DOES JUSTICE COME FROM THE BRIEFCASE OF THE WHITE MAN?

Samuel C. Duckett White*

The International Criminal Court (ICC) has been viewed as the ideal forum to try, decide and dispense punishments for transnational violations of individual and collective human rights as part of a broader transitional justice framework. This paper explores general global issues with transitional justice, as well as whether the concept of justice is inherently Eurocentric, through the lenses of two case studies: Argentina and Uganda. It culminates with some observations on, and provides alternates too, retributive and reconciliation justice models.

I INTRODUCTION

It does not necessarily follow that ending a conflict brings about peace; for 'peace is not merely the absence of armed conflict; it is the restoration of justice, and the use of law to mediate and resolve intersocial and interpersonal discord.'[1] Justice as a concept has been increasingly scrutinised and assessed for its subjectivity, depending upon not only the individual but also how a culture, ethnicity, religion or family group conceptualises a basis for rights and reconciliation: be it truth trials, amnesty, prosecution, reintegration, or execution.[2] This paper explores the International Criminal Court and its effect on national transitional justice through the lenses of two case studies: Argentina and Uganda.

The Secretary-General of the United Nations defines 'transitional justice' as "the processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses."[3] The same report later expresses a clear need for those same mechanisms to meet 'universal' standards.[4] Conversely, emerging literature concerned with transitional justice suggests that the expectations of local populations, or victims, must be considered when designing mechanisms for post-conflict state

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[1] Mahommad Bassiouni (2003) 'Justice and Peace: The Importance of Choosing Accountability Over Realpolitik', *Case Western Reserve Journal of International Law*, 35, 192.

[2] Delia Lin, 'Notions of justice: a comparative cultural analysis' *International Journal of Evidence & Proof* 2017, Vol 21(1-2) 79 – 86.

[3] *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies – Report of the Secretary-General*, UN Doc S/2004/616 (23 August 2004), 4 [8].

[4] Ibid, 4-6.

building.[5] While such concerns are valid, to merely adopt it as the single criterion for success overlooks the ongoing tension between national governments and international organs. Thus, from the outset, it is clear that such a universal standard as promoted by the United Nations may conflict with the use of amnesties or traditional community justice schemes that fail to meet a traditional, retributive concept of justice. Justice is often held to be self-explanatory, yet it is inherently difficult to define - to talk of justice universally implicitly demands that particular norms should be applied to all. It is often commented by Third World Approaches to International Law ('TWAIL') academics that justice itself poses a threat to peace.[6]

The international transitional justice discourse, upon which modern academic commentary and practice revolve around, is often traced back to the dual Nuremberg and Tokyo trials in the aftermath of the Second World War. Since these proceedings, the international community has gradually shifted from an aim of peace towards the 'historical pursuit of justice.'[7] The trials were heavily focused on retribution and deterrence of future breaches of international criminal law, as well as expanding the jurisprudence of international law. It is therefore unsurprising that after the collapse of Latin America's military juntas in the 1980s retributive justice was favoured.

This paper thus aims to outline and explore the rivalry between international and national expectations in transitional justice, and whether any such 'justice' as promoted by the ICC can be detached from its inherently Eurocentric basis[8]. In order to properly develop peace, TWAIL scholars often note that justice must be defined on a case-by-case situation, given what is required by the transitional situation: retributive, deterrent, compensatory, rehabilitative, exonerative and restorative. Finally, a solution will be promoted for any future developments.

II ARGENTINA AND THE TRIAL OF THE SIXTH JUNTA

A *Background Facts*

Argentina is a country characterised by massive European immigration and

[5] See, eg. Patrick Vinck and Phuong Pham, 'Ownership and Participation in Transitional Justice Mechanisms: A sustainable Human Development Perspective from Eastern DRC' (2008) 2 *The International Journal of Transitional Justice*, 398; Simon Robins, 'Towards Victim-Centred Transitional Justice: Understanding the Needs of the Disappeared in Post-conflict Nepal' (2011) 5(1) *International Journal of Transitional Justice*, 75.

[6] Vink and Pham, ibid.

[7] Ruti Teitel, 'Transitional Justice Genealogy' (2003) *Harvard Human Rights Journal*, 16; 69.

