its relevance has been undermined by the following problems: attitudinal problems, environmental factors, lack of cooperation from state governments, and the limits of criminal law.<sup>102</sup>

### **Attitudinal Problems**

The success of international criminal prosecution and the ability to achieve the stated objectives of reconciliation, and deterrence ultimately depend on the support and acceptance by the public whose conduct it seeks to influence.<sup>103</sup> Unfortunately, the persistence and pervasiveness of anti-Western sentiment continues to foster a climate of public opinion unreceptive to the activities of international criminal tribunals in Africa. International criminal prosecutions are treated with suspicion, even hostility, by a vast majority of Africans, partly because they are viewed as another symptom of the deep-seated paternalism that pervades much of the West's dealing with Africa and

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<sup>101</sup>Democracy will not be deepened unless citizens understand that actions have consequences and that no citizen is above the law. In pushing for the prosecution of generals responsible for human rights abuses in Argentina, President Alfonsin stated;

our intention was not so much to punish as to prevent; to insure that what had happened could not happen in the future . . . Our principal objective was not to obtain retribution for every wrong but to prevent the recurrence of similar wrongs in the future by internalizing in the collective conscience the idea that no group, however powerful it might be, is beyond the law.

Raul Alfonsin, *Never Again*, 4 JOURNAL OF DEMOCRACY, 16 (1993).

<sup>102</sup>Other problems like inadequate funding and lack of logistical support are beyond the scope of this study

<sup>103</sup>See note 52, *supra*.

partly because the model of justice implicit in the ICTR and sought by the West is inconsistent with traditional notions of justice.<sup>104</sup> Lingering accusations of paternalism disaffect the citizens and diminish the already low level of interest in anything sponsored by the West. Inevitably and even perfunctorily, some Africans resent and distrust international criminal tribunals. They continue to question the ability and integrity of international criminal tribunals to dispense justice in Africa. Resentment springs from two different bases - one selfish, the other cultural. Leaders, as potential defendants in future international criminal trials, resent the notion of foreign intrusion into their domain. The political elites, moved more by calculations of self interest than the well-being of their citizens, resort to blackmail to discredit international efforts to promote accountability.<sup>105</sup> Blackmail often resonates with the masses, most of whom continue to roil over the pain suffered during colonialism.<sup>106</sup> Facile disdain for the West continues to evoke negative sentiments and attitudes that undermine the effectiveness of international criminal law.

Citizens, most of whom have long-standing complaints about the attitude of the West towards Africa, view international criminal law with skepticism. They deride international criminal prosecutions as judicial colonialism, imperial condescension, or worse, as ersatz efforts by the West to imbricate its failure to prevent *tu quoque* violence that continues to disfigure Africa.<sup>107</sup> Amidst

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<sup>104</sup> See pages 35-39 of text *infra*.

<sup>105</sup> A typical example is the attempt by the Sudanese government to portray the ICC indictment of Sudanese officials to an effort to discredit Muslims. See note 179 *ante*..

<sup>106</sup> See David Crane, *White Man's Justice: Applying International Justice After Regional Third World Conflicts*, 27 CARDOZO L. REV. 1683, 1686 (2006) (stating that African leaders can easily manipulate popular thinking by loudly declaring that the justice being imposed (and threatening the status quo or a leader's power) is "white man's justice," playing upon the fears of colonialism as a way of excusing the rampant corruption and impunity that is Africa, particularly West Africa).

<sup>107</sup> Ralph Zacklin, *The Failings of AD Hoc International Tribunals*, 2 J. INT'L CRIM. JUST. 541, 542 (2004) (the reality is that the ICTY and the International Criminal Tribunal for Rwanda (ICT) were established more as acts of political contrition, because of egregious failures to swiftly confront situations in the former Yugoslavia and Rwanda, than as a part of a deliberate policy, promoting international justice); Moghalu, RWANDAS GENOCIDE, *supra*

allegations of paternalism, bias, and imperial condescension, most citizens lose sight of what international criminal prosecutions seek to accomplish and are therefore generally dismissive of efforts by international criminal tribunals to promote accountability. Questions about the legitimacy of international tribunals make it difficult for citizens to respect the verdicts of the tribunal.<sup>108</sup> Continuing disdain for the tribunals undermines the tribunal's ability to attain the professed goal of promoting reconciliation.<sup>109</sup>

Contempt for international criminal tribunals also reflects a historical discomfort with the Western type legal system. The Western type legal system, introduced by colonial authorities and sustained by African countries, generates substantial and continuing public distrust, especially among the unsophisticated segments of the society.<sup>110</sup> Elaborate substantive and procedural rules characteristic of the Western legal process are virtually incomprehensible to the local inhabitants. Citizens feel no loyalty to the Western type legal system that they suspect of being corrupt, unfair,

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note 71 at 48-9 (stating that the Arusha tribunal . . . was established primarily as an act of political contrition for the failure of political will to intervene militarily to halt mass atrocities, and not because there was a proactive, deliberate policy to promote international justice)

<sup>108</sup> Aloys Habimama, *Judicial Responses to Mass Violence: Is International Criminal Tribunal for Rwanda making a Difference toward Reconciliation* in RWANDA, in INTERNATIONAL WAR CRIMES TRIALS: MAKING A DIFFERENCE, 86 (Steven Ratner & James Bischoff eds., 2003) (stating that “constantly exposed to such bitter criticisms highlighting the imperfections of the tribunal, many Rwandans tend to hold an overwhelmingly negative opinion of international justice”).

<sup>109</sup> David Cohen, “Hybrid” Justice in East Timor, Sierra Leone, and Cambodia: “Lessons Learned” and Prospects For the Future, 43 STAN. J. INT’L L. 1, 6 (2007) (the possibility of trials to have an effect on reconciliation, accountability, and the promotion of respect for the rule of law depends on effective outreach and other educational or capacity-building programs. Such success becomes all the more difficult when the justice process is perceived as taking place in a foreign court, without the participation of nationals of the countries in question. This problem is compounded when the basic information about the trials is lacking. For those individuals or groups linked to the perpetrators, it becomes too easy to dismiss the process as simply imposed by foreign countries and organizations who have misunderstood what really happened).

<sup>110</sup> For a discussion of public disaffection with Western type legal system in Nigeria, see Okechukwu Oko, *The Problems and Challenges of Lawyering in Developing Societies*, 35 RUTGERS L.J. 569, 601-7 (2004).

cumbersome, unresponsive to their needs, and generally inaccessible.<sup>111</sup> International criminal tribunals suffer the same fate and are generally treated with disdain by the local inhabitants. Citizens, especially the largely unsophisticated and illiterate segments of the society, do not understand the dynamics of international criminal prosecutions and, hence, neither respect nor accept the legitimacy of international criminal tribunals, which most of them increasingly regard as agents or instruments of an uncaring or patronizing imperial power. Some citizens confuse the necessary and genuine efforts by the international community to punish evildoers with attempts to colonize Africa, this time, via judicial means.<sup>112</sup>

Lack of public support accounts for the disinterest and dismissive attitude toward the activities of international criminal tribunals in Africa. Three factors, namely the nature and practice of the tribunals, location, and contradictions with the African concept of justice, continue to fuel public disenchantment with international criminal prosecutions in Africa.

## **Practice and Procedure**

International criminal tribunals function in ways Africans either do not understand or fail to appreciate.<sup>113</sup> They are viewed as an entirely alien system with different laws and principles. Some

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<sup>111</sup>G.N.K. Vukor-Quarshie, *Criminal Justice Administration in Nigeria: Saro Wiwa in Review*, 8 CRIM. L.F. 87, 104 (1997) The author stated that:

[T]he criminal justice system that the British bequeathed to Nigeria has certain objective shortcomings: the system is expensive, inflexible, overly technical, and elitist. Social and economic disadvantages also “rule out access to the judicial process for the overwhelming majority of the population; for them the antiquated informal procedures of conciliation and mediation are the first recourse in situations of conflict. For the majority, the rights of the official legal system are unavailable.

<sup>112</sup>See Fink, *supra* note 43.

<sup>113</sup>Christina Carroll, *An Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing With Mass Atrocities of 1994*, 18 B.U. INT’L L.J. 163,

Africans believe that the efficacy of international criminal tribunals is limited by practice and procedure, especially due process requirements and the non imposition of the death penalty.<sup>114</sup> International criminal tribunals observe all the due process requirements - the right to counsel, right to confront and cross examine witnesses, presumption of innocence, and prohibition against self incrimination.<sup>115</sup> These requirements, taken for granted in established democracies, often evoke negative sentiments from Africans, especially victims of mass violence, and even state governments.<sup>116</sup> Citizens convinced of the identity and guilt of their tormentors cannot understand why a defendant should be acquitted on technical grounds. From the perspective of most citizens, these technical requirements serve no useful purpose, save to help guilty defendants escape punishment. For example, the release of one of the principal architects of the genocide in Rwanda, Jean-Bosco Barayaguiza, because of the delay in bringing him to trial, elicited widespread condemnation from both the government and the people of Rwanda.<sup>117</sup>

Also, the failure to impose the death penalty continues to fuel antipathy towards the tribunal.<sup>118</sup> The death penalty, generally available in most African countries, is not an option in all

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193 (2000) (attributing Rwandan peoples' frustration with the ICTR to lack of knowledge and information about ICTR trials).

<sup>114</sup>ICTR statute, *supra* note 22, art. 23.

<sup>115</sup>*Id.* at 20.

<sup>116</sup>Snyder & Vinjamuri, *supra* note 65 at 25 (stating that the government of Rwanda felt that the ICTR was more concerned with due process and the rights of the accused than it was with holding leaders of the genocide accountable).

<sup>117</sup>*Rwandan Genocide Accused Freed by Tribunal*, THE NATIONAL POST, November 6, 1999 at A15.

<sup>118</sup>Wendy Lambourne, *Post Conflict Peace Building: Meeting Human Needs for Justice and Reconciliation*, PEACE CONFLICT DEVELOPMENT, Issue four, 1,14 (2004) (noting that ICTR has been criticized by the Rwandan government for failing to provide justice because of slow trials and inadequate sentencing).

the tribunals sponsored by the United Nations.<sup>119</sup> This is consistent with the prevailing attitude within the United Nations and most parts of Europe that consider the death penalty barbaric.<sup>120</sup> African countries have the death penalty in their sentencing arsenal, and in appropriate cases, and consistent with their laws, impose the death penalty.<sup>121</sup> Most Africans do not share the European revulsion with the death penalty and have no qualms with the death penalty. Indeed, for most Africans, especially the victims of brutality, the only penalty they seek for their abusers is the death penalty. To them, any sanction for genocide short of the death penalty is unacceptable and diminishes the legitimacy of international criminal tribunals. The Rwandan Ambassador to the United Nations who cast the lone vote against the establishment of the ICTR “protested the disparity in sentencing possibilities between the Rwandan penal code, which permitted capital punishment and the ICTR statute which did not.”<sup>122</sup>

Sentencing disparity between domestic courts and international criminal tribunals elicited criticisms and complaints from both scholars and the Rwandan people.<sup>123</sup> Perpetrators of evil

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<sup>119</sup> See ICTR statute, *supra* note 22, Art. 23 (“the penalty imposed by the trial chamber shall be limited to imprisonment”).

<sup>120</sup> WILLIAM A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* 2 (2002) (fifty-five years after the Nuremberg trials, the international community has now ruled out the possibility of capital punishment in prosecutions for war crimes and crimes against humanity) for a survey of the international community’s opposition to the death penalty, see Roger Hood, *The Death Penalty: The U.S. in World Perspective*, 6 J. TRANSNAT’L L. & POL’Y 517, 521 (1997).

<sup>121</sup> A survey by Amnesty International revealed that 20 African countries retain and use the death penalty while 20 countries retain but no longer carry out executions. According to the survey, only 13 African countries have abolished the death penalty. AMNESTY INTERNATIONAL STATISTICS ON THE DEATH PENALTY IN AFRICA (2005).

<sup>122</sup> Quoted by Jason Strain & Elizabeth Keyes, *Accountability in the Aftermath of Rwanda’s Genocide*, in ACCOUNTABILITY FOR ATROCITIES: NATIONAL AND INTERNATIONAL RESPONSES, 99 (Jane Stromseth ed., 2003).

<sup>123</sup> Morris, *supra* note 75 at 362-73 (arguing that it is unfair for high level perpetrators to be allowed the benefits of the full panoply of rights afforded defendants in trials before the ICTR while ordinary perpetrators face imperfect justice within the Rwandan courts)

processed through the domestic courts receive the death penalty,<sup>124</sup> while their luckier and arguably more culpable counterparts tried by the ICTR receive terms of imprisonment to be served in comfortable European prisons.<sup>125</sup>

## Location

The ICTR currently sits in Tanzania pursuant to a provision in the enabling statute which empowers it to sit outside of Rwanda as it deems fit.<sup>126</sup> The location of the ICTR in Tanzania undermines its aim of deterrence, diminishes the legitimacy of the tribunal and, at a practical level, makes its operations inefficient.<sup>127</sup> The tribunal is far removed from the people whose behavior it is intended to influence. The Rwandan envoy to the United Nations, who vigorously opposed the location of the ICTR in Tanzania, argued that trials “held hundreds of miles away from the scene of the crime with no knowledge of Rwandese people will undermine the deterrent effect of the

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<sup>124</sup>Moghalu, *RWANDAS GENOCIDE*, *supra* note 71 at 40 (reporting that in 1998 Rwanda executed 22 persons convicted by domestic courts for their involvement in the genocide); Jens David Ohlin, *Applying The Death Penalty to Crimes of Genocide*, 99 AM. J. INT’L L. 747, fn. 12 (2005) (stating that several defendants convicted of genocide in Rwanda were eventually executed. Twenty-two of them were executed in cities across Rwanda on April 24, 1998).

<sup>125</sup>Alvarez, *supra* note 77 at 417-18 (noting that those most responsible for the worst offences will receive relatively lenient treatment, have their lives spared, and face, at most, some years in confinement under conditions far better than they could have anticipated back home).

<sup>126</sup>U.N. Doc S/RES/1995/977, Feb. 22, 1995.

<sup>127</sup>Rosana Lipscomb, *Notes Restructuring the ICC Framework to Advance Transitional Justice: A Search for a Permanent Solution in Sudan*, 106 COLUM. L. REV. 182, 196 (2006).

[T]he physical distance between the tribunal, the inability of the international tribunal to publicize its work within the ravaged communities, and the complete lack of participation of local actors have negatively impacted the legitimacy of international courts in domestic settings (footnotes omitted);

*See also* Jenia Iontcheva Turner, *Nationalizing International Criminal Law*, 41 STAN. J. INT’L L. 1, 24 (2005) (the history of the ad hoc tribunals reveal that the remoteness of international tribunals damages their legitimacy and effectiveness with the local population); *see also* Kingsley Chiedu Moghalu, *Image and Reality of War Crime Justice*, 26 FLETCHER F. WORLD AFF. 21, 29 (2002) 9 (criticizing the International Criminal Tribunal for Rwanda for its remoteness from the place where the crimes took place).



tribunal.”<sup>128</sup> Rwanda is a relatively unsophisticated society with little or no access to events outside its boundaries.<sup>129</sup> Some Rwandans read about the ICTR proceedings in the newspapers, luckier and more privileged ones watch excerpts on television. The vast majority of Rwandans are unfamiliar with the proceedings at the tribunal and have no opportunity either to read about it in the newspapers or watch excerpts of the proceedings on television.<sup>130</sup>

The ICTR was established to hold Rwandans accountable for atrocities and “to contribute to the process of national reconciliation and to the restoration and maintenance of peace.”<sup>131</sup> To be effective, an international criminal tribunal should be located in the country where the violations occur.<sup>132</sup> Prospects of reconciliation are significantly enhanced if justice is administered in the affected society.<sup>133</sup> Justice Hassan B. Jallow, the Chief Prosecutor for ICTR stated:

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<sup>128</sup>Quoted by Yacob Haile-Mariam, *The Quest for Justice and Reconciliation: The International Criminal Tribunal for Rwanda and the Ethiopian High Court*, 22 HASTINGS INT’L & COMP. L. REV. 667, 698 (1997); Mark R. Amstutz, *Is Reconciliation Possible After Genocide? The Case of Rwanda*, 48 J. CHURCH & STATE, 541 (2006) (arguing that one of the reasons why ICTR trials have had little impact on Rwanda is because of the location of the tribunal in neighboring Tanzania).

