NUREMBERG'S LEGACY WITHIN TRANSITIONAL JUSTICE: PROSECUTIONS ARE HERE TO STAY

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ABSTRACT

A lasting legacy of the Nuremberg and Tokyo military tribunals is the assertion that individuals are subjects of international law and should be held criminally responsible for perpetrating war crimes and crimes against humanity. Building upon the Nuremberg legacy, the emergence and proliferation of modern international(ized) tribunals has ushered in a new era in international criminal justice, whereby states seek to end impunity for international crimes through criminal trials. This Article addresses the legacy of Nuremberg in transitional justice approaches. It examines the criticisms within the transitional justice field that criminal justice processes are generally ill-suited to address the social forces that characterize collective violence and the push away from criminal prosecutions towards other non-retributive processes. It argues that while post-conflict peacebuilding requires a more holistic transitional justice approach, recourse to at least some criminal prosecutions remains an enduring legacy of Nuremberg, supported by both international actors as well as victim communities.

I. INTRODUCTION

Modern international criminal law dates back to the military tribunals established after World War II. The Allied Powers opted to hold trials rather than summarily execute their enemies. These trials were massive undertakings. The Prosecution at Nuremberg relied heavily on documentary evidence comprised of over 200,000 affidavits, in addition to testimony from 94 witnesses, including direct survivors, former SS members, camp guards and Nazi party members.[1] The Tokyo Tribunal, on the other hand, had to rely on a greater amount of victim and witness

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1. *See* The Trial of German Major War Criminals, Judgment, 412 (Int'l Mil. Trib. Oct. 1, 1946), http://crimeofaggression.info/documents/6/1946_Nuremberg_Judgement.pdf.

testimony due to the fact that the Japanese destroyed most of their military records prior to their surrender. The Tribunal heard courtroom testimony from 416 witnesses and accepted unsubstantiated affidavits and depositions from an additional 779 individuals, including victims.[2] The success of these military tribunals was due in large part to the legal teams that were assembled to prosecute the cases. Thousands of lawyers and support staff sifted through piles of evidence. Undoubtedly, a significant amount of financial resources were poured into both courts.

As such, the Nuremberg and Tokyo trials have come to "represent the possibility of legal responses [to war crimes and mass atrocity], rather than responses grounded in sheer power politics or military aggression."[3] But the trials were not flawless. Commentators have criticized the fact that the proceedings operated without precedent, failed to recognize the crimes committed by Allied Powers, and curtailed the ability of the accused to access documents and conduct investigations.[4] The proceedings have been criticized as slow, inconvenient, and expensive.[5] Yet the moral weight that the judgments conveyed changed the world forever, giving "rise to a new vision of moral responsibility among nations."[6] The structure and approach of the Nuremberg and Tokyo trials, moreover, paved the way for and heavily influenced the shape of future international(ized) courts and domestic responses to serious human rights violations.[7] The jurisprudence that emerged from the proceedings also aided in the further development of international norms.[8] Most importantly, the legacy of the Nuremberg and Tokyo trials is the understanding and general acceptance of the notion that individuals are subjects of international law and should be held

2. BRIANNE MCGONIGLE LEYH, PROCEDURAL JUSTICE? VICTIM PARTICIPATION IN INTERNATIONAL CRIMINAL PROCEEDINGS 136 (2011); *see* John Danaher, *The Illusion of Legality? Post-WWII Military Tribunals in the Far East*, 1 CORK O. L. REV. 1, 11 (2006).

3. MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 27 (1998).

4. *Id.* at 30.

5. Thane Rosenbaum, *The Romance of Nuremberg and the Tease of Moral Justice Legacy*, 27 CARDOZO L. REV. 1731, 1733 (2005–2006).

6. *Id.*

7. Michael G. Karnavas, Association President, Ass'n of Def. Counsel ICTY Practicing Before the Int'l Criminal Tribunal for the Former Yugoslavia, Nuremberg—60 Years After: The Beginning and Development of International Criminal Justice (Nov. 10–12, 2006), *available at* http://www.michaelgkarnavas.net/files/Nuremberg_speech_MGKarnavas_10Nov2006.pdf (last visited Aug. 21, 2016). The term international(ized) includes international courts such as the ICTY, ICTR and ICC as well as hybrid courts that are sometimes referred to as internationalized courts such as the ECCC and SCSL, amongst others.

8. *Id.*

criminally responsible for perpetrating war crimes, crimes against humanity, and (later) genocide.[9]

This Article argues that the legacy of Nuremberg is reflected not only in the proliferation of international and hybrid criminal courts from the early 1990s until today, but also in the development of the notion within international human rights law of a state's duty to investigate, prosecute, and punish international crimes, as well as the continued demand from both international actors and victim populations for criminal prosecutions within transitional processes. The Article will address the criticism that criminal justice processes are generally ill-suited to address the social forces that characterize collective violence. Additionally, the Article will discuss the push within the transitional justice field away from criminal prosecutions and towards other less retributive responses. There has always been a pendulum swing with regard to criminal trials for mass atrocity crimes. At times there has been a strong enthusiasm for implementing criminal prosecutions, but this eagerness typically yields to political pragmatism. This Article explores this pendulum swing by examining the lasting legacy of Nuremberg within transitioning societies as shown, for example, by the growing number of trials in Argentina for crimes committed by its military from the mid-1970s to mid-1980s. It concludes by showing that recourse to criminal prosecutions remains a favored response despite efforts to minimize the importance of the criminal justice paradigm. This emphasis, both locally and internationally, on holding individuals criminally accountable for mass atrocity crimes is the lasting legacy of Nuremberg. This legacy is now firmly imbedded in integrated transitional justice responses.

