

2003

## An International "Truth Commission": Utilizing Restorative Justice as an Alternative to Retribution

Carrie J. Niebur Eisnaugle

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vjtl>



Part of the [Criminal Law Commons](#), [International Law Commons](#), and the [Law and Society Commons](#)

---

### Recommended Citation

Carrie J. Niebur Eisnaugle, An International "Truth Commission": Utilizing Restorative Justice as an Alternative to Retribution, 36 *Vanderbilt Law Review* 209 (2021)

Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol36/iss1/11>

This Note is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Journal of Transnational Law by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact [mark.j.williams@vanderbilt.edu](mailto:mark.j.williams@vanderbilt.edu).

# An International “Truth Commission”: Utilizing Restorative Justice as an Alternative to Retribution

## ABSTRACT

*A restorative justice paradigm emphasizes healing relationships between offenders, their victims, and the community in which the offense took place. It rejects retribution as a response to crime, focusing instead on the needs of all parties involved. This Note discusses the necessity for, and possible benefits of, using restorative justice principles when responding to international crimes and conflicts. Prosecution, war, and other violent means remain the most common responses to crime and conflict today. Such retributive reactions often lead to further violence rather than healing and peace. Using restorative justice principles to address crime and conflict, as was done in the Truth and Reconciliation Commission in South Africa, has proven that focusing on healing can end cycles of violence. In order to promote an end to international conflict and violence, therefore, countries unable to create their own truth commissions should have the opportunity to respond to conflict through restorative means by way of a permanent international truth commission.*

## TABLE OF CONTENTS

I.	INTRODUCTION.....	210
II.	BACKGROUND ON RESTORATIVE JUSTICE.....	211
	A. <i>Definition</i> .....	211
	B. <i>Goals</i> .....	213
	C. <i>Methods Used to Achieve Goals</i> .....	215
III.	CURRENT RESPONSES TO CRIME AND CONFLICT ON AN INTERNATIONAL LEVEL.....	217
	A. <i>The International Criminal Court</i> .....	217
	B. <i>The Use of Force: Armed Conflict</i> .....	220
IV.	TRUTH COMMISSIONS .....	221
	A. <i>Definition</i> .....	221
	B. <i>Goals</i> .....	222
	C. <i>Methods Used to Achieve Goals</i> .....	223
V.	SOUTH AFRICA’S TRUTH AND RECONCILIATION COMMISSION (TRC) .....	224

	A.	<i>Background of the TRC</i> .....	224
	B.	<i>Creation of the TRC</i> .....	225
	C.	<i>Theological Parameters of the TRC</i> .....	229
VI.		RESTORATIVE JUSTICE: A BETTER RESPONSE TO CRIME AND CONFLICT .....	231
	A.	<i>Promoting an End to International Crimes and Conflicts</i> .....	231
	B.	<i>Current Responses: Failure to Promote an End to International Crimes and Conflicts</i> .....	231
	1.	The Use of Force: Armed Conflict.....	231
	2.	The ICC .....	233
	a.	Effect on Victims .....	234
	b.	Effect on Offenders.....	237
	C.	<i>International Truth Commission: Promoting an End to Conflict, Cyclical Violence and Revenge Through Healing, Forgiveness, and Understanding</i> .....	238
VII.		CONCLUSION .....	241

## I. INTRODUCTION

Since the slaying of Abel by Cain,<sup>1</sup> people have been in violent conflict with one another. This first violent disruption in creation was caused in part by Cain's reaction to feeling that he had been treated unjustly compared to Abel.<sup>2</sup> Perceived injustice is the most frequent cause of disruption, pain, and suffering in societies—both because of the effects of injustice itself and because of personal and societal responses to unjust situations.<sup>3</sup> Injustice has most often been addressed by people and groups through war, destruction, and other violent means as an effort to restore justice.<sup>4</sup> Responding to injustice with violence is almost always answered with more violence,

---

1. *Genesis* 4:8 (NIV) ("Cain said to his brother Abel, 'Let's go out to the field.' And while they were in the field, Cain attacked his brother Abel and killed him.").