<sup>129</sup>Hafner & King, *supra* note 99 at 14 (the seat of the ICTR is in Arusha, Tanzania, and even television broadcasts of the trial in Rwanda cannot bring them close to the vast majority of Rwandans who lack access to televisions).

<sup>130</sup>Goldstein-Bolocan, *supra* note 82 at 371-2 (the effectiveness of the tribunal in delivering justice while seeking peace and reconciliation has indeed been frustrated by its inaccessibility to ordinary Rwandans. While the location in “neutral” land - Arusha, Tanzania - was to send a message of impartiality, it makes it in fact impractical- if not impossible - for Rwandans to attend court proceedings or hear news of ICTR trials).

<sup>131</sup>Preamble to ICTR statute, *supra* note 22.

<sup>132</sup>David Crane, former prosecutor in the Special Court for Sierra Leone put it best when he advised that tribunals be placed “in the location where the international crimes took place, at the scene of the crime. It is imperative that the victims of those international crimes see justice done before their eyes. After all, a tribunal is for and about the victims, their families, as well as their towns and districts.” David Crane, *White Man’s Justice: Applying International Justice After Regional Third World Conflicts*, 27 CARDOZO L. REV. 1683, 1684 (2006).

<sup>133</sup>The ICTR’s main audience is Rwanda and as Kritz aptly stated:

They more than the rest of the world need to see the tribunal at work, to be reminded on a daily basis that the international community is committed to the establishment of justice and accountability for the heinous crimes of 1994.

Neil Kritz, *Coming to Terms With Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, 59 LAW & CONTEMP. PROBS. 127, 131 (1996).

[T]he holding of trials in Arusha, Tanzania, far away from the theatre of genocide distances the people of Rwanda from a process designed to render justice to its people. For the people to feel that justice was being done, the criminal justice system ought ideally to operate within sight and hearing of the victims themselves....<sup>134</sup>

By continuing to conduct sessions at Arusha, the ICTR risks having its work “ignored or dismissed as an alien effort, irrelevant to the concerns in the country.”<sup>135</sup> Locating the tribunal in another country often results in a feeling of alienation and even resentment. Citizens do not feel vested in the accountability process and, consequently, are mostly oblivious to the relevance of the tribunal.<sup>136</sup> Nothing emphasizes legitimacy of a new regime and deepens the rule of law more than criminal prosecutions undertaken in venues where the crimes occurred.<sup>137</sup> The Human Rights Watch succinctly captured the problems of locating trials outside the countries where the atrocities took place:

Cases brought before the international or in national courts (based on universal jurisdiction) are often tried far away from the crime scene and thus are less accessible to victims and those in whose name the crimes were committed. These trials sometimes lack the visibility in the country where the crimes occurred that a local trial would have. The states where the crimes occurred, whose government may include accused war criminals or their confederates, may oppose the

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<sup>134</sup>Justice Hassan B. Jallow, *Justice After Genocide: The Challenges of the International Criminal Tribunal for Rwanda*, Speech to the University of Lund in Stora Salen, Af-Building Lund, Jan. 31<sup>st</sup> 2007, p.4.

<sup>135</sup>Kritz, *supra* note 133 at 131.

<sup>136</sup>Yacob Haile -Mariam, *The Quest for Justice and Reconciliation: The ICTR and the Ethiopian High Court*, 22 HASTINGS INT’L & COMP. L. REV 667, 744 (1999) (because of the proximity of the Ethiopian Central High Court trial to the sites of the crimes and the intimate knowledge people have of the trial . . . prosecution and punishment . . . will have a larger deterrent effect).

<sup>137</sup>Ratner & Abrams, *supra* note 8 at 182 (when trials take place in the country where the offenses occurred, the entire process becomes more deeply connected with the society, providing it with the potential to create a strong psychological and deterrent effect on the population).

prosecutions, resisting cooperation and making it difficult to obtain custody of the defendants or obtain evidence. Gathering evidence for crimes that occurred hundreds or thousands of miles away makes it more difficult to meet the level of proof required for a conviction and for the accused to develop a comprehensive defense. Another downside to distance includes a lack of familiarity with the cultural and historical context in which the crimes occurred. The need for translation services also slows the pace of trials and makes them more costly.<sup>138</sup>

The Special Court for Sierra Leone, to some degree, addressed the problem by locating the tribunal in Freetown and staffing it with a mixture of locals and non-Africans.<sup>139</sup> But the International Criminal Court risks a similar fate suffered by the ICTR because it is located at the Hague, a venue far removed from the continent and the people whose lives and affairs it is supposed to repair.<sup>140</sup>

### **African Concept of Justice**

Another source of tension is that the Western concept of justice differs significantly from traditional African notions of justice. Traditional justice systems place a significant premium on social harmony, while the Western type justice system is concerned chiefly with rights of the citizens and punishment of those who violate the law.<sup>141</sup> Western-type criminal justice is

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<sup>138</sup>Richard Dicker and Elise Keppler, *Beyond the Hague: The Challenges of International Justice*, HUMAN RIGHTS WATCH WORLD Report 2004 at 6.

<sup>139</sup>The Special Court for Sierra Leone is structured differently from the ICTR. Members are drawn from both Sierra Leone and the international community. The court also incorporates both domestic and international law. For detailed analysis of the Sierra Leone Special Court, see Nmehielle & Jallo, *supra* note 33.

<sup>140</sup>*See* ICC Statute, *supra* note 24.

<sup>141</sup>Jeremy Sarkin & Erin Daly, *Too Many Questions, Too Few Answers: Reconciliation in Transitional Societies*. 35 COLUM HUM. RTS. L. REV. 661, 671-72 (2004). The authors elegantly described the motivations for and the dynamics of traditional conflict resolution mechanism:

The notion of reconciliation has been part of African systems of dispute resolution for centuries. In these traditions, the restoration of balance, rather than

contradictory to the spirit of reconciliation, which animates local conflict resolution mechanisms.<sup>142</sup> The ICTR emphasizes guilt and punishment, while the African traditional justice system stresses reestablishment of social harmony by reconciling the disputants.<sup>143</sup> One of the main goals of the justice system in traditional African society is to reestablish harmony through long discussions supervised by elders or chiefs.<sup>144</sup> All the parties to the conflict are involved in the process and are united by the common goal and understanding that social equilibrium is far more important than individual rights.<sup>145</sup> Essentially, through exhortation rather than threat of sanctions, elders challenge, inspire, and ultimately ensure compliance with social norms. The elders and chiefs are connoisseurs of social norms and typically use the platform of adjudication to transmit their wisdom

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punishment of the guilty, is the focus of law enforcement. The group, not the individual, has been the traditional unit of African society. Consequently, legal proceedings are community affairs in which a central aim is to reconcile the disputing parties, to restore harmonious relationships within the community, and to compensate the victims. . . . These proceedings focus more on the relationship between the parties than the actual event complained of because the underlying objective is to restore harmony within the society.

<sup>142</sup>For an excellent collection of essays on traditional justice systems in various African countries, see TRADITIONAL CURES FOR MODERN CONFLICTS: AFRICAN CONFLICT MEDICINE (William Zartman ed., 2000).

<sup>143</sup>See Antony N. Allot, African Law, in AN INTRODUCTION TO LEGAL SYSTEMS 145 (J. Duncan M. Derret ed., 1968) (noting that at the heart of African adjudication lies the notion of reconciliation or the restoration of harmony and that the job of a court or an arbitrator is less to find the facts, state the rules of law, and apply them to the facts than to right a wrong in such a way as to restore the harmony within the disturbed community)

<sup>144</sup>See AMAZU ASOUZU, INTERNATIONAL ARBITRATION AND AFRICAN STATES, 16 (2001). Dr. Asouzu eloquently explained why Africans prefer the traditional mode of conflict resolution. He stated:

African social values and family cohesion dictated a dispute settlement process that accorded with these traits and ensured economic and social progress. Family heads and where they exist, chiefs usually engage in the “traditional peace making effort,” the object being not to declare and enforce strict legal rights but to assuage injured feelings, to restore and to reach a compromise acceptable to both parties. A greater degree of reconciliation rather than rigid adjudication is used to diffuse tensions in the family and society, since tensions in the traditional African society would disrupt the communistic modes of economic production.

<sup>145</sup>Sarkin & Daly, *supra* note 141 at 139.

and advice to the parties.<sup>146</sup> The erring party acknowledges his mistakes, tenders an apology, and in some cases, compensates the victim who is prodded to forget and forgive.<sup>147</sup>

The parties leave the process with a sense of satisfaction and hopes of becoming better members of the society. The Honorable Keba M'Baye of Senegal, an eminent Judge at the International Court of Justice, stated:

[A]ccording to African conception of the law, disputes are settled not by contentious procedures, but through reconciliation. Reconciliation generally takes place through discussions which end in a consensus leaving neither winners nor losers. Trials create animosity. People go to court to dispute rather than to resolve a legal dispute.<sup>148</sup>

The Western adjudicatory process, on the other hand, emphasizes rights and makes a firm pronouncement of the rights and responsibilities of the parties. It is an adversarial system in which the parties are pitted against each other in a fierce and often bitter attempt to persuade the fact finder to accept their version of events. The dominant focus of the process is on ascertaining the truth and apportioning blame to the offending party. This process is scarcely concerned with the consequences of its judgment on the society. The adversarial process, which typically involves trading accusations and counter-accusations, reopens wounds, quickens alliances, and hardens

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<sup>146</sup>Laurence Juma, *Africa, its Conflicts and its Traditions: Debating a Suitable Role for Tradition in African Peace Initiatives*, 13 MICH. ST. J. INT'L L. 417, 495-6 (2005) (“the position of elders in African communities has not changed, despite new political organization. They are still considered paragons of wisdom and command respectability from the entire membership of the community and beyond. In terms of conflict resolution, they are a great repository of first hand information on the historical aspects of the conflict, its cultural ramifications, and the actors involved, and can inspire confidence in a cause of action that seeks to bring peace”).

<sup>147</sup>Agwu Ukiwe Okali, *Justice in Africa and the African Diaspora*, paper delivered at the 74<sup>th</sup> Annual Convention of the United States National Bar Association held in Philadelphia, July 28, 1999, p.5 (noting that restitutive justice is an inherent notion of justice in African tradition - indeed in these societies, it is often more important than retribution against an offender).

<sup>148</sup>Quoted by Irina Sinitsina, *African Legal Tradition*, 31 J.A.L. 44 (1988)

positions. Once the process is set in motion it becomes difficult, perhaps impossible to reconcile the parties.<sup>149</sup>

Another source of discomfort with the Western-type system is that citizens whose rights have been violated and who are often victims of violence often play no roles in the adjudicatory process.<sup>150</sup> Victims are sidelined and participate only minimally as witnesses who testify under the strict strictures of applicable evidentiary rules and standards.<sup>151</sup> Kingsley Moghalu, former spokesperson for the ICTR, expressed concerns that fairly and accurately reflect the problems with the non- involvement of victims in the criminal process. He stated that:

[T]hese trials have generally focused far more on the rights of the defendants, which are certainly important, but have neglected those of the victims to restitution and courtroom participation in addition to retributive justice. . . . where their [defendants] rights clearly trump those of the victims, as at Arusha and the Hague, the conception of justice embodied in the trial is skewed toward the process at the expense of the outcome. . . . There is surely something incomplete about international war crimes trials in which the rights of the defendant appear to be far more important than those of hundreds of

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<sup>149</sup> Helena Cobban, a journalist with significant practical experience in the areas of international human rights and transitional justice stated that:

in a criminal trial, two sets of facts - those of the prosecution and those of the defense- do public battle with each other. Those competing facts are probed and examined in detail and a winner and loser are ultimately decided. When such a trial concerns events that took place in recent memory, in a society that's still highly divided and deeply traumatized, the trial itself too often exacerbates existing political rifts.

Helena Cobban, *International Courts, Foreign Policy*, March 1, 2006.

<sup>150</sup> Hafner & King, *supra* note 99 at 104 (in a trial system, the focus is on the offenders- determining their guilt or innocence - while the victims are essentially treated as tools in the prosecutor's case, confined in their testimony to only those fragments of their experience that meet the legal standards of evidence)

<sup>151</sup> For a general discussion of evidentiary standards applicable in international criminal courts including ICTR, see Bert Swart, *International Criminal Courts and the Admissibility of Evidence*, in *FROM SOVEREIGN IMPUNITY TO INTERNATIONAL ACCOUNTABILITY: THE SEARCH FOR JUSTICE IN A WORLD OF STATES* 135-153 (Ramesh Thakur & Oeter Malcontent eds., 2004).

thousands of victims and survivors and become the sole yardstick for assessment of such trials.<sup>152</sup>

As long as Africans remain distrustful of, and feel alienated from, the accountability mechanism, they are unlikely to support efforts to address impunity through international criminal prosecution. Efforts must be made to involve citizens in the accountability process, especially victims who feel marginalized and frustrated by their inability to participate.<sup>153</sup> Without providing a forum for the victims and survivors of mass violence to tell their stories, it will be difficult to build and sustain public trust that is critical to efforts to address impunity in Africa.<sup>154</sup> The answer to the problem of non involvement of victims in trials, according to Kingsley Moghalu “is not to consistently seek international trials even when the circumstances call for alternative approach, but instead to utilize, wherever possible local justice that meets standards that can be objectively regarded as adequate.”<sup>155</sup>

## **Environmental Factors**

## **Ethnic Tensions**

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<sup>152</sup>Kingsley Chiedu Moghalu, *Saddam Hussein’s Trial Meets the “Fairness” Test*, 20 ETHICS & INT’L AFFAIRS 517 (2006).

<sup>153</sup>Neil Kritz, *Progress and Humility: The Ongoing Search for Post Conflict Justice*, in POST CONFLICT JUSTICE, 55, 59 (Cherif Bassioni, ed., 2002) (noting that the victim’s group and local society were long ignored by the two ad hoc international criminal tribunals, and outreach to the local population on their work took years to begin).

<sup>154</sup>Cobban, AMNESTY AFTER ATROCITY, *supra* note 18 at 13 (stating that the viewpoint of victims/survivors of atrocities is an extremely important one. They form a sizeable proportion in any post atrocity society, and if the needs are not adequately met then there is no chance that those of the broader society can be met either).

<sup>155</sup>Moghalu, *supra*, note 30.

The challenge of prosecuting perpetrators of evil in Africa is complicated by decades of mutual distrust among the ethnic groups that comprise the nation.<sup>156</sup> Deeply rooted distrust and reciprocal hatreds among the ethnic groups continue to sustain the prevailing credo that emphasizes ethnic identity above loyalty to the nation.<sup>157</sup> Every government action is viewed through the lens of ethnicity, thus making it difficult, if not impossible, for citizens to fairly and objectively evaluate important issues like economic policies and programs, political initiative, and even the administration of justice.<sup>158</sup> Depending on the background of the defendants, international criminal prosecution is either acclaimed as an effort to promote accountability or as an attempt to silence a particular ethnic group by disabling their leaders.<sup>159</sup> The objects of criminal prosecution lament their loss of power and accuse prosecutors of doing the bidding of their political opponents with the blessing or backing of the international community.<sup>160</sup> For example, the ICTR's alleged failure to issue indictments against the Tutsis despite allegations of abuses against the Tutsis lead many in Rwanda "to view the tribunal as vehicle to prosecute Hutus rather than promote a return to impartial

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<sup>156</sup>See generally DANIEL HOROWITZ *ETHNIC GROUPS IN CONFLICT* (1985)

<sup>157</sup>*Ethnic Identity and Constitutional Design for Africa*, 29 STAN. J. INT'L L.J. 1, 12 (1992) ("ethnicity tends to be more important to Africans than it is to individuals elsewhere. In much of Africa, ethnicity is the hub around which life revolves").