II. THE PROLIFERATION OF INTERANTIONAL(IZED) CRIMINAL TRIBUNALS

Following the military trials in Nuremberg and Tokyo, the UN sought to codify the Nuremberg principles and looked into the establishment of a permanent international criminal court. However, such a court was not to be. Cold War realities meant the idea would be shelved (though the

9. An amendment on the crime of aggression, prosecuted as crimes against peace before the Nuremberg and Tokyo Tribunals, has been adopted by consensus at the International Criminal Court's 2010 Kampala Review Conference and is now open to ratification by States Parties. U.N. Secretary-General, *Amendments to the Rome Statute of the International Criminal Court: Adoption of Amendments on the Crime of Aggression*, U.N. Doc. C.N.651.2010.TREATIES-8 (June 11, 2010). For those states that ratify the amendment, the ICC will have jurisdiction of this crime no earlier than January 1, 2017. Rome Statute of the International Criminal Court, art. 15, sec. 3, July 17, 1998, 2187 U.N.T.S. 90.

International Law Commission (ILC) continued to work on the idea) until the political situation once again became open to the possibility of holding individuals accountable for international crimes.

In response to the violence and atrocities in the former Yugoslavia and Rwanda, and almost 50 years following Nuremberg, the United Nation's Security Council, pursuant to its Chapter VII powers, established the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). The *ad hoc* tribunals, as they became known because of their specific mandates and temporary nature, were the first of their kind. The connection between Nuremberg and these tribunals is widely recognized. For example, in the ICTY's first trial, the prosecutors and judges referenced Nuremberg in applying legal and moral standards.[10] Building on the work of the *ad hoc* tribunals, within a few years and after decades of work by the ILC, states adopted the Rome Statute establishing the International Criminal Court (ICC) in July 1998. After the required number of state ratifications, the ICC became operational on July 1, 2002. Preparatory documents clearly show how the establishment of the ICC was undoubtedly part of the legacy of Nuremberg,[11] while the mounting case law of the Court continues to underscore the Nuremberg Principles in practice.

In addition to these international courts, several countries implemented a new type of court, hybrid tribunals, to prosecute genocide, crimes against humanity, and war crimes. Hybrid courts have been established for East Timor (Special Panels for Serious Crimes (SPSC)), Sierra Leone (Special Court for Sierra Leone (SCSL)), Cambodia (Extraordinary Chambers in the Courts of Cambodia (ECCC)), Kosovo (UNMIK/ EULEX War Crimes Panels), and Lebanon (Special Tribunal for Lebanon (STL)).[12] Like the ICTY, ICTR and ICC, each of these courts carries on

10. The ICTY continued to reference Nuremberg throughout its operations. *See* Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 200 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999). In the ICTY's Outreach Program's Global Legacy Conference Report from 2011, Nuremberg was mentioned no less than 41 times. *See* ICTY Global Legacy: Conference Proceedings, Nov. 15–16, 2011, *available at* http://www.icty.org/x/file/Outreach/conferences_pub/global_legacy_publication_en.pdf.

11. *See, e.g.*, Rep. of the Ad Hoc Comm. on the Establishment of an Int'l Criminal Court, Apr. 3-13,1995, U.N. Doc. A/AC.244/2 (Apr. 21, 1995); Rep. of the Ad Hoc Comm. on the Establishment of an Int'l Criminal Court, Apr. 3–13, Aug. 14–25, 1995, U.N. Doc. A/50/22), 5 (Sept. 6, 1995); Rep. of the Int'l Law Comm. on the work of its forty-fifth sess., May 3–July 23, 1993, U.N. Doc. A/48/10; Rep. of the Int'l Law Comm. on the work of its forty-fifth sess., May 2–July 22, 1994, A/49/10; Twelfth Rep. on the Draft Code of Crimes Against the Peace and Sec. of Mankind, U.N. Doc. A/CN.4/460 (Apr. 15, 1994).

12. For the SCSL *see* Statute of the Special Court of Sierra Leone, attached to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special

the legacy of Nuremberg by seeking to end impunity for the commission of international crimes. Hybrid courts play a pivotal role in the enforcement of international criminal law and remind states of the shared responsibility for the investigation, prosecution and punishment of serious violations of human rights and humanitarian law.[13] Indeed, it is this shared responsibility for prosecution where Nuremberg has had a tremendous impact on the domestic prosecution of international crimes.

III. SHARED RESPONSIBILITY: THE DUTY TO PROSECUTE

Although the Nuremberg legacy did not immediately increase the frequency of criminal trials for international crimes, it was part of a growing body of soft and hard law emphasizing the importance of criminal prosecutions.[14] Along with the adoption of the Nuremberg Principles, the Genocide Convention,[15] the Geneva Conventions of 1949,[16] Protocols I