[8] The phrase 'eurocentric' relates to the notion that *inter alia* certain values, ideals, terminology, social, economic and political concepts are inherently European and may not have equivalents in other cultures.

substantial economic growth in the early 20th century. Consequent economic decline, and military coups culminated in the civic-military dictatorship of Jorge Rafael Videla. From 1976 to 1983, the *junta* – calling itself the National Reorganisation Process – organised and carried out the repression of dissidents under the pan-South American *Operation Condor*. State officials alleged that sedition was an inheritable trait and thus could be eugenically altered through forcibly removing infants at birth and disappearing the mothers.[9] Victims included trade-unionists, studentS, left-wing activists, journalists and intellectuals. Although disputed, some estimates place the death toll at nearly 30,000 persons, whose bodies were dropped into the ocean under the eponymous phrase 'death flights', buried in concrete or collectively burnt.[10] The military, faced with increasing public pressure, attempted to regain popular support through the occupation of the disputed Falkland Islands.[11] The defeat of Argentine forces by the British forced the junta to step aside and allow free elections, on the condition of a blanket amnesty.

The blanket amnesties – manifesting in the so-called 'Impunity Laws'[12] - were justified by the incoming Government, arguing that 'political stability simply out-balanced that of accountability.'[13] The amnesties were compounded under the successive democratic government of President Alfonsin who introduced what was colloquially referred to as the 'Full Stop' Law and the Law of 'Due Obedience.'[14] It is against this legal-political historical background that Argentina has had to deal with its past.

B *Retributive Justice: A Double-Edged Sword*

The development of national transitional justice mechanism, without the oversight of the ICC (in comparison to Uganda's experience covered below) has resulted in a plethora of answers attempting to balance complex social, legal and economic concerns in seeking justice for victims of human rights abuses. Initially, in 1995, the then-Commander in Chief of the Argentine Army, Mr Martin Balza, offered an apology to victims of the *junta* in an appeal for reconciliation, observing plainly that '[i]

[9] Paul Hoeffel, 'Junta takes over in Argentina' *The Guardian* March 24 1976, retried on 29 Oct 17 <https://www.theguardian.com/world/2016/mar/25/argentina-junta-coup-videla-peron-1976-archive>

[10] Antonius Robben, *Political Violence and Trauma in Argentina,* 2007, University of Pennsylvania Press, p 112 – 145.

[11] Ibid.

[12] 'Argentina: Amnesty Laws Struck Down' *Human Rights Watch* June 14 2005, accessed <https://www.hrw.org/news/2005/06/14/argentina-amnesty-laws-struck-down>

[13] Anastasia Kushleyko, 'Accountability v 'Smart Amnesty' in the Transitional Post-conflict Quest for Peace: A South African Case Study' (2015) *Current Issues in Transitional Justice*, Springer Series in Transitional Justice, 32.

[14] Above, no 27.

llegitimate methods leading to the suppression of life where used'.[15] Similar admissions were subsequently made by the Air Force Chief of Staff, Brigadier Juan Paulik, and the Navy's Chief of Staff, Admiral Enrique Molina Pico. When apologies were not sufficient, however, a reparation scheme was instituted in 1997 under the presidency of Carlos Menem with varying success.[16] The reparations offered varied and were initially limited to granting a pension to the spouses and children of the disappeared persons, before transitioning to a compensation scale based on civil servant salaries. As Alicia Pierini, Undersecretary for Human and Social Rights in Menem's government explains:

> The way in which this amount was fixed has to do with the idea of reparation rather than with indemnification. What we wanted was to pay, for each day of the detention, what the State's public servant of the highest rank would have earned. This implied breaking away from labor rights criteria and those of accidents in the workplace. Imprisonment was no accident.[17]

Those who received a benefit - be it the victim or the victim's family – had to renounce any further rights for indemnification for damages; this initially provoked resistance amongst certain international human rights organisations, who protested that receiving reparations implied exchanging the lives of victims for abandoning demands for justice.[18] Yet, domestically there was grassroot support for the request, with only one major NGO rejecting the idea.[19] The success of the policy reflected the needs and desires of the Argentine population.