<sup>158</sup>For a detailed analysis of the impact of ethnicity on the governance process in Nigeria, See Okechukwu Oko *Partition or Perish: Restoring Social Equilibrium in Nigeria Through Reconfiguration*, 8 IND. INT'L & COMP. L. REV. 317 (1998).

<sup>159</sup>Kingsley Moghalu, *Reconciling Fractured Societies: An African Perspective on the Role of Judicial Prosecutions*, in FROM SOVEREIGN IMPUNITY TO INTERNATIONAL ACCOUNTABILITY: THE SEARCH FOR JUSTICE IN A WORLD OF STATES 197, 217-8 (Ramesh Thakur & Peter Malcontent eds., 2004) (in fractured societies, which have come to that state as a result of the demagoguery of leading political figures, attempts will be made to deflect efforts to exalt individual accountability with propaganda that seeks to undermine the perception of the impartiality of justice).

<sup>160</sup>McMorran, *supra* note 67 (in cases of genocide, those accused of war crimes are usually all from one ethnic group. To this group, a war crimes tribunal can appear to be a trial against their ethnicity, not just an individual from their group).



rule of law.”<sup>161</sup> Claims of bias, even though unsubstantiated for the most part, have historical resonance because most African countries are fractured societies marked by deep-seated ethnic animosities.<sup>162</sup> Prosecuting authorities face an avalanche of negative sentiments from citizens who either impute improper motives or impugn their integrity. Jose Alvarez in his disquisition on the ICTR stated that “the majority of the thousands detained in Rwanda’s jail today report, and perhaps genuinely feel that they have done nothing wrong and are being victimized merely because they were on the wrong side of the war.”<sup>163</sup> Criminal prosecutions conducted amidst accusations and counter-accusations of bias generate public dissatisfaction, fuel citizens’ anger, and ultimately diminish the likelihood of reconciliation.

### **Attitude Towards Litigation**

Africans generally dislike litigation and typically go to court as the last resort after exhausting every available means of conflict resolution.<sup>164</sup> Distaste for litigation is both cultural and experiential. It is generally understood among the citizens that good members of the community need not go to court to resolve their differences; they typically work out their differences on their own or with the support of the community’s dispute resolution machinery.<sup>165</sup> The few cases that make it to trial leave bitter memories in the minds of the parties. Trials are adversarial and parties, in an attempt to bolster their case, trade accusations that reignite old hostilities. The exchange of

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<sup>161</sup>Smith, *supra*, note 62 at 16.

<sup>162</sup>See pages 66-68 of text *infra*

<sup>163</sup>Alvarez, *supra* note 77 at 468.

<sup>164</sup>See 148 *supra* and accompanying text.

<sup>165</sup>See Vuko-Quarshie, *supra* note 111 (stating that for a majority of the population “the antiquated informal procedures of conciliation and mediation are the first recourse in situations of conflict”).

unpleasantries in court severs whatever is left of the bonds of friendship between the parties, making it almost impossible for them to reestablish any relationship.

Trials in the context of post conflict present unique problems and challenges for the parties and, more so, for the international criminal tribunal that has as one of its mandates the reconciliation of the parties.<sup>166</sup> Parties who come from the same community, or who are neighbors or old friends, find it difficult to reestablish social harmony after a rancorous and protracted trial before a foreign tribunal.<sup>167</sup> Publicly trading accusations in court forecloses the prospects of reestablishing peaceful relationships among the parties. As Jason Fink aptly observed it in the Rwandan context:

[A]s a society which has just experienced the trauma of a social genocide and as a society whose social geography dictates that the surviving victim group must coexist with the aggressor group, Rwanda has a special requirement which needs to be addressed in order to generate a framework for social reintegration.<sup>168</sup>

A way out may be to resort to the traditional justice system, which is less confrontational and more conducive for dealing with conflicts in African societies.<sup>169</sup> The disenchantment of African leaders with the destabilizing effects of criminal prosecutions probably informed the decision of Ugandan leaders to request the international criminal tribunal to halt the prosecution of members of

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<sup>166</sup>Hafner & King, *supra* note 99 at 104-5 (where the violence of civil conflict was widespread, eventually partisans from both sides are going to return to communities and often will have to live alongside the people they once considered enemies. Even when a human rights abuser has been punished by the court, this does not assure that in the eyes of the community, justice has been done and all debts paid).

<sup>167</sup>Jackson N. Maogoto, *The International Criminal Tribunal for Rwanda: A Paper Umbrella in the Rain? Initial Pitfalls and Brighter Prospects*, 73 *Nordic Journal of International Law*, 187 (2004) (in a deeply divided society, arguably the only type of society likely to produce the types of crimes for which the ICTR was established, criminal prosecutions do not necessarily have a conciliatory effect. Rather, they manifest and exacerbate division...).

<sup>168</sup>Fink, *supra*, note 43 at 124

<sup>169</sup>See notes 41-46, *supra*.

the Lord's Army, a rebel group fighting with the Ugandan government.<sup>170</sup> In urging a halt to criminal prosecutions, the leaders stated "that their communities' traditional approach would be far more effective than international prosecutions in ending the violence."<sup>171</sup>

### 3. Lack of Cooperation from State Governments

International criminal tribunals need the cooperation of state governments on a broad range of issues to effectively investigate and prosecute perpetrators of evil.<sup>172</sup> International criminal prosecutors depend importantly on access to the crime scene to gather evidence and crucially on access to victims and witnesses to determine exactly what happened and to ascertain those responsible for the atrocities.<sup>173</sup> Also, international criminal prosecutors do not have enforcement mechanisms and, therefore, need the cooperation of state governments, which can generally assist in the arrest and extradition of defendants within their borders.<sup>174</sup> Carla Del Ponte, former chief

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<sup>170</sup>Helena Cobban, *International Courts*, 22 Foreign Pol'y, March 1, 2006.

<sup>171</sup>Id.

<sup>172</sup>Annie Wartanian, *The ICC Prosecutor's Battlefield: Combating Atrocities While Fighting for States' Cooperation Lessons From the U.N. Tribunals Applied to the Case of Uganda*, 36 GEO. J. INT'L L. 1289, 1292 (2005) (international tribunals dealing with atrocity crimes lack their own mechanisms and, as a result, they must rely first and foremost on the cooperation of the state where the crime occurred).

<sup>173</sup>Jacob Katz Cogan, *International Criminal Courts and Fair Trials: Difficulties and Prospects*, 27 YALE J. INT'L L. 111, 119 (2002) (international criminal courts are dependent on other organizations – the states, most importantly – to give them things. These things – money, evidence, access to evidence, defendants, witnesses, witness protection, court personnel, prison facilities, and the enforcement of orders and judgments – are all necessary for the courts' success, and indeed, without them, the courts will not operate or exist).

<sup>174</sup>Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT'L L. 383, 408 (1998) (the weakest link in all of the international law is the lack of effective enforcement mechanism). The importance of cooperation from state governments was recognized by the ICC statute which in part 9 contains elaborate provisions relating to cooperation and assistance from state government See ICC Statute, *supra* note 24 at part 9. For a detailed examination of the obligations of state governments to cooperate with the ICC, see Valerie Oostened, Mike Perry, John Mcmanus, *The Cooperation of States with the International Criminal Court*, 25 FORDHAM INT'L L.J. 767 (2002).

prosecutor for the ICTR, in a statement remembered more for its lack of tact and appeal to raw politics than its intrinsic eloquence, conceded the leverage state governments hold over international criminal prosecutions. She stated, while arguing a case before the appellate chamber of ICTR, “whether we like it or not, we must come to terms with the reality that our ability to continue our investigations depends on Rwanda.”<sup>175</sup> Antonio Cassese, the first President of the International Criminal Tribunal for Yugoslavia, underscored the tribunal’s dependence on state governments more poignantly than Carla Del Ponte:

Our tribunal is like a giant who has no arms and legs . . . . To walk and work, he needs artificial limbs. These artificial limbs are the state authorities.<sup>176</sup>

African leaders are deeply concerned, perhaps consumed by obsession, with retaining power. They therefore execrate the idea of a foreign agency over which they have no control invading their domain. The relationship between the government and the international criminal tribunal is dictated by calculations of self-interest. They are reluctant to cooperate with international prosecutors, especially if such cooperation carries potential risks. Kingsley Moghalu, former spokesperson for the ICTR, in a balanced and dispassionate account of the attitude of African leaders toward ICTR, stated:

African support for the Arusha tribunal has been far more ambivalent, especially in the tribunal’s early years . . . . African leaders were initially unsure of just how to respond to the idea of an intrusive international tribunal in the creation of which they played little or no role. Some were suspicious, some apprehensive, and the majority non committal, adopting a wait and see posture.<sup>177</sup>

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<sup>175</sup>Quoted by Moghalu, RWANDA’S GENOCIDE, *supra* note 71 at 117.

<sup>176</sup>Quoted by GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNAL 213-4 (2004).

<sup>177</sup>Moghalu, RWANDAS GENOCIDE, *supra* note 71 at 163.

African leaders, whose primal impulse is to cling onto power find themselves in a quandary. They understand that criminal prosecutions, especially of high profile perpetrators, will help reestablish the legitimacy of the government, deepen respect for the rule of law, affect dynamics of group relations and attract the respect and support from the international community. On the other hand, they are suspicious of anything that will diminish their influence in the society. They are acutely aware that supporting international prosecutions in a society riven by distrust for the West and where citizens question the bona fides of the central government carries enormous risks and consequences. Concern that supporting international criminal prosecutions would unleash popular dissatisfaction often affect the calculations of African leaders. Support for criminal prosecutions might convey the wrong impression that the government is “a powerless tool of the West,”<sup>178</sup> or encourage the restive citizenry to seek a regime change. Some citizens also accuse leaders who support international prosecutions as playing the role of quislings for cheap gains or advantage. Leaders only show commitment to prosecution if it is in their self interest or if they are sure that such prosecution poses no substantial threat to their survival. They gauge the sentiments of their citizens and take action or issue statements designed to placate public opinion. In refusing to cooperate with ICC prosecutors, the Sudanese government “painted the ICC investigation as a Western-inspired plot to punish the regime and perhaps seek a regime change.”<sup>179</sup> Another reason for the lack of cooperation is that most governments are either ethnic-based or tribally inspired and thus exhibit understandable reluctance to cooperate with international prosecutors when the targets

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<sup>178</sup>Blumenson, *supra* note 42 at 826

<sup>179</sup>Nick Grono, *Future of the World Court in Balance*, YaleGlobal March 7, 2007 available at <http://yaleglobal.yale.edu/display.article?id=8875>

of indictment are either their kinsmen, loyalists or friends.<sup>180</sup> Despite claims of nationhood, ethnic fervor runs deep in the psyche of Africans.<sup>181</sup> Leaders, most of whom assumed office through the support of their ethnic group, can ill afford to risk loss of support and possible alienation by authorizing the prosecution of their kinsmen. In Iraq, for example, it is doubtful whether the trial and subsequent execution of Saddam Hussien would have been possible if the Sunnis controlled the government.<sup>182</sup>

Also, in some cases, some of the new leaders have connections with the ancien regime and cannot completely absolve themselves from the atrocities of the former leaders.<sup>183</sup> Either due to timidity or corruption, new leaders are reluctant to support the prosecution of their benefactors.<sup>184</sup> Considerations of self interest also affect the calculations of national leaders in deciding whether or not to cooperate with international criminal prosecutors.<sup>185</sup> Some governments are nervous about the activities of international criminal prosecutors and are reluctant to cooperate with them. African leaders deeply resent the involvement of foreign agencies in what they consider to be their dominion. They truly believe that allowing international criminal prosecutors unfettered access to

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<sup>180</sup>See page 47 of text.

<sup>181</sup>John Rapley, *The New Middle Ages*, Foreign Affairs May/June 2006, 95, 102 (in many sub-Saharan African countries for example, the post-colonial state never succeeded in implanting itself deeply in the day-to-day lives of its citizens, let alone their consciousness. In such lands, the state retreat has led to the reactivation of traditional political actors, such as ethnic communities and religious brotherhoods).

<sup>182</sup>For a collection of essays examining the establishment, operations and politics of the trial of Saddam Hussein, see *SADDAM ON TRIAL: UNDERSTANDING AND DEBATING THE IRAQI HIGH TRIBUNAL* (Michael P. Scharf & Gregory S. McNeal eds., 2006).

<sup>183</sup>See Oko, *supra* note 16.

<sup>184</sup>*Id.*

<sup>185</sup>Synder & Vinjamuri, *supra* note 65 at 40 (reporting that “the Rwandan government fearing indictment of its own leaders has refused to cooperate with the international tribunal and thereby convinced the U.N. Secretary General to recommend the replacement of prosecutor Carla Del Ponte.”)

their domain will diminish their influence and authority, and ultimately lead to a lack of respect by their citizens. Some African rulers are tyrants and dictators masquerading as democrats.<sup>186</sup> Even though they do not publicly condemn the activities of international criminal prosecutors, privately, they express disquiet about them.<sup>187</sup> They fear that if the trend represents the wave of the future, they too some day, may become objects of international criminal prosecution.<sup>188</sup> As Kingsley Moghalu put it:

There are few countries in sub-Saharan Africa where politically or ethnically inspired mass killings or war crimes have not occurred in the past four decades. These events necessarily implicate the responsibility of the political and military leadership, past or present, in these countries. Consequently there is little appetite for a normative approach that could return to hunt its supporters.<sup>189</sup>

For whatever reason, African governments have not given international criminal prosecutors the level of cooperation they need to effectively discharge their obligations. A devastating example of the lack of cooperation is the current stand-off between the Sudanese Government and prosecutors of the International Criminal Court. Soon after the United Nations' Security Council voted to refer Darfur to the International Criminal Court, President al-Bashir defiantly declared, "I

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<sup>186</sup>U.S. DEP'T COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 2006 (2007) (documenting human rights abuses in various African countries).

<sup>187</sup>Some people believe that calls for an African solution are motivated by selfish interests. African governments have traditionally promoted the idea of non interference in a nation's internal affairs. See section 3 of the Charter of African Union.

<sup>188</sup>International criminal prosecution represents a real threat to African leaders, one which most of them genuinely fear. Describing the unwillingness of some West African countries to cooperate in the arrest of former Liberian war lord Charles Taylor, Eric Witte, an analyst with Democratization Policy Council, stated:

Obasanjo and others in West Africa were so reluctant to see Taylor arrested because so many of these leaders have skeletons in their closets. This was an old boys' network and they were looking out for each other's interest while failing to look after their people's interest.

Quoted by Robin Dixon, *The Message in Taylor's Arrest*, LA TIMES, April 2, 2006.