Court for Sierra Leone, U.N. Doc. S/2002/246 (2002); for SPSC in Dili, Timor-Leste *see* S.C. Res.1272, U.N. Doc. S/Res/1272 (Oct. 25, 1999) (establishing UNTAET); UNTAET Reg. 2000/30 (Sept. 25, 2000), on Transitional Rules of Criminal Procedure (as amended by UNTAET Reg. 2001/25 (Sept. 14, 2001)) and on January 1, 2006, a new Code of Criminal Procedure of Timor-Leste, Law No. 15/2005 of 16 September 2005, replaced UNTAET Reg. 2000/30; S.C. Res.1244, UN Doc. S/Res/1244 (1999); for the UNMIK / EULEX war crimes panels in Kosovo *see* The Kosovo Court System Was Based Partly on UNMIK Regulation 1999/24 from Dec. 12, 1999 and partly on the Constitutional Framework; in April 2009, the European Rule of Law Mission in Kosovo (EULEX) took over the operational role of UNMIK with regard to rule of law; Council of the European Union, Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo; EULEX Kosovo, Feb. 4, 2008; Kosovo, Law No. 03/L-053, On the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo; Kosovo, Law No. 03/L-052, On the Special Prosecution Office of the Republic of Kosovo; for the STL operating in The Hague, Netherlands *see* S.C. Res.1757, Attachment to the Annexed Agreement to Resolution 1757, Statute of the Special Tribunal for Lebanon, U.N. Doc. S/Res/1757 (May 30, 2007); for the ECCC in Cambodia *see* Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea (June 6, 2003); Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (2004).

13. ALEXANDER ZAHAR & GORAN SLUITER, INTERNATIONAL CRIMINAL LAW 4 (2008).

14. Kristin Henrard, *The Viability of National Amnesties in View of the Increasing Recognition of Individual Criminal Responsibility at International Law*, 8 MICH. ST. U.-DCL J. INT'L L. 595, 600 (1999) (tracing the creation of treaties prohibiting genocide, torture, and war crimes back to the Nuremberg Principles).

15. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

16. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Geneva Convention relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva

and II of 1977,[17] and the Convention against Torture all codified specific international crimes.[18] This codification, coupled with the passage of the Nuremberg Principles, indicates that states recognize the importance of criminalizing certain acts and reinforces the idea that individuals who commit those acts should be held accountable, either domestically or internationally.[19] Prior to the proliferation of international and hybrid criminal courts, criminal prosecutions remained the sole prerogative of states, and there was no general agreement over whether states had a duty to prosecute serious human rights or humanitarian law violations.[20]

Not until the matter came before the Inter-American human rights system did the notion of a duty to prosecute emerge from the notion of a right to a remedy under human rights law. The Inter-American human rights system played a significant role in expanding international human rights obligations in this respect.[21] In 1988, the Inter-American Court of Human Rights (IACtHR) issued a landmark decision in the *Velásquez Rodríguez* case.[22] The Court concluded that Article 1(1) of the American Convention on Human Rights has a criminal law component, requiring states to investigate grave violations of human rights.[23] The duty to investigate, it found, is closely connected with the right of victims to know all the facts surrounding the disappearance of their loved ones. As a result,

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Convention relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]. Certain acts are specified in the Geneva Conventions as "grave breaches." *See* First Geneva Convention, arts. 49–50; Second Geneva Convention, arts. 50–51; Third Geneva Convention, arts. 129–30; Fourth Geneva Convention, arts. 146–47. Common Article 3 of the Geneva Conventions applies to conflicts of a non-international nature. *See, e.g.*, First Geneva Convention, art. 3.

17. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609. [hereinafter Protocol II]. Protocol I also identifies acts which are classified as "grave breaches." *See* Protocol I, arts. 11, 85, 86.

18. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85.

19. Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L. REV. 2537, 2551–95 (1991) (though it should be noted that the Convention against Torture did not call for criminal accountability).

20. *Id.* at 2551.

21. *See* Jo M. Pasqualucci, *The Whole Truth and Nothing but the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System*, 12 B.U. INT'L L.J. 321, 361 (1994); Brian D. Tittemore, *Ending Impunity in the Americas: The Role of the Inter-American Human Rights System in Advancing Accountability for Serious Crimes Under International Law*, 12 SW. J.L. & TRADE AM. 429 (2006).

22. Velasquez Rodriguez v. Honduras, Judgment, Inter-Am. Ct. H.R. (ser. C) (July 29, 1988).

23. *Id. See also* Godínez Cruz v. Honduras, Judgment, Inter-Am. Ct. H.R. (ser. C) (Jan. 20, 1989); Fairen Garbi et al. v. Honduras, Judgment, Inter-Am. Ct. H.R. (ser. C) (Mar. 15, 1989).

in this case and others, the Court implicitly linked the duty to investigate with the right to truth.[24]

However, in this case, the Court declined to require criminal proceedings as requested by the victims' families. Thus it remained unclear whether *Velásquez-Rodriguez* required states to initiate criminal prosecutions, or whether other non-criminal investigations would suffice. Later, the Court clarified its position in a number of subsequent cases.[25] Interpreting the general obligation of states to give effect to the Convention, together with the right to an effective remedy, the Court found a duty to investigate and prosecute in cases concerning the right to life and personal integrity.[26] The Court held that victims have the right to state investigation of crimes, state prosecution of those suspected of perpetrating the offense, and state punishment of those found guilty of the criminal act.[27] While these decisions only relate to the Inter-American regional system, the world took notice. The European Court of Human Rights would later arrive at a similar conclusion, and held that states have a duty to investigate serious human rights violations, particularly right to life violations.[28] However, the European Court of Human Rights has not yet found there is a duty to prosecute.

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24. Velasquez Rodriguez v. Honduras, Judgment, Inter-Am. Ct. H.R. (ser. C) (July 29, 1988); *see also* Bámaca-Velásquez v. Guatemala, Judgment, Inter-Am. Ct. H.R. (ser. C), ¶ 201 (Nov. 25, 2000); Barrios Altos v. Peru, Judgment, Inter-Am. Ct. H.R. (ser. C), ¶ 48 (Mar. 14, 2001); Castillo Páez v. Peru, Judgment, Inter-Am. Ct. H.R. (ser. C), ¶ 90 (Nov. 3, 1997) (linking the right to truth with the state's duty to investigate).