These developments are further reflected in evolution in Argentine civil procedure. Whilst Argentina is unique in that it is the first country to prosecute its previous military dictatorship in its national civil courts[20] its acceptance of the supranational sovereignty of the individual is particularly worthy of discussion. To deal with past human rights abuses, successive governments have increased the legal standing of non-government organisations ('NGOs') to a point where, on behalf of the victims of government-sanctioned murders and disappearances, but who nonetheless have not been affected directly by crimes against humanity, may bring actions or claims against

[15] Argentina Army Admits Dirty War Killings ' *New York Times* April 25, 1995 - accessed <http://www.nytimes.com/1995/04/26/world/for-the-first-time-argentine-army-admits-dirty-war-killings.html>

[16] Marcela Valente, 'Belated reparations for Victims of dictatorship', *IPS News* Feb 7 1997 accessed <http://www.ipsnews.net/1997/02/argentina-belated-reparations-for-victims-of-the-dictatorship/>

[17] Pablo de Grieff, *The Handbook of Reparations* (Oxford University Press, 2008) 30.

[18] Ibid.

[19] Ibid, 32.

[20] Sergio Ciancaglini and Martín Granovsky, '*Nada más que la verdad: el juicio a las juntas*] (Nothing more than the truth: the trial of the juntas)', *Buenos Aires: Planeta, 1995.*

the Government.[21]

Such developments are important in contemporary Argentina, where a 'wall of silence' by former members of the junta has resulted in little to no information being available for prosecutions[22] reflecting the realpolitik of transitional justice, insofar 'political crimes committed by highly skilled operatives trained in the art of concealing their crimes and destroying evidence are difficult to prosecute.'[23] Previous members of the junta who have publically announced they would whistle blow have been found dead[24] or have retracted their undertakings.[25] The expansion of the number of individuals who may take actions against the former junta has thus increased accountability and public confidence in the rule of law. The converse however is as true; a failure to prosecute may encourage vigilante justice, create feelings of distrust towards the new government, and encourage cynicism towards the rule of law.[26]

In 2005, when it became apparent that justice required more than economic compensation, the Argentine Supreme Court found the aforementioned impunity laws to be unconstitutional, favouring the relentless prosecution of military officials of all ranks involved.[27] The Court held that the amnesty laws were incompatible with the American Convention on Human Rights and as such were null and void.[28] The aim of the subsequent criminal trials was dually to publicly punish the officers who facilitated abuse, and to deter any future juntas that may seek to rule Argentina. As such, the application of sentencing provisions specific to the situation of Argentina reflects the aforementioned proposition; that being, allowing the development of national transitional justice mechanisms is a more appropriate solution than the imposition of a global, Eurocentric norm.

[21] *Argentinan Federal Constitution,* Art. 43(2).
[22] Paul Hogget, 'Politics, Identity and Emotion' *Collective Feelings* 19:
[23] Paul van Zyl, 'Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission' (1999) 52 *Journal of International Affairs* 647, 652.
[24] See Fox News, 'Argentine "Dirty War" Witness Kidnapped and Released, accessed: https://www.foxnews.com/world/argentine-dirty-war-witness-kidnapped-and-released
[25] Ibid.
[26] Luc Huyse, 'To Punish or to Pardon: A Devil's Choice' in Christopher Joyner and M Cherif Bassiouni, *Reining In Impunity for International Crimes and Serious Violations of Fundamental human Rights: Proceedings of the Siracusa Conference, 17 – 21 September 1997,* (1998) 79, 80-81.
[27] Causa No. 17.768 c. *Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc*., No 17.768, Argentina: Corte Suprema de Justicia, 14 June 2005; see also Christine A.E. Bakker 'A Full Stop to Amnesty in Argentina: The *Simon* Case' *Journal of International Criminal Justice,* Vol 3, Issue 5, 1 November 2005, 1106 – 1120.
[28] Inter-American Court of Human Rights, *Barrios Altos Case - Series C No. 75 [2001] IACHR 5.*

The scope of the desire for justice through punishment can be seen in the sentencing of the single voluntary confessor and witness who provided evidence surrounding the now-infamous 'death flights' to dispose of bodies into the Atlantic Ocean. Despite full co-operation which led not only to further prosecutions but shed light on the entire operation, the confessor was sentenced to 640 years imprisonment for crimes against Argentina and humanity.[29]

The severity of the sentencing is perhaps best viewed as an example of the orthodoxy of Eurocentric justice, highlighting the Global North's need for physical punishment as part of the reconciliation process. Prosecutions are viewed as necessary to promote a society based upon the rule of law, which is arguably integral to democratic government itself. Some academics have noted where the severity of sentencing in Argentina's prosecution of its forma junta may reflect an inherent Eurocentric desire for retributive justice, such a policy is a cultural norm and thus effective in this instance. More simply, it may reflect a frustration at the inability of the country to make any substantive headway into prosecuting its former junta.

