

Transitional Justice Cascades

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Introduction

Despite the enormous development of international criminal justice after the Cold War, disappointment with it has never been greater. The International Criminal Court (ICC) faces criticism from all sides. The facts speak for themselves: in nearly twenty years, and having spent approximately €1.5 billion, the ICC secured only three core criminal convictions.¹ At the same time, more than a million people responsible for

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1. Andrew Murdoch, Legal Dir., Int'l Crim. Ct. Assembly of States Parties, U.K. Statement at the 17th Session in The Hague (Dec. 5, 2018) (transcript available at <http://www.gov.uk/government/speeches/uk-statement-to-icc-assembly-of-states-parties-17th-session> [<https://perma.cc/AJ8S-229D>]).

atrocities around the globe may never face justice. National courts are backlogged with cases involving gross human rights violations—even in countries in which wars ended before the ICC was established, and despite the billions of dollars invested in transitional justice.² This unbearable status quo necessitates consideration of alternative justice responses that complement national penal responses and the ICC.

The ICC, by design, may exercise jurisdiction only when national justice systems fail to do so.³ The complementarity of the ICC's jurisdiction was initially interpreted as a catalyst for comprehensive, domestic penal responses.⁴ Post-war experiences in former Yugoslavia and Rwanda, however, teach us that domestic penal responses do not have the capacity to process the abundance of cases arising from atrocities committed during wartime.

In a recent article, Martha Minow discusses whether alternative justice mechanisms can deprive the ICC of its jurisdiction over gross violations of human rights.⁵ She concludes that restorative justice alternatives involving conditional amnesties might fulfill the requirement of individual accountability for crimes under the ICC's Rome Statute if certain conditions are met.⁶ There is, however, a lack of empirical evidence-based studies on how to integrate these restorative justice alternatives and other available responses in a way that would create a coherent and effective transitional justice framework. The concern is that international criminal justice might clash with “non-legalistic traditions that offer alternatives” to trials.⁷

Based on fieldwork research on transitional justice in the former Yugoslavia and elsewhere (as part of a broader Peacebuilding Compared Project),⁸ this Article provides a holistic approach to the problem of integrating different responses complementing the current framework of

2. For example, Bosnia has approximately 1,100 unresolved war crimes cases, half of which include 4,500 identified perpetrators while others remain unknown. See Emina Dizdarevic, *Bosnian Prosecution's Slowdown on War Indictments Causes Concern*, BALKAN TRANSITIONAL JUST. (May 15, 2019), <https://balkaninsight.com/2019/05/15/bosnian-prosecutions-slowdown-on-war-indictments-causes-concern/> [https://perma.cc/9YNV-5L2N].

3. See Rome Statute of the International Criminal Court arts. 17–20, 23, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

4. See generally Katherine L. Doherty & Timothy L.H. McCormack, “Complementarity” as a Catalyst for Comprehensive Domestic Penal Legislation, 5 U.C. DAVIS J. INT'L L. & POL'Y 149 (1999).

5. See generally Martha Minow, *Do Alternative Justice Mechanisms Deserve Recognition in International Criminal Law?: Truth Commissions, Amnesties, and Complementarity at the International Criminal Court*, 60 HARV. INT'L L.J. 1 (2019).

6. See *id.* at 44 (advocating for “[d]omestic processes that provide for gathering people's experiences, give voice to victims, individualize accountability with opportunities to be heard for those charged with wrongdoing, and produce public reports.”).

7. Sorpong Peou, *The Limits of Collaborative Action on Criminal Justice in East Asia*, in HUMAN SECURITY IN EAST ASIA: CHALLENGES FOR COLLABORATIVE ACTION 108, 121 (Sorpong Peou ed., 2008).

8. See generally *The Peacebuilding Compared Project*, AUSTL. NAT'L UNIV. (Aug. 10, 2017), <http://regnet.anu.edu.au/research/research-projects/details/534/peacebuilding-compared-project> [https://perma.cc/YHL7-T5X3] [hereinafter *The Peacebuilding Compared Project*].

international criminal justice. Only now is there enough hindsight to take stock of the entire panorama of transitional justice in the former Yugoslavia.

This Article first considers how international criminal courts work, using empirical research on the former Yugoslavia and other qualitative and quantitative sources to inform the analysis. Then, it considers national courts, particularly in Bosnia-Herzegovina, as a light on the hill that is, despite the backlog of cases, crucial for developing future responses to mass atrocities in war and understanding the limits of national truth and reconciliation commissions. The potential of more local-level restorative justice to strengthen the glue that can bind these three levels of transitional justice together are then discussed. Along this institutional journey, we inject an analysis of possibilities for more preventive and restorative transitional justice that supplants retributive justice. Finally, we consider failed institutions of transitional justice even in the peak, international transitional justice that we consider the former Yugoslavia to be. These failed institutions of transitional justice include: the flawed transitional justice contributions of the International Court of Justice, universal jurisdiction, and civil lawsuits—all of which serve as backups to the three-level transitional justice we weave together. Had the different transitional justice levels been established more coherently from the beginning throughout former Yugoslavia, it would have been far more successful, and the transitional justice processes might have been completed by now.

The breakup of former Yugoslavia triggered a global transitional justice boom that set a high-water mark for prosecutions of high-level defendants. Various transitional justice responses have been applied to thousands of individuals whose atrocities created millions of victims throughout the world since World War II. Still, global transitional justice is predominantly a combination of supranational and national criminal justice responses that are selective, incoherent, and disappointing for advocates. For example, the Syrian civil war has been ongoing since 2011, making it the worst conflict of this decade, but most of the international discourse on Syria is focused on establishing peace,⁹ while formal transitional justice is far from sight.¹⁰ Without a green light from the world's "superpowers," it is

9. International and domestic actors face challenges in peace negotiations, as well as security risks, when the perpetrators continue to retain political or military power. See Minow, *supra* note 5, at 40; Carlo Nino, *The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina*, 100 *YALE L.J.* 2619, 2624–30, 2632, 2639–40 (1999); Charles Villa-Vicencio, *Why Perpetrators Should Not Always Be Prosecuted: Where the International Criminal Court and Truth Commissions Meet*, 49 *EMORY L.J.* 205, 206, 212, 216–17 (2000); José Zalaquett, *Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations*, 43 *HASTINGS L.J.* 1425, 1426–30, 1431, 1438 (1992).

10. So far, Sweden initiated discussions in Europe to propose an international tribunal to try fighters from the Islamic State of Iraq and Syria (ISIS). Rojava, a Kurdish-run district that broke from Syrian control in 2012, installed such a court and it has already tried 7,000 ISIS suspects in summary proceedings, with 6,000 more awaiting trial. See Jane Arraf, *ISIS Fighters on Trial in Kurdish Territory*, *NAT'L PUB. RADIO* (May 25, 2019,

unlikely that those responsible for the atrocities in Syria will be brought to justice, nor will their victims receive reparations.

There is not even consensus about what transitional justice encompasses. Arguably, transitional justice should be a specially designated system within the United Nations' (U.N.) organizational structure because the quality of transitional justice responses directly affects international peace and security. As Mark Drumbl notes, international crimes are not the same as domestic ones, and we should acknowledge "the uniqueness of mass atrocity" and develop responses accordingly.¹¹ This also reflects the particularity of transitional justice goals, which need to be understood and prioritized to develop adequate and systemic transitional justice.

While the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were U.N. tribunals, the ICC was established somewhat independently of the U.N. after failed attempts to reform the Security Council.¹² However, the ICC is still linked to the Security Council giving strong referral powers to the U.N.'s principal organ, charged with the maintenance of international peace and security.¹³ This makes the U.N. ultimately responsible for the ICC. Therefore, in order to make the ICC work better, the U.N. needs to build a system of global transitional justice around the ICC. It may not be possible to undertake this reform through the Security Council; thus, the General Assembly and other U.N. organs are more appropriate forums through which the parties to the ICC's Rome Statute can impact decision-making processes.

A starting question is whether war crimes tribunals work. In his germinal book on the politics of war crimes tribunals, Gary Jonathan Bass raised this question and gave a rather cautious answer: we are better off with them than without.¹⁴ Bass also argued that the least awful alternative to war crimes tribunals is to encourage national courts to prosecute war criminals.¹⁵ Due to dissatisfaction with the outcomes of ad hoc tribunals, and the enormous amounts of money spent on them—even more so on the ICC, which brought few people to justice,—rising criticism proliferated discussions about alternatives to war crime tribunals. These include national prosecutions, hybrid international courts, truth and reconciliation commissions, as well as community justice.¹⁶ But these are still mostly ad hoc

8:20 AM), <https://www.npr.org/2019/05/25/726941819/isis-fighters-on-trial-in-kurdish-territory> [<https://perma.cc/M9G4-P4TD>].

11. Mark A. Drumbl, *Toward a Criminology of International Crime*, 19 OHIO STATE J. ON DISP. RESOL. 263, 281 (2003).

12. See Tiina Intelmann, *The International Criminal Court and the United Nations Security Council: Perceptions and Politics*, HUFFPOST (July 28, 2013), http://www.huffpost.com/entry/icc-un-security-council_b_3334006?guccounter=1 [<https://perma.cc/5JV4-EZLE>] (stating that "many states consider the Security Council unrepresentative of the world's opinion").

13. See *id.*

14. See GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* 282 (2014).

15. See *id.*

16. See *id.*

improvisations resulting from political compromises. What the world needs are permanent solutions to ensure that there will be a transitional justice response to atrocities.

The main question addressed by this Article is how we should reorganize the global transitional justice system. Earlier studies have shown that one-size-fits-all models do not work.¹⁷ This does not mean rejecting permanent transitional justice solutions, rather it means that transitional justice mechanisms need to be more flexible and situation-specific so that they can be tailored to fit local needs and circumstances. That requires creating multi-layered solutions that are responsive to particular post-conflict contexts. Other studies have concluded that a bottom-up, participatory approach can better contribute to transitional justice than the dominant, top-down post-conflict arrangements.¹⁸

Another question addressed by this Article is whether transitional justice can be used to achieve sustainable peace.¹⁹ Peace has undoubtedly been a top priority for the international community's efforts in former Yugoslavia but only as a direct response to war. The post-conflict agenda in former Yugoslavia has neglected the option of framing transitional justice as an indirect response tool for achieving sustainable peace.²⁰ Instead, former Yugoslavia developed multi-layered punitive approaches to transitional justice while neglecting restorative justice responses.²¹ Non-punitive goals, in particular reparations and reconciliation, have consequently been neglected.

The reason former Yugoslavia was selected for this research is that it developed "laboratories of transitional justice"²² that paved the way to the ICC, as well as other transitional justice responses. In fact, former Yugoslavia presents a case where nearly all known transitional justice responses were tried; and, learning about the interplay between these different responses is crucial to developing a successful transitional justice model for the future. Yugoslavia is also a case where there was strong, foreign support for transitional justice. Not only did the United States (U.S.) and the European Union (EU)—along with the Organization for Security and Co-operation in Europe (OSCE) and the Council of Europe—finance courts, prosecutors, police buildings, equipment, and training, but they also supported a number of projects for strengthening the national crimi-

17. See Drumbl, *supra* note 11, at 267; Patricia Lundy & Mark McGovern, *Whose Justice? Rethinking Transitional Justice from the Bottom Up*, 35 *J.L. & Soc'y* 265, 282, 291 (2008); Carrie Menkel-Meadow, *Cultural Variations in Restorative/Transitional Justice: Process Pluralism, Not One Size Fits All* 3-4 (U.C. Irvine Sch. of L. & Legal Stud. Rsch. Paper Series, Paper No. 2014-68, 2014).

18. See Lundy & McGovern, *supra* note 17, at 282.

19. See *id.* at 291.

20. See Minow, *supra* note 5, at 3-4, 38.

21. See *id.*

22. Jasna Dragović-Soso & Eric Gordy, *Coming to Terms with the Past: Transitional Justice and Reconciliation in the Post-Yugoslav Lands*, in *NEW PERSPECTIVES ON YUGOSLAVIA: KEY ISSUES AND CONTROVERSIES* 193, 193 (Dejan Djokić & James Ker-Lindsay eds., 2011).

nal justice system and victim protection programs.²³ Yugoslavia's accession of EU support has also been used as a tool to incentivize national governments to support transitional justice.²⁴ A lot of resources were invested in transitional justice in Yugoslavia and a lot of progress was made as many individuals, who would have normally escaped justice in previous political arrangements, were found accountable. Yet, the international support for that kind of investment has waned. Yugoslavia's international transitional justice peaked, but it was certainly the highest peak in transitional justice that any credible criminal tribunal has had so far.

Our study explores the realities of transitional justice mechanisms. It follows a hypothesis originating in responsive regulation theory—namely, that no single response can work in conflicts where mass atrocities occurred. The choice between different responses is not a simple coordination of alternatives, but it must reflect awareness of the strength, intensity, and social importance of each response. For example, one framework for responses can be for the U.N. Security Council to strengthen rule of law with responsive peacekeeping operations, responsive sanction regimes, and responsive use-of-force mandates.²⁵

Understanding the hierarchy among different responses is important for choosing an integrated, interscalar framework of responses that work. It is also important to ponder which transitional justice responses can trigger other justice responses—the so-called “justice cascade.” The justice cascade has been enlivened through a series of “norm-affirming events including the decisions of foreign courts to try cases involving violations of international human rights, the active participation of non-governmental organizations (NGOs) and governments in the process of establishing the ICC, and the willingness of states to ratify” the Rome Statute.²⁶ This Article develops the notion of “transitional justice cascades,” which integrates alternative restorative responses that the Western approach to “justice cascades” failed to acknowledge.²⁷

The analysis of data from fieldwork in former Yugoslavia suggests that there is value in the integration of different approaches to transitional justice—that is, a cluster of effective, supranational responses. The purpose of such integration is to minimize the necessary level of criminal justice inter-

23. See James Ker-Lindsay, *The ‘Final’ Yugoslav Issue: The Evolution of International Thinking on Kosovo, 1998–2005*, in *NEW PERSPECTIVES ON YUGOSLAVIA: KEY ISSUES AND CONTROVERSIES*, *supra* note 22, at 176, 181.

24. See LAURA DAVIS, INT’L CENTER FOR TRANSITIONAL JUSTICE, *THE EUROPEAN UNION AND TRANSITIONAL JUSTICE* 13 (2010).

25. See Jeremy Farrall & Marie-Eve Loisele, *The UN Security Council as Regulator and Subject of the Rule of Law: Conflict or Confluence of Interest?*, in *STRENGTHENING THE RULE OF LAW THROUGH THE UN SECURITY COUNCIL* 287, 293–97 (Jeremy Farrall & Hilary Charlesworth eds., 2016).

26. Ellen Lutz & Kathryn Sikkink, *The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America*, 2 *CHI. J. INT’L L.* 1, 4 (2001).

27. See Wendy Lambourne, *What Are the Pillars of Transitional Justice? The United Nations, Civil Society and the Justice Cascade in Burundi*, 13 *MACQUARIE L.J.* 41, 44 (2014) (criticizing “justice cascade[s]” for failing to acknowledge alternatives, such as truth commissions, which might be more suitable in different cultural and conflict settings).

vention for lower-level actors²⁸ and to maximize the ICC's impact against high-level offenders who have historically enjoyed impunity. The best approach is already in place: nearly two-thirds of the world's countries are parties to the Rome Statute,²⁹ though support is currently in decline.³⁰ But as Ralph Henham argues, the future challenge for the ICC lies, *inter alia*, in adopting principles and approaches that successfully engage with local accountability.³¹ The ICTY was burdened with too many low-profile trials—even those of foot-soldiers like Dražen Erdemović³²—and failed in some of the most important trials, including that of Slobodan Milošević.³³ Thus, maximization of the ICC's impact should not result from the widest possible application of criminal law, but from strategically targeted application. Based on the complementarity of the ICC's jurisdiction, it should focus on the top-ranking officials most responsible for atrocities.

In ideal conditions, the first trials should not take place at the ICC, but at the local level through the joint work of an International Transitional Justice Unit (ITJU) and local judges. The ITJU, established by the U.N. or in cooperation with major regional organizations (e.g., EU, African Union, Union of South American Nations, etc.), would move from one post-conflict region to another. It would be constituted of judges, prosecutors, and police, including military and other peacebuilding professionals. The ITJU would work with national judges, prosecutors, and police to try mid- and high-ranking officials, as well as all those who failed to cooperate at the first level, but would first offer these individuals a second chance to cooperate through plea-bargaining.

Finally, the bottom-level response, a Reparations and Reconciliation Commission (RRC), would have the task of addressing the greatest number of individual offenders (i.e., foot soldiers and low-ranking military officials) and their victims. Instead of putting them all on trial, the RRC's primary strategy would be to encourage a restorative justice response followed by qualified restorative amnesty³⁴ in order to stop denial policies at

28. See generally John Braithwaite, *Minimally Sufficient Deterrence*, 47 *CRIME & JUST.* 69 (2018).

29. See *Rome Statute of the International Criminal Court*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=en [<https://perma.cc/7PS9-52DU>] (last visited Dec. 24, 2020). See generally Rome Statute, *supra* note 3.

30. See Mwangi S. Kimenyi, *Can the International Court Play Fair in Africa?*, *BROOKINGS* (Oct. 17, 2013), <https://www.brookings.edu/blog/africa-in-focus/2013/10/17/can-the-international-criminal-court-play-fair-in-africa/> [<https://perma.cc/77X3-82AA>].

31. See Ralph Henham, *Some Issues for Sentencing in the International Criminal Court*, 52 *INT'L & COMPAR. L.Q.* 81, 90 (2008).

32. See *Prosecutor v. Erdemović*, Case No. IT-96-22-Tbis, Sentencing Judgement, ¶ 10 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 5, 1998) (sentencing Erdemović to five years of imprisonment following his guilty plea).

33. See generally *Prosecutor v. Milošević*, Case No. IT-02-54, Report to the President: Death of Slobodan Milošević, (Int'l Crim. Trib. for the Former Yugoslavia May 30, 2006).

34. See generally Kieran McEvoy & Louise Mallinder, *Amnesties, Transitional Justice and Governing Through Mercy*, in *THE SAGE HANDBOOK OF PUNISHMENT AND SOCIETY* 434 (Jonathan Simon & Richard Sparks eds., 2012).

their roots and trigger the expedient collection of all evidence about each individual crime committed.

I. Transitional Justice Goals and Methods

A. A Brief Overview of the Goals of Transitional Justice

In order to develop an adequate transitional justice response, it is important to be aware of its goals, and which goals must be prioritized. The goals of any particular response must not be as overambitious as they have been in the current system of international criminal justice.³⁵ For example, the ICTY realized it could not meet its goal of prioritizing truth by allowing guilty pleas on lesser charges,³⁶ explicitly stating in some decisions that the “Tribunal is not a final arbiter of historical facts. That is for historians.”³⁷

In the era before the ICC was established, while discussing the goals of transitional justice, the mainstream view embraced a predominantly retributivist narrative.³⁸ Even Hannah Arendt, who was known for her “defense” of Adolf Eichmann, justified Eichmann’s death sentence through a retributivist argument.³⁹ Retributivists seek punishment for as many culpable individuals as possible under the belief that these individuals deserve it.⁴⁰ Retributivism “gives voice to the intuition that there is a moral case for punishing the worst atrocities that is not reducible to expected societal benefits.”⁴¹ Some also argue that there is a particular obligation to prosecute for serious international human rights violations.⁴² Until recently, the dominant narrative of international criminal tribunals was

35. See Mirjan Damaska, *What Is the Point of International Criminal Justice?*, 83 CHI-KENT L. REV. 329, 365 (2008); see also RAY NICKSON & ALICE NEIKIRK, *MANAGING TRANSITIONAL JUSTICE: EXPECTATIONS OF INTERNATIONAL CRIMINAL TRIALS* 13 (2018).

36. See generally, e.g., *Prosecutor v. Krajisnik*, Case No. IT-00-39&40-PT, Plea Agreement (Int’l Crim. Trib. for the Former Yugoslavia Sept. 30, 2002) (excluding genocide charges in Biljana Plavsić’s guilty plea); *Prosecutor v. Krajisnik*, Case No. IT-00-39&40-PT, Amended Consolidated Indictment (Int’l Crim. Trib. for the Former Yugoslavia Mar. 7, 2002).

37. *Prosecutor v. Nikolić*, Case No. IT-94-2-S, Judgment, ¶ 122 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 18, 2003).

