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Transitional Justice and Local Ownership: A Framework for the Protection of Human Rights

Andrew B. Friedman

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TRANSITIONAL JUSTICE AND LOCAL OWNERSHIP: A FRAMEWORK FOR THE PROTECTION OF HUMAN RIGHTS

Andrew B. Friedman*

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I. INTRODUCTION

The recent wave of regime change and democratization in the Middle East and North Africa has once again thrust transitional justice

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concerns to the forefront of popular and legal interests. As several states struggle to create a new future, the crimes and injustices of the past must first be confronted. While the substantive goals of transitional justice may be comparatively easy to identify, the procedure by which these goals can be accomplished has been the subject of much debate, both recently and throughout history.1

The difficulty of the procedural aspect stems from an important dichotomy. On one hand, it is vital that the populace of the transitional state be fully responsible for the process. The importance of local ownership or a “bottom up” approach has been addressed in great detail by a multitude of scholars.2 For example, Patricia Lundy and Mark McGovern analyze this necessity with regard to the conflict in Northern Ireland.3 In particular, Lundy and McGovern argue that local participation and consultation is vital at all stages of the process, including “conception, design, decision making, and management.”4 It is not the intention of this paper to argue the importance of all of these elements; it is merely to determine areas where such local ownership may be inserted into transitional justice mechanisms.

On the other end of the dichotomy, it is vital that any transitional justice mechanisms follow the internationally recognized fair trial rights as contemplated by various international, regional and domestic human rights documents. Without such adherence, the cycle of violence is difficult to stem and a state risks losing the peace that transitional justice mechanisms are intended to secure.5

This paper will attempt to contribute to that debate by identifying this fundamental tension on a hypothetical level and discussing ways in which it can be addressed, alongside other common problems of transitional justice mechanisms. The paper is an attempt to build on the vital work of Lars Waldorf,6 who has examined the dichotomy with


3. Lundy & McGovern, supra note 2, at 265.

4. Id.


6. See generally Lars Waldorf, Mass Justice for Mass Atrocity: Rethinking Local Justice as
regard to post-genocide Rwanda by building a hypothetical framework for use in any future situation, as opposed to one limited to a particular set of events. Such a framework will provide vital insight that can be drawn on to constantly improve the all-important mechanisms of transitional justice.

In order to adequately examine this tension, several steps must be taken. First, it is necessary to define the goals of transitional justice and examine historical mechanisms that have been used. Without such a survey, it would be impossible to judge success and correct past failings. The focus of this paper will be only on prosecutions and other mechanisms with formality and ability to punish akin to a prosecution. Of the many such pseudo-prosecutions, particular focus will be paid to Truth and Reconciliation Commissions for their formality, their ability to grant amnesty, and the darling space they occupy in the collective public and scholarly imagination.7

Second, the importance of local ownership will be discussed. As previously mentioned, a great deal of work has been done on this particular topic.8 The discussion in this article will be limited to the problems associated with local ownership in transitional justice. There are two extremes within this problem that will be discussed in this paper. The majority of the discussion will focus on the many systems that local populaces have considered imposed upon them by the international community because of a lack of decision-making and no incorporation of local norms. However, there will also be a discussion of the Rwandan Gacaca, in which a local system was adopted nearly wholesale and has still encountered extraordinary problems.9

Third, the international law of fair trials will be examined through international and regional human rights treaties and international case law.10 Various international courts have repeatedly examined the requirements for a fair trial. The law will be surveyed in an attempt to create a rough sketch as to what constitutes a fair trial under international human rights law.

Within this sketch, various areas of flexibility will be identified. These will be the areas in which traditional or local forms of justice can

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8. See generally, Lundy & McGovern, supra note 2; Chesterman, supra note 2.
10. See infra text accompanying notes 109-112.
be inserted without running into conflict with international human rights norms. In particular, the distinction between what constitutes an individual right and what is a requirement of the tribunal form will be discussed. This article aims to demonstrate that while international law mandates individual rights within a particular form, there exists some flexibility in rights that fall within the form of the tribunal. This distinction will be addressed in great detail later in the paper.

II. WHAT IS TRANSITIONAL JUSTICE?

In order to create a workable transitional justice mechanism, some time must first be devoted to defining transitional justice. While many have attempted to define the topic, a particularly useful definition comes from the United Nations Working Group on Lessons Learned.11 According to the Working Group, “Transitional justice is an approach to systematic or massive violations of human rights that both provides redress to victims and creates or enhances opportunities for the transformation of the political systems, conflicts, and other conditions that may have been at the root of the abuses.”12

Another useful definition comes from Professor Ruti Teitel, who states, “transitional justice can be defined as the conception of justice associated with periods of political change, characterized by legal responses to confront . . . wrongdoings.”13 Professor Teitel goes on to mention the imperative that there be “repressive predecessor regimes,” however, for the purposes of this article, that is too narrow.14

The definitions above set forth the most important elements of transitional justice efforts. First, there must have been an era where there were massive human rights violations. Historically, these eras have taken many forms, including times of war, oppressive and despotic regimes, and times of massive civil upheaval. For the purposes of this paper, such eras will be simply defined collectively as atrocities, as the non-specific nature of the article requires that it allow for flexibility as situations require, without presuming to know the details and exhaustive requirements of each individual situation.

12. Id.
13. Teitel, supra note 7, at 69.
14. The scope of this article includes transitional justice situations in all post-atrocity situations, including Professor Teitel’s “repressive predecessor regimes” along with civil wars, massive periods of civil insurrection such as genocide and countless other atrocities. See id.
Among the most important elements of transitional justice, set forth in the first definition, is the fundamental conflict that lies at the heart of all transitional justice efforts. While a primary goal is to provide some form of redress or justice for victims of past violence and human rights violations, that effort can often conflict with the competing goals of transforming political systems and ending conflicts that were at the root of the abuses. It is this conflict that is responsible for such tremendous historical difficulty in the creation of transitional justice mechanisms that give justice to victims of past atrocities and simultaneously allow for lasting peace and stability.

In order to reach a definition that is useful for the purposes of this paper, the section below will examine a number of areas of transitional justice. First, the above principles of transitional justice will be broken down into concrete goals that have been used historically. Second, there will be a brief examination of historical transitional justice mechanisms and the problems experienced with such mechanisms.

A. Importance and Goals

As is true for any form of justice, the most important step in any attempt to define transitional justice is to determine what the goals of such efforts are. Such a determination is particularly important when attempting to create or upgrade mechanisms for transitional justice, as the outcome will be determined by the mechanisms and the mechanisms will be chosen based on their goals. While mentioned briefly above, the broad goals of transitional justice are threefold. The desire of such efforts is to “ensure accountability, serve justice and achieve reconciliation . . . “.

Such broad goals can be further broken down into concrete ideals. Transitional justice efforts have included the creation of an accurate historical record for society, the restoration of the rule of law, the

17. Teitel, supra note 7, at 70.
19. Id.
20. See generally Promotion of National Unity and Reconciliation Act, No. 34, Preamble (1995) (S.Afr.) (“To provide for the investigation and the establishment of as complete a picture as possible of the nature, causes and extent of gross violations of human rights committed during
facilitation of reconciliation through the healing of divisions created by long running atrocities and many others. \(^{22}\) Put broadly, the goals of transitional justice fall under the competing values of justice and reconciliation. \(^{23}\)

The importance, then, is twofold. First, justice must be adequately achieved. \(^{24}\) Second, transitional justice efforts must lay the groundwork for reconciliation from divisions fostered during periods of atrocity. \(^{25}\) The fundamental conflict between on one hand punishing and on the other reconciling has been among transitional justice’s biggest problems. There are several important examples from history.