<sup>189</sup>Moghalu, RWANDA'S GENOCIDE, supra note. 71 at 164.

shall never hand any Sudanese to a foreign court.”<sup>190</sup> The Sudanese government subsequently threatened to “cut the throat of any international official . . . who tries to jail a Sudanese official in order to present him to the international justice.”<sup>191</sup>

The relationship between the Rwandan government and the ICTR has hovered dubiously between unease and downright contempt. The Rwandan government has often expressed its exasperation with the activities of the ICTR, and has been less than enthusiastic in helping the ICTR to deal with perpetrators of evil. The government also openly castigated the former chief prosecutor, Carla Del Ponte, and endlessly complained to the United Nations urging her removal.<sup>192</sup> Apart from dislike for the chief prosecutor, the Rwandan government fussed interminably over a broad range of issues, including the performance of the tribunal resulting from poor organizational structure,<sup>193</sup> incompetent tribunal personnel, and “the tribunal leadership that shows a perceived hostility towards cooperating with the government of Rwanda.”<sup>194</sup> Another source of tension between Rwandan government and the ICTR is the perception by Rwandan government that the “ICTR and Western observers value the rights of defendants over those of the victims.”<sup>195</sup> The perception of the ICTR’s insensitivity to the victims of genocide is further heightened by the sentencing disparity between Rwandan courts and the ICTR. Perpetrators tried by Rwandan courts

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<sup>190</sup>Nick Grono, *Future of the World Court in Balance*, YaleGlobal March 7, 2007 available at <http://yaleglobal.yale.edu/display.article?id=8875>

<sup>191</sup>*Id.*

<sup>192</sup>*The Rwandan Genocide: Did Carla Del Ponte Do Too Little or Too Much in Rwanda? Both*, *ECONOMIST*, Aug. 23, 2003, at 38.

<sup>193</sup>Strain & Keyes, *supra* not 122 at 106.

<sup>194</sup>*Id.*

<sup>195</sup>*Id.* at fn 92.



receive the death penalty while their more fortunate counterparts who appear before the ICTR receive terms of imprisonment to be served in more comfortable prisons in Europe.<sup>196</sup> An official of the RPF expressed the frustration widely shared by both the government and citizens of Rwanda when he stated that “it does not fit our definition of justice to think of the authors of the Rwandan genocide sitting in full-service Swedish prisons with a television.”<sup>197</sup>

It was widely reported that Rwandan President Paul Kagame resented the chief prosecutor, Carla Del Ponte, for attempting to investigate crimes allegedly committed by the Tutsis during the mayhem.<sup>198</sup> The subtle resentment of the ICTR by the Rwandan government telescoped into full blown defiance following the dismissal of the indictment against Barayagwiza by the ICTR on technical grounds.<sup>199</sup>

The judgment confirmed the belief that was already percolating in Rwanda that the ICTR was engaged in “judicial conspiracy” against the government of Rwanda.<sup>200</sup> The Rwandan government condemned the decision of the ICTR in very strong terms. It announced that it was suspending

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<sup>196</sup>Some European countries including Denmark, Norway and Belgium and some African countries offered to provide their prisons for perpetrators convicted by the ICTR. See ICTR, International Cooperation With the Tribunal, FACT SHEET No. 6, available at [www.ictt.org](http://www.ictt.org).

<sup>197</sup>PHILIP GOUREVITCH WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES 255 (1998).

<sup>198</sup>Declan Walsh, *Turning a Blind Eye to Increasingly Dictatorial Ways of Rwanda's Leader*, IRISH TIMES, Aug. 27, 2003, at 14.

<sup>199</sup>Prosecutor v Barayagwiza, Case No. ICTR-97-19-AR72 Decision (Nov. 3, 1999) An Appeal Chamber of the ICTR dismissed the indictment against Barayagwiza, one of the principal architects of the genocide in Rwanda. The Appeal Chamber held that his lengthy pre-trial detention amounted to a violation of his right to be tried without delay. In March of 2000, however, a new panel of the Appeal Chamber reviewed and reversed its former decision and ordered that Barayagwiza should be tried for the charges against him. See Prosecutor v Barayagwiza, Case No. ICTR-97-19-AR 72 Decision (Prosecutor's Request for Review and Reconsideration March 31, 2001). The Appeal Chamber found that Barayagwiza's rights had been violated but ruled that the remedy was not outright release but a reduction in sentence. *Id.* For a detailed analysis of the case and the politics surrounding it, see Jared Paul Marx, *Intimidation of Defense Witnesses at the International Criminal Tribunals: Commentary and Suggested Legal Remedies*, 7 CHI. J. INT'L L. 675 (2007).

<sup>200</sup>Moghalu, RWANDAS GENOCIDE, supra note 71 at 108.

cooperation with the ICTR unless the decision was reversed.<sup>201</sup> In addition to the torrent of splenetic criticisms, the Rwandan government took some measures to demonstrate its seriousness in ending relations with the ICTR. The Rwandan government turned down the chief prosecutor's routine and anodyne request for a visa to visit Rwanda.<sup>202</sup> It also refused to issue visas to witnesses summoned to testify before the ICTR.<sup>203</sup> Reacting to the government's denial of travel documents to witnesses, an obviously exasperated ICTR presiding Judge Navanethem Pillay, stated:

[T]he Rwandan government's failure to issue travel documents in a timely manner to facilitate the appearance of witnesses before the international tribunal has resulted in unavailability of witnesses and consequently the postponement of three trials.<sup>204</sup>

The public and well documented battle between the ICTR and the government of Rwanda provides a devastating illustration of the treacherous terrain international criminal prosecutors must navigate as they seek to promote accountability. International criminal prosecutors must learn to deal cautiously with state governments and leaders who have the ability and incentive to scuttle efforts to promote accountability. They must also be sensitive to the masses whose sensibilities have been lacerated by what they consider an attempt by the international community to recolonize Africa.

The potential for promoting accountability through international criminal prosecutions is thwarted when state governments refuse to cooperate with international criminal prosecutors. Lack of cooperation will frustrate the work of the tribunal because state governments typically exert

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<sup>201</sup>*Id.*

<sup>202</sup>*Id.*

<sup>203</sup>Marc Lacey, *Tribunal Says Rwanda is Stalling Inquiry into 1994 Killings*, NEW YORK TIMES, Sept. 7, 2002.

<sup>204</sup>*Id.*

enormous influence over their citizens. Witnesses, fearful of reprisal from state governments, may become uncooperative or unavailable.<sup>205</sup> Establishing guilt without the cooperation of witnesses will be very difficult and perhaps elusive. That is why the threat by the Sudanese government to derail prosecution should be taken seriously. Successful open defiance of the international community would embolden other countries, diminish the significance of international criminal prosecutions, and may ultimately thwart all hopes of promoting accountability in Africa through criminal prosecutions. Nick Grono, Vice President of International Crisis Group, accurately framed the consequences of failing to address the threats raised by the Sudanese government:

Security Council inaction in the face of Sudanese defiance would undermine the ICC, perhaps fatally, and expose it as a paper tiger. . . failure to ensure compliance would encourage not just Sudan but other governments whose officials are targeted by the ICC to defy the court. . . . How the Security Council respond's to Sudan's defiance will go a long way to determining whether the ICC will meet its founders' expectations that it "put an end to impunity for the perpetrators of atrocity crimes and thus contribute to the prevention of such crimes."<sup>206</sup>

#### **4. Limits of Criminal Prosecutions**

Almost everyone involved in the establishment of international criminal tribunals, the United Nations Security Council,<sup>207</sup> scholars,<sup>208</sup> and the tribunals<sup>209</sup> all cite the normal cliches-

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<sup>205</sup> Credible fears of retaliation against witnesses probably accounts for the establishment of witness protection programs by the ICTR. For a discussion of the various witness protection programs instituted by the ICTR, see Goran Sluiter, *The ICTR and the Protection of Witnesses*, 3 J. INT'L CRIM. JUST. 962 (2005).

<sup>206</sup> Grono, *supra* note 190.

<sup>207</sup> The preamble of the United Nations Security Council resolution that established the ICTR stated inter alia that "prosecutions of persons responsible for the above mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed." *See* note 22 *supra*.

deterrence,<sup>210</sup> incapacitation, the need to consolidate democracy and deepen the rule of law<sup>211</sup>- to justify international criminal prosecutions.<sup>212</sup> The deterrent value of punishment proceeds on the assumption that by punishing perpetrators of evil, other citizens will be discouraged from engaging in similar conduct.<sup>213</sup> It is hoped that punishment will deter the defendant by “giving him an

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<sup>208</sup> See e.g., M. Cherif Bassiouni, *Combating Impunity for International Crimes*, 71 U. COLO L. REV. 409, 410 (2000) (“The pursuit of justice and accountability, it is believed, fulfills fundamental human values, helps achieve peace and reconciliation, and contributes to the prevention and deterrence of future conflicts); David Scheffer, *War Crimes and Crimes Against Humanity*, 11 PACE INT’L L. REV. 319, 328 (1999) (As instruments of deterrence, the tribunals are formidable partners that cannot be lightly ignored in the future”).

<sup>209</sup> See e.g., *Prosecutor v. Raganda*, Case No. ICTR-96-3, paras 475, 6 Dec. 1999, available at [www.ictt.org](http://www.ictt.org) stressing the relevance of deterrence, the tribunal stated that:

the penalties imposed on accused persons found guilty by the Tribunal must be directed . . . at deterrence, namely to dissuade forever, others who may be tempted in the future to perpetrate such atrocities by showing them that the international community shall not tolerate the serious violations of international humanitarian law and human rights

Also, Richard Goldstone, the former Chief Prosecutor at the ICTY emphasized deterrence as one of the main values of international criminal prosecutions. He stated:

[I]f people in leadership positions know that there’s an international court out there, that there’s an international prosecutor, and that the international community is going to act as an international police force, I just cannot believe that they aren’t going to think twice as to the consequences. Until now, they haven’t had to. There has been no enforcement mechanism at all.

Quoted in Michael P. Scharf, *The Prosecutor v Dusko Tadic, An Appraisal of the First International War Crimes Tribunal Since Nuremburg*, 60 ALB. L. REV. 861, 868 (1997).

<sup>210</sup> See e.g. Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2542 (1991); Payam Akhan, *Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on United Nations War Crimes Tribunal* 20 HUM. RTS Q. 739, 743-51 (1998).

<sup>211</sup> See e.g. CARLOS SANTIAGO NINO, *RADICAL EVIL ON TRIAL* (1996) (Retroactive justice for massive human rights violations helps protect democratic values. An aggressive use of the criminal laws will counteract a tendency towards unlawfulness, negate the impression that some groups are above the law, and consolidate the rule of law).

<sup>212</sup> Aukerman *supra* note 60 at 44 (noting that in the context of domestic and international crime, theoretical frameworks justifying punishment of offenders include desert/retribution/vengeance, and deterrence).

<sup>213</sup> Zolo, *supra* note 69 at 733 (the memory of past pains should advise the convict against reiterating his criminal behavior, whereas the social spectacle of the misery imposed upon deviant individuals should lead most citizens to respect those collective rules that the group freely adopted).

unpleasant experience he will not want to endure again.”<sup>214</sup> Imposing costs on prohibited conduct will discourage citizens from engaging in criminal behavior.

Retribution satisfies society’s need for sanctions against errant behavior.<sup>215</sup> Punishing wrongdoers prevents recourse to self-help or vigilantism by victims of crime.<sup>216</sup> Martha Minow elegantly stated one of the chief values of criminal prosecution:

[I]t transfers the individuals’ desires for revenge to the state or official bodies. The transfer cools vengeance into retribution, slows judgment with procedure, and interrupts with documents, cross-examination, and the presumption of innocence, the vicious cycle of blame and feud.<sup>217</sup>

Isolating the criminal from the rest of the society, otherwise known as incapacitation, disables the perpetrator from doing further harm to the society.<sup>218</sup> Incapacitating the offender also protects the society from those considered by their criminal antecedent to be dangerous.<sup>219</sup> In the context of mass violence, indicted leaders either in custody or running from justice lose standing before their

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<sup>214</sup>WAYNE R. LAFAVE CRIMINAL LAW 27 (4<sup>th</sup> ed., 2003).

<sup>215</sup>Minow, *supra*, note 27 at 12 (arguing that retribution “motivates punishment out of fairness to those who have been wronged and reflects a belief that wrongdoers serve blame and punishment in direct proportion to the harm inflicted”).

<sup>216</sup>*Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart J., concurring) (stating that when people “begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they “deserve,” then there are sown the seeds of anarchy - of self-help, vigilante justice, and lynch law”); Payam Akhavan, *Beyond Impunity, Can International Criminal Justice Prevent Future Atrocities?* 95 AM. J. INT’L L 17, 23 (2001) (detention and trial of tens of thousands of genocidaires before Rwandese courts may be viewed as an alternative to mass expulsions or widespread extrajudicial executions and private revenge killings).

<sup>217</sup>MINOW, *supra*, note 27 at 26 (1986); Leila Nadya Sadat, *Exile, Amnesty and International Law*, 18 NOTRE DAME L. REV. 955, 983 (2006) (stating that by channeling accountability and punishment through an official mechanism, society hopes to avoid individual vigilantism and to provide an impartial forum where the individuals accused of crimes during a prior regime may have their cases heard, with all the due process rights necessary to ensure that their treatment is not tantamount to a vendetta or purge).

<sup>218</sup>Greenwalt, *supra* note 89 at 601-2 (incarceration may remove evil political actors from power, and those who remain at large may go into hiding from where they have less influence, or they may otherwise temper their behavior.).

<sup>219</sup>Lafave, *supra* note 32 at 27.

supporters and thus are ultimately unable to engineer violence.<sup>220</sup> Arrest, or even mere indictment of genocidal leaders, deflates the aura of invincibility enjoyed by war lords, limits their capacity to plot more evil, and reassures the restive public that no one is beyond the reach of the law.<sup>221</sup> As was admirably put by Justice Hassan Jallow, the chief prosecutor for the ICTR, “public exposure of the criminality of leaders, be they military or civil, through evidence adduced at trial not only brings to account those arrested and prosecuted, but incapacitates those on the run from the law, thereby excluding extremists tendencies from the national transitional process.”<sup>222</sup>

Punishment also serves educative functions both for the perpetrator and the larger society. Punishment conveys to both the defendant and other citizens the society’s revulsion at criminal behavior.<sup>223</sup> The guilty typically suffer obloquy and are held up to the society as unsavory examples of unacceptable conduct. It is therefore hoped that punishment and accompanying obloquy will redirect behavior or blunt impulses that lead to criminal behavior. Punishment sends a strong

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<sup>220</sup>Darryl Robinson, *Serving the Interest of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 14 EUR. J. INT’L L. 481, 489 (2003) (arguing that a criminal prosecution “tends to expose the extremists for what they are -criminals, thereby stigmatizing them, diminishing their influence and removing them from power and society”).

<sup>221</sup>Jane E. Stromseth, *Pursuing Accountability for Atrocities After Conflict: What Impact on Building the Rule of Law*, 38 GEO. J. INT’L L. 251, 262 (2007) (by removing perpetrators of atrocities from positions in which they can control and abuse others, criminal trials ...can have a cathartic impact by assuring the population that old patterns of impunity and exploitation are no longer tolerated. Barring known perpetrators from committing new atrocities and delegitimizing them in the eyes of the public helps to break patterns of rule by fear and build public confidence that justice can be fair).

<sup>222</sup>Justice Hassan B. Jallow, *Justice After Genocide: The Challenges of the International Criminal Tribunal for Rwanda*, Speech to the University of Lund in Stora Salen, Af-Building Lund, Jan. 31 2007. p.9.

<sup>223</sup>Laurel Fletcher, *From Indifference to Engagement: Bystanders and International Criminal Justice*, 26 MICH. J. INT’L L. 1013, 1028-9 (2005) (international criminal trials are powerful symbols that convey moral, social, as well as legal approbation of the guilty and the political objectives that drive them to commit their misdeeds).

message to the citizens that illegal actions attract consequences and “demonstrates to citizens that there are ways of coping with differences other than resorting to violence.”<sup>224</sup>

Central to the notion of criminal trials is the assumption that individuals whose conduct the law seeks to prohibit are capable of rational thinking.<sup>225</sup> By simply engaging in cost-benefit analysis, citizens will refrain from committing crimes if the cost of illegal behavior far exceeds its value.<sup>226</sup> Punishing criminal conduct is appropriate because the individual punished is considered a free moral agent who knew or had reason to know that his conduct was illegal, and could have refrained from engaging in the conduct if he so desired but nevertheless chose to violate the law. This assumption explains the existence of defenses like insanity, intoxication, and compulsion in criminal jurisprudence.<sup>227</sup>

The assumptions that undergird criminal trials seem to be of doubtful utility in a continent with dramatically different cultural and social assumptions and in the context of mass violence.<sup>228</sup> The causes of violence in Africa are considerably different from what leads to deviant behavior in developed societies. Causes of and motivations for crimes of mass violence reside in structural deficiencies in the society, not in the personalities trapped within the system. The assumptions of

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<sup>224</sup> Andrew Rigby, *Dealing With the Past: Forgiveness and the Reconstruction of Memory in Divided Societies*, 3 INT'L J. POL. & ETHICS 93 (2003)

<sup>225</sup> JOHAN BRAITHWAITE CRIME SHAME AND REINTEGRATION 131 (1989) (‘punishment presumes human beings to be rational actors who weigh the benefits of non compliance against the probability and costs of punishment); See generally Johannes Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949, 960 (1966).