38. For a critique of retributivist arguments in international criminal justice, see George P. Fletcher, *The Place of Victims in the Theory of Retribution*, 3 BUFF. CRIM. L. REV. 51, 52-53 (1999) (“[T]he right response to evil is to simply make the offenders suffer This is the way most people think of the newly established [I]nternational [C]riminal [C]ourt.”). For retributivist counterarguments, see Michael Moore, *Victims and Retribution, A Reply to Professor Fletcher*, 3 BUFF. CRIM. L. REV. 65, 69 (1999).

39. See HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 127 (2d ed. 1994) (“[E]vil violates a natural harmony which only retribution can restore . . . it was precisely on the ground of these long-forgotten propositions that Eichmann was brought to justice to begin with, and that they are, in fact, the supreme justification for the death penalty.”).

40. See Fletcher, *supra* note 38, at 52.

41. Alexander K.A. Greenawalt, *International Criminal Law for Retributivists*, 35 U. PA. J. INT’L L. 969, 1044 (2014).

42. See Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2586 (1991).

retributive: to end impunity for war atrocities.⁴³ This remains the primary goal of the ICC Office of the Prosecutor (OTP)⁴⁴ although, in recent years, opinion in The Hague shifted toward accepting the fact that alternatives like restorative justice are not the same as impunity, even though they are hardly retributive. As Émile Durkheim argued, public reactions to crime can bring a community closer together, reinforce social norms, and increase valued forms of consensus.⁴⁵ Data collected during fieldwork in Kosovo empirically verified this thesis. It showed that, as a reaction to Milosević's oppressive regime, Kosovo Albanians quit the widespread tradition of blood feuds in the early 1990s, and that their nonviolent resistance could have prevented the subsequent armed conflict had there been enough international support for it.⁴⁶ Even so, transitional justice cannot harbor unrealistic expectations that this Durkheimian response can be repeatedly achieved because transitional justice also teared many communities apart in the former Yugoslavia.

Today, ICC judges claim that the ICC “bring[s] retributive and restorative justice together.”⁴⁷ The ICC's major contribution to restorative justice is allowing (limited) victim participation at the proceedings as well as enabling limited compensation schemes for them through the ICC's Trust Fund for Victims.⁴⁸ The ICTY did not have this. A litmus test for the ICC will be whether it ultimately accepts the novel “restorative sanctions”—rec-

43. See, e.g., LIONEL NICHOLS, *THE INTERNATIONAL CRIMINAL COURT AND THE END OF IMPUNITY IN KENYA* 12 (Olivera Simic ed., 2015); M. Cherif Bassiouni, *Combating Impunity for International Crimes*, 71 U. COLO. L. REV. 409, 409 (2000); Barbara Bedont & Katherine Hall-Martinez, *Ending Impunity for Gender Crimes Under the International Criminal Court*, 6 BROWN J. WORLD AFFS. 65, 69 (1999); Benjamin B. Ferencz, *Ending Impunity for the Crime of Aggression*, 41 CASE W. RESV. J. INT'L L. 281, 281 (2009); Geoffrey Robertson, *Ending Impunity: How International Criminal Law Can Put Tyrants on Trial*, 38 CORNELL INT'L L.J. 649, 649 (2005).

44. See Fatou Bensouda, Prosecutor, Int'l Crim. Ct., Statement of the Prosecutor of the International Criminal Court at First Arria-Formula Meeting on UNSC-ICC Relations (July 6, 2018) (transcript available at <https://www.icc-cpi.int/Pages/item.aspx?name=180706-otp-statement-arria-formula> [<https://perma.cc/ED8C-5VUJ>]).

45. See GEORGE PAVLICH, *LAW AND SOCIETY REDEFINED* 72 (2010). See generally ÉMILE DURKHEIM, *ON THE NORMALITY OF CRIME* (1895).

46. See Aleksandar Marsavelski et al., *Did Nonviolent Resistance Fail in Kosovo?*, 58 BRIT. J. CRIMINOLOGY 218, 223 (2018).

47. See Claire Garbett, *The International Criminal Court and Restorative Justice: Victims, Participation and the Processes of Justice*, 5 INT'L J. RESTORATIVE JUST. 198, 198–99 (2017) (quoting Judge Sang-Hyun Song).

48. See, e.g., Edda Kristjansdóttir, *International Mass Claims Processes and the ICC Trust Fund for Victims*, in *REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY* 167, 172 (Carla Ferstman et al. eds., 2009); Tom Dannenbaum, *The International Criminal Court, Article 79, and Transitional Justice: The Case for an Independent Trust Fund for Victims*, 28 WIS. INT'L L.J. 234, 234 (2010); Anne-Marie De Brouwer, *Reparation to Victims of Sexual Violence: Possibilities at the International Criminal Court and at the Trust Fund for Victims and Their Families*, 20 LEIDEN J. INT'L L. 207, 208 (2007); Peter G. Fischer, *The Victims' Trust Fund of the International Criminal Court—Formation of a Functional Reparations Scheme*, 17 EMORY INT'L L. REV. 187, 192 (2003); Frédéric Mégret, *Justifying Compensation by the International Criminal Court's Victims Trust Fund: Lessons from Domestic Compensation Schemes*, 36 BROOK. J. INT'L L. 123, 124 (2010).

ognized in the Colombian Peace Agreement and by the Colombian courts—as penal sanctions, even for high-level offenders and perpetrators of crimes against humanity.⁴⁹

Restorativists support much broader transitional justice outcomes such as restitution, truth-seeking, and reconciliation.⁵⁰ Crimes that hurt weep for transitional justice that heals. The strengths of predominantly retributive international criminal justice lie in establishing truth and criminal liability for a limited number of cases; yet it falls short of achieving reconciliation or establishing collective truth about atrocities.⁵¹ Post-conflict justice viewed through a restorative lens, according to Stephan Parmentier, includes elements known under the acronym TARR: to search for truth (T); ensure accountability (A); provide reparation for victims (R); and reconcile former enemies (R).⁵² The current system of transitional justice is unable to make large inroads against any of these goals, let alone all of them. Therefore, the international transitional justice system needs to be developed by critically questioning the features of past transitional justice models and linking those features to the current debate about the ICC's relationship with transitional justice mechanisms.

B. Methods

This Article leverages a range of data to gain insight on how various transitional justice responses employed in the former Yugoslavia have affected the post-conflict societies of its successor countries. Our main source of data are 281 interviews across former Yugoslavia: Bosnia-Herzegovina, Croatia, Kosovo, and Serbia. Most of the interviews typed up for this research were conducted jointly by the authors on four fieldwork trips, mostly between 2013 and 2017. This study is part of the Peacebuilding Compared Project that codes more than 700 variables about the character and strength of transitional justice in post-war societies.⁵³ This will allow us to assess whether our qualitative conclusions about transitional justice in former Yugoslavia has wider relevance as applied to the (at least) eighty

49. See Courtney Hillebrecht et al., *The Judicialization of Peace*, 59 HARV. INT'L L.J. 279, 297, 299 (2018) (stating that the ICC OTP's position has shifted from being a "major spoiler" of the peace process to being a strong supporter, and afterward being "less sanguine in its post Peace Accord statements"); see also Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace, Colomb.-FARC, Nov. 24, 2016, <http://especiales.presidencia.gov.co/Documents/20170620-dejacion-armas/acuerdos/acuerdo-final-ingles.pdf> [<https://perma.cc/4RE8-XHDQ>] [hereinafter Final Agreement].

50. See, e.g., Linda M. Keller, *Seeking Justice at the International Criminal Court: Victims' Reparations*, 29 T. JEFFERSON L. REV. 189, 190 (2007); Carrie J. Niebur Eisnaugle, *An International "Truth Commission": Utilizing Restorative Justice as an Alternative to Retribution*, 36 VAND. J. TRANSNAT'L L. 209, 209 (2003); Charles Villa-Vicencio, *supra* note 9, at 206.

51. See Stephan Parmentier et al., *Dealing with the Legacy of Mass Violence: Changing Lenses to Restorative Justice*, in SUPRANATIONAL CRIMINOLOGY: TOWARDS A CRIMINOLOGY OF INTERNATIONAL CRIMES 338-39 (Alette Smeulers & Roelof Haveman eds., 2008).

52. See Stephan Parmentier, *Global Justice in the Aftermath of Mass Violence: The Role of the International Criminal Court in Dealing with Political Crimes*, 41 INT'L ANNALS CRIMINOLOGY 203, 207-08 (2003).

53. See *The Peacebuilding Compared Project*, *supra* note 8.

wars since the Cold War. Those interviewed include victims and victim organizations' representatives; convicted and acquitted defendants (including those discharged after investigation); attorneys; prosecutors; judges; police; trial witnesses; and victims', human rights, peacebuilding, and women's NGOs. In addition to this, we interviewed high-ranking officials and policy makers, including nine former Presidents and Prime Ministers of Yugoslavia or its successor states or sub-states (e.g., the sub-state of Republika Srpska) and many former and current Ministers. We also interviewed intelligence officials to obtain information about what was happening behind transitional justice processes, as well as historians, journalists, and officials of international organizations (e.g., U.N., EU, OSCE, etc.) who monitored war crimes trials. Our ethics protocols require that all interviews be anonymous unless informants specifically consent to being on the record.⁵⁴

The secondary sources of data are case studies with several research foci. First, we focused on cases that have been mentioned throughout our interviews to verify data and to collect additional relevant information that was not mentioned in our interviews. Second, we studied fifty-seven cases involving individuals who pled guilty because guilty pleas have restorative justice potential, and they are a main feature of Rudolph Giuliani's 1980s prosecutorial strategy. This included studying thirty-one cases at the Cantonal Court of Bosnia-Herzegovina (Court of BiH), twenty cases at the ICTY, one case at Belgrade High Court, and one case at the Supreme Court and Constitutional Court of Croatia. Third, we studied nine cases of universal jurisdiction. The case materials were mainly obtained from the websites of the ICTY,⁵⁵ Court of BiH,⁵⁶ TRIAL International,⁵⁷ and the Asser Institute's International Crime Database.⁵⁸ However, case materials were also collected from national courts, NGOs, press releases, and media reports. In this way, we were able to obtain information available inside and outside the case file about our selected cases. We also observed two war crimes trial sessions in person—at the EU Rule of Law Mission (EULEX) Court in Mitrovica and at the Court of BiH in Sarajevo—and many more through video files available on the ICTY's website.

To a lesser degree, we also rely on over 4,000 interviews, conducted since 2005, of more than 5,000 individuals (some interviews were with more than one informant) from the entire Peacebuilding Compared Project

54. See AUSTRALIAN RESEARCH COUNCIL, NATIONAL STATEMENT ON ETHICAL CONDUCT IN HUMAN RESEARCH 33-34 (2007).

55. U.N. INT'L CRIM. TRIBUNAL FORMER YUGOSLAVIA, <http://www.icty.org> [<https://perma.cc/59LT-JZYK>] (last visited Aug. 20, 2019).

56. SUD BOSNE I HERCEGOVINE [Court of Bosnia-Herzegovina], <http://www.sudbih.gov.ba> [<https://perma.cc/WGB2-HWUD>] (last visited Aug. 20, 2019).

57. TRIAL INT'L, <https://trialinternational.org> [<https://perma.cc/48P5-LVZ4>] (last visited Aug. 20, 2019).

58. INT'L CRIMES DATABASE, <http://www.internationalcrimesdatabase.org> [<https://perma.cc/XSR3-G698>] (last visited Aug. 20, 2019).

led by the second author.⁵⁹ So far, that project has studied sixty-four armed conflicts.⁶⁰ We have used these data, for example, to compare the ICTY's impact in the former Yugoslavia with the ICC's impact in the Democratic Republic Congo (DRC), to contrast the failure of the former Yugoslavia's truth commissions with Rwanda's Gacaca courts, and to learn what former Yugoslav countries learned from networked governance in Timor-Leste.⁶¹

To get a broader picture, we also rely on quantitative data about war crimes cases from official and non-governmental statistical reports that were obtained online or directly from interviewees.

II. Integrating Transitional Justice

A. Top Response: The ICC Learning from the ICTY's Peak Transitional Justice Response

The ICC must build upon the ICTY's legacy.⁶² Not only did the ICTY produce more international criminal law jurisprudence than had been produced in the entire history of international criminal law,⁶³ but it created the single biggest international criminal justice response in history. The ICTY indicted 161 individuals, ninety of which were convicted; heard nearly 5,000 testifying witnesses; and produced almost three million pages of transcripts.⁶⁴ Adding the thousands of subsidiary cases heard by multiple national courts, the magnitude of Yugoslavia's cases dwarfs all other efforts at fair and impartial international criminal justice adjudication for post-World War II conflicts. ICTY's biggest achievement was holding a number of political, military, and paramilitary leaders accountable even amidst substantial doubt that they would ever face prosecution for their actions.⁶⁵ This type of response is what the ICC should strive for since its jurisdiction is limited to "the most serious crimes of concern to the international community as a whole."⁶⁶ But this requires support that the ICC does not have because the three major world powers oppose it. Thus, even a Security Council referral will not be enough unless it is followed by polit-

59. See JOHN BRAITHWAITE & BINA D'COSTA, *CASCADES OF VIOLENCE: WAR, CRIME AND PEACEBUILDING ACROSS SOUTH ASIA* 30 (2018); *The Peacebuilding Compared Project*, *supra* note 8.

60. See *The Peacebuilding Compared Project*, *supra* note 8.

61. See JOHN BRAITHWAITE ET AL., *NETWORKED GOVERNANCE OF FREEDOM AND TYRANNY: PEACE IN TIMOR-LESTE* 191 (2012).

62. See Leila Nadya Sadat, *The Legacy of the ICTY: The International Criminal Court*, 37 *NEW ENG. L. REV.* 1073, 1074 (2003).

63. Anette Bringedal Houge, *Narrative Expressivism: A Criminological Approach to the Expressive Function of International Criminal Justice*, 19 *CRIMINOLOGY & CRIM. JUST.* 277, 287 (2019).

64. See *Infographic: ICTY Facts & Figures*, INT'L CRIM. TRIBUNAL FORMER YUGOSLAVIA, <https://www.icty.org/en/content/infographic-icty-facts-figures> [<https://perma.cc/98EG-9T97>] (last visited May 18, 2020) (including data from cases before the International Residual Mechanism for Criminal Tribunals).

65. See Dragović-Soso & Gordy, *supra* note 22, at 195.

66. Rome Statute, *supra* note 3, at art. 5.

ical and financial support.⁶⁷ However, support to charge the “big fish” can also come from the bottom in situations where the ICC already has jurisdiction, which will be decisive for its leadership in the future.

Both the ICC⁶⁸ and the ICTY⁶⁹ are ill-perceived in the communities where the atrocities took place. Not only did ICTY trials fail to lead to reconciliation, they revived the conflicts in public discourse.⁷⁰ A number of people whom we interviewed revealed the divided public reactions to ICTY verdicts; for example, Croatian peace and military sociologist Ozren Zunec stated:

When the ICTY reversed the convictions of the leading Croatian generals, there was a national joy. Fireworks! Previously, on the day when the trial judgement was expected a big screen was erected on the main square for live streaming of the court’s verdict—when they were declared guilty, the crowd booed. At this time there was jubilation in Serbia. When the ICTY’s appellate decision was announced, the big screen was not up because no one thought the conviction would be reversed.⁷¹

The case of Croatian General Mirko Norac particularly illustrates the possibilities for public enlightenment about transitional justice when it is shifted from The Hague to the local community. When Norac was arrested following the ICTY’s indictment,⁷² 100,000 people flooded the streets in protest.⁷³ But after the ICTY transferred the case to Croatia, where he was

67. See, e.g., Mahmoud Cherif Bassiouni, *The ICC—Quo Vadis?*, 4 J. INT’L CRIM. JUST. 421, 425 (2006) (noting the failure to address the atrocities in Darfur, regarding which “[t]he Security Council’s referral excluded financial resources to the ICC and did not explicitly offer the prospects of future political support. . . . [leaving] the Prosecutor with little leverage with which to induce the government of Sudan to cooperate with the ICC.”); see also, *UN Security Council: Address Inconsistency in ICC Referrals*, HUM. RTS. WATCH (Oct. 16, 2012, 4:37 PM), <https://www.hrw.org/news/2012/10/16/un-security-council-address-inconsistency-icc-referrals> [<https://perma.cc/U5CM-B66Q>] (noting the Security Council’s unanimous referral to the ICC, but that “once political circumstances changed in Libya, the Security Council no longer actively supported the ICC investigation and failed to press Libya’s new government to cooperate with the court.”).

68. See MAX DU PLESSIS, UNIVERSALISING INTERNATIONAL CRIMINAL LAW: THE ICC, AFRICA AND THE PROBLEM OF POLITICAL PERCEPTIONS, in INST. FOR SEC. STUD. PAPERS 1, 9 (Inst. For Sec. Stud. Paper No. 249, 2013) (arguing that “the ICC’s narrow application of international criminal law has given rise to a perception problem, the sum of which can no longer be ignored and which threatens to undermine the credibility of the Court.”); see also Sara Darehshori, *Lessons for Outreach from the Ad Hoc Tribunals, the Special Court for Sierra Leone, and the International Criminal Court*, 14 NEW ENG. J. INT’L & COMPAR. L. 299, 304 (2008) (giving the example of 2006 peace talks in Uganda when the ICC was publicly characterized as a “peace-spoiler”).

69. See Janine Natalyia Clark, *International War Crimes Tribunals and the Challenge of Outreach*, 9 INT’L CRIM. L. REV. 99, 104 (2009) (asserting that “the ICTY still has a serious image problem in the former Yugoslavia”); see also Jean-Marie Kamatali, *From the ICTR to ICC: Learning from the ICTR Experience in Bringing Justice to Rwandans*, 12 NEW ENG. J. INT’L & COMPAR. L. 89, 90 (2005) (comparing the negative perceptions of ICTR and ICTY between Rwandans and former Yugoslavians).

70. See NICKSON & NEIKIRK, *supra* note 35, at 92–96.

71. Interview with Ozren Zunec, Professor of Socio., Zagreb Sch. of Humanities & Soc. Sci., in Zagreb, Croat. (May 12, 2014).

72. See generally *Prosecutor v. Norac*, Case No. IT-04-76, Initial Indictment (Int’l Crim. Trib. for the Former Yugoslavia May 20, 2004).

73. Interview with Anto Nobilo, Lawyer, in Zagreb, Croat. (May 9, 2014).

convicted, only a group of war veterans protested the guilty verdict⁷⁴— perhaps, this was partly due to the enlightening local coverage of the trial by Croatian journalists.

The ICTY substantially contributed to historical truth-finding by establishing an impressive historical record.⁷⁵ But that record is not necessarily reflected in its judgements. Croatian historian Davor Marijan,⁷⁶ who also appeared as expert witness before the ICTY,⁷⁷ said that written records are more valuable for historians than the ICTY judgments because some judgments are based on selective factual findings by the judges. The ICC faces the same challenge but with much less documentation in cases concerning war crimes of armed groups in African countries.⁷⁸ Again, a much more efficient way to establish the historical record about the conflict is to work locally, instead of in The Hague, and to unlock the historical chemistry between local trials, journalists, historians, and citizenry.

The most serious international crimes are typically “crimes of the powerful”—mass atrocities orchestrated by top political and military leaders.⁷⁹ These individuals should be tried at the ICC because post-conflict, national criminal courts, even with strong international support, are typically unable to deliver such trials in a credible way.⁸⁰ The problem of having such trials abroad, however, is that local communities often perceive them as an instrument to enforce the sordid interests of major powers.⁸¹

74. See Snjezana Vukic, *Ex-Croatian Gen. Convicted of War Crimes*, ASSOC. PRESS NEWS (Mar. 24, 2003), <https://www.apnews.com/f4452a263bd7cb2ba86a97d207cd7faa> [<https://perma.cc/Q3WW-G7TH>].

75. See, e.g., Ivan Zveržhanovski, *Watching War Crimes: The Srebrenica Video and the Serbian Attitudes to the 1995 Srebrenica Massacre*, 7 SE. EUR. & BLACK SEA STUD. 417, 421–22 (2007).

76. Interview with Davor Marijan, Historian, Croat. Inst. of Hist., in Zagreb, Croat. (May 12, 2014).

77. Prosecutor v. Prlić, Case No. IT-04-74, Decision on Submission of the Expert Report of Davor Marijan Pursuant to Rule 94 bis (a) and (b) and on Motions for Additional Time to Cross-Examine Davor Marijan, ¶ 1 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 11, 2008). For the ICTY’s translation of Davor Marijan’s expert opinion, see generally Davor Marijan, *Expert Opinion: On the War Connections of Croatia and Bosnia and Herzegovina (1991–1995)*, 36 J. CONTEMP. HIST. 249 (2004).