**B. Previous Mechanisms**

The history of modern transitional justice mechanisms is traditionally understood as beginning with the trials that took place at the conclusion of World War Two. \(^{26}\) This includes both the Nuremberg Trials and the Tokyo Tribunals. \(^{27}\) However, transitional justice can be traced back nearly as far as conflict itself. The field has been studied as far back as the Ancient Athenians more than four centuries before the Common Era. \(^{28}\) In that instance it was not merely historical barbarism where the offending parties were heinously killed or jailed, it was in fact a complex formula balancing retribution and forgiveness that included amnesties and reintegration. \(^{29}\)

Since that time there have been many different mechanisms used for transitional justice. The Nuremberg and Tokyo Tribunals were formal international trials, organized and presided over by the Allied Powers. \(^{30}\) This type of formal, international trial scenario has been used repeatedly in transitional justice, including *ad hoc* United Nations


\[^{25}\] Id.

\[^{26}\] Teitel, *supra* note 7, at 70.

\[^{27}\] Id.


\[^{29}\] Id.

tribunals including the International Criminal Tribunal for the former Yugoslavia (“ICTY”), the International Criminal Tribunal for Rwanda (“ICTR”), and other special courts for Sierra Leone, Cambodia and others. More recently, a permanent court has been set up to adjudicate war crimes, crimes against humanity, and other acts often present in transitional justice scenarios. The International Criminal Court (“ICC”) has recently injected itself into transitional justice by issuing arrest warrants for Muammar Qaddafi and other members of the late dictator’s inner circle during the Libyan revolution, thus renewing a debate as to the role the Court should play in transitional justice.

In the cases of ad hoc international tribunals, there has often been complementary adjudication through the domestic court systems of post-atrocity states. In this case, complementary jurisdiction refers to the primacy of the domestic court system. In one example, complementary prosecutions took place initially in the wake of the Rwandan genocide adjudication until the lack of capacity for the genocide torn state made such a complementary prosecution scheme impossible.

Such domestic prosecutions do not only serve as a complement to international prosecutions. They can, and have, been used along with many other types of transitional justice mechanisms. They have been particularly successful in complementing the so-called conditional amnesty, most often in the form of a truth and reconciliation commission (“TRC”). Such TRC’s allow a person to escape prosecution for crimes by coming forward and telling the story of said crimes. While the first such TRC was created in Argentina, it is now predominantly associated with the transition from Apartheid in South Africa.

32. Teitel, supra note 7, at 74.
35. Id.
36. Eugenia Zorbas, Reconciliation in Post-Genocide Rwanda, 1 AFR. J. LEG. ST. 1, 36 (2004) (It was estimated that due to the state of the Rwandan judicial system at the time it would take the formal system more than a century to judge the cases of genocidaires.).
38. Id.
39. Teitel, supra note 7, at 78.
One vitally important element of TRC is its limited mandate.\(^{40}\) Amnesties can only be offered for crimes that fit within particular temporal and subject matter limitations. For example, such limitations existed in post-Apartheid South Africa’s TRC, where the mandate only allowed for amnesties for “political crimes” and they must have taken place during the apartheid era.\(^{41}\) Without such jurisdictional limitations, it would be possible for ordinary criminals to take advantage of such a system’s existence, both destroying the public confidence and legitimacy and vastly decreasing the efficiency of such a system.

The final type of transitional justice mechanism of interest here gained international notoriety in the wake of the Rwandan genocide. In this particular occasion, a historical dispute settlement mechanism that had been used for settling land disputes was adapted to adjudicate the crimes of the *genocidaires*.\(^{42}\) While many elements of the traditional *Gacaca* would change, the main goals were the adaptation of a system involving community involvement that would be accessible to all.\(^{43}\) While the system was not without valid criticisms that will be discussed in great detail below, it was an early attempt at the incorporation of tradition and local norms into the adjudication process.\(^{44}\)

III. PROBLEMS WITH PREVIOUS MECHANISMS

The problems of previous transitional justice mechanisms can be grouped broadly into four categories. By examining the various issues categorically as opposed to going through each mechanism individually and discussing its problems it will be far easier to craft a hypothetical framework that will avoid such pitfalls.

There have been broad categories of complaints against previous mechanisms. The first category that will be discussed is the imposed nature of such mechanisms. Often the international funding and attention that post-atrocity states attract tends to cause the international community to decide the best domestic policy.\(^{45}\) This has created problems throughout the history of transitional justice. The second issue


\(^{41}\) Promotion of National Unity and Reconciliation Act 34 of 1995, art. 3(3) (S.Afr.).


\(^{44}\) Venter, *supra* note 42, at 578.

has been a lack of respect for international human rights norms and the international law of fair trials.\textsuperscript{46} This problem is of particular importance for the purpose of this article. The third category that will be discussed is an all-important transitional justice failure. While processes are meant to allow a state to move on and come together after atrocities, certain mechanisms have been accused of failing at this critical goal.\textsuperscript{47} The fourth and final category that has been a tremendous criticism of transitional justice mechanisms is extraordinary inefficiency.\textsuperscript{48} This is mainly a procedural issue, however its significant impact on substantive progress and processes has led to it being a constant complaint of nearly every historical mechanism.

\textbf{A. Imposed Justice}

As has been mentioned previously in the article, there are varied, and often competing, goals of transitional justice.\textsuperscript{49} While some parties and mechanisms may place high value on retribution, others may focus on restoration.\textsuperscript{50} This particular difference is readily apparent, and immensely problematic, when the international community involves itself in post-atrocity justice, whether through financing, technical assistance or any other form.\textsuperscript{51}

One such prominent example is in the period of transition and rebuilding following the 1994 genocide in Rwanda.\textsuperscript{52} In the period immediately following the genocide, an ashamed international community began entering the Central African nation in droves.\textsuperscript{53} Barbara Oomen observes that in the period after the genocide, tremendous increases were seen both in internationally funded projects (an increase from zero to thirty-five) and in expenditures (an increase from $0 to over $30 million U.S.).\textsuperscript{54}

This type of international funding and interest does not come without political strings. In the case of Rwanda, the international community saw the country as somewhat of a justice laboratory,
examining different types of transitional justice to see how well they could work.55 The international community also seemed to favor a TRC, similar to the one that was used in post-apartheid South Africa, while the Rwandan government had considerable suspicions of an independent body with the power to grant pardons to those who committed acts of genocide.56

The government ended up creating a watered-down version of the TRC, which would not have the power to grant pardons.57 By effectively hamstringing the National Unity and Reconciliation Commission, the body ended up as merely a forum for grievances that turned a blind eye to many of the genocide’s root causes.58 In this way, the Commission was an attempt to appease the international community by creating a body similar to the South African TRC. However, because it was based on the fears and desires of domestic authorities, it removed one of the most important elements of such a mechanism.59 Such an example is telling in the relationship between the international community and the host country. While Rwanda had no interest in such a body, international donors expected one, thus forcing the creation of a body that proved powerless and wasted both time and finite resources.60