25. *See* Paniagua-Morales et al. v. Guatemala, Judgment, Inter-Am. Ct. H.R. (ser. C) (Mar. 8, 1998); Durand & Ugarte v. Peru, Judgment, Inter-Am. Ct. H.R. (ser. C) (Aug. 16, 2000); Genie Lacayo v. Nicaragua, Judgment, Inter-Am. Ct. H.R. (ser. C) (Jan. 29, 1997); Blake v. Guatemala, Judgment, Inter-Am. Ct. H.R. (ser. C) (Jan. 24, 1998); Villagrán Morales et al. v. Guatemala, Judgment, Inter-Am. Ct. H.R. (ser. C) (Nov. 19, 1999); Bámaca-Velásquez v. Guatemala, Judgment, Inter-Am. Ct. H.R. (serc. C) (Nov. 25, 2000); *see also* Raquel Aldana-Pindell, *In Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes*, 35 VAND. J. TRANSNAT'L L. 1399, 1417–18 (2002).

26. *See* Paniagua-Morales et al. v. Guatemala, Judgment, Inter-Am. Ct. H.R. (ser. C) (Mar. 8, 1998); Durand & Ugarte v. Peru, Judgment, Inter-Am. Ct. H.R. (ser. C) (Aug. 16, 2000); Genie Lacayo v. Nicaragua, Judgment, Inter-Am. Ct. H.R. (ser. C) (Jan. 29, 1997); Blake v. Guatemala, Judgment, Inter-Am. Ct. H.R. (ser. C) (Jan. 24, 1998); Villagrán Morales et al. v. Guatemala, Judgment, Inter-Am. Ct. H.R. (ser. C) (Nov. 19, 1999); Bámaca-Velásquez v. Guatemala, Judgment, Inter-Am. Ct. H.R. (ser. C) (Nov. 25, 2000); *dee also* Raquel Aldana-Pindell, *In Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes*, 35 VAND. J. TRANSNAT'L L. 1399, 1417–18 (2002).

27. Paniagua-Morales et al. v. Guatemala, ¶ 155-56; Durand & Ugarte, ¶ 130; Genie Lacayo, ¶ 76; Villagrán Morales, ¶ 227; Bámaca Velásquez, ¶ 182-83; La Cantuta v. Peru, Judgment, Inter-Am. Ct. H.R. (ser. C), ¶ 160 (Nov. 29, 2006); Goiburú et al. v. Paraguay, Judgment, Inter-Am. Ct. H.R. (ser. C), ¶ 131 (Sept. 22, 2006).

28. McCann and Others v. United Kingdom, App. No. 18984/91, Eur. Ct. H.R. (1995); Öneryıldız v. Turkey, App. No. 48939/99, Eur. Ct. H.R. (2004).

In addition to the regional human rights courts, the International Convention for the Protection of All Persons from Enforced Disappearance (Convention on Enforced Disappearance) became the first core human rights treaty to explicitly note the duty to investigate and prosecute.[29] Article 3 recognizes a state's duty to investigate alleged violations by non-state actors, and Article 6 holds that states must make necessary measures to hold perpetrators criminally responsible. Moreover, Article 11 further recognizes the obligation of states to criminally prosecute those suspected of being responsible for enforced disappearances. Likewise, despite no mention of a duty to prosecute in their relevant treaties, human rights treaty bodies, such as the Human Rights Committee, have come to interpret their treaties as requiring a duty to prosecute for a specific set of crimes.[30] Similarly, in 2004, the Appeals Chamber of the SCSL emphasized the obligation to prosecute specific categories of crimes in one of its judgments, ruling out options for amnesty.[31]

As such, there is general consensus amongst states that even when national jurisdictions acknowledge amnesties for some human rights violations, amnesties for codified serious human rights violations, war crimes, crimes against humanity, and genocide will not be recognized at the international level,[32] and should not be recognized at the domestic level.[33] The Inter-American Commission on Human Rights has consistently questioned the appropriateness of amnesties in Latin American political transitions,[34] and even when countries had created a

29. International Convention for the Protection of All Persons from Enforced Disappearance, Dec. 20, 2006, 2716 U.N.T.S. 3 (*entered into force* Dec. 23, 2010).

30. Human Rights Council, Boucherf v. Algeria, Communication 1196/2003, Views of 27 April 2006, ¶ 11; Bousroual v. Algeria, Communication 992/2001, Views of 24 April 2006, ¶ 11; Celal v. Greece, Communication 1235/2003, Views of 11 November 2004, ¶ 6.2; Rajapakse v. Sri Lanka, Communication 1250/2004, Views of 5 September 2006, ¶ 9.3; Mulezi v. Democratic Republic of the Congo, Communication 962/2001, Views of 23 July 2004, ¶ 7; Sarma v. Sri Lanka, Communication 950/2000, Views of 31 July 2003, ¶ 11; General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 15, 18.

31. Prosecutor v. Gbao, Case No. SCSL04-15-PT-141, Decision on Preliminary Motion on the Invalidity of the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court, ¶ 10 (May 25, 2004).