78. See, e.g., John Dugard, *Palestine and the International Criminal Court: Institutional Failure or Bias?*, 11 J. INT’L CRIM. JUST. 563, 565 (2013) (implying that situations in Africa lacked well-documented evidence in comparison with the newly opened situation in Palestine).

79. John Braithwaite & Peter Drahos, *Zero Tolerance, Naming and Shaming: Is There a Case for It with Crimes of the Powerful?*, 35 AUSTR. & N.Z. J. CRIMINOLOGY 269, 272 (2002); see also DAWN L. ROTHE & DAVID KAUZLARICH, *CRIMES OF THE POWERFUL: AN INTRODUCTION* 7 (2016).

80. See Gabriele Olivi, *The Role of National Courts in Prosecuting International Crimes: New Perspectives*, 18 SRI LANKA J. INT’L L. 83, 118–28 (2006).

81. See Archangel Byaruhanga Rukooko & Jon Silverman, *The International Criminal Court and Africa: A Fractious Relationship Assessed*, 19 AFR. HUM. RTS. L.J. 85, 103 (2019) (“The failure of the [c]ourt to do more to acknowledge perceptions of remoteness and neo-colonialism is also keenly felt on the continent.”); see also Mayeul Hiéramente et al., *Barasa, Bribery and Beyond: Offences Against the Administration of Justice at the International Criminal Court*, 14 INT’L CRIM. L. REV. 1123, 1124 (2014) (suggesting that the accusation of “neo-colonial justice” is unfair).

Even the ugliest of war criminals such as Milosević,⁸² Karadžić, Mladić, and their closest collaborators,⁸³ enjoyed sympathy in substantial parts of the Serbian population because they presented themselves as patriots who defended Serbia. It is difficult to expect their community to perceive them as war criminals just because someone in The Hague says so.⁸⁴ A bottom-up approach can help resolve this problem. If the individuals who participated in the conflict agree that certain political leaders drove them into an atrocious war, and if a national court finds mid-rank politicians and soldiers guilty of obeying orders to perform some particularly egregious crimes, then the public's perspective of the persons whom they previously glamorized might change. The ultimate conviction of these officials in The Hague would then come as no surprise to the public because they would have already travelled the local road of post-war enlightenment through lower-level transitional justice responses.

Many of our informants raised the question of whether sustainable peace is more important than accountability at any cost. For example, President Franjo Tuđman had supreme command over the Croatian military, including units that committed war crimes, but at the same time, he was allied with Alija Izetbegović, one of the guarantors of the 1995 Dayton Peace Agreement.⁸⁵ Thus, it might not have been wise to prosecute President Tuđman at the ICTY. Instead, after peace was established, he might have been encouraged to fully cooperate in investigations and to publicly apologize to Serbian and Bosniak victims in exchange for amnesty. Further, if Slobodan Milosević had ensured implementation of three key peace plans that had previously failed—the Vance Peace Plan for Croatia,⁸⁶ the Vance-Owen Peace Plan for Bosnia-Herzegovina,⁸⁷ and the Rambouillet Agreement for Kosovo⁸⁸—even he could have been granted amnesty. But then it would have been imperative that he testify against the Krajina and Republika Srpska leadership. Qualified amnesties for Milosević and

82. See Jovana Mihajlović Trbovc & Vladimir Petrović, *The Impact of the ICTY on Democratization in the Yugoslav Successor States*, in BUILDING DEMOCRACY IN THE YUGOSLAV SUCCESSOR STATES 135, 140 (Sabrina P. Ramet et al. eds., 2017).

83. See *id.* at 145 (stating that homecoming celebrations awaited both the acquitted and convicted persons who served their sentences, such as the wartime leaders of Republika Srpska Biljana Plavšić and Momčilo Krajišnik).

84. ICTY lacked popular support from all nations of former Yugoslavia, except from Kosovo Albanians who gave the greatest support—as much as 83.3%—according to a survey done by the International Institute for Democracy and Electoral Assistance. Mirko Klarin, *The Impact of the ICTY Trials on Public Opinion in the Former Yugoslavia*, 7 J. INT'L CRIM. JUST. 89, 92 (2009).

85. See Bill Clinton, *Dayton Accords*, ENCYC. BRITANNICA (Dec. 14, 2009), <https://www.britannica.com/event/Dayton-Accords> [<https://perma.cc/Q53J-YYU6>].

86. See generally *The Vance Plan*, WAYBACK MACH., <http://web.archive.org/web/20130521223325/http://sca.lib.liv.ac.uk/collections/owen/boda/vanc1.pdf> [<https://perma.cc/2HZ8-VUVZ>] (last visited Aug. 20, 2019).

87. See generally DAVID OWEN, BOSNIA-HERZEGOVINA: THE VANCE/OWEN PEACE PLAN (David Owen ed., 2013).

88. *Interim Agreement for Peace and Self-Government in Kosovo*, WAYBACK MACH. (Feb. 23, 1999), <https://web.archive.org/web/20000816032139/http://www.alb-net.com/kcc/interim.htm> [<https://perma.cc/D68F-P4UU>].

Tuđman would not have been Hirohito-type amnesties⁸⁹ because substantial contributions would have been made to transitional justice, and they would have surrendered substantial power. The ICTY failed to convict them anyway, so more transitional justice would have been achieved by appropriate, qualified amnesties. In this counterfactual scenario, Milosević and Tuđman would still have been vulnerable to demands for truth and reconciliation, including truth-telling and victims' compensation.

Anto Nobile, a former Croatian prosecutor who spent nine years working as legal counsel at the ICTY,⁹⁰ commented that the quality of the judges at the ICTY was "nothing special though it has improved over time."⁹¹ The ICC continues to face this problem since the election of judges to international courts and tribunals are generally politicized processes.⁹² For instance, one elected judge had no law degree,⁹³ and most judges have no practical experience in transitional justice.⁹⁴ The three-level transitional justice scheme that we propose would overcome this problem, for example, by requiring from ICC candidates previous transitional justice experience at an ITJU-national court.

Almost all transitional justice actors whom we interviewed reported that political pressure from the U.S. affected ICTY decisions, and one reported U.K. influence.⁹⁵ But that does not mean politically strategic prosecutions are always bad.⁹⁶ For example, it was not bad that the U.S.

89. Unconditional amnesties following severe violence, just like pardons following flawed trials, indicate political pressures to sacrifice justice. See generally Stéphane Léman-Langlois, *Constructing a Common Language: The Function of Nuremberg in the Problematization of Postapartheid Justice*, 27 *LAW & SOC. INQUIRY* 79, 88-89 (2002); Richard John Galvin, *The Case for a Japanese Truth Commission Covering World War II Era Japanese War Crimes*, 11 *TUL. J. INT'L & COMPAR. L.* 59, 72 (2003).

90. Nobile himself experienced charges for contempt of court before the ICTY, for which he was sentenced in the first instance judgement and acquitted on appeal. Prosecutor v. Aleksovski, Case No. IT-95-14/1-AR77, Judgment on Appeal by Anto Nobile Against Finding of Contempt, ¶¶ 1-2 (Int'l Crim. Trib. for the Former Yugoslavia May 30, 2001).

91. Interview with Ozren Zunec, *supra* note 71.

92. See Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 *HARV. INT'L L.J.* 271, 277 (2003).

93. This was the case of Judge Fumiko Saiga from Japan. See Kai Ambos, 'Witness Proofing' Before the International Criminal Court: A Reply to Karemaker, Taylor, and Pittman, 21 *LEIDEN J. INT'L L.* 911, 915 (2008). Judge Saiga died shortly after her appointment, and the international community learned from the critique and modified the nomination process as a result.

94. In the election process, the "established competence in law" requirement is often reduced to a simplistic distinction between "criminal law judges" and "international law judges" presented on two separate lists. WILLIAM A. SCHABAS, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* 692 (2d ed. 2016).

95. Interview with Ozren Zunec, *supra* note 71; see also PIERRE HAZAN, *JUSTICE IN A TIME OF WAR* 98-99 (James Thomas Snyder trans., 2004); Judith A. McMorrow, *Creating Norms of Attorney Conduct in International Tribunals: A Case Study of the ICTY*, 30 *B.C. INT'L & COMPAR. L. REV.* 139, 150 (2007).

96. For example, ICTY Prosecutor Carla Del Ponte admitted that in order to obtain cooperation from one ethnic group, she expanded investigations in which that ethnic group was victimized. See CARLA DEL PONTE & CHUCK SUDETIC, *MADAME PROSECUTOR: CONFRONTATIONS WITH HUMANITY'S WORST CRIMINALS AND THE CULTURE OF IMPUNITY* 250, 281, 319 (2008); see also Allen S. Weiner, *Prudent Politics: The International Criminal*

wanted Saddam Hussein prosecuted because Iraqis were terrified of the return to power of his fascist regime; but it was bad that he was tried in a politicized way and that he showed more dignity in his execution than those who taunted him.⁹⁷ Politically strategic prosecutions are particularly welcomed if they secure peace and freedom from tyranny, instead of being peace-spoilers.⁹⁸ A counsel in the ICTY's OTP said that The Hague indictment of Radovan Karadžić⁹⁹ disempowered him in the Dayton process.¹⁰⁰ Had Karadžić been indicted before April 1993, he would not have had the chance to undermine the earlier Vance-Owen Peace Plan.¹⁰¹ Thousands of lives would have been saved, including all Srebrenica genocide victims. The ICC should learn from this experience. The ICC holds the same power now with current conflicts as the ICTY held then over the fates of Milosević and Karadžić; thus, the ICC has the same peacebuilding potential, and that is what distinguishes it from lower-level transitional justice. Preventive prosecutorial action is the most important part of good, international criminal law, an argument we further develop below when we discuss the preventive actions of ICTY prosecutor Louise Arbour. This is not to discount the modest benefits of general deterrence through prosecutions of washed-up politicians and generals after the crime.¹⁰²

B. Mid-level Hybrid Response: The Internationalized National Courts

One of Nobile's comments was that "the ICTY was necessary to get national courts to do their jobs."¹⁰³ And the ICC's complementary jurisdiction provides even more incentives for national judiciaries to do their

Court, International Relations, and Prosecutorial Independence, 12 WASH. U. GLOB. STUD. L. REV. 545, 562 (2013).

97. See MICHAEL A. NEWTON & MICHAEL P. SCHARF, *ENEMY OF THE STATE: THE TRIAL AND EXECUTION OF SADDAM HUSSEIN* 203-06 (2008).

98. See Veselin Popovski, *The Global Approaches and the Future of Peace Research*, in *THE PALGRAVE HANDBOOK OF GLOBAL APPROACHES TO PEACE* 733, 740 (Aigul Kulnazarova & Veselin Popovski eds., 2018) ("The International Criminal Court . . . is not a peace actor by design, in fact it can be seen even as a peace 'spoiler' as it investigates and prosecutes governmental officials and warlords."); see also Darehshori, *supra* note 68, at 304 (providing the example of the ICC's perception in Uganda as a peace-spoiler); Hilbrecht et al., *supra* note 49, at 280 (stating that the international courts in Colombia acted "neither as a spoiler of the peace, nor as a *deus ex machina* that imposes justice").

99. See generally *Prosecutor v. Karadžić*, Case No. IT-95-5-I, Indictment (Int'l Crim. Trib. for the Former Yugoslavia July 24, 1995).

100. Interview with 101501, Principal Legal Couns. & Deputy Prosecutor, Int'l Crim. Tribunal for the Former Yugoslavia, in Canberra, Austl. (Oct. 1, 2015).

101. This is so because Milosević had already accepted the Vance-Owen plan; thus, conflict could not have continued without Karadžić's military support of Bosnian Serbs. It was only the spoiling tactics of Karadžić that derailed the agreement. See James E. Goodby, *When War Won Out: Bosnian Peace Plans Before Dayton*, 1 INT'L NEGOT. 501, 514 (1996) (explaining that the Vance-Owen plan had already been signed in Athens but Karadžić said "his signature would be void if the Bosnian Serb assembly failed to support the decision," which subsequently occurred).

102. See David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 FORDHAM INT'L L.J. 473, 485-88 (1999) (discussing prosecutions as a contribution to general deterrence).

103. Interview with Anto Nobile, *supra* note 73.

job (as opposed to ICTY's primary jurisdiction).¹⁰⁴ The option advanced is that when national courts fail to deliver justice for their citizens, the ICC should be the "big stick" at the top that does the law enforcement job of national courts for them. The ICC can use various legal and diplomatic means to blacklist a regime that spurns cooperation, but that needs to be done in cooperation with the Security Council members.¹⁰⁵ The quality of the results primarily depends, according to this research, on the quality of the lower-level responses. But top-down pressure can improve that lower-level law enforcement. Here, we describe a hybrid, mid-level transitional justice response modelled after the Court of BiH in Sarajevo—the most successful national court in war crimes prosecutions of former Yugoslavia,¹⁰⁶ which we visited several times during our fieldwork.

As of August 2019, the Court of BiH had completed more than 200 war crimes trials, involving more than 400 individuals,¹⁰⁷ making it the court with the greatest number of completed war crimes cases for post-World War II conflicts from any level of governance. At least it is the court with the highest number of prosecutions of reasonable legal integrity, although we would not suggest it was totally devoid of corruption or politicization. Meanwhile, Iraq's courts have sentenced at least 3,000 Islamic State of Iraq and Syria (ISIS) fighters to death in the last two years for the offence of belonging to a terrorist organization, regardless of their actions within it.¹⁰⁸ These are almost all low-level fighters; ISIS leaders either chose the martyrdom of death in battle or had the resources to flee to safety. These Iraqi executions should be viewed as war crimes in breach of international humanitarian law rather than as transitional justice. It is noteworthy that while the U.S.' media persistently refer to U.S.-led operations against ISIS,¹⁰⁹ it never discusses the justice for ISIS fighters as "[U.S.]-led transitional justice."

International staff in the court and peer-to-peer support from The Hague aided the Court of BiH in its rather positive experiences. This support should be replicated and become permanent features of mid-level,

104. See Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT'L L. 383, 424–25 (1998).

105. For example, Karadžić's Serb Democratic Party in Bosnia, as well as Republika Srpska's President Milorad Dodik are still under U.S. sanctions for failing to arrest and turn over war crimes suspects to The Hague. The sanctions prohibit any exchange of funds or materials with the U.S. See *Specially Designated Nationals and Blocked Persons List*, OFF. FOREIGN ASSETS CONTROL 1 (Dec. 23, 2020), <https://www.treasury.gov/ofac/downloads/sdnlist.pdf> [<https://perma.cc/57UB-C6XX>].

106. David Tolbert, *EU Must Protect Bosnia's War Crimes*, INT'L CTR. TRANSITIONAL JUST. (Feb. 8, 2012), <https://www.ictj.org/news/eu-must-protect-bosnia-s-war-crimes-court> [<https://perma.cc/3HD3-HJXU>].

107. See generally SUD BOSNE I HERCEGOVINE, *supra* note 56.

108. Jenna Consigli, *Prosecuting the Islamic State Fighters Left Behind*, LAWFARE BLOG (Aug. 1, 2018, 11:34 AM), <https://www.lawfareblog.com/prosecuting-islamic-state-fighters-left-behind> [<https://perma.cc/QS62-ET2G>].

109. See, e.g., Michael R. Gordon & Eric Schmitt, *U.S.-Led Force Reduces Attacks on ISIS in Syria After Airstrike*, N.Y. TIMES (Apr. 8, 2017), <https://www.nytimes.com/2017/04/08/us/politics/us-islamic-state-syria.html> [<https://perma.cc/ZR4V-HBXR>].

post-conflict transitional justice. In such an arrangement, the greatest number of criminal cases would not end up at the ICC, nor at the local courts, but would form part of the joint work of an ITJU collaborating with national courts.

Establishment of the Court of BiH, however, came very late—in 2002—after “the Parliament of [Bosnia-Herzegovina enacted] the Law on the Court of BiH.”¹¹⁰ Such an arrangement should have been a part of the Dayton Accords, but no one thought of it at that time because even the ICTY was still a pilot experiment with only one defendant on trial.¹¹¹ Apart from several provisions concerning cooperation with the ICTY, the only provision related to transitional justice is Article 9 of the Accords:

The Parties shall cooperate fully with all entities involved in implementation of this peace settlement, as described in the Annexes to this Agreement, or which are otherwise authorized by the United Nations Security Council, pursuant to the obligation of all Parties to cooperate in the investigation and prosecution of war crimes and other violations of international humanitarian law.¹¹²

In practice, however, there have been significant oscillations in transitional justice cooperation with the ICTY, and between the parties themselves. The cooperation has depended on who was in power. Initially, during the Tuđman and Milošević eras, cooperation was minimal. In the 2000s, it intensified as a result of political changes, but at the time of Croatia’s accession to the EU in 2013, cooperation deteriorated again.¹¹³ Still, among the ICTY’s successes was the strong impulse it gave national criminal justice administrations to process war criminals—especially through referral of cases.¹¹⁴

The hybrid Court of BiH had the best cooperation with the ICTY among national courts. Even the court complex used to be called “the little Hague.”¹¹⁵ The largest number of cases delegated by The Hague Tribunal

110. *Domestic*, INT’L CRIMES DATABASE, www.internationalcrimesdatabase.org/Courts/Domestic [<https://perma.cc/C6WF-N6WM>] (last visited Apr. 7, 2020).

111. See *Judgment List*, INT’L CRIM. TRIB. FORMER YUGOSLAVIA, <https://www.icty.org/en/cases/judgement-list> [<https://perma.cc/ALT2-NNCL>] (last visited Apr. 7, 2020).

112. Rep. of the S.C. & G.A., General Framework Agreement for Peace in Bosnia and Herzegovina, U.N. Doc. A/50/790-S/1995/999, at art. 9 (1995).

113. See Miroslav Tuđman, 48 *Absurd Meetings Between Tudman and Milošević*, 16 NAT’L SEC. & FUTURE 121, 121 (2015).

114. ICTY referred a total of thirteen indicted persons to courts in the former Yugoslavia. See generally Michael Bohlander, *Referring an Indictment from the ICTY and ICTR to Another Court—Rule 11bis and the Consequences for the Law of Extradition*, 55 INT’L & COMPAR. L.Q. 219 (2006); Sarah Williams, *ICTY Referrals to National Jurisdictions: A Fair Trial or a Fair Price?*, 17 CRIM. L.F. 177 (2006); Susan Somers, *Rule 11 of Bis of the International Criminal Tribunal for the Former Yugoslavia: Referral of Indictments to National Courts*, 30 BC INT’L & COMPAR. L. REV. 175 (2007); Jens Dieckmann & Christina Kerll, *UN Ad Hoc Tribunals Under Time Pressure—Completion Strategy and Referral Practice of the ICTY and ICTR from the Perspective of the Defence*, 8 INT’L CRIM. L. REV. 87 (2008); Olympia Bekou, *Rule 11 BIS: An Examination of the Process of Referrals to National Courts in ICTY Jurisprudence*, 33 FORDHAM INT’L L.J. 723 (2009).

115. Interview with 081626, Judge, State Ct. of Bosn. & Herz., in Sarajevo, Bosn. & Herz. (Aug. 17, 2016).

went to the Court of BiH—six in total. The Court of BiH is the only court that entirely adopted the standards developed in the ICTY's case law, including, for example, the joint criminal enterprise doctrine, which was never applied in neighboring countries.

The ITJU would consist of judges, prosecutors, police, military, and other peacebuilding professionals who would work with national judges, prosecutors, and police to put on trial all who fail to cooperate in the restorative justice process at the lower level. The ITJU would also process cases against mid- and high-ranking officials based on their respective levels of responsibility for atrocities. Some of these officials would still get a chance to cooperate during the plea-bargaining stage by applying Rudolph Giuliani's prosecutorial strategy—explained later in this Article.¹¹⁶

The ITJU would be a mobile unit that would, while the war was still ongoing, begin to investigate from abroad, either in cooperation with the ICC or integrated as part of the ICC. Preferably, the unit would be stationed in a neighboring country along with most of the refugees, or in a pacified region of the country at war (e.g., in the Green Zone of Baghdad during the Iraqi war). This advantageous location would allow ITJU officials to conduct investigations and collect testimony earlier in the conflict.