Put broadly, a major problem of international justice has been the differing interests and goals of the international community, which provides much of the funding and expertise for such justice mechanisms, and domestic authorities, who have differing (and often competing) goals.61 Predictably, this complicates the process tremendously. While the international donors must be appeased in order to continue the flow of vital aid, both financial and technical, true reconciliation cannot occur without the input and decision making of local leaders and populations. These competing interests create an air of imposed decisions and imposed justice. While the full importance of local ownership will be discussed later, this fracture is an important criticism of historical transitional justice mechanisms.62

55. Id. at 897.
56. Id.
57. Id. at 897-899.
60. Id.
61. Oomen, Donor Driven Justice supra note 45, at 897-898.
62. See generally Jens Narten, Dilemmas of Promoting “Local Ownership,” in THE
B. *International Human Rights*

The second criticism takes place in situations where the international community is less involved. Often when post-atrocity states develop their own mechanisms for transitional justice, they do not adhere to internationally recognized fair trial norms and international human rights law.\(^{63}\) Instead, such states often devise systems that value efficiency, expediency, and familiarity over what would be acceptable under international human rights law.\(^{64}\) Just as above, the greatest example of this failure existed in the period of post-genocide transition in Rwanda.\(^{65}\)

The Rwandan transitional justice system went through many modifications.\(^{66}\) The initial plan was to prosecute those most responsible for the genocide in the ICTR, while the minor participants would be tried in Rwandan domestic courts.\(^{67}\) For a variety of reasons, this plan was doomed. Among the primary reasons were inefficiency and lack of capacity, issues that will be discussed later.\(^{68}\) As an answer to this problem, the international community, along with Rwandan authorities, came up with the idea of the *Gacaca*.\(^{69}\) In the *Gacaca* courts, a traditional dispute settlement mechanism was adopted in an effort to expedite the process of genocide adjudication as well as battle the problem of imposed justice discussed above.\(^{70}\)

In the adaptation of the *Gacaca* for genocide adjudication, much was left to be desired from the standpoint of an international human rights lawyer.\(^{71}\) A few examples of the plethora of such criticisms were the lack of access to counsel and inability to produce evidence in defense, the incredibly quick speed of decision-making and the inability to have a fair and impartial tribunal.\(^{72}\) During the process it was not uncommon for defendants to appear alone before a *Gacaca* tribunal for mere minutes and be sentenced to long prison sentences.\(^{73}\)

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64. Id.
66. Id.
67. Id.
70. Id.
72. Id.
73. Maya Sosnov, *The Adjudication of Genocide: Gacaca and the Road to Reconciliation in*
format that was so heralded also allowed for high levels of bribery and intimidation of both witnesses and community judges.\textsuperscript{74}

The issues in such traditional systems historically helped bring about the system of international fair trial rights. As the trial system grew, the formality grew along with it. Thus, using traditional systems can often be problematic from a human rights standpoint unless they are adapted to incorporate international fair trial norms. This incorporation was not done well in Rwanda, and has been a constant criticism of international lawyers and academics.\textsuperscript{75}

C. Failure to Move Forward

The final substantive complaint against transitional justice mechanisms is that such mechanisms have not allowed for the necessary reconciliation.\textsuperscript{76} The widespread nature of the problem makes it particularly difficult to deal with. I will use this section as an attempt to briefly explain why, in each particular situation, there have been complaints of a failure to move forward in reconciliation.

First, in the event of formal trials, along with those trials that incorporate local norms, there have been constant complaints of victor’s justice.\textsuperscript{77} That is, there has been an invariable allegation that those who are punished for crimes committed are merely those that committed crimes on the losing side of the conflict.\textsuperscript{78} This has been particularly prevalent in the case of civil wars and transitions from despotic regimes.\textsuperscript{79} Often times the state will have problems reconciling due to lingering bitterness that exists among groups who feel they have been unjustly targeted for retribution, while those on the victorious side committed similar atrocities and go unpunished.\textsuperscript{80}

Post-genocide Rwanda exemplifies this difficult issue.\textsuperscript{81} During

\textsuperscript{74} Le Mon, \textit{supra} note 46, at 17.
\textsuperscript{75} \textit{Id.}
\textsuperscript{76} SG Report 2004, \textit{supra} note 18, at Par. 8.
\textsuperscript{78} See Coyne, \textit{supra} note 78.
\textsuperscript{80} \textit{Id.}
\textsuperscript{81} \textit{Id.}
that time, genocide was primarily perpetrated by members of the Hutu ethnic group against the Tutsis. The slaughter of Tutsis was not stopped until current President Paul Kagame and his largely Tutsi Rwandan Patriotic Front (“RPF”) were able to capture the capital and stem the violence. From that time through the present, Kagame and other Tutsis have dominated the Rwandan government. This has meant that in the period immediately following the genocide all the way through today, there have been accusations of hesitancy to investigate the crimes of the RPF and other Tutsis. Predictably, many Hutus are sent to jail for crimes committed that they believe were mirrored in form and brutality by the RPF. This has fostered tremendous bitterness between the two ethnic groups and halted the country’s progress towards reconciliation.

TRCs and other forms of amnesty can often present the exact opposite problem. A victorious side demands revenge over the brutalities of the cast off despot or vanquished foe. When a TRC is convened or an amnesty is offered, the winning side can become embittered and unwilling to reconcile with its former oppressors. Blanket amnesties present an obvious problem in that they are simply a promise not to achieve retribution against those who have perpetrated atrocity. TRCs, however, present a unique dichotomy that can be particularly difficult for victors who seek retribution and vengeance to tolerate.

It is a unique difficulty of the TRC process that the greater crimes one explains and admits to, the less penalties the individual will face.

82. Id.
87. Id.
88. For more information on amnesties and the issues surrounding them, see generally LOUISE MALLINDER, AMNESTY, HUMAN RIGHTS AND POLITICAL TRANSITIONS: BRIDGING THE PEACE AND JUSTICE DIVIDE (2008).
89. ROSALIND SHAW, UNITED STATES INST. FOR PEACE, RETHINKING TRUTH AND RECONCILIATION COMMISSIONS: LESSONS FROM SIERRA LEONE, SPECIAL REPORT 6-7 (2005), available at
For example, a person who spent his life in a government security force may have committed hundreds of horrific acts in defense of the regime, and if he is unwilling to admit to many of those acts, he may face punishment. However, if he admit to all of them and gives details on each horrible act, he may be given amnesty. Thus, the greater the crimes admitted to, the more likely one can spend the rest of his days in his own home. In the case of South Africa, this infuriated the families of many victims of the apartheid regime. It has even been said that those who were victims of the apartheid regime were “robbed . . . of their right to justice.” This belief has fostered a similar level of bitterness in other post-atrocity states acquainted with the TRC.

The failure of reconciliation problem thus exists in both extremes. On one hand, when there are formal prosecutions and trials it feels as though only those that lost the conflict are being punished. On the other hand, when no one is punished or a TRC is used, the victors often harvest feelings of resentment for missing their chance at retribution for years of oppression and brutality. These problems have existed in transitional justice throughout its modern history.

D. Efficiency

Finally, many transitional justice mechanisms have been woefully inefficient. While this is primarily a procedural issue, it can often have substantive effects. A state that is still in the process of adjudicating an atrocity is forced to live under the shadow of its worst moments for many years after the atrocity is over. There are a few primary reasons for the inefficiency within transitional justice mechanisms.