2. *Id.* at 4:3-7. The Lord looked with favor on Abel after Abel "brought fat portions from some of the firstborn of his flock" to the Lord as an offering, but did not look with favor on Cain after Cain "brought some of the fruits of the soil as an offering to the Lord." *Id.* This difference in treatment angered Cain, although the Lord explained to Cain that he would have been treated with favor also had he offered to the Lord the best of the fruits of his labors, as Abel had. *Id.*

3. Lutz Netzig & Thomas Trenczek, *Restorative Justice as Participation: Theory, Law, Experience and Research*, in *RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES* 241, 242 (Burt Galaway & Joe Hudson eds., 1996).

4. *Id.*

however, creating an unending cycle. The need for an alternative response to perceived injustice exists, therefore, especially in a world where conflicts between differing ideologies, beliefs, and standards of living unavoidably cause feelings of unjust treatment.

When international injustices, such as acts of war and terrorism, are committed today, the victims of such crimes most often respond through armed conflict or criminal prosecution. Answering violent acts with violence, however, perpetuates cycles of violence that will end only when alternatives to violence are sought in response to criminal offenses and war. Nations need the opportunity to pursue a non-violent response to injustice, rather than resorting to fighting or attempting to punish offenders through a national or international legal system. An international restorative justice forum would fulfill this need. Such a forum, established as an alternative to violence or vengeance, could be used in response to international conflicts and crimes in much the same way truth commissions are used in response to human rights crimes and conflicts committed in a domestic setting. This Note discusses the need for, and benefits of, utilizing restorative justice through the format of a truth commission when responding to international crimes and conflicts.

## II. BACKGROUND ON RESTORATIVE JUSTICE

### A. Definition

The particular foci of definitions of restorative justice differ somewhat, depending on the person or group doing the defining.<sup>5</sup> All groups seem to agree, however, on the basic and primary foundations of the requirements of a restorative justice paradigm.<sup>6</sup> Generically, restorative justice is a way of thinking about how to respond to crime; it is a set of values and ideals that define a just reaction to the commission of a crime and the crime committer.<sup>7</sup> This "new" way of thinking about justice, that actually hearkens back to views of crime and justice prior to the rise of centralized governments in Europe during the middle-ages,<sup>8</sup> is "a wide-ranging movement . . . seeking to

---

5. See *infra* Part II.

6. *Id.*

7. Kay Pranis, *A State Initiative Toward Restorative Justice: The Minnesota Experience*, in *RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES* 493, 496 (Burt Galaway & Joe Hudson eds., 1996).

8. Daniel W. Van Ness, *Restorative Justice and International Human Rights*, in *RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES* 17, 22-23 (Burt Galaway & Joe Hudson, eds., 1996). The idea that any crime committed was a crime committed

transform the systems that are in place to deal with interpersonal and intergroup conflict.”<sup>9</sup> Definitions vary from this basic premise, evidenced by subtle differences in the goals and methods that make up a restorative paradigm.

In the Christian theological tradition, for instance, restorative justice derives its meaning from older systems of “community justice,” including both Christian ideals expressed in the Sermon on the Mount<sup>10</sup> and earlier concepts of justice described in the Hebrew Bible, such as Jubilee (a year of freedom), restoration, forgiveness, and *shalom*, meaning “peace with justice.”<sup>11</sup> Outside of this tradition, restorative justice derives its meaning from the research and observations of practitioners of victim-offender reconciliation and mediation programs<sup>12</sup> that have led to specific beliefs formed in reaction to the failures of current retributive criminal justice systems.<sup>13</sup>

Both the “secular,” or political, theory of restorative justice and the Christian theological model remain focused on restoration, or repairing the harm done by the crime and criminal to the greatest extent possible.<sup>14</sup> In the Christian tradition, restoration is characterized as an effort to restore “right relationships” between victims and offenders, and between offenders and the community.<sup>15</sup> According to the secular definition, this is exemplified as the need to engage the community in the reintegration of victims and offenders, and to enforce community standards of behavior.<sup>16</sup> All proponents of a restorative justice paradigm deny that there is any value in

---

against the “king’s peace” (the state) arose after the centralization of governments as a means of usurping the jurisdiction of the courts of local rulers and of the Roman Catholic Church. *Id.* Although prior to that time legal systems recognized that crime harmed the community peace (the state), they primarily viewed and treated crime as an injury to the victim and the victim’s family, and restitution was the principal means of repairing that injury and restoring the state/community peace. *Id.*