The ITJU could also issue advisory letters to military commanders and political leaders similar to those issued by ICTY prosecutor Justice Arbour in Bosnia-Herzegovina.¹¹⁷ For example, advisory letters could warn against deploying force in certain contexts because doing so would be prosecutable as a war crime. These were referred to as "Are You Aware of Your Obligations" letters in the OTP.¹¹⁸ When some Serbian officials refused to accept the letters, Justice Arbour made them public and named the persons to whom they were sent, which included President Milosević.¹¹⁹ This was the beginning of a brilliant transitional justice innovation because it put the Sword of Damocles over the head of potential war criminals. But this practice could have been performed with greater finesse, specificity, astuteness, and timeliness had the prosecutor been closer to the location of the conflict. On a more positive note, the ICTY prosecutor's letters were complemented by on-the-ground work from NGOs like Geneva Call and the International Committee of the Red Cross (ICRC).¹²⁰ After the wars in former Yugoslavia, Geneva Call and ICRC refined their strategies for dialogue with local commanders—to ensure commanders understand the risks they are taking with the laws of war—

116. See discussion *infra* Section II.C.

117. Interview with 101501, *supra* note 100; see, e.g., Press Release, Louise Arbour, Prosecutor of the Int'l Crim. Tribunal for the Former Yugoslavia, Statement by the Prosecutor (Mar. 31, 1999).

118. Interview with 101501, *supra* note 100.

119. See, e.g., Press Release, Louise Arbour, *supra* note 117.

120. Interview with 101501, *supra* note 100; see also Pascal Bongard & Jonathan Somer, *Monitoring Armed Non-State Actor Compliance with Humanitarian Norms: A Look at International Mechanisms and the Geneva Call Deed of Commitment*, 93 INT'L R. RED CROSS 673, 696-701 (2011).

and their strategies for issuing explicit warnings, which increase the legal jeopardy of commanders after they are put on notice.

Saving lives through the preventive “lawfare” of an ITJU close to the action will also require networked governance with Geneva Call, the ICRC, and all countries where refugees are located. Every receiving country would have the duty to identify victims of war among refugees and obtain information about other victims from the refugees. As soon as peace is established, the ITJU would be deployed, along with peacekeepers, to the post-conflict zone. The court’s location is important because tribunals cannot realistically contribute to reconciliation when they are “physically, conceptually, and linguistically removed from the intended beneficiaries of their work, namely the relevant local communities.”¹²¹ When justice is not locally present, it is not transparent or trustworthy.

The relationship between the ICC and ITJU-national courts could be regulated through an amendment to the Rome Statute or by creating a separate ITJU statute. The Rome Statute’s members would be encouraged to ratify either the amendment or the separate statute because the ITJU reduces the ICC’s power and gives more judicial power to the judiciaries of member states themselves. The ITJU could derive its power from a Security Council resolution; a regional organization decision (i.e., a decision from the EU or the African Union); or the consent of the country receiving transitional justice support.

But why would national authorities be motivated to cooperate? Every post-war country needs money to recover and restore what was destroyed in the war. One condition for financial donations for post-war reconstruction or lifting of international sanctions would be transitional justice cooperation. This would persuade governments because they would have more money in the state budget to complete their political agenda. Besides, many post-conflict governments may already want transitional justice but simply do not want to spend much money on it. For local judges, incentives would be in the form of a new court building, modern equipment, free training, logistical support, or new judges and ancillary staff.

During times of conflict, it is important that the ITJU step in as soon as possible in order to preserve material evidence and collect statements from victims and witnesses. Previously, peacekeeping missions were charged with these tasks in addition to their primary task of maintaining peace. For example, the task of the U.N. Mission in Kosovo (UNMIK) was to arrest Kosovo’s war criminals, document victims who reported to them, and then prosecute these cases. However, UNMIK officials lacked motivation to engage with these cases long term because staff mandates were limited, and they knew the task would pass on to someone else at some point. This resulted in a backlog of 1,192 war crimes cases.¹²² Another reason for the necessary early intervention by the ITJU is the often-neglected goal

121. Janine Natalya Clark, *Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation*, 20 *EUR. J. INT’L L.* 415, 434 (2009).

122. Interview with 121532, War Crimes Investigator, U.N. Mission in Kos., in Prishtina, Kos. (Dec. 16, 2015).

of courts to contribute to historical memory. The artifacts collected by police and prosecutors for the court must be preserved for local museums. These artifacts will become an important symbol of memorialization and a node of never-again prevention to educate the young. The ICTY shockingly failed in this regard, almost destroying the vast trove of evidentiary artifacts it collected.

As mentioned, after the conflict, the ITJU would position its hybrid court in a lead city in the post-conflict zone. For example, Kigali would have been a better location for the ICTR than Arusha, a location that caused criticism.¹²³ In the case of armed conflicts between two or more states, the best location would be in each country's capital or lead city. For example, in former Yugoslavia, that would mean parallel ITJU-national courts in Belgrade, Prishtina, Sarajevo, and Zagreb to try their own citizens. The importance of having local tribunals, instead of being headquartered in the Netherlands, is well described by Mr. Nobile:

The message of The Hague Tribunal does not reach common people. If you have a local court, the judges know the local context. There is always a lot of local context, which takes a long time to learn. . . . [That is why] the Nuremberg trials were held in Germany, as well as the Tokyo trials were held in Japan. By putting the judges there they began to learn the local context. . . . I spent nine years working at the ICTY and I was amazed at how the judges had to be explained basic things that are understood by every Croatian judge. They had historian expert witnesses who were not very good at giving judges a primary-school level of understanding on Croatian and Yugoslav history.¹²⁴

In implementing transitional justice with two or more countries, the ITJU would have to ensure a rotation of judges to avoid saturation with a one-sided story of the conflict. For example, in a crime committed by the Serbian military against Croatian victims, the chamber composition could include one foreign, one Serbian, and one Croatian judge—regardless of whether the trial took place in Belgrade or Zagreb. The same would apply for prosecution teams on each case and for police teams. Vukovar's joint policing of Serbs and Croats (initially, along with a U.N. officer) and Mitrovica's integration of Serbs into the Kosovo police (along with U.N. police forces) were success stories according to our fieldwork interviews, which included police officers themselves.

After the establishment of these joint police forces, no conflict arose within the police nor was there ethnically motivated police violence, triggering ethnic inequality in other areas. In 1997, the U.N. declared that at least forty percent of public administration offices and courts in Vukovar had to go to Serbs.¹²⁵ This was achieved because four of the twelve

123. See Lilian A. Barria & Steven D. Roper, *How Effective Are International Criminal Tribunals? An Analysis of the ICTY and the ICTR*, 9 INT'L J. HUM. RTS. 349, 363 (2005).

124. Interview with Anto Nobile, *supra* note 73.

125. *Eastern Slavonia: The Croats Are Coming*, ECONOMIST (Jan. 8, 1998), <https://www.economist.com/europe/1998/01/08/the-croats-are-coming> [https://perma.cc/DCY4-5FD5].

appointed judges in Vukovar at that time were Serbs.¹²⁶ In places of major atrocities (such as Vukovar in Croatia, and Srebrenica and Prijedor in Bosnia), as well as in cities that remained divided after the war (such as Mitrovica in Kosovo and Mostar in Herzegovina), it would be important to have smaller ITJU-national court branches, similarly composed to the one in Vukovar. This would ensure local impact, make investigations easier, and allow local victims to access the court with compassionate support from their loved ones during the trauma of the criminal process.

One defense counsel at the ICTY said that her client and his co-defendants, all accused of war crimes in Bosnia-Herzegovina, were so dissatisfied with the work of chambers, which was composed of all-foreign judges, that one of the co-defendants told her they would have all been better off had the chamber been composed of one Serb, one Bosniak, and one Croat.¹²⁷ The ITJU-national court could avoid this problem by having only one foreign judge—out of three sitting in trial chambers—to ensure the quality of the law applied and to eliminate the possibility that two judges outvoted the third judge on biased grounds. Unlike UNMIK's and EULEX's staff in Kosovo, the length of the ITJU's staff mandate would be indefinite until cases with known perpetrators were completed. Mandatory tenure would not necessarily make them inefficient because there are other ways to boost staff efficiency. In fact, short mandates were the main cause of UNMIK's and EULEX's inefficiency. Most of them only had one-year contracts that could have been extended.¹²⁸ Of course it is also necessary to agree on a termination date to allow for a transition back to an all-national judiciary.

An additional argument in favor of ITJUs supplementing national judiciaries as hybrid courts is that national judiciaries are usually already overburdened by other crimes associated with the transition—particularly, organized crime and corruption. In the former Yugoslavia, various politicians and journalists were killed and many of the assassins were never found; at the same time, numerous white-collar criminals enriched themselves and got away with it.¹²⁹ Such offenders were “untouchable” even in countries that underwent transition without war, such as the Czech Republic.¹³⁰ War profiteers in former Yugoslavia barely faced any punishment, and that is a heavy burden these post-war societies still carry. One solution for this is to extend the jurisdiction of the ITJU to war-related crimes of particular transitional justice importance—such as terrorism in areas affected by ISIS or child labor in DRC mines. There may be no such thing as an armed conflict in which war profiteering is not a transitional justice

126. Interview with Jovan Ajduković, Serbian Minority Representative, in Vukovar, Croat. (June 25, 2015).

127. Interview with 041801, Lawyer, in Dubrovnik, Croat. (Apr. 25, 2018).

128. Interview with 121532, *supra* note 122.

129. See Aleksandar Marsavelski & John Braithwaite, *The Best Way to Rob a Bank*, INT'L J. CRIME, JUST. & SOC. DEMOCRACY, Mar. 2018, at 123, 131–32.

130. Vladimír Baloun & Miroslav Scheinost, *Economy and Crime in the Society in Transition: The Czech Republic Case*, in UPPERWORLD AND UNDERWORLD IN CROSS-BORDER CRIME 43, 52 (Petrus C. van Duyne eds., 2002).

problem; it is just the modalities that are different: bank crimes in former Yugoslavia, oil-profiteering in Iraq, jade-trading from Myanmar to China, and the blood diamond trade in a number of African war zones all serve as examples.

Former Yugoslavia also had some negative experiences with hybrid courts that must not be replicated. All criminal justice systems of the successor countries of former Yugoslavia allow the possibility for victims to seek reparations during criminal trials in so-called “adhesive procedures.”¹³¹ In more than ninety percent of war crimes cases before the Court of BiH, victims exercised their right to request reparations.¹³² However, courts hardly ever granted victims reparations. Instead, they referred victims to civil lawsuits where they also rarely received compensation. It took a decade before the Court of BiH granted reparations to a war crime victim.¹³³ The situation was the same in Kosovo where the trials also had international judicial staff:

Some victims just want the bones of their loved ones. Some want to know who it was that did this. Some want the perpetrators to go to jail. It varies. Some victims have their lawyer at the trial . . . can[not] remember a case where the victim expressed a view during the trial that they want a particular sentence. Most injured parties have no advocates, but sometimes they have an NGO advocate. They have to fund it themselves or have someone give them the funds. They do have a right to be represented, but there is no budget for this . . . do[not] know of any case in Kosovo where the victim has been compensated. These cases are just about the defendant and how many years of prison he will get . . . never heard of a case where a victim pursued civil damages in a separate civil procedure.¹³⁴

Neither of the hybrid transitional justice responses met expectations. Initially, the international staff and local judges lacked expertise in international criminal law. One of the Bosnian judges commented on her experience with foreign judges:

Their motivation was questionable because a lot of them were divorced individuals in ‘midlife crisis’ who wanted to move abroad to start a new life . . . while some saw themselves as representing the political interests of the country they came from . . . but at times their presence contributed to the quality, legitimacy and independence of our courts.¹³⁵

Pluralizing ITJU across different sides of the conflict allows networked governance and harmonious responses, vertically and horizontally. We

131. Elisabeth Baumgartner, *Aspects of Victim Participation in the Proceedings of the International Criminal Court*, 90 INT’L REV. RED CROSS 409, 412–13 (2008) (citing to ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 361 (2007)).

132. SUD BOSNE I HERCEGOVINE, *supra* note 56.

133. The Associated Press, *Bosnia-Herzegovina: Court Grants Compensation to War Crimes Victim*, N.Y. TIMES (June 24, 2015), <https://www.nytimes.com/2015/06/25/world/europe/bosnia-herzegovina-court-grants-compensation-to-war-crimes-victim.html> [<https://perma.cc/ZUJ7-U5X7>].

134. Interview with 121532, *supra* note 122.

135. Interview with 081625, Judge, Const. Ct. of Fed. Bosn. & Herz., in Sarajevo, Bosn. & Herz. (Aug. 19, 2016).

interviewed a war criminal who was first prosecuted by the Serbian Military court. That court acquitted him in the first instance and the judgement was confirmed on appeal. Later, Serbian authorities arrested him and transferred him to The Hague where he was convicted. After serving his sentence, he returned home. Croatia, however, issued an arrest warrant against him and now he is unable to travel outside of Serbia.¹³⁶ In a coherent transitional justice system, this would not have happened. If there are war crimes that have not been addressed in the judgement of the top response, be it the ICTY or the ICC, there is virtue in integrating into hybrid justice the alternative of referring these matters to the bottom-level, restorative justice response. These observations have practical implications in the case of the ICC's first defendant, Thomas Lubanga, who was initially arrested in Kinshasa in 2005 and charged with genocide, crimes against humanity, murder, illegal detention, and torture.¹³⁷ The ICC did not prosecute him with any of these crimes, but he was prosecuted and convicted for recruiting and using child soldiers under fifteen years old, for which he is now serving a fourteen-year prison term.¹³⁸ This was at a time when all sides in Congo recruited children to fight. Does this mean that once he is released from prison he should be prosecuted again for the other much more serious crimes? That may be undesirable, but the threat of another prosecution could be used to encourage him to engage in reparation and reconciliation processes in DRC.

Additionally, the ITJU would partly relieve local police, prosecutors, judges, and other judicial staff from the burden of criminal administration while simultaneously teaching them how to try war crimes cases. Once the ITJU nears completion of its mandate, it can gradually withdraw and leave future cases to be handled by the national judiciary. Then, in future conflicts, the ITJU could even collaborate with local police and judicial staff in past conflict zones who achieved the best results and deploy them to other transitional justice zones.

Therefore, one advantage of the ITJU is the flexibility of its proposed arrangements. It would prosecute all crimes under the Rome Statute but could also prosecute other crimes of particular importance for the conflict. For example, it could address liability of criminal organizations and corporations.¹³⁹ Similarly, the ICTY had the tools to address collective liability

136. Interview with 071502, Retired Colonel, Yugoslav People's Army, in Belgrade, Serb. (July 1, 2015).

137. BENJAMIN N. SCHIFF, *BUILDING THE INTERNATIONAL CRIMINAL COURT* 220 (2008).

138. See *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo Against his Conviction, ¶ 529 (Dec. 1, 2014) (confirming the conviction); see also *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Judgment on the Appeals of the Prosecutor and Mr. Thomas Lubanga Dyilo Against the "Decision on Sentence Pursuant to Article 76 of the Statute", ¶ 119 (Dec. 1, 2014) (confirming the fourteen-year prison sentence).

139. These could include prosecutions of multinational corporations profiting from war, but also independent paramilitary groups, political parties with their military wings, or ruling parties that control the state army. See, e.g., Norman Farrell, *Attributing Criminal Liability to Corporate Actors: Some Lessons from the International Tribunals*, 8

by applying the joint criminal enterprise doctrine—a RICO-type liability¹⁴⁰ that Rudolph Giuliani frequently used in hunting white-collar criminals, whose strategy we discuss in the forthcoming Section.

C. Between Responses: An Example of a Prosecutorial Strategy that Works

One reason the ICTY had a poor impact on the local community was because it started prosecutions in areas where there were no previously established facts at lower levels of transitional justice. When a military general or a head of state is brought to trial for a crime in which no direct perpetrator has been prosecuted before, adverse reactions can be expected. Victims see this person as the source of evil because the media demonizes that person as being the most responsible for the conflict, but members of the defendant's community may see that person as a hero who protected the community and who achieved (or tried to achieve) the community's political and military goals. Thus, unless someone who committed the crime following the orders of this defendant is found guilty or admits guilt, the defendant's link to the charged crime might appear unconvincing to members of the defendant's community. The ICTY, and then the ICC's OTP, gradually began to appreciate this, as can be seen in its 2012–2015 strategic plan:

A strategy of gradually building upwards might then be needed in which the Office first investigates and prosecutes a limited number of mid- and high-level perpetrators in order to ultimately have a reasonable prospect of conviction for the most responsible. The Office will also consider prosecuting lower[-]level perpetrators where their conduct has been particularly grave and has acquired extensive notoriety.¹⁴¹

One of our hypotheses for a prosecutorial strategy in war crimes cases comes from white-collar crime prosecution. Top-ranking war criminals are, by their personal characteristics, white-collar criminals. A stereotypical white-collar offender is a person of “respectability and high social status”¹⁴² offending in the course of their occupation, and “whose crimes are underreported, [and] rarely prosecuted.”¹⁴³ One of the most innovative prosecutorial strategies in convicting white-collar criminals was deployed by Rudolph Giuliani in the 1980s, when he was the U.S. Attorney for the Southern District of New York. The first step of Giuliani's strategy was to interview low-ranking, corporate employees and investigate those who

J. INT'L CRIM. JUST. 873, 873 (2010); see also ALEKSANDAR MARSAVELSKI, RESPONSIBILITY OF POLITICAL PARTIES FOR CRIMES: TRANSITIONAL JUSTICE AND BEYOND (forthcoming 2020).

140. Racketeer Influenced and Corrupt Organizations (RICO), 18 U.S.C. §§ 1961–1968 (1976). See generally G. Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009 (1980).

141. OFF. OF THE PROSECUTOR, INT'L CRIM. CT., STRATEGIC PLAN JUNE 2012–2015, at 6 (2013).

142. EDWIN SUTHERLAND, WHITE COLLAR CRIME 9 (2d ed. 1961).

143. Hazel Croall, *Who Is the White-Collar Criminal?*, 29 BRIT. J. CRIMINOLOGY 157, 157 (1989).

committed tax fraud or some other lesser crime.¹⁴⁴ Then, Giuliani would arrest them and offer them immunity from prosecution or a lenient sentence in exchange for information about the serious crimes of their superiors.¹⁴⁵ Crudely, it is a “gotcha” strategy that invites you to help yourself by giving evidence against a bigger fish, then likewise invites that bigger fish to give evidence against an even bigger fish. This strategy led Giuliani to Dennis Levine (a very big fish) and ultimately to Michael Milken, inventor of the “junk bond” and the greatest financial genius on Wall Street in the 1980s.¹⁴⁶ Milken went to prison for a long time and paid millions of dollars in fines as well.¹⁴⁷ For a while, Giuliani’s strategy cleaned Wall Street of major white-collar criminals. Ironically, this strategy was recently directed against Giuliani’s client, Donald Trump.¹⁴⁸

A former Croatian military prosecutor explained that Giuliani’s strategy is the only way to investigate war crimes, giving the example of how the Gopsc massacre case, in which the Croatian military killed over 100 civilians, was resolved:

A [Croatian] military official was convicted for a crime against the state (a political crime) and he was supposed to serve a long prison sentence, but after a year or two, he was released. And right about that time, evidence appeared which was the basis for General Mirko Norac and others to be indicted for war crimes. I do [not] know exactly what happened here, but the convict obviously cooperated to disclose information and he was offered early release in return.¹⁴⁹

Giuliani’s strategy is a way to boost prosecutorial efficiency, but it must be done prudently with safeguards in order to not set the major culprits free and charge the innocent on suspicious evidence fabricated to soften their own sentence. Furthermore, the ITJU-national courts will not produce the desired transitional justice outcomes if plea bargaining agreements are made without consulting the victims. Only when the community sees that victims accept this justice,¹⁵⁰ will they react to it in a positive

144. See Joel Cohen, *No More ‘Perp Walks’*, NAT’L L.J., Aug. 5, 2002, at 1.

145. See John Braithwaite, *What’s Wrong with the Sociology of Punishment?*, 7 THEORETICAL CRIMINOLOGY 5, 21 (2003).

146. See Peter Behr, *Levine Admits Stock Fraud*, WASH. POST (June 6, 1986), <https://www.washingtonpost.com/archive/politics/1986/06/06/levine-admits-stock-fraud/254e2081-8e04-499c-b894-18743b0ea034/> [<https://perma.cc/Q6KN-KWHG>].