32. *See Princeton Principles on Universal Jurisdiction*, PRINCETON UNIVERSITY PROGRAM IN LAW AND PUBLIC AFFAIRS (2001), *available at* https://lapa.princeton.edu/hosteddocs/unive_jur.pdf; Lisa P. Laplante, *Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes*, 49 VA. J. INT'L L. 915, 971–75 (2009); Charles P. Trumbull IV, *Giving Amnesties a Second Chance*, 25 BERKELEY J. INT'L L. 283, 297–323 (2007); Louise Mallinder, *Can Amnesties and International Justice be Reconciled?*, 1 INT'L J. TRANSITIONAL JUST. 208–30 (2007).

33. *See* Laplante, *supra* note 32.

34. *See, e.g.*, Garay Hermosilla v. Chile, Case 10.843, Inter-Am. C.H.R., Report No. 36/96, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 105 (1996); Consuelo v. Argentina, Cases 10.147, 10.181, 10.240,

truth commission to investigate crimes, it stated that these non-criminal investigations were "not enough."[35] The Inter-American system decisions have underpinned the principle of individual criminal responsibility for serious human rights violations.[36] Despite the fact that states continue to recognize amnesties for serious human rights violations, largely to secure peace,[37] there remains little recognition at the international level, and the state could be found in breach of their obligations to investigate, prosecute and punish either under a regional system or within a treaty-body process.

Promoting the rule of law at the national and international levels is a key aspect of the United Nations' mission. It has a long history of strengthening criminal law processes around the world.[38] While embracing integrated and complementary approaches within transitional justice responses, the United Nations continues to emphasize the important role that criminal trials can play in transitional contexts.[39] It not only supports the *ad hoc* tribunals (i.e. SPSC, ECCC, and STL), it also pumps millions of dollars into supporting domestic criminal processes for serious crimes.[40] These combined regional and international developments, together with the proliferation of the international criminal tribunals, reinforced arguments that there is a legal norm that the most egregious international crimes, including genocide, crimes against humanity, and war crimes, require investigation, prosecution and punishment. The Nuremberg

10.262, 10.309, 10.311, Inter-Am. C.H.R., Report No. 28/92, OEA/Ser.L/V/II.83, doc. 14 ¶ 50 (1992–93); Mendoza v. Uruguay, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374, 10.375, Inter-Am. C.H.R., Report No. 29/92, OEA/Ser.L/V/II.83, doc. 14 ¶ 54 (1992–93); Massacre Las Hojas v. El Salvador, Case 10.287, Inter-Am. C.H.R., Report No. 26/92, OEA/Ser.L/V/II.83, doc. 14, at 83 (1992–93); IACHR, Report on the Situation of Human Rights in Peru, OEA/Ser.L/V/II.83, doc. 31 ¶ 15-27 (Mar. 12, 1993), *available at* http://iachr.org/countryrep/Peru93eng/background.htm#f.%20 Impunity; 1985–1986 Annual Report, ch. IV, *available at* http://www.cidh.oas.org/annualrep/ 85.86eng/chap.4.htm.

35. Garay Hermosilla, Case 10.843, Inter-Am. C.H.R., Report No. 36/96, ¶ 77.

36. *See* Mirko Bagaric & John Morss, *In Search of Coherent Jurisprudence for International Criminal Law: Correlating Universal Human Responsibilities with Universal Human Rights*, 29 SUFFOLK TRANSNAT'L L. REV. 157, 204 (2006).

37. For instance, amnesties have been included as part of peace processes in Sudan (Sudan Peace Agreement of 21 April 1997), the Democratic Republic of Congo (1999 Lusaka Ceasefire Agreement) and Sierra Leone (Lome Peace Agreement of 8 July 1999), as well as in Argentina, El Salvaldor, Guatemala, amongst others. Naomi Roht-Arriaza, *State responsibility to investigate and prosecute grave human rights violations in international law*, 78 CALIF. L. REV. 451, 458–61 (1990).

38. The United Nations Office on Drugs and Crime has played a significant role in criminal law reforms around the world.

39. U.N. Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies*, S/2004/616, art. XII, ¶ 39 (Aug. 23, 2004).

40. Rupert Skilbeck, *Funding Justice: The Price of War Crimes Trials*, 15 HUM. RIGHTS BRIEF 1, 1–5 (2009).

precedent echoed throughout all of these developments, calling again and again on states to ensure criminal accountability.

IV. CRITICISMS OF A CRIMINAL JUSTICE APPROACH

The legal pendulum has therefore often swung in favor of criminal prosecutions for serious human rights and humanitarian law violations. Yet, despite what seems to be a preference for criminal justice responses following serious human rights abuses, criminal justice processes have always and faced strong criticism in the literature.[41] The criticism is particularly loud, and the picture particularly bleak, for instances of collective violence and mass victimization.

Already in 1963, Shklar asserted that a criminal justice paradigm is ill-suited to address situations of collective violence.[42] Fletcher and Weinstein similarly argue that trials of individuals accused are ill-equipped to accurately reflect contemporary conflict.[43] Criminal prosecutions are too easily susceptible to political manipulation and instrumentalization of the law.[44] Such manipulation could lead to selective prosecutions that focus neither on the real perpetrators nor the real crimes. Moreover, since most trials focus on a narrow set of violations, namely violations of bodily integrity (i.e. murder, torture, rape) or property rights, they fail to address the full range of harms suffered by victims and victim communities such as violations of economic and social rights.[45] This failure to focus on the needs and concerns of victims, and their inability to effectively respond to mass atrocity, has led to calls for other non-retributive responses. As noted by Laplante, "'[t]he original strong link of justice to criminal trials

41. In the Amnesty Law Database Queen's University Belfast and the Arts & Humanities Research Council provide information on over 500 amnesties in 138 countries. *The Amnesty Law Database*, QUEEN'S UNIV. BELFAST, http://www.incore.ulst.ac.uk/Amnesty/about.html (last visited May 3, 2016).