III UGANDA AND CHEWING THE BITTER ROOT

A *Background Facts*

Uganda, however, offers a very different case study, reflecting its unique cultural history. Generally speaking, two ethnic groups exist in Uganda: the Bantu-speaking Baganda agriculturalists in Uganda's south and east, and the Nilotic-speaking Acholi in the north, the former becoming the centre for commercial trade and the latter providing the bulk of the national labour market, as well as contributing to the majority of the military.[30] After achieving independence in 1962 from the British Empire, the ethnic groups continued to compete with each other within the bounds of Uganda's new political system. In 1986, after emerging victorious from the Ugandan Bush War, President Yoweri Museveni's National Resistance Army sought vengeance against the Acholi people under Operation Simsim. The Lord Resistance Army (LRA) emerged consequent to the attacks, aiming to undermine the support of the Government through heavy-handed tactics against the population.[31] The LRA has caused over 23,000 deaths and displaced 1.2 million Ugandans since 1986 under the banner of Christian

[29] Ed Stocker, 'Victims of death flights in Argentina' *The Independent* 27 November 2012, http://www.independent.co.uk/news/world/americas/victims-of-death-flights-drugged-dumped-by-aircraft-but-not-forgotten-8360461.html

[30] Marisa O. Ensor, 'Drinking the Bitter Root' *African Conflict and Peacebuilding Review'*

[31] Ibid.

fundamentalism, although it appears mostly to function as a personality cult of its leader, Joseph Kony.[32] A majority of those displaced live in densely settled camps where they are subject to atrocious living conditions. Farming is impossible due to the terrain and most survive on foreign aid.[33]

C *Tension between the ICC and Host State*

Uganda more specifically highlights a non-Eurocentric concept of justice. Like Argentina, Uganda provided blanket amnesty for all persons who renounced and abandoned involvement in hostilities. In Uganda however, such an action finds unique cultural acceptance and support by those involved. Northern Uganda is home to the ritual of *mate oput* - to drink the bitter root - which is a process whereby the inner family of a victim and the perpetrator of a crime acknowledge their wrongdoing and offers compensation. Traditional justice in Uganda, as opposed to public punishment, aims to ritualise expressions of regret and corrective measures that have adapted to contemporary social experiences.[34] Such a reconciliation process has been observed to have tremendous support in the local communities, encapsulated in the notion that 'justice doesn't come from the suitcase of the white man.'[35]

In a bid to reconcile the nation, the Ugandan Government drafted an amnesty to allow the LRA to disband peacefully and legally in 2004. Concurrently, the ICC came into effect, and Uganda became a widely welcomed choice, with President Museveni himself making a request. In 2005, the ICC overruled the Ugandan amnesty and issued arrest warrants against key LRA personnel.[36] In part reigniting the conflict, and in part just failing to stop it, the actions of the ICC have yet to have any foreseeable benefits: Ugandan citizens remain in a state of terror, forced marriages, summary executions and camp living without peaceful conclusion.

The primary criticism of Uganda and the ICC is the disregard shown in its use of Article 53 of the Rome Statute. Article 53 provides for an investigation to be initiated, where:

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[32] *Julian Borger (8 March 2012). "Q&A: Joseph Kony and the Lord's Resistance Army". The Guardian.* Retrieved 27 December 2017

[33] Tim Allen, *Trial Justice. The International Criminal Court and the Lord's Resistance Army* (London, Zed Books, 2006).

[34] Benoit Girardin *Ethics in Politics - why it matters more than ever and how it can make a difference* (Paraic Reamon, Switzerland, 2012) 17.

[35] Clark, above no 9*,* 598.

[36] Rhona Smith, *Texts and Materials on International Human Rights* (Oxford University Press, 2013) 176 - 178.

Article 53: Initiation of an investigation

> 1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:
>
> > (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
> >
> > (b) The case is or would be admissible under article 17; and
> >
> > (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.[37]

This latter point – the interest of justice – has allowed international law to overtake the decisions of a sovereign nation; Uganda has been refused individual recognition as a civilised state - so to speak in the Westphalian system - and been forced to accept the role of the benevolent West in legitimising its actions. Although Uganda was the first nation to self-refer to the ICC, the allowance of subsection (c) has caused fears that Global North criminal prosecution organs may impose themselves on the Global South.