147. Kurt Eichenwald, *Milken Set to Pay a \$600 Million Fine in Wall St. Fraud*, N.Y. TIMES (Apr. 21, 1990), <https://www.nytimes.com/1990/04/21/business/milken-set-to-pay-a-600-million-fine-in-wall-st-fraud.html> [<https://perma.cc/WHV7-X7XX>]; see also Ronald Sullivan, *Milken’s Sentence Reduced by Judge; 7 Months Are Left*, N.Y. TIMES (Aug. 6 1992), <https://www.nytimes.com/1992/08/06/business/milken-s-sentence-reduced-by-judge-7-months-are-left.html> [<https://perma.cc/QA56-DSUQ>].

148. See Larry Buchanan & Karen Yourish, *Mueller Report: Who and What the Special Counsel Investigated*, N.Y. TIMES (Apr. 17, 2019), <https://www.nytimes.com/interactive/2019/03/20/us/politics/mueller-investigation-people-events.html> [<https://perma.cc/VGF3-4SW6>].

149. Interview with 101601, Prosecutor, State Att’y Off. of Croat., in Zagreb, Croat. (Oct. 6, 2016).

150. Religions across the world encourage victims to forgive wrongdoers and abandon resentment and vengeance. Psychologists, sociologists, and medical experts have also

way. As can be seen in the following examples, transitional justice that is unresponsive to victims erodes social bonds and public value instead of repairing them.

[I]n 1995 the ICTY indicted Dusan Fustar, a guard shift commander at the Keraterm detention camp on the outskirts of Prijedor in northwest Bosnia, with crimes against humanity committed between 24 May and 30 August 1992. He pleaded not guilty to all charges. On 6 May 2006, his case was transferred to the State Court of BiH under Rule 11bis of the ICTY's Rules of Evidence and Procedure, and Fustar entered into a plea agreement with the Prosecutor. On 22 April 2008, he was sentenced to nine years' imprisonment for crimes against humanity. On 30 May 2008, the day on which Fustar's co-accused were sentenced, camp victims from Prijedor and Kozarac made a peaceful demonstration in front of the State Court to protest against Fustar's plea agreement and nine-year prison sentence. Holding banners with phrases such as "Judge [war criminals] instead of trading [with them]," they were angry that the Prosecutor, in the words of the president of the Association of Camp Survivors in Kozarac, "reached an agreement with the monster from Keraterm" and that they had not been sufficiently informed about the plea agreement.¹⁵¹

If transitional justice is unresponsive to victims, it makes no difference if it is delivered in The Hague or locally. The twenty guilty pleas at the ICTY had little impact in areas where crimes had been committed. The problem arises when those who plead guilty publicly state, after serving their prison term, that their guilty plea was just a tradeoff for a more lenient sentence. For example, the highest-ranking person who plead guilty in former Yugoslavia was Republika Srpska's President Biljana Plavsić. She plead guilty to one charge in exchange for dropping seven other charges from the indictment, including two for genocide.¹⁵² As a result, she only received an eleven-year prison sentence for the charge of crimes against humanity.¹⁵³ The troubling part is the fact that while serving her prison term in Sweden, she made several statements denying her guilt, claiming that she was unable to find witnesses to support her defense and that she did it to avoid the genocide charges.¹⁵⁴

But plea agreements can also lead to convictions for many criminals. This is what happened when Giuliani reached plea agreements with senior

found evidence that "forgiveness and restorative justice efforts help victims heal psychologically and physically." Minow, *supra* note 5, at 2; see also Alistair Spiers, *Forgiveness as a Secondary Prevention Strategy for Victims of Interpersonal Crime*, 12 AUSTRALASIAN PSYCHIATRY 261, 262 (2004); Charlotte vanOyen Witvliet et al., *Granting Forgiveness or Harboring Grudges: Implications for Emotion, Physiology, and Health*, 12 PSYCHOL. SCI. 117, 117 (2001).

151. Clark, *supra* note 121, at 435-36.

152. See, e.g., Prosecutor v. Krajisnik, Case No. IT-00-39 & 40-PT, Plea Agreement, ¶¶ 3, 9 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 30, 2002).

153. Prosecutor v. Plavsić, Case No. IT-00-39&40/1-S, Sentencing Judgement, ¶ 132 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 27, 2003).

154. See Daniel Uggelberg Goldberg, *Bosnian War Criminal: 'I Did Nothing Wrong'*, LOCAL (Jan. 26, 2009, 2:57 PM), <https://www.thelocal.se/20090126/17162> [https://perma.cc/E9WD-DJS3].

Wall Street figures after their subordinates turned on them.¹⁵⁵ Such justice cascades help uncover evidence, establish the truth, and provide satisfaction to victims. We learned this from Bosnian prosecutors who prosecuted cases where “one plea agreement led to another plea agreement which led to another mass grave.”¹⁵⁶

D. Bottom-Level Response: Shifting the Prevalence of Criminal Justice to Restorative Justice

In all jurisdictions bottom-level responses must address the greatest number of individual offenders. Impunity is the current reality for the overwhelming majority of bottom-level responses even in cases like Timor-Leste, which featured a truth and reconciliation commission with a large and effective “Community Reconciliation Process” that was responsive to indigenous justice traditions.¹⁵⁷ In transitional justice arrangements, bottom-level responses focus on processing cases with foot soldiers and low-ranking military officials and police. In Bosnia-Herzegovina, Croatia, and even in present-day Kosovo, however, immediate perpetrators of war crimes hardly faced any prosecutions. There were too many for the ICTY to handle, and national judiciaries did not show interest in prosecuting their own war veterans. A former Croatian prosecutor reported that the first case against a Croat was Mihajlo Hrastov who killed thirteen Serbian prisoners of war at the Korana bridge in 1991.¹⁵⁸ Hrastov was acquitted three times until his fourth retrial in which he was convicted. After almost twenty-four years of proceedings, Hrastov’s judgement became final in 2015. Another former Croatian prosecutor reported that he initiated an investigation against Croats in 1991 for the murder of the Zec family in Zagreb, but his successor did not continue these proceedings.¹⁵⁹ During our study, we learned that the Croatian authorities arrested and indicted Tomislav Merčep for these killings. Merčep was found guilty and the judgement became final in 2017.

Until the mid-2000s, the former Yugoslavia only prosecuted “enemies”—typically through in absentia trials—in a phenomenon that Günther Jakobs called “criminal law for the enemy.”¹⁶⁰ Nationalist narratives dominated public discourse with every nation perceiving itself as a war victim and its respective enemies as war criminals. In such settings, without international initiative and support, it was almost impossible to hold war crimes trials. Only after 2000—after the presidential eras of Tuđman, Izetbegović,

155. See, e.g., JAMES B. STEWART, *DEN OF THIEVES* 398 (1992).

156. Interview with 081641, Prosecutor, Prosecutor’s Off. of Bosn. & Herz., in Sarajevo, Bosn. & Herz. (Aug. 23, 2016).

157. See JOHN BRAITHWAITE ET AL., *supra* note 61, at 205.

158. Interview with 101601, *supra* note 149.

159. Interview with Ozren Zunec, *supra* note 71.

160. Günther Jakobs, *Kriminalisierung im Vorfeld einer Rechtsgutsverletzung*, 97 *ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT* 756 (1985).

and Milosević ended¹⁶¹—did these countries begin to cooperate with the ICTY and subsequently initiate investigations against members of their own ethnic groups. This means that, if we do not count the in absentia trials and a few show trials,¹⁶² almost all national war crimes trials began at least a decade after the crimes were committed. But for ICTY’s pressure “from above,” most of the currently resolved war crimes cases would have never been completed.

Another obstacle was the fact that all post-Yugoslav countries have laws that prevent extradition of their own nationals.¹⁶³ What results are cases in which, for example, a Bosnian Serb war criminal flees to Serbia, where he obtains citizenship, and then Serbia rejects Bosnian extradition requests and fails to prosecute. Another example would be a Croat who committed war crimes in Croatia, obtained dual citizenship as a son of Bosnian Croats, and then fled to Bosnia-Herzegovina. The EU induced most of the cross-border cooperation between the states of former Yugoslavia as a condition for EU accession.¹⁶⁴ While Bosnia-Herzegovina has demonstrated full cooperation, Serbia has always demonstrated minimal cooperation, and Croatia ceased most cooperation after joining the EU in 2013. Two prosecutors in Banja Luka told us they were awaiting Croatia’s response to their requests in over 100 cases but “nothing was happening.”¹⁶⁵ According to the media, Bosnia-Herzegovina has 900 pending indictments against Croatian war veterans,¹⁶⁶ but without cooperation from Croatian authorities, none will ever be brought to justice. Based on our analysis, one way to achieve cooperation with Croatia is to offer Croatian war veterans a restorative justice process that trades amnesties for truth, apologies, or small gestures of compensation (perhaps matched by the state and the EU). Additionally, EU pressure on Croatia would be helpful since Croatia still wants to enter the Schengen Area and the euro-zone.

In former Yugoslavia, by far the greatest number of cases were tried by national courts, with the Court of BiH having the most cases. In 2008, Bosnia-Herzegovina’s authorities reported 4,990 war crimes, with 9,879 identified war crimes suspects in 1,781 of those cases.¹⁶⁷ The estimations

161. See Carol J. Williams, *Bosnian President Resigns, Ending an Era in the Strife-Torn Balkans*, L.A. TIMES (Oct. 15, 2000, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2000-oct-15-mn-36915-story.html> [https://perma.cc/S5GP-38TB].

162. See Dragović-Soso & Gordy, *supra* note 22, at 198.

163. See *Laws on Extradition of Citizens*, LIBR. CONG. (July 9, 2019), <https://www.loc.gov/law/help/extradition-of-citizens/chart.php> [https://perma.cc/2CX9-2YR8].

164. See Florian Trauner, *EU Justice and Home Affairs Strategy in the Western Balkans: Conflicting Objectives in the Pre-Accession Strategy* 1, 7 (Ctr. Eur. Pol’y Stud., Working Paper No. 259, 2007).

165. Interview with Branko Mitrovic & Igor Cimesa, War Crimes Prosecutors, Dist. Pub. Prosecutor’s Off., in Banja Luka, Bosn. & Herz. (Aug. 30, 2016).

166. Vedran Pavlic, *Bosnia Has 900 Indictments Ready Against Croatian Veterans?*, TOTAL CROAT. NEWS (Sept. 15, 2016), <http://www.total-croatia-news.com/item/14063-bosnia-and-herzegovina-has-900-indictments-ready-against-croatian-veterans> [https://perma.cc/VWT6-YC7R].

167. Jared O. Bell, *The Bosnian War Crimes Justice Strategy a Decade Later*, at 2 (FICHL Pol’y Brief Ser. No. 92, 2018).

of the criminal justice administration at the time suggested that there were around 16,000 war criminals in Bosnia-Herzegovina.¹⁶⁸ Ten years later, more than 1,100 unresolved war crimes cases with more than 9,000 perpetrators remained, half of which were cases with identified perpetrators.¹⁶⁹ The statistics suggest that local courts mainly processed cases with just one or two defendants. At this pace, war crimes trials in Bosnia-Herzegovina will continue until 2030, with many cases being terminated if the defendant dies; therefore, in reality, only a few of those who fled to Serbia or Croatia will be prosecuted. The situation in Kosovo is even worse. EULEX officials told us they inherited a backlog of 1,192 war crimes cases from UNMIK. Overburdened, EULEX dismissed many of these cases and focused on only thirty priority cases. By December 2015, when we interviewed them, EULEX officials had completed about half those cases. These data show that most war crimes victims in former Yugoslavia will never experience any kind of transitional justice. In part, this is because criminal prosecution was chosen as the primary bottom-level and transitional justice response. Thus, the most likely case¹⁷⁰ for lower-level cases to receive attention was through criminal prosecution.

But the benefits derived from local criminal trials are also questionable. First, most trials were completed over a decade after the crimes occurred. More importantly, however, critics believe these tribunals lack the expertise to handle war crimes cases. For that reason, one of the judges in Sarajevo commented that she would abolish jurisdiction of the canton and municipal courts in war crimes trials.¹⁷¹ The lack of expertise may be exemplified by the fact that, in past cases, these courts ignored victim reparation requests and dismissively referred victims to civil lawsuits. In fact, judges were so reluctant to order reparations that they failed to do so even when the exact amount to be compensated was established in the case facts. For instance, a prosecutor at the Court of BiH¹⁷² reflected on one of his war crimes cases in which two people had been killed and 6,000 marks had been stolen. The surviving family members, the daughter and mother-in-law, said that no money could compensate the deaths. All they asked from the defendant was to return the 6,000 marks he took.¹⁷³ But after convicting the defendant, the court referred the victims to seek their compensation in civil proceedings instead of issuing the award themselves.¹⁷⁴ Importantly, however, although war crimes victims may not always value reparation as a just form of compensation, the cases we studied show that

168. *Id.*

169. See Dzana Brkanic, *Bosnia Hopes to Complete War Crimes Cases in 2023*, BALKAN TRANSITIONAL JUST. (Feb. 23, 2018), <http://balkaninsight.com/2018/02/23/bosnia-hopes-to-complete-war-crimes-cases-in-2023-02-23-2018> [https://perma.cc/6W8X-UU4C].

170. 7 Harry Eckstein, *Case Studies and Theory in Political Science*, in HANDBOOK OF POLITICAL SCIENCE 94 (Fred I. Greenstein & Nelson W. Polsby eds., 1975).

171. Interview with 081625, *supra* note 135.

172. Interview with Jasmin Mesic, Head, War Crimes Prosecution Off., in Bihac, Bosn. & Herz. (Aug. 26, 2019).

173. *Id.*

174. *Id.*

an overwhelming majority of these victims would in fact prefer to receive reparations.¹⁷⁵ Admittedly, sometimes the desired reparations are small, such as having an offender return a stolen watch because the victim's mother does not want to relive the experience of losing her son if she goes to the market and sees the killer wearing her son's watch. A justice system that cannot deliver to victims of terrible atrocity something as small as this will never be legitimate in its citizens' eyes.

One of the cases that sparked controversy in the Bosnian media was that of Amir Coralic who, together with two other soldiers, abducted two underage girls and then raped one of them.¹⁷⁶ After the war, Coralic fled to Switzerland. When he was reported to the Swiss authorities, he surrendered to Bosnia-Herzegovina, expressed remorse, and plead guilty. He received a one-year prison sentence but was allowed to "purchase freedom" by paying 86,500 marks.¹⁷⁷ What was not reported by the media was that one of the victims did not object to the lenient punishment but instead sought a compensation of 50,000 marks to repair her house. After the judgement, she immediately received the amount.¹⁷⁸ These examples illustrate how important it is to meet the victim's needs, instead of insisting on punitive responses at any cost, especially when these become unrealizable costs. Thus, two of the things that the bottom-level transitional justice response should prioritize are listening to victims and securing reparations that meet victims' needs.

Bottom-level transitional justice is an appropriate field for restorative justice because many war crimes are borderline cases. Examples include: (1) a soldier who mistakenly thinks a civilian is holding a gun and shoots him; (2) a soldier who hears gunshots coming from a civilian house and then fires a missile at it, but the gunshots were coming from elsewhere; or (3) a soldier who is ordered by his superiors to shoot seventy prisoners or face his own death. The last example is based on soldier Erdemović who was sentenced to ten years in prison by the ICTY,¹⁷⁹ with two appellate judges dissenting on the guilty verdict.¹⁸⁰

Nevertheless, one major problem of bottom-level transitional justice is lack of evidence for war crimes cases. For example, when there is only a fifty percent chance of proving the defendant's guilt, the prosecutor might

175. *Id.*

176. *See Amir Coralic*, TRIAL INT'L (Feb. 9, 2017), <https://trialinternational.org/latest-post/amir-coralic> [<https://perma.cc/VFJ5-D7MG>].

177. This amount is equivalent to approximately 100 average monthly wages (net) in Bosnia-Herzegovina at the time. Under Bosnian law, persons sentenced up to one year in prison can choose to pay a fine, amounting to 100 marks per day in prison, instead of going to prison. KRIVICNI ZAKON BOSNE I HERCEGOVINE [CRIMINAL CODE] art. 42 (Bosn. & Herz.).

178. Interview with Jasmin Mesic, *supra* note 172.

179. *Prosecutor v. Erdemović*, Case No. IT-96-22-T, Sentencing Judgement, ¶ 111 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 29, 1996).

180. *See generally* *Prosecutor v. Erdemović*, Case No. IT-96-22-T, Separate and Dissenting Opinion of Judge Cassese (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997); *Prosecutor v. Erdemović*, Case No. IT-96-22-T, Separate and Dissenting Opinion of Judge Stephen (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997).

be better off referring the case to a restorative justice conference, than risking an acquittal. This was the case for Miroslav Tadić,¹⁸¹ a retired school-teacher who was sentenced to five years in prison.¹⁸² The court convicted Tadić for deporting non-Serb civilians¹⁸³—a crime against humanity—despite conflicting evidence that Tadić was actually helping Bosnian Muslims in Samac at that time.¹⁸⁴ There are many more such cases which do not fit the justice versus impunity template of choice. Post-war transitional justice should be particularly open to alternative restorative justice approaches as the third path for these borderline cases.

Bottom-level alternative approaches to transitional justice have drawn a lot of attention among scholars in various disciplines during the past decade.¹⁸⁵ Deficiencies of these alternative approaches relate to the lack of pressure from higher responses toward lower responses, the selection of transitional justice goals that were overambitious and shattered expectations, and the poor prioritization of goals. Overly ambitious lists of transitional justice goals create disparities between expectation and achievement.¹⁸⁶ Moreover, when priorities are unclear, the response may be doomed to fail.¹⁸⁷ This is especially the case with bottom-level approaches because they address the greatest number of cases. If the bottom-level approach seeks to simultaneously accomplish multiple goals—to establish a historical record, to fight impunity, to reconcile, to compensate

181. See *Prosecutor v. Simić*, Case No. IT-95-9-T, Judgement, ¶ 1119 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 17, 2003) (sentencing Miroslav Tadić to eleven years of imprisonment for “persecutions based upon deportation and forcible transfer” constituting crime against humanity).

182. See Press Release, U.N. Int'l Residual Mechanism for Crim. Tribunals, Miroslav Tadić Granted Early Release (Nov. 4, 2004).

183. See *Prosecutor v. Simić*, Case No. IT-95-9-T, Judgement, ¶ 1119-22 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 17, 2003).

184. See *id.* ¶ 494.

185. See generally Patricia Lundy & Mark McGovern, *The Role of Community in Participatory Transitional Justice*, in *TRANSITIONAL JUSTICE FROM BELOW: GRASSROOTS ACTIVISM AND THE STRUGGLE FOR CHANGE* 99 (Kieran McEvoy & Lorna McGregor eds., 2008); Kieran McEvoy & Lorna McGregor, *Transitional Justice from Below: An Agenda for Research, Policy and Praxis*, in *TRANSITIONAL JUSTICE FROM BELOW: GRASSROOTS ACTIVISM AND THE STRUGGLE FOR CHANGE*, *supra* note 185, at 1; Stephan Parmentier & Monica Aciru, *The Whole Truth and Nothing but the Truth? On the Role of Truth Commissions in Facing the Past*, in *FACING THE PAST: AMENDING HISTORICAL INJUSTICES THROUGH INSTRUMENTS OF TRANSITIONAL JUSTICE* 225 (Peter Malcontent ed., 2016); Rosalind Shaw & Lars Waldorf, *Introduction: Localizing Transitional Justice*, in *LOCALIZING TRANSITIONAL JUSTICE: INTERVENTIONS AND PRIORITIES AFTER MASS VIOLENCE* 3 (Rosalind Shaw et al. eds., 2010); Harvey M. Weinstein, *Victims, Transitional Justice and Social Reconstruction: Who Is Setting the Agenda?*, in *JUSTICE FOR VICTIMS: PERSPECTIVES ON RIGHTS, TRANSITION AND RECONCILIATION* 161 (Inge Vanfraechem et al. eds., 2014); Tine Destrooper & Stephan Parmentier, *Gender-Aware and Place-Based Transitional Justice in Guatemala*, 27 *SOC. & LEGAL STUD.* 323 (2018); Menkel-Meadow, *supra* note 17; Simon Robins & Erik Wilson, *Participatory Methodologies with Victims: An Emancipatory Approach to Transitional Justice Research*, 30 *CAN. J.L. & SOC'Y* 219 (2015); Simon Robins, *Toward Victim-Centered Transitional Justice: Nepal and Timor-Leste*, *MIDDLE E. INST.* (Dec. 4, 2013), <http://www.mei.edu/publications/toward-victim-centered-transitional-justice-nepal-and-timor-leste> [<https://perma.cc/D84C-77CG>].