9. Peggy Hutchison & Harmon Wray, *What Is Restorative Justice?*, NEW WORLD OUTLOOK, July/Aug. 1999, at 4.

10. These ideals focus on living by the spirit behind the law, which Jesus taught as loving our enemies and extending mercy and forgiveness toward those who would harm us. *See Matthew 5:38-48 (NIV).*

11. Hutchison & Wray, *supra* note 9, at 4-5.

12. Van Ness, *supra* note 8, at 23 (stating that the practitioners of these programs developed a theory of restorative justice by drawing from their observations of victim and offender satisfaction with mediated, as opposed to adjudicated, justice).

13. *See Pranis, supra* note 7, at 494-96; Van Ness, *supra* note 8, at 23 (noting that these beliefs include defining crime differently than how it is defined under a retributive model, reacting to crime differently than how it is reacted to under that model, and allowing and calling for more substantial victim participation, among others).

14. Pranis, *supra* note 7, at 496; Hutchison & Wray, *supra* note 9, at 5.

15. Hutchison & Wray, *supra* note 9, at 5.

16. Pranis, *supra* note 7, at 496.

vengeance; as a result, a restorative justice paradigm brings into question many of the assumptions that underlie the retributive instincts and systems that define "justice" in the world today.<sup>17</sup>

### B. Goals

One of the primary goals of any criminal justice system is to control crime.<sup>18</sup> In nations using a retributive legal framework, crime control has been sought partially through deterrence, assumedly created through the threat of punishment.<sup>19</sup> Restorative justice questions many of the current practices in adversarial and retributive systems of justice, including the idea that the threat of punishment functions as a deterrent, due to the current system's state of crisis.<sup>20</sup> Individuals concerned about the failure of retributive crime-control practices "have been working to develop the theory and practice of restorative justice for over a decade. . . ."<sup>21</sup> The development of this theory and practice has resulted in specific goals and core values that directly contradict assumptions embraced by retributive models of justice.<sup>22</sup>

For instance, crime is defined differently in a restorative model. Under a retributive system of justice, crime is defined as "an act against the state[;] . . . a violation of a law."<sup>23</sup> Under a restorative justice model, crime is defined as a conflict between individuals that results in injury to the victims, as well as to the community and the offenders themselves.<sup>24</sup> From this perspective, crime is seen as "an injury which [sic] violates personal and community harmony."<sup>25</sup> Because crime is considered an act against both the individual victim

17. Hutchison & Wray, *supra* note 9, at 5; *see also* Pranis, *supra* note 7, at 495-96.

18. *See* Paul McCold, *Restorative Justice and the Role of Community*, in RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES 85, 86 (Burt Galaway & Joe Hudson, eds., 1996) (stating that when talking about criminal justice practices in the United States, safety is one of the ultimate pursuits of the criminal justice system).

19. Pranis, *supra* note 7, at 495. In a retributive model, it is believed that the threat of punishment deters crime and punishment itself changes behavior. *Id.* In a restorative model, however, it is believed that an offenders' behavior has a better chance of actually being impacted through taking responsibility for and repairing the harm done, rather than through punishment. *Id.*

20. *Id.* at 493; *see also* McCold, *supra* note 18, at 86 (emphasizing the state of crisis the U.S. legal system is currently in by noting that although the United States "is already the most punitive nation in the modern world, [it] continues to construct more prisons in spite of the lack of any credible empirical evidence that punishment of any kind or amount reduces crime").

21. Pranis, *supra* note 7, at 493-94.

22. *Id.* at 494-96.