<sup>226</sup> *Id.* at 949 (stating that because of the hazards involved, a person who contemplates a punishable offense might not act).

<sup>227</sup> See generally Lafave, *supra* note 32.

<sup>228</sup> See Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U.L. REV 1221, 1254-55 (questioning the deterrent value of the ICTY and the ICTR for crimes against humanity); Jose E. Alvarez, *Rush to Closure: Lessons of the Tadic Judgment*, 96 MICH. L. REV. 2031, 2079-80 (questioning the effectiveness of deterrence in cases of mass violence).

criminal prosecution discount or fail to adequately recognize the idiosyncratic environmental factors that animate citizens to engage in violence. Violence in Africa is often environment-driven and takes place when conditions are right. The environment and prevailing culture create violent behavior in two ways. First, state failures and the resulting power vacuum present optimal anarchic environments for violence. Once the state collapses, violence becomes an attractive option for all the parties concerned. Officials of the failing government, maneuvering to retain control, use violence to consolidate their grip on power and demand allegiance from disaffected citizens.<sup>229</sup> Political elites resort to violence to press for greater participation in the government and in some cases to finagle their way to power.<sup>230</sup> Ethnic groups use violence to invite attention to their plight, to demand a more equitable distribution of the nation's resources, and to attain other strategic objectives.<sup>231</sup> Warlords and ethnic leaders manipulate these environmental factors to transform otherwise law abiding citizens into mindless zealots who have no qualms inflicting violence on their fellow human beings.<sup>232</sup>

Second, criminal trials are especially ineffective in an environment where “criminal conduct that is normally characterized as deviance is transformed into acceptable, even desirable

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<sup>229</sup>Preben Kaarsholm, *State Failure, Societies in Collapse? Understanding of Violent Conflict in Africa*, in VIOLENCE POLITICAL CULTURE AND DEVELOPMENT IN AFRICA, 1-2 (Preben Kaarsholm ed., 2006) (giving account of how political office holders in various African countries use violence to retain power).

<sup>230</sup>OMAR MCDOOM, RWANDA'S ORDINARY KILLERS: INTERPRETING POPULAR PARTICIPATION IN RWANDA GENOCIDE 10-11 (2005) available at [www.crisisstates.com/download/wp/wp77.pdf](http://www.crisisstates.com/download/wp/wp77.pdf) (describing how political elites used violence to wrest power from local officials in two communities in Southern Rwanda).

<sup>231</sup>PAUL RICHARDS FIGHTING FOR THE RAIN FOREST: WAR, YOUTH AND RESOURCES IN SIERRA LEONE xx (1996) (noting that hand cutting, throat slitting and other acts of terror in Sierra Leone became rational ways of achieving intended strategic outcomes).

<sup>232</sup>For an explanation of why and how ordinary citizens participate in genocide, see generally JAMES WALLER BECOMING EVIL: HOW ORDINARY PEOPLE COMMIT GENOCIDE AND MASS KILLING (2002); see also DANIEL CHIROT & CLARK MCCAULEY WHY NOT KILL THEM ALL? THE LOGIC AND PREVENTION OF MASS MURDER, 11-50 (2006) (examining four main motives that lead to mass murder, namely convenience, revenge, simple fear, and fear of pollution)



behavior.”<sup>233</sup> Mass violence in Africa thrives on and is driven by prevailing orthodoxy that aggrandizes violence. Environmental factors, especially the culture that celebrates violence, provide motivations for criminal violent conduct. Crime in developed societies is generally attributable to character flaws or misdirected inclination of the perpetrator to gain a private advantage.<sup>234</sup> Violence in Africa and perpetrators of mass violence, on the other hand, are motivated by cultural factors, especially the desire to address ethnic group grievance.<sup>235</sup> Perpetrators of mass violence or genocide are often different from typical defendants in settled societies. Violence, especially mass murders and genocide, the kinds experienced in Rwanda, is not committed by ordinary criminals who kill because of individual weaknesses or deficiencies. Rather, it is committed by citizens who accept and absorb the poisoned culture of hatred against other ethnic groups. The values, attitudes and practices that promote compliance with the law are dethroned and overwhelmed by the culture that aggrandizes violence. Citizens raised in a culture that celebrates violence participate in mass violence because they believe killing members of another ethnic group was the right thing to do. Professor Mark Drumbl offers an illuminating perspective on the motives for mass violence by genocidal killers in Africa:

Genocidal killers are not like common criminals. Staffing the crematoria at Auschwitz was a job paid by the state. This does not make the work any less wicked, but distinguishes it from ordinary crime. Similarly, I have interviewed detainees in the Rwandan genocide prisons. Most of them thought they were doing good by

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<sup>233</sup>*The Promise of International Prosecution*, Developments in the Law; International Criminal Law, 114 HARV. L. REV. 1957, 1964 (2001).

<sup>234</sup>MARK J. OSIEL MASS ATROCITY, ORDINARY EVIL AND HANNAH ARENDT: CRIMINAL CONSCIOUSNESS IN ARGENTINA’S DIRTY WAR 32 (2001) (stating that ordinary crime generally stems from ordinary vices: strong envy, avarice, hatred, vengeance, jealousy, ambition, pride, distrust).

<sup>235</sup>BENJAMIN A. VALENTINO FINAL SOLUTIONS: MASS KILLING AND GENOCIDE IN THE TWENTIETH CENTURY 69 (2004) (hereinafter FINAL SOLUTIONS) (my research . . . also suggests that perpetrators may view mass killing as a rational way to counter threats or implement certain types of ideology).

eliminating the enemy, including unarmed civilians and defenseless children. They were following orders of a criminal state. The state told them to butcher and hack. They believed in the state, so they butchered and hacked. They perversely thought they were fulfilling a civic duty.<sup>236</sup>

Professor Andenaes's, in an oft cited article identified three conditions that prevent an individual from engaging in criminal conduct: his moral inhibition, his fear of censure of his associates, and his fear of punishment.<sup>237</sup> Professor Andenaes analysis assumes that individuals who contemplate engaging in criminal behavior are capable of thinking rationally and operate in a society where crime carries a social stigma.<sup>238</sup> It also assumes that the society is stable, orderly and has a history of swiftly and effectively responding to criminal conduct. Professor Andenaes also predicates his analysis on the belief that condemnation from peers affects the calculations of citizens and helps them muster the self restraint necessary to avoid engaging in criminal conduct.<sup>239</sup>

These assumptions do not accord with the realities of contemporary Africa. Crazy war lords irredeemably committed to nihilistic violence operate within a different normative realm. They are convinced in the rightness of their conduct, are immune to the factors that typically generate and sustain the impulse to refrain from criminal conduct. Violence rarely carries social disapproval or even disgrace in most parts of Africa. It has, instead, been celebrated, and carries a lot of cachet, especially when used in pursuit or defense of ethnic interests.<sup>240</sup> The reality is that

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<sup>236</sup>Transcript of recording, Nuremberg's legacy, 60 years later (NPR 2006) Available on westlaw 2006 WLNR 22953916.

<sup>237</sup>Andenaes, *supra* note 225 at 961.

<sup>238</sup>*Id.*

<sup>239</sup>*Id.*

<sup>240</sup>*See* pages 66-68 of text *infra*.

given the prevailing cultural orthodoxy that endorses violence against an opposing ethnic group as a moral or civic duty, it is doubtful if the conditions listed by Professor Andenaes can constrain conduct.<sup>241</sup> As Professor Drumbl so eloquently stated “when eliminating the enemy becomes a civic duty, the threat of prosecution by a distant international criminal court, offers little in the way of deterrence.”<sup>242</sup>

Fear of punishment is the last thing on the minds of citizens consumed by violence and eager to unleash it on their perceived enemies.<sup>243</sup> Leaders exhibit a narcissistic sense of invincibility that blunts fears of detection and possible prosecution. Their acolytes and foot soldiers are often less inclined to think about the consequences of their actions. Most of them are poor, illiterate, and have nothing significant to lose.<sup>244</sup> Some are self-conceited middle-aged men yawning for adulation of their ethnic group. A disproportionate percentage of perpetrators of mass violence are unemployed youths with no marketable skills who view mass violence as an outlet to identify with warlords in the hopes of eking out a living. Others are young children, dragooned or bewitched with

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<sup>241</sup>For a discussion of genocide as a civic duty, see A. Des Forges, *Leave None to Tell the Story: Genocide in Rwanda*, HUMAN RIGHTS WATCH, 1999, p. 515.

<sup>242</sup>Drumbl *supra*, note 236; PHILLIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA* 123 (1998) (stating that during genocide, the work of the killers was not regarded as a crime in Rwanda; it was effectively the law of the land).

<sup>243</sup>Akhavan, *supra* note 31 at 9 (noting that “the threat of punishment- let alone an empty threat- has a limited impact on human behavior in a culture already intoxicated with hatred and violence).

<sup>244</sup>A profile of fighters provided by psychologists who interviewed fighters involved in the mayhem in Liberia is fairly representative of perpetrators of mass violence in Africa:

he is someone usually between 16 and 35 years of age, who may have decided to become a combatant for several reasons: to get food for survival, to stop other fighters from killing his family and friends, was forced to become a combatant or be killed, sheer adventurism etc.

E.S Grant quoted in STEPHEN ELLIS, *THE MASK OF ANARCHY: THE DESTRUCTION OF LIBERIA AND THE RELIGIOUS DIMENSION OF AN AFRICAN CIVIL WAR* 127 (1999).

the ideology of hatred into joining the genocidal group.<sup>245</sup> Unemployment, illiteracy, feeling of hopelessness, and craving for acceptance combine powerfully to desensitize and numb perpetrators of mass violence to the moral or legal implications of their conduct.<sup>246</sup> Citizens, especially children under the influence of overweening war lords turn out to be mindless robots willing and eager to do whatever is asked of them. As Crawford Young stated “drugged, terrorized, and promised supernatural protection, the child soldier could be a fearless warrior.”<sup>247</sup> Goaded by war lords or an ethnically inspired government, youngsters facing intense situational pressures to identify with their communities scarcely think about the consequences of their actions.<sup>248</sup> Leaders consumed by the quest for power and acceptance by their communities and citizens engaged in mindless group-think are often unaffected by the chastening influence of criminal law on human behavior.<sup>249</sup>

Citizens involved in collective activities tend to lose their autonomy, and in the context of mass violence, submit to, and are ruled by, the base instincts of the rabble.<sup>250</sup> Citizens lost in the

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<sup>245</sup>Crawford Young, *The End of the Post-Colonial State in Africa? Reflections on Changing African Political Dynamics*, 103 AFR. AFF. 23, 45-6 (2004) (stating that children were often recruited by abduction; other youngsters in a social environment of hopelessness joined voluntarily). *See also* HUMAN RIGHTS WATCH, *EARLY TO WAR: CHILD SOLDIERS IN THE CHAD CONFLICT* (2007) (discussing the involvement of child soldiers in the Chadian conflict).

<sup>246</sup>Lars Waldorf, *Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice*, 79 TEMP. L. REV. 1, 31 (2006) (noting that individuals commit ethnic violence for many factors . . . dehumanization, fear, material greed, group conformity, political opportunism, or more likely some toxic combination thereof).

<sup>247</sup>*Id.* at 45.

<sup>248</sup>The Promises of International Prosecution, *supra* note 233 at fn40 (moreover, even when the wrongful nature of the criminal action is clear, norms of group conformity may be sufficiently powerful to render any deterrent value immaterial)

<sup>249</sup>Drumbl, *supra* note 228 at 1253 (stating that societies engulfed by mass political violence are not particularly conducive to rational behavior or fears of eventual apprehension).

<sup>250</sup>The ability of crowds to affect individual behavior is well documented. The famed French sociologist Gustav Le Bon stated:

under given circumstances, and under those circumstances, an agglomeration of men presents new characteristics very different from those of the individuals

crowd and exhilarated by the sense of invulnerability typically forfeit the capacity to think for themselves and far too often are unaffected by the risks associated with their actions. Rather, as observed by famed scholars “the group processes shifts its members toward taking more risky actions, and deindividuates them, facilitating the commission of destructive behaviors.”<sup>251</sup> They also have no moral inhibitions and are often untroubled by the censure of fellow citizens, most of whom are either involved in or indifferent to the grotesque display of violence against their perceived enemies.<sup>252</sup>

Moreover, the comfort of the crowd and the reassurances of war lords generate feelings of invulnerability. Citizens engaged in mindless group-think typically harbor “illusions of invulnerability,”<sup>253</sup> which lead them “to ignore obvious danger, take extreme risks, and be overly optimistic.”<sup>254</sup> They have little or no room for independent thought and often are uninclined to seize the opportunity to think for themselves. Even those who appreciate the illegality of their conduct genuinely believe that the benefits of continued participation in mass orgy far exceed the costs. In such an environment, the law’s influence is dramatically diminished as citizens pursue ethnic hatred

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composing it. . . . Whoever be the individuals that compose it, however like or unlike be their mode of life, their occupations, their character or their intelligence, the fact that they have been transformed into a crowd puts them in possession of a sort of collective mind which makes them feel, think, and act in a manner quite different from that in which each individual of them would feel, think, and act were he in a state of isolation

GUSTAVE LE BON, *THE CROWD: A STUDY OF THE POPULAR MIND* 23 (1969).

<sup>251</sup> Paul Robinsom & John Darley, *Does Criminal Law Deter? A Behavioural Science Investigation*, 24 OXFORD J. LEGAL STUD. 173, 181 (2004).

<sup>252</sup> Osiel, *supra* note. 234 at 60 (the social practice of retributive punishment is based in the public’s reactive attitudes of resentment and indignation toward the defendant for his wrongful acts. These reactive attitudes are absent, however, when the population largely supports, or is indifferent to these acts).

<sup>253</sup> Kelley Tiffany, *Cheering Speech at State University Athletic Events; How Do You Regulate Bad Spectator Sportsmanship*, 14 SPORTS LAW J. 111, 222 (2007) (citing I.L. JANIS & L. MANN, *DECISION MAKING: A PSYCHOLOGICAL ANALYSIS OF CONFLICT AND COMMITMENT* (1997)).

<sup>254</sup> *Id.*

unfazed by the threat of criminal prosecution.<sup>255</sup> Respect for the law is severely diminished in an environment where war lords and ethnic chieftains bewitch vulnerable citizens with ideology of hatred and assure them that their conduct is consequence free.<sup>256</sup> Once citizens subscribe to the cultural ethos that aggrandizes violence as a legitimate means to advance ethnic interest, the criminal process becomes a poor vehicle for engineering compliance with the law.<sup>257</sup> Mass violence, aptly described by C.S. Santiago Nino as radical evil,<sup>258</sup> is typically not possible “unless carried out with a high degree of conviction on the part of those who participated in it.”<sup>259</sup>

Second, criminal trials designed to deal with individual guilt is scarcely the appropriate vehicle for addressing violence involving several hundreds and even thousands of perpetrators.<sup>260</sup> The distinct and inexorable inclination of criminal trial is to impose sanctions on an identified

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<sup>255</sup>Daly *supra* note 48 at 106. Professor Daly stated two main reasons why criminal trial is unlikely to serve as a deterrent in transitional societies. He stated:

First, criminal trials do not address the causes of the wrong: because they treat the wrong as aberrational, the primary concern is to remove it from society, not to understand it. But when the wrong is woven into the fabric of the society, as in the case of mass atrocities, its etiology must be understood and treated. Second, trials only address the leaders of the prior regime. If society permitted or promoted the atrocity and violence and prejudice permeated the culture, then prosecuting only the leaders does not deter society generally.