186. See NICKSON & NEIKIRK, *supra* note 35, at 76.

187. See Damaska, *supra* note 35, at 365.

the victims, to achieve political objectives—then, the approach could easily fail in all respects. This does not mean giving up on transitional justice as a whole; rather, it means prioritizing and maximizing transitional justice impact at the bottom in order to trigger an upward cascade of transitional justice.¹⁸⁸

1. Bottom-Level Reconciliation and Truth Attempts

Recent studies identify seventy truth commission initiatives that have had varying success.¹⁸⁹ As truth commissions continue to emerge, determining their position in the transitional justice framework is vital for guiding the peace process tactically through its phases. According to research based on Guatemala, Sierra Leone, DRC, Kenya, and Nepal, such commissions can face the following challenges:

In some cases, a desire for simultaneity and immediacy has led to the conflation of all expectations and many tasks into one single institution: a truth commission, powerful on paper, that will presumably establish the facts and determine prosecutorial policy and reparations. Such an approach may result in an overextended mandate for a commission, excessively complex legal instruments, or an unrealistic demand on capacities and resources.¹⁹⁰

A powerful truth commission that allowed amnesties was never established in the former Yugoslavia. Various local initiatives have demonstrated that reconciliation at the bottom-level should not be limited to perpetrators and their victims.¹⁹¹ They can include actors in the conflict who did not commit any crime but witnessed killings that left them traumatized. We conducted interviews at the Centre for Nonviolent Action in Belgrade¹⁹² that reconciles war veterans. Some of the veterans who participated told employees that “the occasion of their reconciliation meeting with the veterans from the other side was the first time they had slept without taking their medication.”¹⁹³ They also organized reconciliations with victims’ associations. However, these NGOs have been marginalized due to insufficient support and the criticism of war veterans’ associations who remained stuck in the war narrative and received enormous governmental support for keeping it that way. For example, a handicapped Serbian veteran who went to Srebrenica for the commemoration of the war acknowledged in his speech the genocide that had happened there and the

188. As two scholars observed, “the ICC will lose if it is primarily perceived as a court, whereas it will win if it is perceived primarily as a lynchpin in a new global system of justice.” Mark Freeman & Max Pensky, *The Amnesty Controversy in International Law*, in AMNESTY IN THE AGE OF HUMAN RIGHTS ACCOUNTABILITY: COMPARATIVE AND INTERNATIONAL PERSPECTIVES 42, 64 (Francesca Lessa & Leigh A. Payne eds., 2012).

189. See Minow, *supra* note 5, at 6.

190. EDUARDO GONZÁLEZ ET AL., CHALLENGING THE CONVENTIONAL: CAN TRUTH COMMISSIONS STRENGTHEN PEACE PROCESSES? 83, 90–91 (2014).

191. See U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 50, U.N. Doc. S/2004/616 (Aug. 23, 2004).

192. For further information, see CTR. NONVIOLENT ACTION, <https://nenasilje.org/en> [<https://perma.cc/X3KY-C639>] (last visited Aug. 20, 2019).

193. Interview with Katarina Milicevic, Peace Activist, Ctr. for Nonviolent Action, in Belgrade, Serb. (July 1, 2015).

subsequent trouble he faced from war veterans' associations upon his return to Serbia.¹⁹⁴

But most bottom-level truth and reconciliation attempts in former Yugoslavia focused on establishing truth and reconciliation commissions (TRCs), or just truth commissions, that were not very bottom-level at all. Around the world, truth commissions were almost all established as national-level institutions that barely touched local peripheries. The first of these commissions for former Yugoslavia was in 1997, when parties to the Dayton Peace Agreement established an international commission of inquiry composed of regional government representatives and international experts. The U.S. Institute for Peace was deeply involved in establishing this commission in Bosnia-Herzegovina but wanted to preclude the TRC from offering amnesties.¹⁹⁵ The Bosnian presidency, however, wanted full control of the TRC's work. In the end, the ICTY opposed the TRC for fear that the TRC's work would conflict with its own.¹⁹⁶ Later, in 2000, more than a hundred NGOs in Bosnia-Herzegovina signed a petition to establish a TRC, but the ICTY again blocked the initiative.¹⁹⁷ The ICTY's reasons included fear of overlapping investigative functions, discrediting ICTY's findings,¹⁹⁸ and the perception that the U.S. Institute of Peace imposed the TRC on Bosnia-Herzegovina.¹⁹⁹

The only commission that was ultimately created was the Srebrenica Commission established by the Parliament of Republika Srpska (RS) in 2003 to investigate events in and around Srebrenica between July 10 and July 19, 1995.²⁰⁰ The RS did not establish the Srebrenica Commission voluntarily, but because it had to implement a decision of the Bosnia-Herzegovina Human Rights Chamber following numerous requests for information about missing persons by the victims' families.²⁰¹ Nevertheless, RS institutions obstructed the Commission's work until Bosnia-Herzegovina's High Representative Paddy Ashdown narrowed its mandate to that of listing the locations of mass graves and missing persons.²⁰² Still, an ICTY prosecutor always attended the Commission's meetings.²⁰³

194. *Id.*

195. See Jasna Dragović-Soso, *History of a Failure: Attempts to Create a National Truth and Reconciliation Commission in Bosnia and Herzegovina, 1997-2006*, 10 INT'L J. TRANSITIONAL JUST. 292, 296-300 (2016).

196. See *id.* at 302.

197. See Corene Rathgeber, *Truth and Reconciliation in Bosnia and Herzegovina 27-28* (unpublished manuscript) (on file at <https://www.angelfire.com/bc2/kip/english/files/MAPAPER5.PDF> [<https://perma.cc/8UDU-PRSHJ>]).

198. Dragović-Soso & Gordy, *supra* note 22, at 202 (describing the ICTY's fear that "the TRC could undermine" its decisions on issues such as "whether 'genocide' had been committed").

199. See Rathgeber, *supra* note 197, at 27-28.

200. Iavor Rangelov, *EU Conditionality and Transitional Justice in the Former Yugoslavia*, 2 CROAT. Y.B. EUR. L. & POL'Y 365, 370 (2006).

201. See *id.*

202. See *id.*

203. Interview with Zeljko Vujadinović, Historian, Banja Luka Fac. of Phil., in Banja Luka, Bosn. & Herz. (Aug. 29, 2016).

In 2004, the Commission provided a report with the location of thirty-two mass graves and information about more than 1,000 missing persons. The RS Parliament adopted the Commission's report, acknowledging the gravity of crimes committed in Srebrenica in July 1995, and made a formal apology to the victims' families.²⁰⁴ The RS President Dragan Cavić also appeared on national television to acknowledge the massacre in Srebrenica and apologize to the victims. The weight of public opinion, however, was that the report and apologies were insincere and took place only because "Paddy Ashdown wielded his big stick."²⁰⁵ The High Representative's "big stick" was a last resort to pressure RS politicians—who had failed to acknowledge the worst massacre in Europe since World War II—to apologize and provide information to the victims' families. Otherwise, the mass graves of the people killed in Srebrenica would have remained hidden for many more years.

After that, establishing a restorative commission needed another big stick: the threat of criminal prosecution. But that stick was wielded in the opposite direction: not only did the ICTY fail to lobby for a Bosnian TRC, it actually blocked it.²⁰⁶ There are three main reasons for this failure. First, the Bosnian TRC's primary goal was to establish truth, but that was also the ICTY's initial priority and many did not want to have "two truths." Therefore, the ICTY argued that the Bosnian TRC should prioritize reparations and reconciliation.²⁰⁷ Second, the Bosnian TRC started as a separate transitional justice instrument, as opposed to being a complementary instrument to the ICTY or within the U.N.²⁰⁸ This meant that the ICTY would not have been able to challenge the Bosnian TRC; but, at the same time, the Bosnian TRC would enjoy greater legitimacy than if it was just a U.S. initiative.

Importantly, this was not the case with the Srebrenica TRC. We observed that although the Srebrenica TRC faced many challenges, it managed to fulfill its main task for two reasons: (1) it was a bottom-up initiative started by forty-nine families of Bosniaks whose loved ones were missing;²⁰⁹ (2) and it was supported by those who carried big sticks (i.e., the High Representative and the ICTY).²¹⁰ President Vojislav Kostunica established the commission in 2001 to investigate the social, inter-ethnic, and political conflicts that led to the war.²¹¹ However, leading experts in the

204. See LOUIS AUCOIN & EILEEN BABBITT, *TRANSITIONAL JUSTICE: ASSESSMENT SURVEY OF CONDITIONS IN THE FORMER YUGOSLAVIA* 154 (2006).

205. Dragović-Soso & Gordy, *supra* note 22, at 204–05 (quoting Mirsad Tokača).

206. See Dragović-Soso, *supra* note 195, at 302.

207. See *id.* at 302–03.

208. See *id.* at 300.

209. Interview with Zeljko Vujadinović, *supra* note 203.

210. See *Srebrenica Commission Report to be Assessed by Judges Before Public Comments*, OFF. HIGH REPRESENTATIVE (Oct. 18, 2004), www.ohr.int/srebrenica-commission-report-to-be-assessed-by-judges-before-public-comments/ [<https://perma.cc/UY89-NGVH>].

211. See Nema Milaninia, *Appeasing the International Conscience or Providing Post-Conflict Justice: Expanding the Khmer Rouge Tribunal's Restorative Role* 23–24 (Bepress Legal Series, Working Paper No. 1274, 2006).

Srebrenica TRC resigned after the first meeting because of its one-sided political mandate. As one of Serbia's legal counsels in The Hague told us, the Srebrenica TRC "was an attempt to avoid The Hague tribunal."²¹² Therefore, it was clear that the commission would not last long, and it ceased its activities in 2003.

The political constellation surrounding these initiatives discouraged bottom-up networked governance in transitional justice processes. NGOs expected that governments would ultimately agree on establishing a transitional justice commission, but that never happened. Once that was clear, in 2006, three NGOs from Bosnia-Herzegovina, Croatia, and Serbia initiated RECOM, an acronym that stands for "the Regional Commission Tasked with Establishing the Facts about All Victims of War Crimes and Other Serious Human Rights Violations Committed on the Territory of the Former Yugoslavia from 1 January 1991 to 31 December 2001."²¹³ It is essentially a citizen-run truth commission initiative seeking voluntary support from former Yugoslavian states to sign an international agreement formally establishing RECOM.²¹⁴ But although the RECOM initiative enjoys considerable support from citizens (555,000 signed the petition for RECOM), and from civil society (the Coalition for RECOM has brought together 2,050 NGOs),²¹⁵ it lacks a "big stick" to pressure governments into joining.

2. *A Reparation and Reconciliation Commission with International Support*

A standard transitional justice narrative provides that ICC's complementarity should act as a catalyst for comprehensive domestic penal responses.²¹⁶ The results of our study suggest the need for an international criminal justice policy in which complementarity would be used to boost a comprehensive, non-criminal transitional justice response.²¹⁷ The enormous backlog of criminal cases in the Court of BiH indicate a phenomenon known as "frozen justice," which results from a "failed transitional justice strategy."²¹⁸ By contrast, the forum that processed by far the most genocide suspects in Rwanda were the Gacaca courts where 12,000

212. Interview with 061507, Adviser, Minister of Foreign Affs. of Serb., in Belgrade, Serb. (June 23, 2015).

213. *What Is the Coalition for RECOM?*, RECOM, <http://www.recom.link/about-recom/what-is-the-coalition-for-recom> [<https://perma.cc/S9DY-8D3D>] (last visited Dec. 27, 2020).

214. *See id.*

215. *Id.*

216. *See* Doherty & McCormack, *supra* note 4, at 149; *see also* 7 Markus Benzing, *The Complementarity Regime of the International Criminal Court: International Criminal Justice Between State Sovereignty and the Fight Against Impunity*, in MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 591, 595 (2003); John T. Holmes, *The Principle of Complementarity*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE—ISSUES, NEGOTIATIONS, RESULTS 41, 74 (Roy S. Lee ed., 1999).

217. As noted earlier, such possibility exists according to Minow, *supra* note 5, at 44.

218. *See generally* JARED O. BELL, *FROZEN JUSTICE: LESSONS FROM BOSNIA AND HERZEGOVINA'S FAILED TRANSITIONAL JUSTICE STRATEGY* (2018).

community-level jurisdictions handled over 1.2 million cases in a period of eleven years.²¹⁹ These processes had many flaws including corruption, false accusations,²²⁰ and none or minimal consequences for serious offenders,²²¹ but they also had important restorative features such as informal community hearings and orders of reparation.²²² Thus, overall, these processes received mixed reviews by commentators.²²³ Importantly, Gacaca courts were not planned by the ICTR's framers.

Would a similar scheme be this feasible within the ICC's transitional justice framework? The ICC sets restorative justice as one of its main features by allowing victims to participate, awarding reparations, and providing support, which was not the case with previous international tribunals such as the ICTY. Prosecutions arising from conflict in Colombia showed a new face of the ICC's complementarity "that includes domestic amnesties, reparations, and negotiated peace."²²⁴ However, just as with the subsequent creation of the Trust for Victims to meet victims' needs, the ICC needs an institutionalized restorative justice approach for its jurisdictional complementarity.²²⁵ We conclude that an appropriate, bottom-level transitional justice response would first need a special International Reparations and Reconciliation Support Unit (IRRSU). To ensure the sustainability of its work, the IRRSU might be best established by the U.N., or at least with support from the U.N. and a regional organization. The IRRSU would promote restorative justice and peacebuilding. Once deployed, it would first

219. Minow, *supra* note 5, at 32.

220. *Justice Compromised: The Legacy of Rwanda's Community-Based Gacaca Courts*, HUM. RTS. WATCH (May 31, 2011), <https://www.hrw.org/report/2011/05/31/justice-compromised/legacy-rwandas-community-based-gacaca-courts> [<https://perma.cc/4B7D-EAQT>].

221. Minow, *supra* note 5, at 33.

222. See, e.g., Phil Clark, *The Rules (and Politics) of Engagement: The Gacaca Courts and Post-Genocide Justice, Healing and Reconciliation in Rwanda*, in *AFTER GENOCIDE: TRANSITIONAL JUSTICE, POST-CONFLICT RECONSTRUCTION AND RECONCILIATION IN RWANDA AND BEYOND* 315 (Phil Clark & Zachary D. Kaufman eds., 2008) (explaining that Gacaca courts sometimes sentenced offenders to community service, such as working on building public housing for survivors).

223. See Minow, *supra* note 5, at 33; Jean Baptiste Kayigamba, *Rwanda's Gacaca Courts: A Mixed Legacy*, NEW INTERNATIONALIST (June 15, 2012), <https://newint.org/features/web-exclusive/2012/06/15/gacaca-courts-legacy> [<https://perma.cc/MHK6-2BUB>]; Laura Seay, *Rwanda's Gacaca Courts Are Hailed as a Post-Genocide Success. The Reality Is More Complicated*, WASH. POST (June 2, 2017, 7:00 AM), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/06/02/59162/?noredirect=on> [<https://perma.cc/6VQN-ZN86>].

224. Minow, *supra* note 5, at 40.

225. A number of scholars agree that the ICC should allow the State to pursue alternative justice mechanisms in order to enable transition to peace and democracy. See 7 Anja Seibert-Fohr, *The Relevance of the Rome Statute of the International Criminal Court for Amnesties and Truth Commissions*, in *MAX PLANCK YEARBOOK OF UNITED NATIONS LAW*, *supra* note 216, at 553, 571; Diba Majzub, *Peace or Justice? Amnesties and the International Criminal Court*, 3 MELB. J. INT'L L. 247, 251-52 (2002); Minow, *supra* note 5, at 40; Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 14 EUR. J. INT'L L. 481, 483, 495 (2003); Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT'L L.J. 507, 512 (1999).

discover if there were national restorative justice responses rooted in local culture, such as the Kanun that was used to reconcile blood feuds in Kosovo.²²⁶ If these do not exist, then it would seek local restorative traditions that are working to the general satisfaction of citizens and attempt to adapt these traditions to local, post-conflict reconciliation as in Timor-Leste and many other societies.²²⁷

As with the ITJU, while the war is still ongoing, the IRRSU could start restorative justice processes in neighboring countries where most refugees are located. The IRRSU could cooperate with the UNHCR to bring refugees from different sides of the conflict together and assist them in reconciliation conferences when they feel it would be beneficial. The initial purpose of the IRRSU in wartime would be to encourage and enable refugees from different sides to engage in reconciliation processes. This might trickle a cascade of reconciliation as reconciled refugees communicate through social networks with members of their group who are located in other conflict zones. At the same time, the experience obtained throughout this period would lay a foundation for subsequent, post-conflict restorative justice. IRRSU workers would, therefore, be able to better assure refugees and IDPs that they will return safely to their homes and offer them practical support in the struggle to restore their homes and communities.

Once peace is established, the IRRSU would move beyond refugee camp work to the post-conflict zone (together with peacekeepers and the ITJU staff) and establish a local reparation and reconciliation commission (RRC). Unlike the ITJU, members of the RRC would normally consist of respected local people from different parties to the conflict, with full financial and administrative support from the IRRSU. It is important that “each society . . . take[s] and exercise[s]” the major transitional justice response itself,²²⁸ especially because domestic control and domestic design adjustments (e.g., adapting traditional justice procedures) enable cultural understandings that are meaningful for the local society.²²⁹

The proposed conception of restorative justice is a locally attuned process where stakeholders in war-related injustice have an opportunity to meet with actors who accept some responsibility for those injustices. Both, the responsible military actor and the survivors attend the process alongside supporters who provide them with a community of care to help them through the ordeal. The process aims to empower survivors to share their stories with the expectation that responsible actors will listen and help. The hope is that apologies will often occur together with some gesture of compensation or community work. These responses could be further supplemented by some form of state reparation, depending on the RRC’s budget. The RRC and war victims’ representatives would have ideally discussed these state reparation principles earlier in the deliberative process and agreed on how to best distribute the reparations budget.

226. See Marsavelski et al., *supra* note 46, at 221.

227. See BRAITHWAITE ET AL., *supra* note 61, at 175.

228. Minow, *supra* note 5, at 38.

229. *Id.*

The IRRSU would first train RRC members to work on large- and small-scale restorative justice conferences. And international, restorative justice NGOs would offer restorative justice as well as human rights and gender equality trainings for transitional justice implementation. Trained RRC officials would then train the public, including children from both sides of the conflict, on how to reintegrate in conflict zones.

Even where restorative justice is rejected in favor of prosecution for all alleged war criminals, there remains a need for restorative justice in any holistic and integrated transitional justice strategy. For example, virtually all ISIS fighters in Iraq died, were imprisoned, or fled. But their families have also been banished by their communities, preventing them from returning home. Children of ISIS fighters, who were taught mathematics by calculating how many would be killed with certain kinds of explosive devices, are now banished to camps where they do not receive any education. At the time of our last fieldwork in Iraq, in December 2018, there were said to be ninety-six such camps, some with thousands of families. The fear is that these children will become the next combatants if they are not reintegrated into the loving bonds of their communities and schools. During our interviews, tribal leaders told us they are afraid to vouch for the return of these families lest they set up a new ISIS cell. The tribe could, under tribal law, banish or even kill the leader who vouched for the reintegration of these children as well as the leader's family. Consensus decision-making in a restorative circle that includes victim representatives; tribal, local, provincial, and national government representatives; and local, security sector leaders who together secure undertakings from banished families, would be the better way to make decisions on how to welcome back these families one at a time. In that way, no single tribal leader would have to bear the burden of this decision alone.

It's clear that "[o]ffenders in transitional contexts often have a variety of needs," such as "skills gaps, psychological and emotional trauma, and a lack of a support network."²³⁰ The transitional communities in which these offenders need to be reintegrated often have strong social bonds and a relatively weak state, "which can create opportunities for sustained criminal activity."²³¹ As Kerry Clamp and Jonathan Doak suggest, it is essential that "reintegration [be] a priority in the early transitional period so that these individuals become law-abiding, productive citizens as quickly as possible."²³² Under our RRC proposal, those who committed war crimes would be motivated to participate in restorative justice in exchange for amnesties and perhaps war veteran status (to qualify for veteran benefits) if they admit the crimes they committed, disclose information about the war crimes of others, and participate in victim reparations. Failure to participate in RRC conferences and disclose war crimes would normally mean a

230. Kerry Clamp & Jonathan Doak, *More than Words: Restorative Justice Concepts in Transitional Justice Settings*, 12 INT'L CRIM. L. REV. 339, 356 (2012) (citing CHANTAL MELONI, *COMMAND RESPONSIBILITY IN INTERNATIONAL CRIMINAL LAW* (2010)).