First, and perhaps most importantly, often states undergoing a period of transition lack the judicial capacity for the amount of work necessary. This includes a lack of infrastructure as well as manpower.

90. Id.


92. Shaw, supra note 89, at 7.

93. Id.


Often states undergoing an atrocity experience an extraordinary “brain drain.” This can happen either of two ways. When there is a short-term atrocity such as the Rwandan genocide, many of the professionals important to the transitional process either flee or are killed during the upheaval. By some estimates, immediately after the genocide, there remained ten lawyers in the entire country.

The second potential brain drain exists during a long-term tyrannical regime. Often, in an attempt to solidify its hold on power, a regime will allow only powerful insiders to take up positions of importance. This includes those in the justice department. As a result, over a period of years, the only people who remain qualified to fulfill these important functions are powerful members of a tyrannical regime. Once that regime is deposed, no one within the country remains able to adequately fulfill the functions other than the members of the former regime, an often-unacceptable solution for those who cast them from power.

This lack of capacity and “brain drain” forces the state to ask for the assistance of the international community. Once the international community is involved there are often many other forms of inefficiencies including repetition, lack of coordination, and general lack of expediency. The ICTR to date has completed only sixty-five cases since 1994. It is, however, important to note that because efficiency is a procedural issue with many more non-legal concerns than the previously discussed substantive issues, the various solutions for inefficiency go well beyond the purview of this paper.

This brief synopsis of the problems associated with previous transitional justice mechanisms is useful in determining what must be avoided when crafting a mechanism that will be useful in the future. The populace must not be made to feel as though an outside definition of justice and reconciliation is being imposed on them from a faceless competent public employees).

96. Id.
98. Id.
99. For a broader discussion of the difficulties associated with the banishment of regime insiders from governance and the subsequent lack of qualified individuals, see generally David Roman, From Prague to Baghdad: Lustration Systems and their Political Effects, 41 Gov. & Opposition 347 (2006).
100. Oomen, Donor Driven Justice supra note 45, at 894-899.
101. Id.
international community with no accountability. In an effort to ensure that this is not the case, many methods have been attempted. One of the most discussed solutions to this problem is the inclusion of various forms of local ownership. As discussed above, the possibility of using a traditional form from the transitioning state took hold in Rwanda.

The traditional form of the Gacaca is important as a remedy to two of the major problems discussed above. First, adapting the traditional Rwandan dispute mechanism was an attempt to remedy the imposed nature of many transitional justice mechanisms brought about by the international community. Linked to this was the attempt to use the Gacaca popular participation to foster reconciliation, something that has been a problem in many past mechanisms.

However, the Rwandan Gacaca failed in several important international fair trial elements. While the Gacaca form and popular participation of Rwandans allowed for true local ownership and thus had great potential for reconciliation going forward, a trial that is fundamentally unfair cannot achieve justice and is thus inherently unacceptable. In order to attempt to rectify this important and fundamental conflict tradition and the ever-evolving international standards of a fair trial, we must first discuss what elements are necessary to make a trial “fair” by international human rights standards.

IV. WHAT CONSTITUTES AN INTERNATIONALLY RECOGNIZED FAIR TRIAL?

Fair trial rights are among the most important, if not the most important, rights in the entire body of international human rights law. For that reason, it is exceptionally well developed in both international and regional documents and case law.

The right to a fair trial is expressly guaranteed in nearly every general international human rights document including the Universal Declaration of Human Rights (“UDHR”), the International Covenant on Civil and Political Rights (“ICCPR”), and others. The right is also

103. Oomen, Donor Driven Justice, supra note 45, at 894-899.
104. Le Mon, supra note 46, at 16.
105. Oomen, Donor Driven Justice, supra note 45, at 894-899.
106. Id.
107. Le Mon, supra note 46, at 16.
guaranteed in regional documents such as the American Convention on Human Rights ("ACHR"), the Banjul Charter, and the European Convention on Human Rights ("ECHR"). Fair trials are so important in international law that the Fourth Geneva Convention requires them even in times of armed conflict. The right is so indispensable that even while many other fundamental rights may be derogated from, a fair trial is still required by international law.

While there are minor differences between the fair trial rights promised in the various documents mentioned above, they have been interpreted in similar manners without much regard to the source, creating a relatively universal body of international fair trial law. International Criminal Court Justice Stefan Trechsel notes that the universally recognized right to a fair trial can further be broken down into eight separate categories. These categories include an independent and impartial tribunal, a public trial, the right to a speedy trial, the presumption of innocence (which includes the freedom from self incrimination), the right to counsel, the right to present both evidence and arguments in defense of the accusations and to challenge the prosecution’s evidence and arguments, the right to be informed of all charges, and finally, the right to "some form of appeal." 

It is the purpose of this article to discuss which of these rights cannot be altered in any way and which of them can be used as areas to insert local ownership and traditional norms while still maintaining the all important compliance with international human rights law. In order to do this, the individual rights Justice Trechsel lists above will be split into two categories, those involving the form and function of the tribunal and those involving the treatment of the defendant.

The belief of this author is that local ownership and traditional norms can be inserted into those involving the form and function of the tribunal, so long as the rights involving the treatment of the defendant are left unaltered. While there are a variety of reasons that individual fair trial rights cannot be harmed, the simple reason is that those rights pertaining to the treatment of the defendant are too narrow and personal, while those concerning the form and function of the tribunal have a

14. Id. (note: the right to appeal will not be discussed in the framework section).
15. See infra notes 143-144 and 145-149 and accompanying text.
much broader range that allows for both cosmopolitan and substantive alterations.

A. Defendant Treatment Rights

This fair trial sketch will begin with the defendant treatment category of Justice Trechsel’s fair trial rights listed above. This category will include the presumption of innocence, which includes the freedom from self-incrimination; the right to counsel; the right of a defendant to present their own evidence and arguments as well as challenge those presented by the prosecution; and the right to be informed of all charges. This section will include a brief discussion of each such right and an explanation as to why it is not an area where local ownership and traditional norms can be inserted alongside the international fair trial right.

The first right to be discussed is the presumption of innocence. Briefly, this right is codified in many international legal documents beginning with article 11 of the Universal Declaration of Human Rights.116 In addition to merely guaranteeing that an individual remains innocent until proven guilty, this fair trial right grants protection against self-incrimination, a fundamental tenet of the presumption of innocence.

The second right under the broad category of defendant treatment rights is the guarantee that the defendant be allowed to present evidence and arguments in his or her defense as well as challenge evidence and arguments presented by the prosecution. Similar to the presumption of innocence, a broad range of international human rights documents guarantee this right. While it is not specifically mentioned by the UDHR, it is enumerated within article 14(3)(e) of the ICCPR.117

The defendant’s right to information is the third right included within this category. Similar to the right to present and refute evidence and arguments, this right is guaranteed by article 14(3)(a) of the ICCPR.118

Of Justice Trechsel’s categories of generally accepted fair trial rights, the final that will be included within this category is the defendant’s right to counsel. Such a right is also guaranteed by the ICCPR, article 14(3)(d).119 For the purposes of this fair trial framework,

116. UDHR, supra note 110, at art. 11.
117. ICCPR, supra note 110, at art. 14(3)(e).
118. ICCPR, supra note 110, at art. 14(3)(a).
119. ICCPR, supra note 110, at art. 14(3)(d).
there are two important inclusions in the right to a counsel. First, the defendant is given a choice of counsel according to, not only the ICCPR, but also the Banjul Charter, the ECHR, and the ACHR. Second, the Human Rights Committee, in interpreting the ICCPR, has determined that defendants should be given a choice of counsel that will act “in accordance with their established professional standards and judgment (sic) without any restrictions, influences, pressures or undue interference . . . .”