42. *See* JUDITH N. SHKLAR, LEGALISM: LAW, MORAL AND POLITICAL TRIALS 112 (Boston, Harvard Univ. Press, 1963).

43. *See* Laurel E. Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 HUM. RTS. Q. 573, 579 (2002).

44. M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW, 418–19 (2003) (on the politics of defendant selection before the Tokyo tribunal).

45. *See* Dustin N. Sharp, *Addressing Economic Violence in Times of Transition: Toward a Positive-Peace Paradigm for Transitional Justice*, 35 FORDHAM INT'L L.J. 780 (2012); Amanda Cahill-Ripley, *Foregrounding Socio-Economic Rights in Transitional Justice: Realising Justice for Violations of Economic and Social Rights*, 32 NETH. Q. HUM. RTS. 183, 184 (2014).

spearheaded by Nuremberg was weakened by an 'an increased pragmatism in and politicization of the law.'"[46]

The outcome has been transitional justice literature examining more fully the validity of alternative justice mechanisms, such as truth commissions,[47] which has resulted in a broadening of transitional justice responses and the belief that criminal prosecutions, even if there is a duty to prosecute, are inadequate on their own or misplaced entirely in some situations.[48] This period of scholarly debate within the transitional justice field assisted in elevating the status of truth commissions from a "second-best" alternative to a mechanism at least as important as criminal justice in the transitional justice movement.[49] In particular, "[t]he South African experience not only helped make truth commissions a part of popular culture, but also simultaneously created the inference that amnesties are an acceptable feature of transitional justice."[50] Truth commissions and commissions of inquiry are often touted as being better suited to address collective accountability and mass victimization. Indeed, they remain a popular choice. To date, the United States Institute for Peace, in its Truth Commission Digital Collection, has profiled over 30 truth commissions and 12 commissions of inquiry from 1974 to the present.[51]

For Chilean human rights lawyer, José Zalaquett, "the real question is to adopt, for every specific situation, the measures that are both feasible and most conducive to the purpose of contributing to build or reconstruct a

46. Laplante, *supra* note 32, at 926 (citing Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69, 70 (2003)).

47. Timothy Phillips & Mary Albon, *When Prosecution Is Not Possible: Alternative Means of Seeking Accountability for War Crimes*, *in* WAR CRIMES: THE LEGACY OF NUREMBERG 244 (Belinda Cooper ed., 1999).

48. *See* Tricia D. Olson, Leigh A. Payne & Andrew G. Reiter, *The Justice Balance: When Transitional Justice Improves Human Rights and Democracy*, 32 HUM. RTS. Q. 980 (2010).

49. *See* Lisa J. Laplante & Kimberly Theidon, *Truth with Consequences: Justice and Reparations in Post-Truth Commission Peru*, 29 HUM. RTS. Q. 228 (2007) (addressing the elevated status of truth commissions in transitional justice); Charles Villa-Vicencio, *Why Perpetrators Should Not Always Be Prosecuted: Where the International Criminal Court and Truth Commissions Meet*, 49 EMORY L.J. 205, 220 (2000) (arguing against the duty to prosecute in all situations).

50. Laplante, *supra* note 32, at 929 (citing Audrey R. Chapman and Hugo Van der Merwe, *Introduction: Assessing the South African Transitional Justice Model*, *in* TRUTH AND RECONCILIATION IN SOUTH AFRICA: DID THE TRC DELIVER? 1, 8 (Audrey R. Chapman & Hugo Van der Merwe eds., 2008)); *see also* Catherine Jenkins, *They Have Built a Legal System Without Punishment: Reflections on the Use of Amnesty in the South African Transition*, 64 TRANSFORMATION: CRITICAL PERSP. S. AFR. 27, 31 (2007).

51. U.S. INSTITUTE OF PEACE, TRUTH COMMISSION DIGITAL COLLECTION, *available at* http://www.usip.org/publications/truth-commission-digital-collection (last visited May 3, 2016).

just order."[52] And, while this may ring true for many working in the field of transitional justice, it contrasts sharply with the principled legal obligation to prosecute. Minow, a renowned scholar and proponent of non-retributive forms of justice, described supporters of criminal justice as idealists who espouse "stirring but often shrill and impractical claims, such as the 'duty to prosecute'" and who are too remote from nations struggling with transitional justice.[53] Yet Minow's account perhaps too easily overlooks internal divisions within nations and the fact that very often local actors, especially victims, do not easily compromise their demands for criminal justice.[54]

V. THE ENDURING LEGACY OF NUREMBERG: A DESIRE FOR CRIMINAL ACCOUNTABILITY

These demands for criminal accountability may be driven by the authoritative acknowledgment of harm suffered in a forum that publically calls upon concrete and individual, rather than abstract and collective, responsibility. Drumbl asserts that trials have an expressive value in that they function as communicative bodies, pronouncing on the moral wrongs and narrating an official history, while also reinforcing respect for the rule of law.[55] Trials, he holds, often transcend notions of "retribution and deterrence in claiming as a central goal the crafting of historical narratives, their authentication as truths, and their pedagogical dissemination to the public."[56] This communicative function of trials for atrocity crimes may in fact be one of the main reasons for its enduring legacy. To be sure, from expressing public denunciation of the acts to de-legitimizing extremist elements, trials do more than simply pronounce upon the guilt of a few accused.