231. *Id.*

232. *Id.*

criminal prosecution and permanent loss of war veteran status upon conviction. In South Africa, amnesties could be granted only to individuals who admitted guilt and offered full disclosure of involvement in human rights violations between 1960 and 1994.²³³

Also, under the Colombian Peace Agreement,²³⁴ a “restorative sanctions” path away from prison is only available to culpable military and insurgency command offenders.²³⁵ But Colombia has additional requirements for command offenders avoiding prison, such as movement restrictions that aim to prevent revictimization of victim communities. Arguably, when combined with the fact that restorative sanctions are imposed by courts, can run from five to eight years, and may include certain kinds of demanding restorative work²³⁶ (such as minefield clearance), these restrictions make restorative sanctions penal as a matter of ICC’s complementarity. Lower-level defendants receive amnesties for truth-telling and (possibly) reparations,²³⁷ leading to the release of thousands of former, insurgent foot soldiers from prison²³⁸ and building evidence against criminal commanders. The Colombian Peace Agreement is also innovative in terms of requiring land reform to benefit those whose land was stolen by generations of landlords²³⁹—a root grievance of the war. The implementation, however, is disappointing so far because it lacks systematic, international support, which the proposed two-level hybrids (IRRSU and ITJU) would provide by bridging the gap between the ICC and the national responses.

Our ideal would be for the RRC to be an institution of the *longue durée*. It would be available to support rape victims who did not want to tell the story of their victimization after the war, but who wish to do so decades later. The RRC would also support programs for schoolchildren. For example, a program were schoolchildren are encouraged to share the struggles of their elders during the war, such as grandparents who may have been unwilling to face restorative justice immediately after the war. This would facilitate family healing and ultimately, feed into to the collective memory of nations. Eventually, the RRC could become a museum for the nation and for tourists, where schoolchildren could learn about what happened at their town, and university professors could research the RRC’s war archives and artifacts, endlessly renovating interpretations of truth

233. See Promotion of National Unity and Reconciliation Act 34 of 1995 §§ 18, 20 21 (S. Afr.); see also 6 AMNESTY COMM., TRUTH & RECONCILIATION COMM’N OF S. AFR., TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT 9-10 (2003).

234. See Final Agreement, *supra* note 49, at 182-86.

235. *Id.* at 175.

236. *Id.*

237. See *id.* at 20-26.

238. See Nicholas Casey, *Colombia’s Peace Deal Promised a New Era. So Why Are These Rebels Rearming?*, N.Y. TIMES (May 17, 2019), <https://www.nytimes.com/2019/05/17/world/americas/colombia-farc-peace-deal.html> [https://perma.cc/EA2H-9HLF].

239. See Ben M. McKay, *Democratising Land Control: Towards Rights, Reform and Restitution in Post-Conflict Colombia*, 39 CAN. J. DEV. STUD. 163, 171 (2018).

from the nation's history.²⁴⁰

III. Cascades of Other Transitional Justice Responses

A. International Court of Justice: A Failed Top Response

The International Court of Justice (ICJ) lacks compulsory jurisdiction, which puts substantial limits on its potency to play a decisive role in transitional justice processes.²⁴¹ The 1948 Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention),²⁴² which an overwhelming majority of states ratified,²⁴³ established the ICJ's jurisdiction to rule on the responsibility of states for the "crime of all crimes," as genocide is typically described.²⁴⁴ The ICJ has already stated that the prohibition of genocide is a peremptory norm (*ius cogens*) of international law and, as such, cannot be derogated from.²⁴⁵

Former Yugoslavia attempted to make the ICJ a top authority alongside the ICTY. The country brought several cases before the ICJ, but none were successful. First, Bosnia-Herzegovina sued Serbia in 1993 on the grounds of violations of the Genocide Convention.²⁴⁶ After fourteen years of proceedings, throughout which political leaders on both sides predicted victory in the case, the ICJ found that Serbia did not commit genocide because it did not have effective control over the Bosnian Serb army that conducted the genocide. Nevertheless, the ICJ determined that Serbia was liable for failing to prevent the genocide in Srebrenica and punish the perpetrators.²⁴⁷ The judgement was reasoned, both factually and legally, but it did not fulfill anyone's transitional justice hopes or expectations. In February 2017, Bosnian politicians again abused the proceedings before the ICJ to stoke inter-ethnic tensions by filing an invalid application for revision of the judgement, which was rejected by the court the following month.²⁴⁸

240. See, e.g., Ray Nickson & John Braithwaite, *Deeper, Broader, Longer Transitional Justice*, 11 EUR. J. CRIMINOLOGY 445, 454-55 (2014).

241. See *Basis of the Court's Jurisdiction*, INT'L CT. JUST., <https://www.icj-cij.org/en/basis-of-> [<https://perma.cc/774L-7JKY>] (last visited May 19, 2020).

242. See generally Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

243. See *id.* at 278.

244. See generally, e.g., NICOLE HAHN RAFTER, *THE CRIME OF ALL CRIMES: TOWARD A CRIMINOLOGY OF GENOCIDE* (2016).

245. See Int'l Law Comm'n, Rep. on the Work of the Seventy-First Session, U.N. Doc. A/74/10, at 147 (2019).

246. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugoslavia (Serb. & Mont.)), Application Instituting Proceedings, 1993 I.C.J. 1 (Mar. 20).

247. See Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugoslavia (Serb. & Montenegro)), Judgment, 2007 I.C.J. 43, ¶ 471 (Feb. 26).

248. See Press Release, H.E.J. Ronny Abraham, President, Int'l Ct. of Just., Document Entitled "Application for Revision of the Judgment of 26 February 2007 in the Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia)" (Mar. 9, 2017).

In 1999, Serbia, which was known at that time as the Federal Republic of Yugoslavia (FRY), instituted proceedings against the U.S. “for violation of the obligation not to use force”²⁴⁹ in the U.S.-led NATO bombing of Serbia, but the ICJ dismissed the claim for lack of jurisdiction because the U.S. did not consent to the proceedings.²⁵⁰ Serbia also brought separate complaints against eight other NATO member states, and they were likewise dismissed for lack of jurisdiction because, according to the ICJ, FRY was not a U.N. member state,²⁵¹ although nobody disputed its U.N. membership before that case. But what truly sparked controversy was the ICJ’s direct opposite ruling in the Bosnian and Croatian genocide case. There, the ICJ ruled that FRY was a U.N. member state since before 2000.²⁵² This blatantly unequal treatment evidenced, as Serbia had argued, that international justice is fundamentally biased.

The *Croatia v. Serbia* genocide case, also filed in 1999, was the longest proceeding before the ICJ.²⁵³ Serbia responded with a countersuit against Croatia, also alleging violations of the Genocide Convention.²⁵⁴ The proceedings plodded on for fifteen years even though no individual had been found individually liable for the alleged “genocide in Croatia”—be it over Croats or over Serbs—by any court. Perhaps the reason for these long proceedings is that the ICJ wanted to offer an opportunity for political leaders to resolve the dispute themselves and withdraw their lawsuits, but that clearly did not work. Croatian political leaders gave false hopes to victims’ families that Serbia would be held accountable for atrocities in places like Vukovar.²⁵⁵ Serbian victims were likewise fired up with false hopes that Croatia will be accountable for killings committed in interventions such as Operation Storm.²⁵⁶ As expected, the ICJ ruled that no genocide was committed by either side.²⁵⁷

249. *Legality of the Use of Force (Yugoslavia v. U.S.)*, Application Instituting Proceedings, 1999 I.C.J. 1, 3 (Apr. 29).

250. *Case Concerning Legality of the Use of Force (Yugoslavia v. U.S.)*, Order, 1999 I.C.J. 916, ¶ 22 (June 2).

251. *See Case Concerning Legality of the Use of Force (Serb. & Montenegro v. Belg.)*, Judgment, 2004 I.C.J. 279, ¶ 26 (Dec. 15).

252. *See Press Release, Int’l Ct. Just., Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Feb. 26, 2007).

253. *See generally Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia): Overview of the Case*, INT’L CT. JUST., <https://www.icj-cij.org/en/case/118> [<https://perma.cc/B8PV-NMZL>] (last visited May 19, 2020).

254. *See Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.)*, Counter-Memorial Submitted by the Republic of Serbia: Volume I, 2009 I.C.J. 1 (Dec.).

255. *See, e.g.,* Kolinda Grabar-Kitarović, President of Croat., Statement by the President Kolinda Grabar-Kitarović at the SC Debate on Reports of the ICTY and Mechanism for International Criminal Tribunals (Dec. 6, 2017).

256. *See* Marko Milanović, *Of Course*, PESCANIK (Feb. 6, 2015), <https://pescanik.net/of-course/> [<https://perma.cc/A788-9JEK>].

257. *See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.)*, Judgment, 2015 I.C.J. 3, ¶ 524 (Feb. 3).

Apart from victims' disappointments with the ICJ's decisions, what is more important is that national interests in these proceedings directly collided with state cooperation in the ICTY. States were unwilling to disclose documents needed for ICTY investigations because their authorities knew that the opposite side would use those documents in proceedings before the ICJ.²⁵⁸ State responsibility for international crimes is a controversial form of collective responsibility, and these cases made any form of collective responsibility even more fraught in international law.

Unfortunately, the ICJ's counterproductive transitional justice role in former Yugoslavia is not yet finished. More victims might be disappointed, and more war narratives can be expected, once Kosovo is admitted into the U.N. One of the ministers in the Kosovo government told us that Kosovo is preparing a genocide case against Serbia before the ICJ.²⁵⁹ If that happens, it is likely that Serbia would also countersuit Kosovo for genocide. For the sake of reconciliation between these countries, the Serbia-Kosovo independence deal that is currently being negotiated between presidents Aleksandar Vučić and Hashim Thaçi²⁶⁰ should include a clause in which they both acknowledge that crimes against humanity were committed by both sides during the Kosovo war, that no progress can be made by interpreting these crimes as genocide, and that they agree they will not initiate proceedings before the ICJ alleging either one committed genocide. Such a clause should have been a part of the peace agreements between Bosnia-Herzegovina and Croatia.

These negative experiences suggest that the ICJ is not the right forum to advance transitional justice. Perhaps the imposition of provisional measures is the only ICJ instrument that might be useful in this context, although it also failed in former Yugoslavia. Following the claim filed by Bosnia-Herzegovina, the ICJ issued various provisional protective measures.²⁶¹ The FRY was explicitly ordered "to do everything in its power to prevent the crimes of genocide and to make sure that such crimes are not committed by military or paramilitary formations operating under its control or with its support."²⁶² Although the first provisional measure was ordered several days before the Vance-Owen Peace Plan was signed, there is

258. See *id.* ¶ 13.

259. Interview with 121505, Minister for Dialogue, Gov't of the Republic of Kos., in Prishtina, Kos. (Dec. 11, 2015).

260. See Tatiana Jancarikova, *Kosovo President Says Deal on Ties with Serbia Possible This Year*, REUTERS (June 7, 2019, 10:23 AM), <https://www.reuters.com/article/us-serbia-kosovo/kosovo-president-says-deal-on-ties-with-serbia-possible-this-year-idUSKCNIT81NO> [<https://perma.cc/KNF3-9QNX>].

261. See *Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro): Provisional Measures*, INT'L CT. JUST., <https://www.icj-cij.org/en/case/91/provisional-measures> [<https://perma.cc/A4AZ-D3BQ>] (last visited Dec. 27, 2020).

262. Henry F. Carey, *International Law and Military Personnel*, in *MODERN GENOCIDE: ANALYZING THE CONTROVERSIES AND ISSUES* 340, 341 (Paul R. Bartrop ed., 2018) (citations omitted).

no evidence that it impacted the negotiation process.²⁶³ But at that time, the ICTY did not yet exist²⁶⁴ and it is more than possible that contemporary political leaders would be more cooperative in peace negotiations if they were threatened with prosecution by the ICC after the matter is brought to its attention by the ICJ. Orders could also be crafted with much more specificity and responsiveness to unfolding events in order to better protect civilians, as opposed to the generalized order of “do everything in [your] power.”²⁶⁵ In principle, this ICJ initiative is the seed of a preventive idea with promise, comparable to the promise of ICTY Prosecutor Justice Arbour’s warning letters in Bosnia.

There are proposals to extend ICJ’s jurisdiction, for example, over the crimes committed by U.N. peacekeeping missions,²⁶⁶ but such extension is not likely in the near future. Thus, the ICJ will continue to lack transitional justice potency unless something substantially changes in its jurisdictional provisions. Until then, it will remain a small transitional justice player in a pool of high expectations.

B. Universal Jurisdiction as a Backup Tool

Universal jurisdiction can be used as a tool to ensure prosecutions when regular transitional justice mechanisms face obstacles in fulfilling their task (e.g., the war is still ongoing, the war criminals have fled abroad, etc.).²⁶⁷ The biggest advantage is that it is essentially an internationalized national response, similar to the ITJU, because the prosecutors and judges come from one country, while the defendants and victims come from another (or from many other countries).²⁶⁸ The application of universal jurisdiction, however, is often associated with unsuccessful and controversial cases brought in absentia against officials with legal immunity such as Spain’s suit against Chilean dictator Augusto Pinochet, Belgium’s suit against Congolese foreign minister Abdoulaye Yerodia Ndombasi, and Belgium’s suit (on behalf of Palestinian victims) against Israeli Prime Minister Arieli Sharon.²⁶⁹ These cases were problematic because of in absentia indictments and arrest warrants that were issued despite legal immunity, not because of universal jurisdiction itself. The universal jurisdiction cases of war crimes in former Yugoslavia have not faced such challenges.

263. The ICJ proceedings are not even mentioned in the David Owen’s book about the peace plan. See generally OWEN, *supra* note 87.

264. See *The Tribunal—Establishment*, INT’L CRIM. TRIBUNAL FORMER YUGOSLAVIA, <https://www.icty.org/en/about/tribunal/establishment> [<https://perma.cc/B6PP-MCWC>] (last visited Dec. 27, 2020).

265. Carey, *supra* note 262, at 341.

266. Charles Sampford, *The Rule of Law Begins at Home*, in STRENGTHENING THE RULE OF LAW THROUGH THE UN SECURITY COUNCIL, *supra* note 25, at 58, 65.

267. See generally Christopher C. Joyner, *Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability*, LAW & CONTEMP. PROBS., Autumn 1996, at 153; M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT’L L. 81 (2001).

268. See Joyner, *supra* note 267, at 171.

269. See Bassiouni, *supra* note 267, at 87, 146.

The cases we studied suggest that the most frequent scenario for applying universal jurisdiction was when a former prison camp guard in Bosnia-Herzegovina became an asylee in Western Europe, but a victim or one of the other refugees identified the guard there. Asylees liable for genocide in Bosnia have particularly attracted the attention of German authorities, which prosecuted these cases. But the total number of prosecutions under universal jurisdiction is small. In our research, we came across nine prosecutions in total—initiated by Austria, Denmark, Germany, Netherlands, Sweden, and Switzerland—six of which ended with a conviction.

Universal jurisdiction is envisioned as a backup tool, but it might also trigger a transitional justice cascade. For example, the ICTY did not have any defendant in sight for crimes in Bosnia until Germany transferred Dusko Tadić to the ICTY. Tadić was a Bosnian official liable for war crimes and ethnic cleansing of Bosniaks.²⁷⁰ After being sent to a war zone, Tadić fled to Germany. In 1994, he was recognized in Munich by camp survivors and subsequently arrested. Although German authorities had already indicted him under universal jurisdiction and the trial was about to begin, the ICTY issued an order to transfer Tadić to The Hague and Germany complied.²⁷¹

C. Military Courts: A Tool of Superiors to Protect Themselves from Accusations

Like ordinary national courts, military courts typically fail to address the war crimes of their own military units. The crimes that military courts typically tackle are offences against military codes. We interviewed a Serbian military officer who was convicted for war crimes by the ICTY but was also prosecuted by a military court for the same crimes. This is how he described his experience with the military court proceedings:

In 1995, the ICTY indicted me. Parts of the indictment I read from the press. I tried to talk to the high Yugoslavia National Army officers and political leaders, but no one wanted to speak with me (not even [Milosević]). In 1998, I was called to the Military Court in Belgrade for investigation. The ICTY representatives were present at the hearing. The Military Court acquitted me of all charges and the Supreme Military Court later confirmed the judgment.²⁷²

Although the military court may not have delivered justice, this case shows that a top court, such as the ICTY or the ICC, can create pressure on lower-level prosecutions, including military courts. But in order to exercise justice, national courts need stronger international support—for example, through deployment of ITJU staff after the war. Additional support needs to come from the bottom to get soldiers to admit their guilt and express

270. See Press Release, United Nations, Dusko Tadić Transferred to Germany to Serve Prison Sentence (Oct. 31, 2000).

271. *Id.*

272. Interview with 071502, *supra* note 136.

remorse, and then use the established facts to bring up a more important case. This can be done through RRCs followed by amnesties.

Critics would say that bottom-level, non-punitive approaches to transitional justice would incentivize soldiers to commit war crimes and later blame their superiors. We reject this argument for two reasons. First, in the restorative justice process, revealing superior liability is not enough.²⁷³ Perpetrators would also have to listen to victims and participate in victim reparations. Second, this approach incentivizes superiors to better control their subordinates. That is, superiors are incentivized to protect themselves by bringing culpable subordinates before military courts the moment they become aware of their subordinates' crimes. In the aforementioned case with the Serbian military officer, the officer failed to charge his subordinates with war crimes. The military courts did not prosecute their own members for war crimes because in 1991, when the crimes were committed, the ICTY was not yet established.²⁷⁴ No one could have expected in that system that a general would be convicted by a military court of his own state for the war crimes of his subordinates. But times have changed. Thus, with pressure from the ICC, military courts could play an important transitional justice role in wartime—that is, before the ITJU and IRRSU move in.

D. Civil Lawsuits: A Failed Backup Tool

If criminal procedural rules allow victims to raise civil claims, then civil proceedings are unnecessary. But in more than ninety percent of war crimes cases we studied, the judges dismissed victims' claims and referred them to civil lawsuits. Post-war civil lawsuits have rarely been effective because war causes so much damage that it is impossible to be even slightly comprehensive in compensating for it. The judges we discussed the matter with very much see it this way.

At the same time, civil proceedings are costly and uncertain because many of the defendants also lose their property in war, and with an eroded post-war judiciary, it takes years to execute judgements. This is the reason why most victims of war crimes never received any reparations from their perpetrators, even when they were found guilty.²⁷⁵ Thus, the few victims with the resources to do it sought justice abroad by turning to costly and inefficient forum-shopping.²⁷⁶

What makes U.S. tort proceedings particularly attractive to victims from abroad is the possibility of imposing punitive damages, making it a quasi-penal administration of justice.²⁷⁷ Two lawsuits were brought

273. See Lisa J. Laplante, *The Plural Justice Aims of Reparations*, in *TRANSITIONAL JUSTICE THEORIES* 66, 72 (Susanne Buckley-Zistel et al. eds., 2014).

274. See *The Tribunal—Establishment*, *supra* note 264.

275. See TRIAL INT'L, *COMPENSATING SURVIVORS IN CRIMINAL PROCEEDINGS: PERSPECTIVES FROM THE FIELD* 44-45 (2016).

276. See Kenneth Bullock, *United States Tort Liability for War Crimes Abroad: An Assessment and Recommendation*, *LAW & CONTEMP. PROBS.*, Winter 1995, at 139, 145.