<sup>256</sup>H. PACKER THE LIMITS OF THE CRIMINAL SANCTIONS 287 (1967) (“respect for law generally is likely to suffer if it is widely known that certain kinds of conduct although nominally criminal can be practiced with relative impunity”).

<sup>257</sup>Maogoto, *supra*, note 167 (arguing that what motivated significant numbers of Rwandans to participate in the genocide “was not coercion, but rather genuine support of the idea that the Tutsi had to be eliminated, together with the pursuit of solidarity with others in attaining this goal”).

<sup>258</sup>C.S. NINO RADICAL EVIL ON TRIAL vii (1996).

<sup>259</sup>*Id* at ix.

<sup>260</sup>William Schabas, *Justice, Democracy and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problems* 7 CRIMINAL LAW FORUM 523 (1996) (it should be kept in mind that no judicial system anywhere in the world has been designed to cope with the requirements of prosecuting genocide. Criminal justice systems exist to deal with crime on an individual level. They are unsuited for crimes committed by tens of thousands, and directed against hundreds of thousands); Amstutz, *supra* note. . at ..discussing the limitations of ICTR, he stated that “the major shortcoming of the ICTR is not inefficiency but the inadequacy of the criminal justice system itself in dealing with society-wide atrocities).

individual for violating the law.<sup>261</sup> Criminal trial designed to deal with individual responsibility is often overwhelmed and ultimately rendered inadequate to handle crimes committed by massive numbers of citizens.<sup>262</sup> Genocide or crimes of mass violence, by definition, cannot be carried out by an individual or even a few individuals.<sup>263</sup> Rather, genocide is typically possible if vast numbers of citizens participate or are complicit.<sup>264</sup> In Rwanda, for example, a fairly accurate survey put the number of citizens who participated in the genocide at between 175,000 to 210,000.<sup>265</sup>

The machinery of justice that functions optimally in settled societies exhibits visible signs of inadequacy or perhaps unsuitably in societies sliding towards anarchy and girdled by mass violence, genocide and corruption.<sup>266</sup> Genocide, for example, typically involves many perpetrators

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<sup>261</sup>LARRY MAY CRIMES AGAINST HUMANITY 237 (2005) (trials are best for dealing with individuals who are responsible, not with groups that are responsible, especially large groups).

<sup>262</sup>Laurel E. Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation* 24 HUM RTS. Q. 573, 579 (2002) The authors argue that the focus of trials on the individuals responsible for ordering or carrying out acts of mass violence leaves three categories of persons and groups largely untouched: (1) unindicted perpetrators including community members who directly or indirectly profited from the event; (2) states outside the area of conflict that may have contributed to the outbreak of violence by their acts or omissions; and (3) the bystanders who did not actively participate in violence, but who also did not actively intervene to stop the horrors.

<sup>263</sup>According to Art. 2 of the ICTR statute, *supra* note 22 genocide is “(a). killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group or (e) forcibly transferring children of the group to another group” if “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.”

<sup>264</sup>May, *supra* note 260 at 157 (genocides rely on widespread cooperation and complicity by many, if not most, members of a given society. Indeed genocides are so pervasive that sometimes nearly all members of the society in some way participate or would have participated).

<sup>265</sup>Scott Straus, *How Many Perpetrators Were There in the Rwandan Genocide? An Estimate*, 6 J. GENOCIDE RES. 85, 94 (2004).

<sup>266</sup>Helena Cobban, an international journalist with experience in Rwanda, raised questions about the unsuitability of Western notions of justice in Rwanda. She stated:

The Rwandan genocide throws into profound relief many of the cosmological and ethical assumptions - about the nature of individual responsibility, the purpose of punishment, and the normal conditions of human life - upon which our contemporary criminal court is based. We in the west seldom examine these assumptions. But the Rwandan case challenges them deeply and calls on us to tread lightly and carefully before we spread the mantle (or straightjacket) of our criminal justice system over population or situations to which it may be fundamentally unsuited.

who bear varying levels of culpability,<sup>267</sup> and participate in the mayhem for different reasons.<sup>268</sup> Some planned and orchestrated the violence, others aided, abetted, and exhorted citizens to engage in violence.<sup>269</sup> Some were unwilling participants, forced into action by overbearing war lords and government officials.<sup>270</sup> Others participated to avoid the wrath of their kinsmen. Others stood idly by and failed to prevent the violence. Some were children between the ages of nine and thirteen recruited or dragooned into joining the mayhem by war lords.<sup>271</sup> Criminal prosecution designed essentially to handle individual liability exhibits visible signs of inadequacy where vast segments of the society participate in the violence.<sup>272</sup> As Maya Golden-Bolocan, a human rights officer, stated:

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Helena Cobban, *The Legacies of Collective Violence*, Boston Review available at [www.bostonreview.net/BR27.2/cobban.html](http://www.bostonreview.net/BR27.2/cobban.html)

<sup>267</sup>For an excellent analysis of the different theories of liability for the various participants in mass violence, see Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Law*, 93 CAL. L. REV. 75 (2005).

<sup>268</sup>Valentino, *FINAL SOLUTIONS*, *supra*, note 235 at 37 (listing patriotic duty, material or careerist ambition, fear or coercion as some of the reasons why individual citizens may participate in mass atrocity).

<sup>269</sup>Valentino, *FINAL SOLUTIONS*, *Id.* at 37 (“more significant segments of the public frequently lend their assistance to mass killing in ways that do not involve direct participation in violence. Indirect cooperation may involve activities such as producing weapons, providing logistical and administrative support to organizations directly involved in the killing, or informing on fellow citizens”).

<sup>270</sup>Waldorf, *supra* note 246 at 33 (noting that officials and soldiers placed substantial pressure on people to demonstrate at least nominal support for the killing. Hutus who rejected the propaganda and chose not to participate in the genocide were subjected to reproach on the radio and in public meetings, humiliation, fines, imprisonment and even death).

<sup>271</sup>The phenomenon of child-soldiers has become a very serious problem in Africa. Child-soldiers were used pervasively in the conflicts in Liberia and Uganda. See Naomi Cahn, *Poor Children “Witches” and Child Soldiers in Sub-Saharan Africa*, 3 OHIO ST. J. CRIM. L. 413 (2006); Nsongurua Udombana, *War is not Child’s Play! International Law and the Prohibition of Children Involvement in Armed Conflict*, 20 TEMP. INT’L & COMP. L.J. 57 (2006).

<sup>272</sup>Daly *supra* note 48 at 105. Discussing the difficulties of using criminal trials to deal with society-wide abuses, Professor Daly stated that:

many of these derive from criminal prosecution’s focus on individuals and on the ideology of the individual responsibility of voluntary perpetrators. But this approach may not fit situations where mass segments of society are responsible for the deprivation of human rights: individuals act collectively, with varying degrees of responsibility and under varying degrees of coercion. Responsibility



because of their focus on the individual responsibility of voluntary perpetrators, criminal prosecutions may be ill-suited to deal with gross human rights abuses committed by mass segments of the population. In such cases, in fact, often individuals act collectively with varying degrees of responsibility and under varying degrees of coercion which makes it difficult to apply ordinary principles of criminal law. The focus on selected individuals cannot account for the structural, inner causes of the violence or uncover the complex connections existing between people that make the massacres possible.<sup>273</sup>

Some of the citizens neither chose nor planned to commit genocide; it was hoisted on them<sup>274</sup>. They also lacked the capacity to resist or withstand the genocidal commands of war lords with dreadful records of brutality.<sup>275</sup> An attempt at resisting would have elicited immediate bodily harm, even death to them and their families.<sup>276</sup> In a sense, some of these perpetrators are victims exposed to the evil machinations of war lords by the inability of the state to provide them the protections available to citizens in settled societies. For some, participating in the violence was a form of self preservation. They joined the violence to avoid the recrimination of brutal war lords and the wrath of their ethnic group. Faced with specific, undisguised and overwhelming threats, they committed what John Kekes describes as unchosen evil.<sup>277</sup> This kind of evil occurs “when

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in these situations is both more widespread and more resistant to the generalities that define non-traditional criminal law.

<sup>273</sup> Maya Goldstein-Bolocan, *Rwanda Gacaca: An Experiment in Transitional Justice*, 2004 J. DISP. RESOL. 355, 360-1 (2005) (footnotes omitted).

<sup>274</sup> SCOTT A. STRAUSS THE ORDER OF GENOCIDE: RACE, POWER AND WAR IN RWANDA 5.32 (2006) In a survey of some low level convicted, confessed participants in the genocide, the author found that “intra-ethnic coercion (among Hutus) appears to have been a . . . greater determinant of genocidal participation than was inter ethnic enmity).

<sup>275</sup> For a discussion of how low level perpetrators were compelled to participate in the genocide, see SCOTT A. STRAUSS THE ORDER OF GENOCIDE: RACE POWER AND WAR IN RWANDA 5.28-41 (2006).

<sup>276</sup> Valentino, FINAL SOLUTIONS, *supra* note 235 at 32 (since active opposition to mass killing can mean prosecution or death, most citizens manage to look the other way, even when the victims are neighbors, friends, or relatives).

<sup>277</sup> JOHN KEKES FACING EVIL 66 (1990).

human agents cause undeserved harm without being able to do otherwise.”<sup>278</sup> Citizens in the throes of intense, macabre violence and operating in an environment inhospitable to rational and independent thinking had little or no choice in deciding whether or not to join in the mayhem. The facts indicate that some were innocent citizens bludgeoned into becoming accomplices by war lords. To attribute to them the capacity to exercise independent judgment and treat them as perpetrators not only does grave violence to logic and common sense but also results in injustice.<sup>279</sup>

Besides the unfairness of treating all the participants as criminals, sorting out the guilty from the innocent amidst chaos often proves to be “potentially destabilizing, socially divisive and logistically and economically untenable.”<sup>280</sup> The United Nations apparently acknowledged the eminently difficult task of sorting out the victims from low-level perpetrators of evil when it confined the jurisdiction of the Sierra Leone tribunal to those “who bear the greatest responsibility for the commission of the crime.”<sup>281</sup>

The third reason why criminal prosecution is ineffective in stopping violence is the resurgence of ethnicity.<sup>282</sup> Claims of nationhood have never really blunted ethnic impulses that

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<sup>278</sup> *Id.*

<sup>279</sup> Helena Cobban, *When War-Crimes Prosecutions are Counter Productive*, CHRISTIAN SCIENCE MONITOR, May 12, 2005.

many - perhaps - most of the people around the world who have actually lived through periods of mass violence say that under such circumstances it is virtually impossible to make the kinds of clear distinctions between “perpetrators” and “victims” that a criminal court system relies on.

<sup>280</sup> Kritz, *supra*, note 133 at 138.

<sup>281</sup> *See* Statute for the Special Court for Sierra Leone, *supra* note 23.

<sup>282</sup> For an interesting collection of essays examining the impact of ethnicity on the political process in various African countries, see *ETHNICITY AND DEMOCRACY IN AFRICA* (Bruce Berman, Dickson Eyoh and Will Kymlicka eds., 2004).

animate and ultimately sunder existing political arrangements and institutions in Africa.<sup>283</sup> Africans have repeatedly proven themselves incapable of breaking the blinders of ethnicity.<sup>284</sup> It is part of their mental make-up. Violence that has disfigured Africa often results from tensions at the armature of the society: ethnic irridentism.<sup>285</sup> New generations of Africans have internalized ethnic hatred and eagerly embraced violent criminal conduct directed at opposing ethnic groups as proper etiquette and a legitimate means either to press for greater respect or to ward off marginalization by the central government.<sup>286</sup> Violence, even the most atrocious- murder, mayhem- is celebrated and rewarded when it is directed against rival ethnic groups.<sup>287</sup> Some political elites, unable to attain power through constitutional means, simply use ethnicity as a means to advance political

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<sup>283</sup>In a way, the value and relevance of ethnic identity have accreted chiefly due to failed efforts to implement constitutional democracy. Political elites readily attribute electoral failures to marginalization by the dominant ethnic group. These claims resonate within the masses and tend to reignite hostilities and resentment toward other ethnic groups. For an interesting study of the impact of ethnicity on the search for social order in Africa, see ETHNICITY AND DEMOCRACY IN AFRICA (Bruce Berman, Dickson Eyoh & Will Kymlicka eds., 2004).

<sup>284</sup>A. Selassie, *Ethnic Identity and Constitutional Design for Africa*, 29 STAN. J. INT'L L. 1, 12 (1992) ("ethnicity tends to be more important to Africans than it is to individuals elsewhere. In much of Africa, ethnicity is the hub around which life revolves.").

<sup>285</sup>Akhavan, *supra*, note.. at 7 discussing reasons for the violence in Yugoslavia and Rwanda, the author stated:  
both conflicts resulted from the deliberate incitement of ethnic hatred and violence by which ruthless demagogues and warlords elevated themselves to positions of absolute power. . . The calculated manipulation of fears and tensions unleashed a self-perpetuating spiral of violence in which thousands of citizens became the unwitting instruments of unscrupulous political elites questing after supremacy.

<sup>286</sup>Kwesi Kwaa Prah, *African Wars and Ethnic Conflicts - Rebuilding Failed States*, AFRICAN REGIONAL BACKGROUND PAPER: HUMAN DEVELOPMENT REPORT 2004. UNDP at page 23 (African ethnicity cannot be obliterated. . . it has been consistently mobilized in Africa by elites, as an instrument, to justify the pursuit of leadership interests and access to resources to the point of resorting to conflict in order to achieve these ends.)

<sup>287</sup>Jackson N. Maogoto, *The International Criminal Tribunal for Rwanda: A Paper Umbrella in the Rain? Initial Pitfalls and Brighter Prospects*, 73 Nordic Journal of International Law, 187 (2004) (discussing the genocide in Rwanda, the author stated that "the political instrumentation of ethnicity was so focused and so pointed that Hutus were led to believe - and many actually believed - that they were doing good by killing the Tutsi).

objectives.<sup>288</sup> Ethnic loyalties have become more pronounced because state failures spawned by corruption and inequitable distributions of resources create an atmosphere of uncertainty and disorder, in which ethnic groups with a long history of mutual distrust and hostility compete for control of the machinery of state.<sup>289</sup> Political elites and ethnic groups with grudges against the central government often stoke existing ethnic divisions to mobilize support to fight for a more equitable distribution of the nation's resources.<sup>290</sup>

Criminal prosecution loses its value and chastening influence in an environment where aggressive ethnic identification trumps everything else.<sup>291</sup> One of the assumptions of criminal law is that by stigmatizing those who commit crimes, others will be discouraged from engaging in similar conduct. As stated earlier, violence has never carried social disapproval or disgrace. There is no sense of shame or even condemnation for those who commit acts of violence. Rather, violence in defense of ethnic interest is celebrated as acts of heroism by ethnic groups. Citizens who commit acts of violence against other ethnic groups are canonized as paragons of loyalty. Stigmatization loses its sting in an environment where perpetrators of violence are impervious to shame and embarrassment and when citizens engulfed in the anomie and anxiety caused by ethnic tensions have no common agreement or understanding of what constitutes unacceptable conduct. Adam Smith accurately stated:

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<sup>288</sup>Kwa Prah, *supra* note 286.