Some have called this impetus for criminal prosecution of serious human rights violations a Western-imposed process.[57] But, when looking at the pendulum swinging between criminal prosecutions and non-retributive responses, it is important to note that there have been a number

52. Naomi Roht-Arriaza, *The Need for Moral Reconstruction in the Wake of Past Human Rights Violations: An Interview with José Zalaquett*, *in* HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA 195, 197 (Carla Hesse & Robert Post eds., 1999).

53. MINOW, *supra* 3, at 28.

54. Laplante & Theidon, *supra* note 49, at 241–42.

55. *See* MARK DRUMBL, ATROCITY AND PUNISHMENT, AND INTERNATIONAL LAW 173 (Cambridge Univ. Press, 2007).

56. *Id*.

57. *See* Melissa Gordon, *Justice on Trial: The Efficacy of the International Criminal Tribunal for Rwanda*, 1 ILSA J. INT'L & COMP. L. 217, 223–24 (1995); *see also* DRUMBL, *supra* note 55.

of growing international grassroots movements challenging amnesties and the "pervasive practice of impunity."[58] While some have been more successful than others, anthropologists and criminologists have shown through their research that victims and victim communities outside of the West often yearn for trials, long after elites compromise on criminal justice.

In South Africa, for example, the law endorsed truth and reconciliation coupled with impunity.[59] While the international community has lauded its truth commission as a model for future transitional justice response,[60] many victims in South Africa have been calling for retribution.[61] Wilson highlights the "large gap" between political reality and victims' expectations of justice, with the vast majority of victims having had a preference for prosecution and punishment.[62] In Latin America, many states once protective of their amnesty provisions have now sought the course of criminal prosecutions due in large part to victim mobilization. Peru, Chile, and Argentina are just a few examples.[63] The example of Argentina is particularly compelling in this regard. After years of reluctance to prosecute individuals for crimes committed during its "Dirty War,"[64] since 2003 the country is now undertaking hundreds of prosecutions, largely initiated by civil society organizations, for serious human rights violations.[65] Similarly, domestic prosecutions for serious

58. Christopher C. Joyner, *Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability*, 26 DENV. J. INT'L L. & POL'Y 591, 593, 595 (1998) (noting, at that time, the rarity of criminal prosecutions since Nuremberg).

59. PROMOTION OF NATIONAL UNITY AND RECONCILIATION ACT 34 OF 1995, http://www.justice.gov.za/legislation/acts/1995-034.pdf (last visited Sept. 6, 2016).

60. For an overview of research on the TRC in South Africa, *see* Annelies Verdoolaege, *The Debate on Truth and Reconciliation: A Survey of Literature on the South African Truth and Reconciliation Commission*, 5 J. LANG. & POL. 15–35 (2006).

61. *See* HUMAN RIGHTS WATCH, *Truth and Justice: Unfinished Business in South Africa* (Feb. 2003), *available at* https://www.hrw.org/legacy/backgrounder/africa/truthandjustice.htm; International Center for Transitional Justice, *Family Seeks Justice in South Africa for Anti-Apartheid Activist 32 Years after her Torture and Disappearance* (May 20, 2015), https://www.ictj.org/news/justice-south-africa-anti-apartheid-activist-disappearance; *Long Battle for Truth in South Africa for Apartheid Victim's Family*, DAILY MAIL (Mar. 4, 2016), http://www.dailymail.co.uk/wires/afp/article-3476166/Long-battle-truth-S-Africa-apartheid-victims-family.html.

62. RICHARD A. WILSON, THE POLITICS OF TRUTH AND RECONCILIATION IN SOUTH AFRICA: LEGITIMIZING THE POST-APARTHEID STATE 25 (Cambridge Univ. Press 2001).

63. Laplante, *supra* note 32, at 976–78.

64. HUMAN RIGHTS WATCH, *Reluctant Partner: The Argentine Government's Failure to Back Trials of Human Rights Violations* (2001), *available at* https://www.hrw.org/legacy/reports/2001/argentina/index.html (last visited Apr. 19, 2016).

65. Joint Workshop, Concluding Report, Forty years on from Operation Condor: Justice without Borders, *available at* http://www.lac.ox.ac.uk/sites/sias/files/documents/Informe%20Taller%20borrador%201%20EN.pdf (last visited May 3, 2016).

human rights violations are being taken up in Africa, with the Central African Republic, Uganda, Cote d'Ivoire, and Senegal all pursuing domestic, and in the case of Senegal, even regionalized, prosecution of international crimes.[66]

Furthermore, though justice may not be a top priority following armed conflict,[67] more than two-thirds of respondents from a 2007 population-based survey in northern Uganda indicated that they wanted individuals guilty of serious human rights and humanitarian law violations to be held accountable. Many of the respondents recognized formal justice mechanisms, both international and national, as an appropriate response.[68] In fact, there are a number of population-based studies that show that in many post-conflict communities there is a broad desire to hold individuals accountable in a formal criminal process. For instance, responses from a 2008 population-based survey from the eastern Democratic Republic of Congo (DRC) suggested that respondents believed justice could be achieved (80 percent), endorsing the national court system (51 percent), the International Criminal Court (26 percent), military courts (15 percent), and traditional/customary justice mechanisms (15 percent) as the main structures for achieving "justice."[69] There was little support for no trials at all (8 percent) and a strong preference (85 percent) for trials to take place in the DRC, whether national or internationalized.[70] Likewise, in a 2009 population-based survey from Cambodia, 70 percent of respondents indicated that members of the Khmer Rouge regime should be held accountable for the crimes committed, with 49 percent indicating the accountability should be through a criminal process.[71] More recently, in October of this year, after 52 years of civil war, the Colombian people narrowly rejected a peace deal reached between the Colombian government and the Revolutionary Armed Forces of Colombia (FARC).