IV THE ICC & EUROCENTRIC TRANSITIONAL JUSTICE

The ICC was created in 2002 following the necessary ratification of the Rome Statute by the requisite number of States. The bailiwick of the ICC was to ensure high ranking government officials who had committed breaches of international criminal law were apprehended and brought to justice.[38] Although not unique in calling for accountability of individuals, the Rome Statute aimed at widening the duty to prosecute in non-international armed conflicts. The overarching institution was explicitly mandated to complement the existing national criminal justice system of the State, thereby rendering the ICC inoperable when a State was either investigating or prosecuting the matter.[39] In this way, it was hoped that the Global North would not be seen to exert normative or post-colonial pressure on the Global South.

A *General Issues*

The ICC has been repeatedly criticised as being a tool for imposing Global North

[37] *Rome Statute of the International Criminal Court* as of Dec. 31 2000.
[38] Ibid, Article 5 - 8.
[39] Above no. 1, Article 17.

values on the Global South. The North-South divide is broadly considered a socio-economic and political divide; regardless of actual geographic location, the South 'lacks appropriate technology, it has no political stability, the economies are disarticulated, and their foreign exchange earnings depend on primary product exports.'[40]

The ICC arguably rejects alternate or 'home grown' transitional justice mechanisms in favour of a Eurocentric interpretation. Nontheless, local involvement in transitional justice has been found as key to a successful post-conflict State. There has long been recognition between the location of law, in terms of space and social hierarchy, indicating power and social control; accordingly, the physical location of law – just as judicial institutions and legal experts – dictates how the law is created, who interprets it, who can access it, and whether individuals and groups interact with the law.[41] The location of the ICC in a developed Western 'hub' – The Hague – naturally amplifies the European composition of the staff. This is perhaps best highlighted by international jurisprudential academic David Kennedy, who reflects on international law as being only valid when viewed with a 'distinction between the West and the rest of the world, and the role of that distinction in the generation of doctrine, institutions and state practice'.[42]

The ICC is reliant upon States and often is hamstrung by the political will of others. There remain no arrest warrants, despite calls for it, against former US-President George W. Bush and former British Prime Minister Tony Blair for crimes of aggression against Iraq in 2003.[43] In its 14 years of its existence, the ICC has issued 55 arrest warrants - of which all are targeting Africans, and 54 of which are for African males.[44] A substantial body of legal criticism by the Global South relates to the methodology and actions of the ICC to date and is of continuing relevance in Africa following the attempted exits of Burundi[45], South Africa[46], and Gambia.[47]

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[40] *Mimiko, Oluwafemi (2012). Globalization: The Politics of Global Economic Relations and International Business. Durham, N.C.: Carolina Academic. p. 47.*

[41] Economides, 2012

[42] Kennedy, *The West and the Rest: Globalisation and the Terrorist Threat,* Federation Press, 101 - 125.

[43] Brenadna Schaefer, 'The Bush Administration and the ICC' 2005 *The Heritage Foundation*

[44] Tor Krever, Africa in the Dock: On ICC Bias, 2016, accessed <http://criticallegalthinking.com/2016/10/30/africa-in-the-dock-icc-bias/.

[45] 'Burundi leaves ICC amid row' *BBC News* 27 Oct 17, accessed 29 Oct 17 from <http://www.bbc.com/news/world-africa-41775951>

[46] Norimitsu Onishi, 'South Africa Reserves Withdraw from ICC' *The New York Times* 8 Mar 17, accessed 29 Oct 17 from <https://www.nytimes.com/2017/03/08/world/africa/south-africa-icc-withdrawal.html?_r=0>.

[47] Merrit Kennedy, 'Gambia Cancels Withdraw' *The Two-Way* 14 Feb 17, accessed from <http://www.npr.org/sections/thetwo-way/2017/02/14/515219467/under-new-leader-gambia-cancels-withdrawal-from-international-criminal-court>.