The reason why these fair trial rights cannot be altered through local tradition is twofold. For the first three rights discussed, the categorization is a matter of the broad interpretation of the right and the restrictiveness of the surrounding policy space. That is, the grey area that exists within many of the tribunal form rights discussed below is simply not present.

Simply put, an individual is either presumed innocent at all phases of the trial or they are not. If at any point that right has been altered or distorted, then the right has been violated and the trial has run afoul of the broad body of international human rights law. The expansive application of this the right to be presumed innocent right has been upheld repeatedly by various international courts. In one example, the ECHR held that a pre-trial public statement by a prosecutor that the police had found the murderer constituted an unlawful rebuke of the presumption of innocence. This level of fortitude and inflexibility has become commonplace.

The same is true for the right of the accused to present and refute evidence and arguments. If the accused, within the confines of evidence and trial law, is not allowed to present and refute evidence and

120. Id.
121. ICCPR, supra note 110, 14(3)(b), Banjul Charter, supra note 111, at art. 7, ACHR, supra note 111, at art. 8(2)(d), ECHR, supra note 111, at art. 6(3)(c).
123. See generally Stefan Trechsel & Sarah Summers, The Right to be Presumed Innocent, in HUMAN RIGHTS IN CRIMINAL PROCEEDINGS (2006).
124. Id.
127. Id.
arguments, their rights have been violated. The same is true with the right to be informed of charges. In order for these rights to be respected, they cannot be altered in any meaningful way.

The fourth right, to be represented by counsel, does not share the same stringent application that the first three rights did. There are ways that could be envisioned where the defendant’s right to be represented by counsel is respected to the letter of international human rights law that also include local tradition or norms, however, the seriousness of the potential punishment for crimes in a transitional context requires that all potential conflicts be resolved in favor of the accused.

One hypothetical situation would be the adaptation of a traditional method of dispute settlement that allowed for village elders to represent sides. In a transitional justice adaptation, that could include the assignment of village elders to defendants. According to the letter of the ICCPR, that would be granting counsel to the accused. If some choice were given, that could also satisfy the requirement that the defendant be given a choice of counsel. However, as the Human Rights Committee has determined, it is not only necessary that the defendant be able to choose his or her own counsel, but that counsel be able to perform to “their established professional standards . . . .”

While the requirement is not, on its face, perfectly clear, it is likely that the Human Rights Committee would require the established professional standards of the Counsel to be those of the legal profession. In short, the Human Rights Committee would probably require the professional standards brought by Counsel be those of the standard profession of a counselor.

The Human Rights Committee has also found that the seriousness of the potential punishment must be taken into account when determining the extent of a right to counsel. For example, in the case of Francisco Juan Larrañaga v. The Philippines, it was held that a defendant’s right to counsel was violated when his request for adjournment to find and hire another counsel was denied after his original lawyer was arrested for contempt of court. The Committee

128. See supra text accompanying notes 123-127.
130. Mahoney, supra note 126, at 121.
131. Id.
132. Id.
133. Larrañaga, par. 2.5, 2.6.
noted that since Mr. Larrañaga was facing the death penalty, a significant amount of leeway must be afforded him, even if it causes a trial delay. 134 In transitional justice mechanisms, the potential punishments are far ranging and include capital punishment, life in prison, and other significant periods of incarceration. 135 Due to the seriousness of these potential punishments, the right to counsel must be viewed broadly in favor of the accused. 136

It can be argued that much of the development of international human rights law pertains to mainly formalist legal systems through bodies such as the Human Rights Committee and the ECHR. 137 This is precisely the argument made by proponents of the Rwandan Gacaca. Advocates argued that because there were no prosecuting attorneys and the Judges did the primary questioning, along with an absence of complex rules of procedure that would hurt the defendant, this was tantamount to a fair trial. 138 This view is simply unacceptable. As discussed above, the Human Rights Committee and other human rights bodies have given significant weight to the ability of the accused to have legal counsel. 139

In contrast, however, it is important to note that the African Commission on Human and Peoples’ Rights, undoubtedly schooled in such informal tribunals, has cast a similarly broad interpretation of the right to counsel. In its “Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa,” the Commission states that accused parties have a right to legal assistance when the “interests of justice require” and, further, that said interests should be determined in criminal cases by the seriousness of the offense and the severity of the potential sentence. 140 While complexity of the case and the ability of the accused to represent themselves comes into play in civil matters, it is irrelevant in criminal matters. 141 In the Gacaca, defendants were facing serious charges and potential sentences that were substantial enough for

134. Id. at 7.6.
135. Sosnov, supra note 73, at 121.
136. Larrañaga, par. 7.6.
137. See generally John G. Merrills, The Development of International Law by the European Court of Human Rights (1993).
139. Larrañaga, par. 7.6.
141. Id.
the interests of justice to require the right to an attorney. 142

With these things in mind, any transitional justice mechanism that would be in line with international fair trial norms must leave the defendant treatment rights untouched. In any such mechanism, the defendant must be presumed innocent at all stages of the trial, including the interrogation where he or she must be free from self-incrimination. The accused must be allowed to defend himself against all accusations and evidence, while being allowed to present both on his own behalf. The defendant must be accused of all charges against him and finally, he must be given access to a counsel of his choosing that is in line with the “established professional standards” of the legal profession. Any deviation from these specific defendant treatment elements would make a trial in violation of international fair trial rights.

B. Tribunal Form Rights

The second category, and that which is considerably more relevant for this article, is the fair trial rights concerning the form and function of the tribunal. Of the rights espoused by Justice Trechsel, this will include that the tribunal be both independent and impartial and that the trial be speedy and public. 143 It is important to note that while these rights are not inferior to those of the defendant’s treatment listed above, they are considerably more flexible. 144 This will allow for the insertion of local and traditional norms into the tribunal form. Just as above, this section will include a brief explanation of each tribunal form right and an explanation as to why the right is flexible enough for the necessary inclusions.

It is possible that there is no more important fair trial right than the right of the accused to an independent and impartial tribunal. 145 This right ensures that the judiciary is not responsible to any of the other branches of government, so that it can make its own decisions about the legality of the charges against an individual, his or her guilt or innocence and the validity of all other aspects of the trial. 146 The Human Rights Committee has discussed tribunal independence and impartiality with particular reference to the following factors: manner and qualifications

142. Organic Law, Law No. 40 of 2000, art. 68 (Rwanda) (the Gacaca law allows for punishments up to and including capital punishment or life imprisonment).
143. See infra text accompanying notes 147-155.
144. See infra notes 156-159 and accompanying text.
146. Id.
for appointment; the experience while serving as justices, including the term duration and their promotion; transfer and removal; and actual independence.  

It is important, however, for the purposes of this article, to recognize that the Human Rights Committee has recognized periods where derogation from the strict independent and impartiality requirement is possible. In the comments this refers to both military and “special” courts that are required by “exigencies of the actual situation.”

Similar flexibility is present in the Committee’s general thoughts on the publicity of trials. While the group believes that it is “an important safeguard in the interest of the individual and of society at large,” it is readily acknowledged that there are situations where this right must be altered. The ICCPR itself acknowledges a number of such exceptions, including a catch-all provision that allows the exclusion of the public “where publicity would prejudice the interest of justice.”