<sup>289</sup>R. Rotberg, *Failed States in a World of Terror*, (2002) FOREIGN AFFAIRS 81 at 130 (stating that in the last phase of failure, the state's legitimacy crumbles. Lacking meaningful or realistic democratic means of redress, protesters take to the streets or mobilize along ethnic, religious or linguistic lines).

<sup>290</sup>Lydia Tomitova, *The Graves are Not Yet Full: Race and Power in the Heart of Africa*, 16 ETHICS & INT'L AFFAIRS 1572 (2002) (stating that ethnicity, while often placed at the root of conflict, is merely a calculated instrument for the mobilization of people, usually by suave Western-educated leaders who conveniently use the term to legitimize their personal quest for power and the money that comes with it).

<sup>291</sup>Selassie, *supra* note 284.

[S]igmatization has also proven difficult to realize, primarily because of the environment within which the tribunals have operated. Stigma requires a degree of societal concurrence with the underlying goals and tactics of the tribunals, but societies in which tribunals have operated have usually been so fractured that one group's stigma has been another's badge of honor.<sup>292</sup>

Moreover, in the context of mass violence, thoughtful deliberative actions give way to the desire to demonstrate one's commitment to the group.<sup>293</sup> Acclaim by their ethnic group blunts the fears of detection and renders perpetrators of mass violence immune to the pains and violence inflicted on fellow human beings.<sup>294</sup> Citizens who face the difficult choice of either obeying the law or identifying with their ethnic groups increasingly choose to join their kinsmen in perpetrating violence against other ethnic groups. The approval of one's ethnic group is far more important than the doubtful threats of sanctions.<sup>295</sup> It is difficult to expect citizens caught in the cyclone of violence crocheted by war lords to exercise rational judgment.<sup>296</sup> Moreover, in some cases, participating in violence may well be the only viable response to genocidal commands of overbearing war lords

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<sup>292</sup>Smith, *supra* note 62 at 9.

<sup>293</sup>Maogoto, *supra* note, 167 at 16 (“societies engulfed by mass violence are not particularly conducive to rational behavior or fears of eventual apprehension) the author further asks “how can we expect individuals to make rational choice calculus when they are surrounded by hysteria, social chaos, panic, coercion, prejudice, and a government that is exhorting mass violence”).

<sup>294</sup>Writing in the Balkan context, Peter French described the mindset of perpetrators of mass violence that has resonance in Africa. He stated that:

they know that what they are doing to those of other ethnic groups inflicts pain and harm on them, but they are convinced that doing so is to be preferred to acting in any other way toward those of the hated ethnic groups.

Peter A French, *Unchosen Evil and Moral Responsibility*, in *WAR CRIMES AND COLLECTIVE WRONG DOING: A READER* 42 (Aleksander Jokic ed., 2001).

<sup>295</sup>Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 354 (1997) (the perception that one's peers will or will not approve exerts a much stronger influence than does that of formal sanctions...).

<sup>296</sup>M. MINOW, *supra* note 27 at 50 (noting that “individuals who commit atrocities on the scale of genocide are unlikely to behave as rational actors deterred by the risk of punishment.”).

who have both the capacity and the willingness to induce compliance with their instructions. It is a well established principle of law that obedience to superior orders is no defense to genocide.<sup>297</sup> But in the context of mass violence and in an environment highly inhospitable to rational thinking and independent judgment, it is unrealistic to expect citizens to resist the orders by war lords who have repeatedly and publicly displayed their penchant for brutality against those who dare to challenge them.

Besides the sense of duty, the celebration and aggrandizing of violence in defense of ethnic interests renders violence an immensely rewarding enterprise.<sup>298</sup> In some communities, violence is considered the toga virilis of leadership and generally accepted as a viable mode of gaining respect in the community. Leaders earn the respect of their ethnic group by displaying the willingness to engage in violence to defend or advance ethnic interests. Those who engage in acts of violence derive tangible benefits either in the form of enhanced prestige or financial reward.<sup>299</sup> Violence helps ambitious ethnic chieftains to garner support and helps otherwise unsuccessful locals achieve upward mobility.<sup>300</sup> Violence enhances the status of war lords and helps them to achieve their objectives. War lords garner support by casting violence as the only meaningful way to defend the interests of their ethnic group. Citizens join them out of a sense of ethnic solidarity or because they

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<sup>297</sup>ICTR statute, *supra* note 22. Art. 6(4).

<sup>298</sup>Koen Vlassenroot, *A Societal View on Violence and War Conflict and Militia Formation in Eastern Congo*, in *VIOLENCE POLITICAL CULTURE AND DEVELOPMENT IN AFRICA*, *supra* note 229 at 49, 58 (discussing violence in the context of warlord politics and militia formation in the Kivu province of Congo, the author stated that “violence is used as a means to reorganize the local social and economic space and to control mobility within and between spaces. Violence offers opportunities as strategies of survival for state actors and as strategies of resistance for a new class of local or regional strongmen.”).

<sup>299</sup>Luca Jourdan, *Being at War, Being Young: Violence and Youth in North Kivu*, in *CONFLICTS AND SOCIAL TRANSFORMATION IN EASTERN DR CONGO* 157, 162 (K. Vlassen-root & T. Raeymaekers eds., 2004) (young combatants use violence to their own profit, in order to renegotiate and improve their social status).

<sup>300</sup>Most of the war lords in Africa were relatively unknown and unaccomplished citizens who gained notoriety by engaging in brutal displays of violence against fellow citizens.

believe in the cause.<sup>301</sup> The masses so mobilized engage in acts of violence not so much to inflict pain on their perceived enemies, but to demonstrate their fealty to their ethnic group. Ethnic irredentism transforms criminal conduct, even the most atrocious, into acts of courage.<sup>302</sup> Punishment loses both its deterrent and educative values in an environment where violence is viewed as proper etiquette and legal.<sup>303</sup> Weighed against the doubtful prospects of detection and international criminal prosecution, engaging in violence, for some citizens, seems far more attractive than self-restraint.<sup>304</sup>

Another limitation is that criminal prosecution is an inadequate mechanism for promoting reconciliation.<sup>305</sup> The enabling statute of international tribunals operating in Africa and statements

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<sup>301</sup> Describing the violence in Rwanda, Professor Maogoto stated “what induced so many individuals to participate was not coercion, but rather genuine support of the idea that the Tutsi has to be eliminated, together with the pursuit of solidarity with others in attaining this goal.” Maogoto, *supra* note 167 at 7.

<sup>302</sup> Rena Scott, *Moving From Impunity to Accountability in Post-War Liberia: Possibilities, Cautions and Challenges* 33 INT’L J. LEGAL INFO. 345, 400 (2005) (stating that “during times of mass violence, moral values get so inverted that individuals who are directly responsible for war crimes are elevated in society to a status akin to national heroes).

<sup>303</sup> As Professor Michael Reisman poignantly observed:

in liberal societies, the criminal law model presupposes some moral choice or moral freedom on the part of the putative criminal. In many of the most hideous international crimes, many of the individuals who are directly responsible operate within a cultural universe that inverts our morality and elevates their actions to the highest form of group, tribe, or national defense. After years or generations of acculturation to these views, the perpetrators may not have had the moral choice that is central to our notion of criminal responsibility.

W. Michael Reisman, *Legal Responses to Genocide and Other Massive Violations of Human Rights*, 59 LAW & CONTEMP. PROBS. 75, 77 (1996).

<sup>304</sup> The possibility of punishment is often not enough to discourage citizens from engaging in criminal conduct, especially mass violence, when citizens willingly engage in acts of violence believing that they can evade detection and also because they believe that the benefits of violence far outweigh the risks. See Helen Fein, *Patrons, Prevention and Punishment of Genocide: Observations on Bosnia and Rwanda*, in THE PREVENTION OF GENOCIDE: RWANDA AND YUGOSLAVIA RECONSIDERED 5 (Helen Fein ed., 1994) (noting that genocide is preventable because it is usually a rational act: that is the perpetrators calculate the likelihood of success, given their values and objectives).

<sup>305</sup> Daly, *supra* note 48 at 106 (arguing that trials do not promote reconciliation because they are both adversarial and divisive); Minow *supra* note 27 at 26 (noting that reconciliation is not the goal of criminal trials except in the most abstract sense); MICHAEL IGNATIEFF, THE WARRIOR’S HONOR: ETHNIC WAR AND MODERN CONSCIENCE 188

by tribunal officials indicate that reconciliation is high on the agenda of international criminal tribunals.<sup>306</sup> The simple truth is that reconciliation has never been pursued with any real commitment or sustained interest.<sup>307</sup> The tribunals have focused inordinately on criminal prosecutions which are poor vehicles for promoting reconciliation.<sup>308</sup> The driving ambitions of a criminal trial are to apportion blame and punish the guilty. Reestablishing social harmony is not part of the aims of a criminal trial.<sup>309</sup> Reconciliation, if and when it happens after a trial, is often an adventitious outcome.<sup>310</sup> Reconciliation demands a reciprocal willingness on the part of both the perpetrators and the victims to transcend the past. Defendants must extend the courtesy of good faith to both the society and their victims, come to terms with their crimes by confessing and tendering apology, and generally display the level of contrition needed to achieve peace and

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(1997) (contending that it is doubtful whether trials assist in the process of reconciliation); Sarkin & Daly *supra* note 141 at 691 (questioning the relationship between criminal trials and reconciliation and concluding that trials rarely promote societal reconciliation); Jacques Fierens, *Gacaca Courts: Between Fantasy and Reality*, 3 J. INT'L CRIM. JUST. 896, 916 (2005) (noting that trials rarely enable reconciliation particularly when the crimes in question are among the most serious imaginable).

<sup>306</sup>The United Nations Security Council in establishing the ICTR stated that the ICTR was designed to “contribute to the process of national reconciliation and the restoration and maintenance of peace.” *see* Preamble, ICTR statute, *supra* note 22

<sup>307</sup>*See* Dieng, *supra* note 28; *see also* INTERNATIONAL CRISIS GROUP: JUSTICE DELAYED, *supra* note 28.

<sup>308</sup>For a discussion of the role of trials in post-conflict reconciliation, *see generally* MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY (Eric Stover & Harvey M. Weinstein eds., 2004).

<sup>309</sup>Minow, *supra* note 27 at 26 (noting that reconciliation is not the goal of criminal trials except in the most abstract sense).

<sup>310</sup>Daly *supra*, note 48 at 105. Professor Daly advanced convincing reasons why criminal trials do not promote social stability:

Criminal trials do not foster social stability because criminal trials are designed for stable societies that operate well, where crime is an aberration. Assuming that the society is otherwise healthy, they seek to remove criminal anomaly. Trials address the problem of crime only incrementally, one perpetrator at a time. In transitional societies rife with massive violations of human rights, however, crime is the norm. It is not sufficient to remove an isolated offender, even a leader; rather, it is necessary to treat, and transform the society as a whole.



reconciliation. Victims, on their part, must break free from the clutches of their painful past, submit to the liberating influence and power of forgiveness, and actively seek to put the ugly past behind them and get on with their lives.

Criminal trials do not and cannot extract such a reciprocal commitment from the parties. Rather, trials are conducted in a setting that either completely ignores or fails to sufficiently acknowledge the humanity of the parties. The law is applied according to established rules and standards with scant or no regard to the emotions of the parties. Trials scarcely induce genuine contrition from criminal defendants, most of whom remain defiant and unrepentant till the end.<sup>311</sup> High-profile defendants like Milosevic at the ICTY, Saddam Hussein at the Iraqi High Tribunal, and Charles Taylor now standing trial before the International Criminal Court, rather than display contrition or remorse, used the plat form of trial to spew invectives on the system, the tribunal, and even the victims of their atrocities.<sup>312</sup> Trials also rarely blunt the victims' desire for vengeance. Feelings of resentment and negative emotions toward the perpetrators of evil will not evanesce simply because of criminal prosecutions undertaken by or under the auspices of the international community. Using trials to promote reconciliation in an environment where the parties have not transcended the passions, sentiments, and bitterness that led to violence is not only illusory, but farcical. Karel Kovanda, a Czech diplomat, in his contributions to the debate and negotiations that culminated in the establishment of the ICTR, stated:

[J]ustice is one thing; reconciliation, however, is another. The tribunal might become a vehicle of justice, but it is hardly designed as a

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<sup>311</sup>COBBAN, AMNESTY AFTER ATROCITY, *supra* note 10 at 213 (like any other convicted criminal, even genocidaire can emerge from an entire criminal proceeding while still denying the factual basis of the court's findings, while expressing a general attitude that says that - whether he committed the crimes in question or not - there is nothing wrong with such actions, and indeed while still also exhibiting an attitude of strong disdain to the court, to the political order that it represents, and to all the victims of the act).

<sup>312</sup>*Id.*

vehicle of reconciliation. Justice treats criminals whether or not they see the error of their ways; but reconciliation is much more complicated, and it is certainly impossible until and unless the criminals repent and show remorse. Only then can they even beg their victims for forgiveness and only then can reconciliation possibly be attained.<sup>313</sup>

Africans and scholars opposed to criminal prosecutions have endlessly asserted that prosecutions will deepen fissures in the society, prolong rifts and expose hapless citizens to further hardships and the continued predations of their desperate leaders.<sup>314</sup> Some of these claims ultimately prove exaggerated, but the adverse effects of trials cannot be completely discounted. Trials exert considerable strain on African societies. As stated earlier, criminal trials tend to impede, rather than facilitate, reconciliation.<sup>315</sup> In the adversarial system, parties are locked against each other and often engage in hostile confrontations all in an attempt to sway the fact finder to see things their way. The guilty party is punished by the imposition of a fine, incarceration, or in extreme cases, execution.<sup>316</sup> As stated earlier, once the process is set in motion, it becomes difficult, perhaps impossible to reconcile the parties.<sup>317</sup> Societies sundered by years of ethnic distrust risk further disruption by post-conflict criminal prosecutions.<sup>318</sup> The arrest, detention and subsequent

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<sup>313</sup>U.N. Doc. S/PV.3453,7.

<sup>314</sup>McMorran, *supra* note 67 (arguing that war crimes tribunals could act as a wedge driving the two groups further apart); Amstutz, *supra* note 128 (exclusive focus on prosecution can impair the quest for unity)

<sup>315</sup>Zolo, *supra*, note 69 at 734 (sometimes - as in Yugoslavia and Rwanda - the punitive justice of ad hoc tribunals may even have contrary effects to those hoped for. This kind of punishment can symbolically reinforce feelings of hostility, and fuel the wish for revenge and exclusion rather than eradicating crime. Indeed, it does not encourage rival parties to agree upon or achieve forms of settlement aimed at rebuilding the social texture and civil solidarity).

<sup>316</sup>The appropriate sentence is often stated in the law establishing the crime.

<sup>317</sup>See note 43 and accompanying text.

<sup>318</sup>Burleigh T. Wilkins, *Whose Trials? Whose Reconciliation*, in WAR CRIMES AND COLLECTIVE WRONGDOING A READER, 85,94 (Aleksander Jokic ed., 2001) (in the final analysis, reconciliation is not achieved by courts of law and adversarial proceedings but only by institutional reforms and ultimately a change of heart, and prolonged legal proceedings may be an impediment to both).

prosecution of ethnic leaders will inflame passions of their supporters and diminish prospects of reconciliation. Criminal prosecutions will neither erase ethnic tensions in deeply fractured societies nor push ethnic groups to transcend hatred and distrust that characterize their relationships with each other. The adversarial nature of trials tends to exacerbate intergroup suspicions. In some cases, threat of prosecution provides perverse incentives for war lords to continue in their fight.<sup>319</sup> Leaders, aptly described as “spoilers,” will do whatever they can, including resorting to violence to frustrate efforts to reestablish social equilibrium.<sup>320</sup> Recognition of these problems probably accounts for the adoption of non incarcerative options like amnesty<sup>321</sup> and truth commissions to deal with the aftermath of mass violence.<sup>322</sup>

It is also clear that criminal trials can neither address the underlying societal problems that lead to mass violence nor reestablish trust across ethnic lines.<sup>323</sup> On the other hand, feelings that one

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<sup>319</sup>Blumenson, *supra* note 42 at 843 (sometimes obtaining indictments may induce a criminal regime to cling to power, leaving that country’s population consigned to suffer continued violations of their most fundamental rights); Ku & Nzelibe *supra*, note 40 at 35 (arguing that belligerents or state actors who are participating in humanitarian atrocities are less likely to have an incentive to sue for peace if they know they are going to be subject to subsequent prosecution for their activities)

<sup>320</sup>Stephen J. Stedman, *Spoiler Problems in Peace Processes*, 22 INT’L SEC 5 (1997) (characterizes as spoilers “leaders and parties who believe that peace emerging from negotiations threatens their power, world view, and interests, and use violence to undermine attempts to achieve it”).