66. *See* Sarah Williams, *The Extraordinary African Chambers in the Senegalese Courts*, 11 J. INT'L CRIM. JUST. 1139–40 (2013).

67. PHUONG PHAM ET AL., WHEN THE WAR ENDS: A POPULATION-BASED SURVEY ON ATTITUDES ABOUT PEACE, JUSTICE, AND SOCIAL RECONSTRUCTION IN NORTHERN UGANDA 22 (2007), *available at* http://ssrn.com/abstract=1448368. *See also* PHUONG PHAM ET AL., SO WE WILL NEVER FORGET: A POPULATION-BASED SURVEY ON ATTITUDES ABOUT SOCIAL RECONSTRUCTION AND THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA 34 (2009), *available at* http://ssrn.com/abstract=1447662.

68. PHUONG PHAM ET AL., WHEN THE WAR ENDS, *supra* note 67, at 34, *available at* http://ssrn.com/abstract=1448368.

69. PATRICK VINCK ET AL., LIVING WITH FEAR: A POPULATION-BASED SURVEY ON ATTITUDES ABOUT PEACE, JUSTICE, AND SOCIAL RECONSTRUCTION IN EASTERN DEMOCRATIC REPUBLIC OF CONGO (2008), *available at* http://ssrn.com/abstract=1447623.

70. *Id.*

71. PHUONG PHAM ET AL., SO WE WILL NEVER FORGET, *supra* note 67, at 31–35.

Some have argued that the deal was defeated because voters felt it was too lenient on the rebels and that a greater number of criminal prosecutions were necessary.[72] All sides must now return to renegotiate another agreement. These surveys and the failed peace agreement in Colombia, together with many attempts at domestic and international prosecutions, demonstrate that when given a choice, many victim populations desire criminal prosecutions. Given these statistics, it is unsurprising that trials remain favored responses in post-conflict societies, supported by many individuals as well as international actors.

VI. CONCLUSION

As a discipline, transitional justice has evolved a great deal in the last few decades. Although its beginnings were largely about transitions to democracy with a focus on legal-institutional reform and retributivism,[73] transitional justice is now seen as an essential aspect of any liberal peace-building program with a broader mandate.[74] There is an entire "transitional justice industry," complete with experts, funders, work packages and standard-setting,[75] that aims to address past wrongs in order to better prepare for a stable future. While the pendulum continues to swing between calls for retributive responses and calls for alternative responses, the United Nations, the European Union, the United States, and other donors have openly called for more integrated responses,[76] utilizing a number of transitional justice measures. As such, transitional justice is moving away from a narrow retributive justice focus and is now embracing a broader range of approaches to contribute toward a sustainable peace following a period of serious human rights abuse or conflict. However, despite the fact that transitional justice has

72. Greg Grandin, *Did Human Rights Watch Sabotage Colombia's Peace Agreement?*, THE NATION, Oct. 3, 2016, *available at* https://www.thenation.com/article/did-human-rights-watch-sabotage-colombias-peace-agreement/; Sibylla Brodzinsky, *Colombia referendum: voters reject peace deal with Farc guerrillas*, THE GUARDIAN, Oct. 3, 2016, *available at* https://www.theguardian.com/world/2016/oct/02/colombia-referendum-rejects-peace-deal-with-farc.

73. Paige Arthur, *How Transitional Justice Reshaped Human Rights: A Conceptual History of Transitional Justice*, 31 HUM. RTS. Q. 321, 325 (2009).

74. Kora Andrieu, *Transitional Justice: A New Discipline in Human Rights*, ONLINE ENCYCLOPEDIA OF MASS VIOLENCE (2010), *available at* http://www.massviolence.org/Transitional-Justice-A-New-Discipline-in-Human-Rights.

75. Kimberly Theidon, *Editorial Note*, 3 INT'L J. TRANSITIONAL JUST. 1–2 (2009); Arthur, *supra* note 73; David C. Gray, *Extraordinary Justice*, 62 ALA. L. REV. 55, 57 (2010).

76. U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, S/2004/616, 9 (2004), 9; Council of the European Union, *European Union's Framework on Support to Transitional Justice*, No. Cion doc. SWD (2015) 158 final (2015).

conceptually expanded from a narrow focus on transitions to democracy, largely stressing retributive justice goals through formalistic legal responses, to a broader emphasis on social justice concerns, the allure and importance of criminal prosecutions remain.

The continued desire to resort to the criminal justice paradigm has much to do with the success of Nuremberg. The Nuremberg and Tokyo military tribunals sought to use the rule of law to prosecute and punish those believed to be responsible for serious crimes. The Nuremberg precedent "was one of the great heroic and romantic moments of the twentieth century. It offered a glimpse as to what moral justice might look like, implemented in response to the world's greatest known atrocity, at a time when humanity failed so miserably."[77] This desire to hold individuals criminally responsible in societies transitioning out of conflict will continue into the future, as evidenced by increasing calls for criminal accountability both from victims as well as from international actors.

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77. Rosenbaum, *supra* note 5, at 1732.