The final right within this category is the right to a speedy trial. In the language of the ICCPR, this is the right to be tried without undue delay. Regional human rights treaties, including the Banjul Charter, the ECHR, and the ACHR alter the language to require that individuals accused of crimes be tried within a “reasonable time.”

In either framing, this right has been interpreted to have a dual requirement. The first is that the individual not be tried so quickly as to restrict their ability to construct a defense. If an individual were arrested and immediately brought before a judge for trial, they would not have had adequate time to construct a defense, consult with an attorney, call and consult witnesses, or review evidence, thus rendering all of the other rights irrelevant. The second prong of the speedy trial requirement is that the accused not be forced to wait an unreasonable time for their trial. This is the more obvious element, as an individual who has been...

147.  Office of the High Commissioner for Human Rights, supra note 122, at par. 3
148.  Id. at par. 4 (note: The Committee envisions such scenarios only for states of emergency as contemplated by article 4 of the ICCPR. The circumstances of such a public emergency are unimportant for this particular article. It is simply necessary to understand that the Committee has acknowledged that in extraordinary circumstances there is a small level of flexibility surrounding the Independent and Impartial requirement.).
149.  Id. at par. 5.
150.  ICCPR, supra note 110, art. 14(1).
151.  ICCPR, supra note 110, art. 14(3)(c).
152.  Banjul Charter, supra note 111, at art. 7(1), ECHR, supra note 111, at art. 5.3, ACHR, supra note 111, at art. 7.5.
154.  Id. at 119-120.
held for years on a charge without trial has already been punished and thus a verdict is immaterial.\textsuperscript{155}

The flexibility of this right is clear. There is no hard line requirement in international law that a trial must occur after a certain number of days. It is simply a guide; the trial must be held in a reasonable time. This broad flexibility has been demonstrated in international holdings, with the ECHR allowing delays up to and including nearly thirteen years depending on the complexity of the case and other individual circumstances.\textsuperscript{156}

The bonding element of these three rights is the flexibility that international human rights law has written into their application.\textsuperscript{157} The same is true for the public order exception to trial publicity. While declaring a public emergency may not be necessary or in the interest of the state, it is important that the crafters of international law understood the difficulties and necessities that may exist during certain periods in the duration of a regime.\textsuperscript{158} During post-atrocity periods, it is necessary that the flexibility of such rights be used in an effort to succeed in all of the goals of transitional justice discussed above, not merely to seek retribution or restitution as is so often the case for standard domestic criminal court systems.\textsuperscript{159}

This breakdown of fair trial rights leaves us with a delineation that is useful for the insertion of local norms and traditions into transitional justice mechanisms. While the first category of fair trial rights, those that concern the treatment of the defendant at and before trial, do not have a grey area that can be used for procedural and substantive changes, the latter rights have such flexibility. These tribunal form and function rights allow enough flexibility that local norms and traditions may be inserted in a meaningful way, giving the local populace control over significant procedural and substantive elements of the transition of their country.

\textsuperscript{155} See generally Mahoney, supra note 126.
\textsuperscript{156} Ikon Industriële konsulenten in marketing-management B.V. & Martin v. The Netherlands, 485 Eur. Ct. H.R. 57 (1992) (accepted a period of twelve years and ten months).
\textsuperscript{157} It is important to note that while it is not the purpose of this article to claim that all transitional justice situations should be viewed in the same category as public emergencies that allow for derogation as envisioned by article 4 of the ICCPR and similar provisions in the ACHR and ECHR, it is important to the article that such provisions exist.
\textsuperscript{158} OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, supra note 122, at par. 4.
\textsuperscript{159} Geetanjali Mukherjee, Achieving Reconciliation through Prosecution in the Courts: Lessons from Rwanda, 28 CONFLICT RES. QUART. 331, 334 (2011).
V. LOCAL OWNERSHIP AND TRIBUNAL FORM RIGHTS

This section of the article will serve two purposes. First, it will act as an area where the tribunal form and function rights discussed above will be paired with hypothetical local tradition and norms. While this may seem like a fool’s errand, it is important to point out specific ways in which traditional dispute settlement mechanisms may be incorporated into the hypothetical transitional justice mechanism, that both integrates local ownership and respects international fair trial rights. The second part of this section will conclude the article in an effort to recap all of the crucial elements, as well as things to avoid, of a transitional justice mechanism that both respects international human rights norms and incorporates local traditions and norms. This section will also include a method by which such a framework can be incorporated into individual transitional justice mechanisms.

A. Hypothetical Inclusion

This section will serve to examine the rights that were determined to have relative flexibility above in the context of how local traditions and norms may be included within their wide umbrellas.

The requirement that tribunals be independent and impartial is perhaps the most important tribunal requirement of any of the fair trial rights. In spite of, or perhaps because of, its importance, it has been one of the most difficult requirements for judicial systems throughout the globe to maintain. Independent and impartial judiciaries have been of particular concern in the developing world due to, among other things, a lack of capacity and strength in central government. Post-atrocity states implementing transitional justice schemes have many of the same problems. As discussed above, the solution to this problem for many transitional states has been to include high levels of international participation.

Thus, the flexibility within the right to an independent and impartial tribunal has a twofold importance. First, it allows for the insertion of

164. Oomen, Donor Driven Justice, supra note 45, at 897.
local norms and traditions. Second, it removes some of the much-maligned international influence that can sometimes have conflicting goals and creates the appearance of imposed justice.

The flexibility of an independent and impartial tribunal does not, however, insinuate that a tribunal needn’t be independent and impartial.\(^{165}\) It merely means that there is some leeway in the creation and application of this particular right that allows for the insertion of local traditions and local ownership.

Take an example of a society where community is extremely important to individual being and traditional dispute settlement mechanisms.\(^{166}\) Often, such community-based mechanisms have a strong focus on both mediation and conciliation. For example, Fiji has a traditional dispute resolution mechanism that has been adapted for use in modern civil disagreements. Under the mechanism, it is common for the offending party to apologize and be conciliatory to the offended party. If this apology is not accepted, the help of a third party mediator is sought. This mediator must be agreeable to both parties and is responsible for judging the sincerity and acceptability of the apology. If it is determined to be acceptable and is still not accepted by the offended party, that party becomes socially ostracized. In the Fijian system, even merely for civil disputes, this mediation was created to foster greater social and communal cohesion, an important goal of transitional justice.\(^{167}\)

The difficulty in incorporating such a system into various elements of transitional justice mechanisms would not be high. For instance, a TRC could be developed where it was the responsibility of the offending party to tell their story and apologize to the aggrieved parties or their families. A third party mediator, who was determined to be acceptable by the whole of society, presumably through republican selection, could then be asked to determine the sincerity of the apology to determine an acceptable punishment. The third party or a third party commission could also be asked to determine the validity of the story, using external

\(^{165}\) Ferejohn, \textit{supra} note 62, at 364.