<sup>321</sup>As part of a trade-off for peace and stability, some emerging democracies grant amnesty for human rights violators of the former regime. Countries that have acquiesced to amnesty include Argentina, Chile, Haiti, Guatemala, and Sierra Leone. See Roman Boed, *The Effect of a Domestic Amnesty on the Ability of Foreign States to Prosecute Alleged Perpetrators of Serious Human Rights Violations*, 33 CORNELL INT’L L.J. 297, 298 (2000); Karen Gallagher, No Justice, No Peace: The Legacies of Amnesty in Sierra Leone, 23 T. Jefferson L. Rev. 149 (2000) (discussing the amnesty deal granted to rebels in Sierra Leone) See HELENA COBBAN AMNESTY AFTER ATROCITY? HEALING NATIONS AFTER GENOCIDE AND WAR CRIMES (2007.) (examining post conflict responses by different countries and urging policy makers to rethink their obsession with criminal prosecution).

<sup>322</sup>Countries that have adopted this strategy include Chile, EL Salvador and South Africa *see generally* PRISCILLIA HAYNER UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY (2001).

<sup>323</sup>Goldsten-Bolocan, *supra* note 82 at 395 (while prosecuting and punishing the worst perpetrators of genocide in Rwanda (i.e. the leaders and organizers as well as those who committed the killings) seems to be necessary to instill a culture of accountability and break the cycle of impunity, “it may be insufficient to strike on its own at the root”

ethnic group is using the criminal process to settle old scores will continue to fuel disenchantment that may ultimately lead to tit-for-tat violence. In Africa, at least in the foreseeable future, maintaining or reestablishing social equilibrium will require managing ethnic interests - a task which criminal prosecution is ill equipped to address.<sup>324</sup> Seeking reconciliation through criminal prosecutions without managing ethnic tensions will remain a Sisyphean obligation unless efforts are made to deal with the situation, system and culture that create violence. As Andrew Rigby aptly stated:

it is doubtful that reconciliation in its deepest sense can be approached without addressing the structures of inequity and exclusion that constituted the framework within which the everyday violence of the old order was perpetrated. . . . For people to move together along the path of reconciliation it is crucial that a sustained effort is made to transform the structures and circumstances of every day life that embody and perpetuate the old divisions between “us” and “them” and between perpetrators, beneficiaries and victims. Only when people feel that the evils of the past will not return, when they believe that “things are moving in the right direction,” will they be in a position to loosen the bonds of the past, relinquish the impulse for revenge and orient towards the future. In other words, reconciliation needs to be grounded in a sustained effort at restitution and “putting things right.”<sup>325</sup>

It is becoming increasingly clear that poor, illiterate, misguided citizens embroiled in the cauldron of seething intrigues and chicanery engineered by scheming war lords have neither the capacity nor

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the inner social and political factors which made such large scale atrocity possible, and which can, if left unaltered, determine its recurrence).

<sup>324</sup>Writing in the Rwandan context, Kinsley Moghalu stated:

the tribunal itself cannot reconcile the Hutus and the Tutsis because it is not in the mainstream of Rwandan daily existence, and indeed it is doubtful that any court can achieve this outcome . . . . Reconciliation cannot be imposed from outside. Investing the possibility of such an outcome on the legal process – an international one, for that matter - might be asking too much from a court of law.

Moghalu RWANDA’S GENOCIDE, *supra* note 71 at 205.

<sup>325</sup>Andrew Rigby *supra* note 224.

inclination to think rationally. It is therefore not surprising that the ICTR did not discourage the masses from participating in the violence and genocide in Darfur, the Congo and Sierra Leone.<sup>326</sup>

It is also clear that war lords, political leaders and government officials irredeemably committed to nihilistic violence will not be deterred by threat of criminal prosecutions.<sup>327</sup> Some scholars have expressed doubts about the deterrent values of criminal prosecutions.<sup>328</sup> For example, Carlos Nino doubts the ability of trials to deter perpetrators of mass violence, which he described in terms popularized by Emmanuel Kant as “radical evil.” He stated that:

[I]t is not clear whether punishing radical evil can prevent similar acts from taking place when these favorable conditions are present nor is it clear whether punishment forestalls the emergence of these conditions.<sup>329</sup>

Another scholar, Keneth Rodman, argued that perpetrators of mass violence need much more than threat of prosecutions to deter them.

[I]hose who perpetrate mass atrocities expect to win, and are likely to be deterred only by credible prospect of outside intervention to

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<sup>326</sup>Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 INT’L SECURITY, 5, 20 (2003). The authors state that “evidence from recent cases cast doubt on the claims that international trials deter future atrocities, contribute to consolidating the rule of law or democracy or pave the way for peace.” Referring specifically to the ICTY and ICTR, they concluded that “neither the Yugoslavia nor the Rwanda tribunals has had a demonstrable effect on reducing atrocities globally or on altering the calculations of combatants in conflicts in East Timor, Chechnya, Sierra Leone or other war sites.” *Id.*

<sup>327</sup>Charles Villa-Vicencio, *Why Perpetrators Should not Always Be Prosecuted: Where the International Court and Truth Commissions Meet*, 49 EMORY L.J. 205, 210 (2000) (stating that fixed mindsets, entrenched prejudice and the kind of ideological bloody-mindedness that drives militant perpetrators are forces too powerful to be curtailed by the threats of future prosecutions alone).

<sup>328</sup>Burleigh T. Wilkins, *Whose Trials? Whose Reconciliation*, in WAR CRIMES AND COLLECTIVE WRONGDOING A READER 85, 87 (Aleksandar Jokic ed. 2001) (it is I think abundantly clear that trials for war crimes have not had any effect whatsoever on the waging of wars or the manner in which wars have been conducted. So called aggressive wars continue to be fought often with great barbarity on both sides of the conflict).

<sup>329</sup>CARLOS NINO RADICAL EVIL ON TRIAL x (1996); McMorran *supra* note 67 (many argue that war crimes tribunals offer no deterrent to potential criminals whatsoever. People with strong convictions against a certain religious or ethnic group will likely not feel any less hatred for that group just because a possible tribunal looms in the future)

change that expectation, not by the threat of post hoc prosecution should they be proven wrong.<sup>330</sup>

In some cases, foregoing criminal prosecutions may be a sensible and pragmatic way to bring warring political elites into the fold.<sup>331</sup> Thabo Mbeki, the then Deputy President of South Africa, conceded that much when he stated that “had there been a threat of a Nuremberg-style trial over members of the apartheid security establishment we would have never undergone peaceful change.”<sup>332</sup>

### Conclusion

A stable Africa is good not only for Africans, but also for the international community.<sup>333</sup> It is therefore important for the international community to help Africa meet the challenges of creating a context in which elected officials respect human rights and citizens learn to process their grievances through established legal channels. Efforts and resources needed to create this context are enormous. But failure to address the problems that create and perpetuate violence in Africa will lead to disastrous consequences that may in the end cost more. The human tragedy that haunts

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<sup>330</sup>Keneth Rodman, *Compromising Justice: Why the Bush Administration and the NGO' are Both Wrong About the ICC*, 20 ETHICS & INT'L AFFAIRS 25 (2006).

<sup>331</sup>May, *supra* note 269 at 237 (stating that trials are most problematic when large groups participate or are complicit, in mass harms. The result is that in some situations, we may do better with various alternative remedies provided by truth commissions and amnesty programs. These alternatives to trials may better advance the goals of reconciliation than would criminal trials, with the heightening of adversarial tensions).

<sup>332</sup>Alex Boraine, *Truth and Reconciliation in South Africa: The Third Way*, in ROBERT ROTBERG & DENNIS THOMPSON, TRUTH V JUSTICE: THE MORALITY OF TRUTH COMMISSION 143 (2000).

<sup>333</sup>Susan Rice, *The New National Security Strategy: Focus on Failed States*, THE BROOKINGS INSTITUTION POLICY BRIEF No. 116, 2003. p. 1 (arguing that failed and failing states serve as safe haven and staging grounds for terrorist organizations and that failed states create environments that spur interregional conflicts with significant economic and security costs to neighboring states).

Africa will be sadly repetitive unless Africans learn the salutary lessons implicit in the activities of international criminal tribunals. These lessons include an end to impunity as well as respect for human and civil rights. One never-to-be forgotten lesson of the international criminal tribunals is that sovereignty does not immunize abusive behavior.<sup>334</sup> Citizens, regardless of rank or status, have equal standing before the law and are accountable for their actions.

Notwithstanding the problems, challenges, and even failures of international criminal tribunals, the last decade marked the ascendancy of accountability in Africa. Criminal prosecutions serve the vital purpose of focusing attention on impunity. International criminal prosecutions have raised awareness in both the leaders and the masses that Africa is no longer a consequence-free zone where atrocities go unpunished. Africa will be better served if the attention and momentum generated by international criminal prosecutions translate into broader and more determined efforts to deal with the underlying social factors that spun violence. The relative ineffectiveness of the ICTR demonstrates the futility of trying to change the dynamics of ethnic group relations or cultural ethos solely through criminal prosecutions. Criminal prosecution will have a greater impact on the assault on impunity if it is complemented by multi-layered efforts that simultaneously promote accountability and reestablish social harmony.<sup>335</sup> Before yielding to the impulse to prosecute, efforts must be made to ascertain the best strategy that fits a given country's needs and circumstances.<sup>336</sup> Imposing an accountability system, especially the Western type justice system, on

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<sup>334</sup> See notes 92-94 *supra* and accompanying text.

<sup>335</sup> Hafner & King, *supra*, note 99 at 91 (stating that in the aftermath of civil conflict marked by widespread human rights violations, international criminal tribunals alone cannot bear the full burden of doing justice and stitching policies back together. They must be augmented by other mechanisms).

<sup>336</sup> Daly, *supra* note 48 at 78 (only institutional mechanisms that are tailored to the specific attributes of the local society at the time of transition can hope to deal with the problems that characterized the society's dysfunction..)

a country with different cultural and social assumptions may prove counter productive.<sup>337</sup> There is no template for dealing with impunity.<sup>338</sup> Every country is different and what worked in one country may be ineffective in another society.<sup>339</sup> Every country must concoct a plan that suits its unique needs and circumstances.<sup>340</sup>

The naive expectations that Africans will wholeheartedly welcome Western concepts of justice account for the unwillingness on the part of the international community to appreciate the meaningful roles traditional justice systems can play in the fight against impunity.<sup>341</sup> Lack of sustained international support for traditional conflict resolution mechanisms is startling, given the growing interest among Africans and scholars in the idea of using traditional African dispute resolution mechanism to address the aftermath of mass violence.<sup>342</sup> Failure to support traditional

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<sup>337</sup>David Crane expressed similar admonition when he argued that “the imposition of international justice on a continent that, at the grass root level, resolves much of its disputes using traditional methods, leads to confusion and political tensions and even threaten the respect for the rule of law we are attempting to nurture.” Crane, *supra* note 106 at 1686

<sup>338</sup>W. Michael Reisman, *Institutions and Practices for Restoring and Maintaining Public Order*, 6 DUKE J. COMP. & INT’L L. 175, 185 (1995) (stating that “there is no general institution that can be applied as a paradigm for all circumstances. In each context, an institution appropriate to the protection and reestablishment of public order in the unique circumstances that prevail must be fashioned such that it provides the greatest return on all the relevant goals of public order”).

<sup>339</sup>Philip J. Drew, *Dealing with Mass Atrocities and Ethnic Violence: Can Alternative Forms of Justice be Effective? A Case Study of Rwanda*, available at [www.cfcj.org](http://www.cfcj.org) (stating that “it must be kept in mind that not all societies are the same. International (and national) responses to issues such as those in Rwanda need to be sensitive to both the differences and commonalities between various societies and their concepts of law.”)

<sup>340</sup>See Fletcher & Weinstein, *supra* note 261 at 634 (urging NGO’s, humanitarian relief agencies, diplomats, and scholars to devote more attention and thought toward enabling local communities to develop and implement responses that represent their aspirations for social repair).

<sup>341</sup>Fletcher & Harvey, *Id.* n.137 (noting that to date relatively little attention has been paid to the cultural contexts in which criminal accountability for mass violence is contemplated).

<sup>342</sup>Alvarez, *supra* note 77 at 370 (international processes for criminal accountability need to encourage and adapt to local processes directed toward the same end.....); Jennifer Widner, *Courts and Democracy in Post Conflict Transitions: A Social Scientist’s Perspective on the African Case*, 95 AM. J. INT’L L. 64, 65 (advocating the rebuilding of local justice mechanisms in post-conflict societies and contending that “the cultural milieu of most African societies strengthens the legitimacy of local forums.”).



modes of conflict resolution is regrettable because it is becoming increasingly obvious, however, that the traditional justice system will be “an important technique for stitching together the wounds in civil society that precipitate and often result in conflict.”<sup>343</sup> It is also abundantly clear that the ambitions of the international community for justice and social equilibrium in Africa can never fully be attained by focusing exclusively on criminal prosecutions.<sup>344</sup> A better and more effective strategy to promote accountability in Africa and facilitate healing and reconciliation in African countries sundered by mass violence should combine criminal prosecutions with traditional justice methods of conflict resolution.<sup>345</sup> The dominant aims of post conflict societies are the reestablishment of social equilibrium and reconciliation. In appropriate cases, therefore, it makes a lot of sense to “defer the right to retribution to the extent that retribution would obstruct peace.”<sup>346</sup> It is time to pay greater attention to the wise and salutary admonition from the editors of the Harvard Law Review:

. . . international prosecution is just one element in a toolbox of accountability. In any given context, those who seek accountability must closely examine their objectives to ensure that the mix of tools they select is best tailored to the particular need. Exaggerating what just one tool - international prosecution - can reasonably accomplish may distract attention and resources from other more suitable mechanisms and will inevitably lead to disappointment in the prosecutions’ performance. Instead, those seeking accountability should carefully examine what they seek to accomplish, employ well-

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<sup>343</sup>W. Michael Reisman, *Legal Responses to Genocide and Other Massive Violations of Human Rights* 59 LAW & CONTEMP. PROBS. 75, 79 (1996).

<sup>344</sup>Goldstein-Bolocan, *supra* note 82 at 394-5 (in the aftermath of the genocide, the exclusive recourse to criminal trials, adjudication and imprisonment have failed to promote justice and societal reconciliation).

<sup>345</sup>Although criminal prosecution is necessary to address impunity, it seems, as demonstrated by the relative success of the Gacaca courts in Rwanda, that traditional methods of conflict resolution tend to have greater impact on the quest for social equilibrium and reconciliation.

<sup>346</sup>Van Roermund, *Rubbing Off and Rubbing On: The Grammar of Reconciliation*, in LETHE’S LAW: JUSTICE, LAW AND ETHICS IN RECONCILIATION 180 (Emilos Christodoloudidis and Scott Veitch eds., 2001).

designed prosecutions to satisfy the highest priority goals, and supplement tribunals with other mechanisms to address the objectives for which prosecution all too often fall short.<sup>347</sup>

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<sup>347</sup>The Promise of International Prosecution, *supra*, note 233 at 1982.