277. See *id.* at 146.

against RS President Radovan Karadžić before U.S. courts under the Alien Tort Statute (ATS). In *Doe v. Karadžić*, the court granted \$4.5 billion to Bosnian, Muslim, and Croat victims of Karadžić's genocidal campaign involving murder, rape, and other forms of torture.²⁷⁸ In *Kadic v. Karadžić*, the court ordered payment of \$745 million in compensatory and punitive damages²⁷⁹ to the plaintiff women and children refugees of Bosnia-Herzegovina who were victims of genocidal rape orchestrated under Karadžić's command.²⁸⁰ But foreign litigation does not always guarantee compensation. Litigation is costly and if there is no property in the U.S. from which to compensate, then apart from some moral satisfaction, it is a waste of money. For example, in 2010, Serbian victims of Operation Storm filed a collective civil lawsuit on behalf of 200,000 refugees against a U.S. company that supported the Croatian military before Operation Storm.²⁸¹ The victims sought \$10.4 billion in damages and accumulated interest since 1995,²⁸² but the case ended in 2016 with a low settlement of \$1.4 million (\$850,000 after the litigation costs), which amounted to just \$4.25 per refugee.²⁸³

The families of Srebrenica victims initiated civil proceedings before a Dutch court against the Netherlands for the Dutch peacekeepers' failure to prevent the massacre of 8,000 people in Srebrenica.²⁸⁴ In 2014, the court found the Netherlands liable for handing Bosnian Serb forces in Srebrenica over nearly 300 Bosniak men who were then killed. But the court did not find liability for 7,700 other deaths.²⁸⁵ Therefore, while a small number of victims received some satisfaction in this lawsuit, the vast majority simply faced another disappointment.

Serbian²⁸⁶ and Kosovo Albanian²⁸⁷ victims brought several cases before the European Court of Human Rights concerning the NATO bombing of Serbia, but none were successful. In 2018, a group of Serbian law-

278. See *Doe v. Karadžić*, 176 F.R.D. 458, 459 (S.D.N.Y. 1997).

279. John Sullivan, *The World; American Justice Tackles Rights Abuses Abroad*, N.Y. TIMES (Sept. 3, 2000), <https://www.nytimes.com/2000/09/03/weekinreview/the-world-american-justice-tackles-rights-abuses-abroad.html> [<https://perma.cc/TC26-WLHW>].

280. See *Kadic v. Karadžić*, 70 F.3d 232, 236 (2d Cir. 1995).

281. See *Genocide Victims of Krajina v. L-3 Servs., Inc.*, 804 F. Supp. 2d 814, 817 (N.D. Ill. 2011); *Jovic v. L-3 Servs., Inc.*, 69 F. Supp. 3d 750, 753–54 (N.D. Ill. 2014).

282. Lorraine Bailey, *Serbians Can't Pursue Genocide Claim in U.S.*, COURTHOUSE NEWS SERVICE (Sept. 25, 2014), <https://www.courthousenews.com/serbians-cant-pursue-genocide-claim-in-u-s/> [<https://perma.cc/V43F-Y4SH>].

283. See *Genocide Victims of Krajina*, 804 F. Supp. 2d at 827; see also *Serbs More Disempowered, International Community Is Silent*, SRNA (Aug. 3, 2017), <http://www.srna.rs/novosti/518750/serbs-more-disempowered-international-community-is-silent.htm> [<https://perma.cc/ZMT5-5L8D>].

284. Dan Bilefsky & Marlise Simons, *Netherlands Held Liable for 300 Deaths in Srebrenica Massacre*, N.Y. TIMES (July 16, 2014), <https://www.nytimes.com/2014/07/17/world/europe/court-finds-netherlands-responsible-for-srebrenica-deaths.html> [<https://perma.cc/YH5Z-32UG>].

285. See *id.*

286. See *Markovic v. Italy*, 2006-XIV Eur. Ct. H.R. 1 (2006); *Banković v. Belgium* 2001-XII Eur. Ct. H.R. 8 (2001).

287. See *Behrami v. France*, App. No. 71412/01, *Saramati v. France, Germany, and Norway*, App. No. 78166/01, 45 Eur. H.R. Rep. 85, 85 (2007).

yers initiated civil proceedings in the domestic courts of NATO countries for the use of depleted uranium in the bombings.²⁸⁸ Nevertheless, it is unlikely that these lawyers will prevail. At first sight, civil lawsuits seem to open real opportunities for victims but in reality, they do not. Consequently, reparations offered at different levels of transitional justice are a more efficient way to meet the needs of victims.

IV. Toward a U.N. Department of Transitional Justice

With the establishment of the ICC, a new supranational legal order emerged.²⁸⁹ Within the scope of this order, the choice presented to negotiators is no longer whether to have peace or justice, the dilemma often posed in the pre-ICC era.²⁹⁰ Now, the concept of justice in the transitional period must not neglect restorative justice's potential to contribute both peace and justice: it can balance the different approaches to atrocity beyond simple retributive justice.²⁹¹ This study concludes by agreeing with the restorativist argument in that transitional justice should give at least as much weight to the justice claims of victims as it gives to justice for perpetrators. None of former Yugoslavia's war criminal were found to have reoffended regardless of whether they were punished or not, meanwhile victims continued to feel the consequences of war for the rest of their lives. On the other hand, we also conclude that there was a major preventive aspect to prosecuting Karadžić during the war, and that genocide (at Srebrenica, for example) could have been prevented had he been prosecuted earlier. Prosecutor Arbour's preventive letters putting officials on notice of their responsibilities to protect civilians and prevent war crimes can be complemented by more restorative forms of prevention. The specific forms of prevention can be discussed by organizations, like Geneva Call or Nonviolent Peaceforce, in the restorative circle with on-field combatants and then persuade these combatants to sign codes of conduct that comply with international humanitarian law and are meaningful within their own belief systems. This is what the ICRC accomplished with the Taliban in Afghanistan.²⁹²

The complexity of armed conflicts and the massive scale of victims and non-typical offenders require complex solutions for transitional justice that are coherent, instead of merely testing different responses at different levels. Kosovo has applied the greatest amount of top-down justice responses: acting through U.N. peacekeeping missions; Hague-based U.N.

288. Interview with Srđan Aleksić, Lawyer, in Moscow, Russ. (May 31, 2018).

289. See I SUPRANATIONAL CRIMINAL LAW: A SYSTEM *SUI GENERIS* 1-3, 350 (Roelof Haveman et al. eds., 2003).

290. See M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, Autumn 1996, LAW & CONTEMP. PROBS., at 9, 12.

291. See Parmentier et al., *supra* note 51, at 239-40.

292. See Bill Chappell, *Taliban Lift Ban on Red Cross, Pledge to Protect Aid Workers in Afghanistan*, NAT'L PUB. RADIO (Sept. 16, 2019, 8:54 AM), <https://www.npr.org/2019/09/16/761152686/taliban-lifts-ban-on-red-cross-pledges-to-protect-aid-workers> [<https://perma.cc/JQ7C-T2D8>].

international tribunal; Kosovo-based, EU-hybrid national court; domestic courts; and finally, a Hague-based EU court.²⁹³ Nevertheless, the most successful response of all was a single, bottom-level, traditional restorative justice response to blood feuds because it created a less violent society before and after the war.²⁹⁴ Therefore, this Article argues that transitional justice cascades need to be well-planned and well-regulated in order to create coherent responses. For instance, the ICC increasingly acts as a regulator by pressuring states to prosecute war criminals who have enjoyed impunity.²⁹⁵

The political turmoil that Kosovo is still facing is a direct result of top-down transitional justice failures. For example, the former Kosovo Liberation Army Leader Ramush Haradinaj was acquitted by The Hague Tribunal in 2008,²⁹⁶ and again in 2012 following a re-trial,²⁹⁷ due to lack of evidence resulting from witness intimidation, and was elected Prime Minister of Kosovo in June 2017. Two years later, the newly established Kosovo Specialist Chambers in The Hague summonsed him as a war crimes suspect for interrogation and Haradinaj was forced to resign in July 2019,²⁹⁸ although he continues to serve as acting Prime Minister of Kosovo. Had there been a well-planned, massive, bottom-level restorative justice implementation eliciting improved evidence against the “big fish,” people like Haradinaj might not have avoided conviction in the first place and a war crimes suspect may have never lead Kosovo’s government. Another projected failure is Kosovo’s expected, future lawsuit against Serbia before the ICJ, and Serbia’s inevitable countersuit.

Generally, the concentration of transitional justice in The Hague itself is weak justice because it is distant from the communities it is affecting. The weaknesses of “distant justice” are even more evident in studies on the ICC’s impact in Africa.²⁹⁹ Another problem is the prevalence of Western, trial-based criminal justice responses to atrocities, which constitute a flawed legacy that the ICC adopted from transitional justice in Yugoslavia, and an unbalanced resistance to the alternative approaches.³⁰⁰ In fact, top-down prosecution ought to constitute the minority response, while major-

293. See LORRAINE DEGRUSON, *MANUAL ON TRANSITIONAL JUSTICE: CONCEPTS, MECHANISMS AND CHALLENGES* 222 (2015).

294. Marsavelski et al., *supra* note 46, at 218–19, 232.

295. See, e.g., *Prosecutor v. Al-Bashir*, ICC-02/05-01/09, Request to the Republic of Belarus for Cooperation in the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir, ¶¶ 2–3 (Dec. 4, 2018).

296. *Prosecutor v. Haradinaj*, Case No. IT-04-84-T, Judgement, ¶ 478 (Int’l Crim. Trib. for the Former Yugoslavia, Apr. 3, 2008).

297. *Prosecutor v. Haradinaj*, Case No. IT-04-84bis-T, Retrial Judgement, ¶ 681 (Int’l Crim. Trib. for the Former Yugoslavia, Nov. 29, 2012).

298. See The Associated Press, *Kosovo Leader Resigns After Being Called to War Crimes Court*, N.Y. TIMES (July 19, 2019), <https://www.nytimes.com/2019/07/19/world/europe/kosovo-leader-resigns-after-being-called-to-war-crimes-court.html> [<https://perma.cc/RT3U-H6GJ>].

299. See generally PHIL CLARK, *DISTANT JUSTICE: THE IMPACT OF THE INTERNATIONAL CRIMINAL COURT ON AFRICAN POLITICS* (2018).

300. See *id.* at 232. See generally NICOLA PALMER, *COURTS IN CONFLICT: INTERPRETING THE LAYERS OF JUSTICE IN POST-GENOCIDE RWANDA* (2015).

ity responses are sought elsewhere. This is because we need to heal and rehabilitate not just victims and offenders, but also conflict-affected communities including the children and grandchildren of said victims and offenders (as with the banished children of ISIS today). By piecing together restorative justice and responsive peacebuilding theories with legal conversations about seeking transitional justice responses that are as helpful and just as possible, we developed a responsive transitional justice model. The model developed is not a one-size-fits-all solution, but a three-level, systemic model that is harsh on the top (the ICC), flexible in the middle (the ITJU-national court), and completely adaptable at the bottom (the RRC). The success of each response also depends on the goals it aims to achieve. These goals should not be overambitious because they would end up dashing expectations they cannot fulfill, which has been the case in the past.³⁰¹

Looking to the future, the ICC, on its own, lacks the means to satisfactorily achieve basic transitional justice goals,³⁰² and find all relevant historical facts needed to establish the truth about the past. Additionally, the ICC cannot hold most serious war criminals accountable since it only gets a small portion of cases because of its complementary jurisdiction. For the same reasons, reparations can be distributed only to a miniscule number of victims, and reconciliation is far beyond the ICC's capacity. The ICTY's experience shows that without support in lower-level transitional justice responses, international courts can actually undermine reconciliation. Despite this, this Article still argues that the ICC can ultimately achieve all crucial transitional justice goals so long as it develops a better-planned strategy for patient, bottom-up complementarity.

The phenomenon of a transitional justice cascade is crucial to explaining the potential of interplay between different responses. The ITJU-national court will never be established and become efficient if it does not have pressure from above—for example, the ICC investigating a particular situation—and support in establishing facts from below. Our data show that this was an incipient reality of transitional justice when it worked well in the former Yugoslavia. When some justice progress was made, national courts responded to pressure from the ICTY and also fed off truth-telling from below. Sometimes the justice cascade was also triggered in small ways by other responses (e.g., through foreign national courts under universal jurisdiction). Once it cascades, the greatest number of individual offenders can only be addressed at the lower-cost, bottom level. The realities we have outlined reveal there is no alternative to this if the aim is justice for the many rather than the few.

Retributive justice responses have proven to be slow and expensive, which makes them a less than ideal choice to address a large number of cases. We have seen that even with billions of dollars in international support, key trials only take place decades after mass atrocities. During that

301. See generally NICKSON & NEIKIRK, *supra* note 35.

302. See Parmentier, *supra* note 52, at 208 fig.1.

period, societies remain stuck in stalemates of unyielding war narratives instead of reconciling and moving on. The data we collected about transitional justice in former Yugoslavia suggests that some of the money spent on such trials would have been better spent supporting victims' voice and funding victims' reparations. The time wasted on long proceedings could have been better spent reconciling communities to achieve sustainable peace and averting war narratives that feed on themselves for decades after the conflict. This has been a large part of the tragic reality of transitional justice in the former Yugoslavia. The outcome of lengthy proceedings is that many defendants, victims, and witnesses are likely to die before justice delivers anything or their memory deteriorates, and some perpetrators manage to remain anonymous. These transitional justice deficiencies could have been avoided by integrating different, bottom-level responses. But the range of responses must go beyond victim-offender restorative justice because the societies in former Yugoslavia are still burdened with war—for example, politicians today still use war-related tensions as a cheap way to gain political support.³⁰³ Part of the reason that war topics continue to rank high on the political agenda has been media coverage of lengthy war crimes proceedings before the ICTY.³⁰⁴ Thus, transitional justice responses should not only reconcile offenders and their victims, but also the communities they come from.

The advantage of flexible, bottom-level, restorative justice responses is that it is never too late to implement them. So, instead of administering the war crimes cases backlog in Bosnia-Herzegovina and Kosovo, a better alternative would be to initiate mass reparation and reconciliation processes in these war-torn societies that are still at the edge of disintegration: Republika Srpska wants to secede from Bosnia-Herzegovina by referendum, Croats keep emigrating from the Herzegovina region, and Serbs are leaving Kosovo. A new situation-specific strategy must address the fact that new human rights abuses emanating from war still occur every week in the former Yugoslavia.

With the establishment of the ICTY and ICTR as U.N. subsidiary bodies in the 1990s,³⁰⁵ it seemed that transitional justice would continue to develop as a U.N. priority. Still, much U.N. work focuses on traditional, rule of law institutions (i.e., police, courts, and prisons) although there are signs of some broadening.³⁰⁶ Instead, we see peak transitional justice

303. See V.P. Gagnon, Jr., *Ethnic Nationalism and International Conflict: The Case of Serbia*, INT'L SEC., Winter 1994-1995, at 130, 132.

304. See Simone Monasebian, *Media Matters: Reflections of a Former War Crimes Prosecutor Covering the Iraqi Tribunal*, 39 CASE W. RESV. J. INT'L L. 305, 307, 309 (2007).

305. See *International Tribunals*, U.N. SEC. COUNCIL, <https://www.un.org/securitycouncil/content/repertoire/international-tribunals> [<https://perma.cc/ZKT8-JBBD>] (last visited Dec. 27, 2020).

306. For example, the U.N. is trying to embrace a more holistic approach to transitional justice including truth commissions and reparation schemes. See Annemarie Devereux, *Human Rights Vis-à-Vis the Rule of Law: Unruly Cousin or Bedrock of the Family?*, in STRENGTHENING THE RULE OF LAW THROUGH THE UN SECURITY COUNCIL, *supra* note 25, at 105, 115.

through our Yugoslavia lens. After supporting the establishment of the ICC outside of the U.N. institutional framework, the U.N. has neglected the institutionalization of international transitional justice. This approach leaves large discretion to member states to choose whether to opt-in or opt-out from transitional justice—as Burundi and the Philippines did by withdrawing from the ICC’s Rome Statute.³⁰⁷

Despite the U.N.’s promotion of transitional justice’s features,³⁰⁸ and even supporting transitional justice at a policy level,³⁰⁹ the U.N. greatly underestimated transitional justice within its institutional framework. Generally, the U.N. gives priority to crime and criminal justice response programs and funds (U.N. Office of Drugs and Crime); research and training institutes (U.N. Interregional Crime and Justice Research Institute); as well as functional commissions (The Commission on Crime Prevention and Criminal Justice). Peace is, of course, also a top priority of central U.N. bodies. The only peacekeeping mission still present in former Yugoslavia is UNMIK. The U.N. addressed transitional justice within the first pillar of UNMIK’s operational framework until that part of their mandate was transferred to EULEX.³¹⁰ Therefore, the only U.N. procedure designed for transitional justice is the *Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*,³¹¹ which is just one of the fifty-three special procedures mandates within the Office of the U.N.’s High Commissioner for Human Rights. Supporting transitional justice is also one of the activities of the U.N.’s Development Programme (UNDP). We interviewed three UNDP officials during our fieldwork in former Yugoslavia on this topic, and dozens more around the world, for the Peacebuilding Compared Project.³¹² But according to the UNDP’s focus and structure, transitional justice is just one more minor task among more than sixty assignments on the current UNDP agenda.

To ensure the ICC’s efficiency, the U.N. needs to build onto the ICC’s transitional justice foundation. This includes policy changes toward transitional justice that are flexible and situation-specific, such as moderating

307. Jason Gutierrez, *Philippines Officially Leaves the International Criminal Court*, N.Y. TIMES (Mar. 17, 2019), <https://www.nytimes.com/2019/03/17/world/asia/philippines-international-criminal-court.html> [https://perma.cc/XH42-2T9S].

308. In a 2011 report, the U.N. Secretary General, inter alia, noted that “[t]ransitional justice initiatives promote accountability, reinforce respect for human rights and are critical to fostering the strong levels of civic trust required to bolster rule of law reform, economic development and democratic governance.” U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Rep. of the Secretary-General to the Security Council*, ¶ 17, U.N. Doc. S/2011/634 (Oct. 12, 2011).

309. See generally U.N. SECRETARY-GENERAL, GUIDANCE NOTE OF THE SECRETARY-GENERAL: UNITED NATIONS APPROACH TO TRANSITIONAL JUSTICE (2010).

310. See Katy A. Crossley-Frolick & Oya Dursun-Ozkanca, *Transitional Justice and Security Sector Reform: The Role of the EU and Other Multilateral Institutions in Building Kosovo’s Police Force 3* (2011) (unpublished manuscript) (on file with author).

311. *Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, U.N. OFF. HIGH COMM’R, <https://www.ohchr.org/en/issues/truthjustice/reparation/pages/index.aspx> [https://perma.cc/FQM3-WZ7Q] (last visited Dec. 27, 2020).

312. See *The Peacebuilding Compared Project*, supra note 8.

amnesty bans to allow effective employment of restorative justice mechanisms.³¹³ Furthermore, transitional justice should become a U.N. priority, particularly because it is directly related to maintaining international peace and security, which is the primary responsibility of the U.N.³¹⁴ Prioritizing transitional justice could mean establishing a specialized U.N. Department of Transitional Justice (UNDTJ). Such a body would be able to monitor and coordinate the work of the ICC and the lower-level transitional justice responses that we propose: the ITJU and the IRRSU. Although the ICC cannot be subjected to the UNDTJ, this body would work with the U.N. Security Council on the ICC's jurisdictional matters. Each level of the responsive hierarchy of institutions would develop strategic, transitional justice plans that respond to the plans of other institutions in the pyramid of justice institutions. The goal is to establish a culture of institutional cooperation whereby each institution enables better justice at all other institutional levels.

The current state of international transitional justice is still a work in progress. The ICC is a major achievement, but the global transitional justice project requires a stronger foundation. In other words, it has a solid roof, barely existent foundations of support in civil society, and weak national walls in between. National judiciaries also need international staff, in the way concrete needs reinforcement. But the biggest, most neglected, challenge is at the foundational level because it requires rebuilding what was lost in the wars: human lives, sensibility to trauma, family homes, and social bonds. Relational foundations are the bedrock for bottom-up justice cascades.

313. According to the current U.N. approach to transitional justice, the U.N. will not endorse provisions in peace agreements that include amnesties for genocide, war crimes, crimes against humanity, and (other) gross violations of human rights. See *id.* While domestic legal systems have used amnesties frequently to move on after a conflict, international scholars often reject amnesties for atrocities as unacceptable. See Max Pensky, *Amnesty on Trial: Impunity, Accountability, and the Norms of International Law*, ETHICS & GLOB. POL. 1, 9-10 (2008); cf. Lisa J. Laplante, *Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes*, 49 VA. J. INT'L L. 915, 918, 926-43 (2009); Diane F. Orentlicher, 'Settling Accounts' Revisited: Reconciling Global Norms with Local Agency, 1 INT'L J. TRANSITIONAL JUST. 10, 10 (2007).

314. U.N. Charter art. 1, ¶ 1.