\(^{166}\) \textit{See generally} Roger MacGinty, \textit{Indigenous Peace-Making Versus the Liberal Peace}, 43 \textit{Cooperation \\& Conflict} 139 (2008) (describes the importance of reconciliation and community in various case studies including the Acholi in Northern Uganda, the Nasa tribe in Colombia and the Rwandan Gacaca courts).

evidence, such as the case with the South African TRC.168

This type of community-based mediation could also be used in the sentencing stage of a formal trial or a mechanism with like powers. This has already been attempted in Australian criminal courts for indigenous defendants. In a transitional justice mechanism, the defendant could be given the opportunity to apologize to the victim or victim’s family and tell his or her story. If a third party mediator believes its sincerity, the sentence could be reduced or changed to something constructive for the community. The goal of the Australian court system is to make for a more meaningful punishment, one that contributes to social cohesion and society in addition to retribution rather than solely retributive justice.169

The commonality between these two examples and the South African TRC does illustrate a tremendous problem discussed above with the TRC.170 That is, the greater the evils committed and admitted to by the defendant, the more they have a potential for a reduced sentence.171 The important difference is that the above examples exist in addition to formal trials or TRC’s, and are not sole mechanisms. The potential for lesser punishment based on communal apology is an adaptation of traditional mechanisms that have been used to foster community and build society for generations.172 An individual who goes to a TRC to tell their story and apologize with utmost sincerity, who then is forced to perform services that help rebuild a post-atrocity state, is considerably different than one who goes to a TRC to simply tell a story and is given an amnesty for his or her crimes based on that story. The apology and the punishment could make a considerable difference to victims and their advocates.173

The same is true for the difference between the use of an apology and mediation in the sentencing phase of a trial. While it may be that a reduced sentence is available, it would be for a traditional mediator to determine the sincerity of the apology and determine whether or not that allows them a commutation of retributive punishment into a constructive punishment. Such a system has been valued in traditional societies with strong senses of community for many years; it is worthwhile to

170. Shaw, supra note 89, at 7.
171. Id.
172. See generally MacGinty, supra note 166.
incorporate such traditions into transitional justice mechanisms.  

The question may be posed: how does this differ from a standard conception of the independent and impartial tribunal? While these are clearly different than traditional western forms of adjudication, that does not mean they are different than the independent and impartial tribunal envisioned in international human rights law. While the fair trial rights regarding defendant treatment are inviolable and unchangeable, there is some flexibility in rights concerning the tribunal form. While the examples above may differ from the ICTY and ICTR, set up in the wake of atrocities by the international community, they have many of the same powers but incorporate a form that has been used in community based societies for generations.

Similar flexibility is possible in the publicity and speed of trials. While these may seem to be minuitae in the wider array of fair trials, they are very important elements to consider when discussing tradition or local norms based dispute settlement mechanisms in transitional justice.

There are two extremely different situations where publicity may be of extreme concern when creating transitional justice mechanisms based on traditional norms and local ownership. The first is in the case of a TRC. The latter is in the event of a trial-like dispute resolution apparatus based on traditional dispute resolution mechanisms.

Consider publicity in a standard form TRC. Among the previously stated goals of a TRC is to create a historical record of the crimes committed during the atrocity period. While the conditional amnesty may serve to induce many to come forward and admit to their crimes, the public shaming that comes from admission of such horrific acts could serve to negate any such inducement. This would be particularly true when the temporal mandate of such a TRC is broad enough that many crimes were committed in the distant past, making their prosecution extremely unlikely. Any significant reason not to

174. See generally RALOGAIVAU, supra note 167.
175. Meron, supra note 145, at 359.
176. See generally RALOGAIVAU, supra note 167.
178. See infra text accompanying notes 180-186.
179. See infra text accompanying notes 187-188.
180. Promotion of National Unity and Reconciliation Act 34 of 1995, Preamble (S.Afr.).
182. Id.
come forward could be a substantial impediment to the creation of a full historical record.

In such a case, it may be in the interests of justice to limit publicity in a manner consistent with local tradition. In several developing states, including Nigeria and other African countries, there has long been a tradition of the administration of justice by a council of elders. The method is also quite prevalent in many Aboriginal cultures in Western Australia. In such scenarios, an aggrieving party is called before a council of elders who will determine his fate.

One potential solution to the TRC problem discussed above would be the creation of a section that would be responsible for dealing only with long past offenses in addition to a public forum for modern crimes. This section would not be broadcast in an effort to ensure greater participation, and thus a greater historical record, but to contrast the significant disincentives to participate such as a communal shaming and fears of retribution under previous TRC regimes.

The second problem that could be remedied by the flexibility of the publicity requirement is the tremendous corruption that is possible through communal trials. Many traditional systems of dispute resolution allow for communal adjudication, in which many respected members of a community are asked to determine the outcome of a trial. With transitional justice mechanisms, the potential for punishment is high enough to invite undue influence over judges by defendants and their supporters. This includes vote buying and intimidation among other methods. A lack of publicity would be useful for hiding the identities of those asked to partake in the judgment, thus limiting the potential for corruption.

Finally is the flexibility of the speedy trial requirement. As previously mentioned the right is twofold. Trials cannot be brought quickly enough to negate the defendant treatment rights above, but cannot be withheld for long enough that the pre-trial detention is similar

185. Id. at 85.
187. Le Mon, supra note 46, at 16-18
188. Id.
189. Mahoney, supra note 126.
in form to retribution.\textsuperscript{190} As one advantage of the use of traditional justice mechanisms is efficiency, any well-designed system need not worry about the latter, so the only concern is the former.

One example of the importance of this flexibility is a hypothetical system in which there is a singular day of adjudication; a system where one day per month, issues are brought before a council that will decide them all on that day. Such a system could be accommodated while respecting international human rights, so long as that day is not near enough as to negate the intractable defendant treatment rights discussed above and fair enough away to make retribution redundant.\textsuperscript{191}

Such flexibility would be vitally important for cultures that believe strongly in special days for the convening of tribunals and adjudication of disputes. While such an accommodation may seem trivial, in many societies it may not be. In the case of Rwanda, the timing of the Gacaca trials was exceptionally important. While the participation in the preparatory stages of the trials was exceptionally high, many of the tribunals themselves suffered from tremendously low participation. This was due, in great part, to the timing of the trials. The initial trials began during the sorghum harvest and not harvesting the grain was an economic impossibility for many Rwandans.\textsuperscript{192} Any system that does not allow for such important elements is doomed to failure.

However, the above examples are not meant to be comprehensive. The hypothetical and overarching nature of this paper demands only that such examples be given in ways that demonstrate the flexibility of the tribunal form rights. Each post-atrocity state is different and has different requirements and goals for transitional justice, along with different cultural backgrounds and traditions. These are all important when incorporating traditional norms into transitional justice mechanisms while respecting international human rights norms.

\textbf{B. Pitfalls to avoid}

In concluding the article, let us first briefly re-examine the major problems of previous transitional justice mechanisms discussed above.

The paper identifies four broad categories of problems that have been prevalent in varying degrees in all of the historical transitional

\textsuperscript{190} See generally Mahoney, supra note 126.
\textsuperscript{191} Mahoney, supra note 126.
justice mechanisms. The first was imposed justice, or the belief of local populations that decisions for the state’s future are being made by the international community that commands the purse strings. The second was a lack of respect for internationally recognized fair trial rights. The third criticism of previous mechanisms was a failure to move the country forward in reconciliation. Finally, there has been a complaint of extraordinary inefficiency. All four of these issues must be dealt within an effort to create a viable transitional justice mechanism.