There remains moreover a critical gap between legal and policy decisions in The Hague and the everyday lives of those directly affected in war zones. NGOs in the Global North who believe only the rule of law and judicial paths can lead to sustainability are sceptical of non-European methods of transnational justice. Such an approach is based on false dichotomies – between peace and justice.[48] TWAIL scholar Tor Krever notes that the ICC relies heavily upon a violence/justice binary, whereby a violent action can be seen to have a clear-cut resolution.[49] This approach is allegedly flawed in that it fails to recognise structural or institutional forms of violence such as racism, apartheid and the remnants of colonialism.

Although Article 17 of the Rome Statute delivers a metaphorical nod to the supremacy of national law, its operation is not so clear cut in practice.[50] Article 17 (as outlined below) represents a shift from the earlier *ad hoc* trials in Yugoslavia and Rwanda where the international frameworks claimed supremacy over the national.

Article 17 - Issue of admissibility

> Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
>
> > (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
> >
> > (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
> >
> > (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
> >
> > (d) The case is not of sufficient gravity to justify further action by the Court.

A failure to recognise the development of sovereignty in international politics and affairs, away from the Westphalian State and towards the supranational individual, places the ICC at risk of being seen by parties as a benevolent Western organ imposed

[48] Clark, above n 9.
[49] Krever, above no 46.
[50] William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2010).

upon nations at risk to dictate post-colonial demands.[51] This is especially dangerous for an institution that requires the co-operation of the host nation to fulfil its ambitions; which can, conversely, lead to a 'battle for the influence and control over transitional justice.'[52]

V MOVING FORWARD

Neither the experiences in Argentina nor Uganda are to be lauded as the exact model for transitional justice. In each circumstance, there are different roles that are necessary to be performed.[53] Such expectations can range from retributive justice, as highlighted in Argentina, which was predominately viewed as successful and restorative to the new democratic nation; compared with the failure of transformative and restorative justice in Uganda because of an imposed desire by the ICC for criminal convictions.

Amnesties have long been used to quickly and efficiently facilitate peace, arguing for collective amnesias towards the wrongs of the past.[54] Arising from the amnesties granted in Latin America in the 1980s and early 1990s, a paradigm shift occurred where the criminal law was increasingly utilised to combat perceived impunity; as such, the prosecution in domestic and international proceedings have become what the Global North has viewed as an 'indispensable requirement to secure justice and peace.'[55]

Blanket immunities are, however, victims of their own ineffectiveness. Between 1974 and 2007, 43 States globally offered amnesties to rebel groups; 28 States offered amnesties more than once, and 19 more than three times.[56] Only 34% of these amnesties were successful (where success is measured by a lack of further conflict).[57] Impunity has been argued to embolden perpetrators of atrocities,[58] which in turn creates a sense of injustice and inability to achieve peace.[59] The failure of blanket amnesties is indicative of the paradigm of peace and justice: both are necessary. To ignore the trauma suffered by citizens of a State is not a viable option, for in responding to such trauma, groups and

[51] Tim van Ham, 'How Post-Colonial is the ICC: A case study on the Kenyatta and Ruto Case' (2010) *The Journal of History and Theory* 38: 591 - 612.
[52] Lambourne, 'What are the Pillars of Justice?' above n 5, 59.
[53] Jennifer Balint, 'Transitional Justice and State Crime' (2014) 13 *Macquarie Law Journal*, 147, 150.
[54] For possibly the earliest use of a blanket amnesty, see Andocides *On the Mysteries;* see further Christopher J. Joyce, 'The Athenian Amnesty and Scruitny of 403' *The Classical Quaterly* Vol 58, No 2, (2008) p507 – 518.
[55] Barrie Sander, 'The Human Rights Agenda and the Struggle Against Impunity' *Justice in Conflict* 2017.
[56] Jeffery Renee, *Amnesties, Accountability and Human Rights.* Philadelphia: University of Philadelphia Press 2014: 109.
[57] Renee 2014: 109.
[58] Human Rights Watch, *Selling Justice Short: Why Accountability Matters for Peace,* 2009: 60
[59] Keppler 2014.