The first and third issues can be dealt with in kind. In order to avoid the perception of imposed justice, as well as assist in the reconciliation of a post-atrocity state, there must be substantial incorporation of local traditions and norms. By allowing a populace to control its own destiny, it assists in the achievement of those goals. When examining this “bottom up” approach, Lundy and McGovern discovered that the achievement of goals, including human rights and others, by outsiders can be achieved only through meaningful participation by the local populace. That is, “control over decision making is itself central to the achievement of those rights.” When applied to reconciliation, the logic goes as follows: by allowing a populace to use its own system to attempt reconciliation, even if the mechanism developed is not the first choice of the international community, that system will likely be more successful because the control over decision making is central to the achievement of the goal of reconciliation.

Of course, local ownership is not the only necessity to avoid a failure to reconcile. Systems must also avoid the seduction of victor’s

193. Teitel, supra note 7, at 11.
196. See supra text accompanying note 76-85.
197. Mayer-Rieckh & De Greiff, supra note 95, at 80-120.
198. Le Mon, supra note 46, at 16.
200. Id.
201. Lundy & McGovern, supra note 2, at 281.
203. Gibson, supra note 173, at 543 (discussing the complex political, social and economic structure that exists around post-conflict reconstruction).
This has been the complaint of many systems throughout history. There is an extremely simple way to avoid this problem in theory, but political realities often get in the way. It is vitally necessary that all potential crimes be investigated, even those committed by the victorious side of the conflict. Trials for the accused must be the same in form and fairness, in stark contrast to the secret military trials by peers of the RPF in Rwanda while Hutus faced open and public Gacaca trials. It is not the intention of this paper to examine the potential political inducements or imperatives that could avoid the pitfall; it is merely a necessity for the success of any legal mechanism for post-atrocity transitional justice.

The use of such local traditions often brings about the second problem mentioned above. That is, the lack of respect for international fair trials norms. Derogation from fair trial rights would be equally disastrous as the two problems discussed above, for that issue, a framework for flexibility was drawn.

According to Justice Trechsel, the right to a fair trial before the appeal can be broken down into the following: presumption of innocence, the right to be informed of all charges, the right to examine and refute witnesses and evidence, the right to counsel, an independent and impartial tribunal, the right to publicity of trial, and the right to a speedy trial. Among these rights, the initial four have been categorized as defendant treatment rights, or those rights that directly affect how the defendant is treated. These rights have been interpreted broadly and have such little leeway as to make the rights fundamentally inflexible. There is no room within these rights to insert any sort of local ownership or traditional norms.

However, the final three rights, the right to an independent and impartial tribunal, the right to a public trial, and the right to a speedy trial have been written and interpreted with considerable flexibility. As it has been said previously, that does not imply any sort of lower

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205. Id.
207. Le Mon, supra note 46, at 16.
208. See supra text accompanying note 114.
209. See supra text accompanying note 115.
210. See supra text accompanying notes 123-142.
211. Meron, supra note 145, at 359.
level of importance for these rights. In fact, among them may be the most important rights. The flexibility simply recognizes the necessity of states, at certain points in their history, to make alterations to the tribunal form rights to account for exigencies. There may be no greater exigency than post-atrocity periods of transition.

The final problem was procedural. That is, many transitional justice mechanisms are extraordinarily inefficient. An answer to this problem historically was the inclusion of local dispute settlement mechanisms that are more efficient than formalist western-style prosecutions such as the ICTR and ICTY. By increasing the speed of mechanisms it allows states to get out from under the shadows of atrocities more quickly. This potential is vitally important for post-atrocity reconstruction and reconciliation.

As this article has identified the fundamental problems experienced by past transitional justice mechanisms and created a framework under which these problems could be remedied, it is now time to discuss what the framework would look like for a hypothetical transitional justice mechanisms that avoids the pitfalls of the past while incorporating local norms and respects international fair trial rights. It is important to note that this is a particularly daunting task and this article does not attempt to create anything greater than a framework from which other systems may draw. Every transitional justice situation is different. The needs of a particular state depend on its culture, history, particulars of the past atrocity, and many other elements. The drawing of a transnational framework does not (and indeed cannot) attempt to encompass all potential societies. It can, however, create an approach by which such individualized systems can be created.

C. Steps for an Individualized Framework

The first, and perhaps most underappreciated step that should take place when attempting to create a transitional justice mechanism based on local tradition and norms, is to determine the potential of the traditional mechanism for bringing about peaceful reconciliation and

212. Id.


214. Mayer-Rieckh & De Greiff, supra note 95, at 80-120.


217. Id. at 360-362.
change. While this may seem trivial, in his study on the Rwandan Gacaca, Lars Waldorf points out the differences that exist in traditional mechanisms. There are many variations of such systems that could be tremendously problematic for their adaptation into transitional justice mechanisms. Many such systems have traditionally been used in an effort to maintain power structures. It is easy to see why such a system would be unacceptable, unless altered tremendously, for something as fundamentally transformative as transitional justice.

Professor Waldorf also goes on to discuss the fact that many so-called traditional mechanisms bear a tremendous external imprint when analyzed in detail. In this instance, perception is more important than reality. While systems that receive external funding and assistance may bear some external imprint when studied closely, the perception and acceptance of local ownership is far more important. As it is vital that the adapted system appear to be local and organic, the external imprint must, however, be miniscule. As long as there is a widespread perception that the system is traditional, the actual history is immaterial.

The second important step is the inclusion of the local populace. As discussed earlier, Lundy and McGovern discovered the importance of local participation with rights and mechanisms. Regardless of the form of the transitional justice mechanism, there will be no success without the participation of the local populace.

While the first two steps are imperative, the word of the local population, through leadership or referendum, should not be viewed as infallible. It is imperative that the selection of a traditional mechanism and the solicitation of local input do not supersede what is required under the internationally recognized right to a fair trial.

This includes the fracture discussed in great detail above where the defendant treatment rights are left untouched and the well-selected local traditions and norms are inserted into the form of the tribunal. Under this system, regardless of the state, culture, area or traditions, the defendant is always entitled to certain things. The defendant is always given an attorney, always fully informed of the charges against them, always given a right to present and rebut witnesses and evidence brought

219. Id.
220. Le Mon, supra note 46, at 16.
221. Lundy & McGovern, supra note 2, at 265.
222. Id.
223. See supra text accompanying notes 115-158.
224. See supra text accompanying notes 115-142.
about by the prosecution, and finally, the defendant is always presumed to be innocent throughout all stages of the trial.225

While the tribunal form rights are important, the appearance of said rights can be completely different depending on the incorporation of local traditions.226 For example, if, as was the case in Rwanda, a harvest is an economic necessity of the entire population, it would not be worthwhile to hold rounds of trials during the harvest.227 It would erode participation and therefore local ownership.228 The number of examples is unending.

After the form of the tribunal has been determined, the most important element is the fundamental fairness towards all parties.229 While victor’s justice is tempting for the long oppressed groups that were able to win a civil war or cast off despotic oppression, such temptations hamper future reconciliation.230

This article by no means intends to over simplify or denigrate the process of transitional justice through various prosecution or prosecution-like mechanisms. Every system is different because the needs of every post-atrocity state are different. Democratization is a difficult and winding process. However, if good institutions are set up that allow for justice and reconciliation while respecting international human rights norms, the process will be markedly easier for future transitional states.

225. Id.
226. See, e.g., RALOGAIVAU, supra note 167 and accompanying text.
228. Id.
229. See supra text accompanying text notes 206-207.
230. Id.