nations tend to function similarly to individuals. Societies shattered by the perpetration of atrocities need to adapt or design mechanisms to confront their demons, to reckon with these past abuses. Otherwise, for nations, as for individuals, the past will haunt and infect the present and future in unpredictable ways. The assumption that individuals or groups who have been the victims of hideous atrocities will simply forget about them or expunge their feelings without some form of accounting, some semblance of justice, is to leave in place the seeds of future conflicts.[60] Equally, to approach criminal prosecutions as the only possible endstate fails to understand the risks associated with fledgling governments and impacts on long-term development.[61] The post-apartheid South African experience, implementing truth and reconciliation commissions (TRCs) has long been asserted as a middle way of bridging reconciliation and retribution, attempting to disinfect conflict-inflicted wounds.[62] It attempts to shy away from an evidence-heavy court system by allowing victims to share their stories and lower barriers to victim engagement. [63]

Despite being lauded as a success story, South Africans have noted that the TRC has 'aggravated racial tensions by uncovering the details of the misdeeds of everyone involved, and therefore called into question the future of coexistence under a new democratic regime.'[64] Equally, while allowing victims access to the reconciliation process, it may also prevent a court from adequately addressing crimes which were raised during TRC's.[65]

Current scholarly trends towards conflating the expectations of the national government and the international community feed into this poor implementation. It is by properly unpacking the expectations of the various stakeholders, which can impact the implementation of transitional justice that we start to understand where tensions arise. As noted at the outset of this paper, local involvement in transitional justice has been found as key to a successful post-conflict State. Thus, an initial issue that must be addressed by the ICC in any future proceedings should be to identify the differing levels of party

[60] Neil Kritz, 'Coming to terms with atrocities: a review of accountability mechanisms for mass violations of human rights' (1996) 59 *Law and Contemporary Problems,* 127, 127.
[61] David Crocker, 'Reckoning with Past Wrongs: A Normative Framework' (1999) 3 Ethics and International Affairs 43, 43.
[62] Sarkin 2008; Waldman 2004.
[63] Eiskovits, above n 27, 711.
[64] Gibson, 2005: 344.
[65] Ibid.

involvement and modify their prosecutions, or allowances of amnesties, accordingly.[66] Relevantly, the ICC has developed heavily since its early years, producing a policy paper in 2016 that stated its new priorities for case selection, namely:

> [P]articular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land.[67]

This move towards the aforementioned slow-violence is neither theoretical nor aspirational; in 2016 Ahmad Al-Faqi Al-Mahdi pleaded guilty to the crime of destroying cultural property.[68] With these cases, it is clear that the ICC is not only shifting its priorities but equally embracing its symbolic function of providing and expanding jurisprudence with respect to international criminal law, from which grassroots domestic prosectuions may rely upon.[69]

VI CONCLUSION

The paradox between peace and justice requires more than a mere cursory glance and it is open to all readers to determine their subjective belief and solutions: be that a bitter root or half-millennium imprisonment. In situations where there is tension between the international community's expectations of transitional justice and the national government, there have been lengthy delays or complete subversion in the implementation of mechanisms. Every conflict is *sui generis* and requires individual approaches to both peace and justice, and to model one system of justice to cover all needs is implausible - yet this is what the International Criminal Court aims to achieve.

Moving forward there remains strong TWAIL criticisms that should be adopted when conceiving justice in all senses. Primarily, the drive for justice should move away from purely retributive and towards the form(s) the host nation requires. While blanket amnesties may not be the answer, there are certain situations where it should not be dismissed. Equally, in dealing with post-abuse eras, the relaxation of standing requirements by allowing NGOs to represent victims in national court systems victims

[66] Wendy Lambourne, 'Transitional Justice and Peacebuilding after Mass Violence' (2009) 3 *The International Journal of Transitional Justice*, 28, 33.

[67] International Criminal Court, (2016) *Office of the Prosecutor - Policy Paper on Case Selection and Prioritisation,.*

[68] International Criminal Court, *The Prosecutor v. Ahmad Al Faqi Al Mahdi,* Doc No ICC-01/12-01/15.

[69] See with respect to El Salvadore - Gwen Young, 'Amnesty and Accountability' *UC Davis Law Review* 7, 427 – 481; see with respect to Guatemala - Elisabeth Malkin, 'Ex-Dictator Ordered to Trial' *The New York Times* 28 Jan 2013, accessed 29 Oct 17 from <http://www.nytimes.com/2013/01/29/world/americas/ex-dictator-is-ordered-to-trial-in-guatemala-for-war-crimes.html>

can improve accountability. Equally, international NGOs should be required to liaise with any peace and reconciliation infrastructure as part of their brief in order to add legitimacy as well as enhancing their development functions.