23. Van Ness, *supra* note 8, at 23.

24. *Id.*

25. Pranis, *supra* note 7, at 494.

and the community as a whole, justice is defined in terms of reparation and restoration, through which both the community and the victim engage in the process of justice in an effort to repair the harms suffered as a result of the offender's acts.<sup>26</sup>

This alternative definition of justice and of just reactions to conflict and crime focuses on creating "dialogue and negotiations between individuals or groups that are in conflict with one another" by encouraging those individuals or groups to deal with one another directly, face-to-face, rather than through an advocate such as a lawyer or diplomat.<sup>27</sup> Direct interaction between victim and offender is encouraged because, according to proponents of restorative justice, facing the one who has wronged the victim creates the need to solve problems to the benefit of both parties.<sup>28</sup> Also, some restorative justice proponents believe that face-to-face problem solving is important because the consequences of settling conflicts through anonymous third parties can be fatal.<sup>29</sup> Such dependence on a third party can hinder an individual's ability to cope directly with interpersonal conflicts, which may lead to intolerance and an increased potential for violence.<sup>30</sup>

A system of restorative justice, therefore, "is not content with fixing blame and punishing someone."<sup>31</sup> Rather, proponents of restorative justice believe that in order to solve the problems that lead to and result from crime, all parties affected by the crime including the victim, the offender, and the community must be involved in the solution.<sup>32</sup> Christian proponents of restorative justice believe that bringing victims and the community face-to-face with offenders may foster "truth telling, repentance, reconciliation, and healing for all parties in a given situation."<sup>33</sup> Restorative justice proponents from the socio-political perspective believe that if the community and the victim are brought face-to-face with the offender, all will benefit because making reparations and enforcing community standards of behavior will cause community-building to occur, resulting in the further prevention of crime.<sup>34</sup>

---

26. *Id.* at 495-96. In contrast, under a retributive paradigm, where justice is defined as retribution or punishment, the victim and the community are not involved in the process of justice, and little is done to repair the harms suffered by both.

27. Hutchison & Wray, *supra* note 9, at 5.

28. *Id.* Direct action remedies the need to solve problems, rather than for someone to win and lose, as is the case in adversarial or retributive systems.

29. Netzig & Trenczek, *supra* note 3, at 243.

30. *Id.*

31. Hutchison & Wray, *supra* note 9, at 5.

32. *Id.*

33. *Id.*

34. Pranis, *supra* note 7, at 496.

### C. *Methods Used to Achieve Goals*

To achieve healing through reparation, restorative justice programs call for restitution to the victim by the offender.<sup>35</sup> The purposes of restitution are to restore the relationship between the victim and the offender, and to restore the victim's status prior to their encounter with the offender, to the extent that is possible.<sup>36</sup> Through restoration, therefore, restitution is intended to stop cycles of violence, instead of continuing and escalating those cycles by creating further harms through retributive or forceful responses.<sup>37</sup>

Restitution is also considered an act of accountability.<sup>38</sup> In a retributive system, holding someone accountable for a crime that person committed requires making the person "pay" for their crime through suffering, by taking away that person's freedom.<sup>39</sup> If an offender is imprisoned or executed, and therefore suffers, members of the community believe that person has been held accountable.<sup>40</sup> In a restorative system, however, accountability requires that the offender take responsibility for the harm done and take action to repair that harm.<sup>41</sup> These two aspects of accountability are discouraged in a retributive system of justice. Imprisonment, for instance, does not allow for reparation to the victim or the community. Additionally, a retributive or adversarial court system may encourage offenders to plead "not guilty," in effect allowing them to avoid taking responsibility for the crime committed. Restorative justice, therefore, can be characterized as pursuing a more "holistic" approach to conflict than alternative forms of justice because it does not focus solely on attempting to ensure that the offender suffers, but rather focuses on the needs of all parties involved in the crime, including the victim and the community.<sup>42</sup>

In order for the goals of restitution and reparation to be practically carried out, restorative justice programs throughout the world have been created wherein the victim and offender meet face-to-face to discuss the terms of restitution through a facilitator or

---

35. See Hutchison & Wray, *supra* note 9, at 5.

36. *Id.*

37. *Id.* See generally HOWARD ZEHR, CHANGING LENSES 19-44 (1990) (explaining the ways in which retributive or forceful responses to crime harm both the victim and the offender).

38. Pranis, *supra* note 7, at 495.

39. *Id.*

40. *Id.*

41. *Id.*

42. Hutchison & Wray, *supra* note 9, at 5.



mediator.<sup>43</sup> As previously mentioned, the face-to-face meeting requirement is an essential aspect of the restorative justice paradigm, in which all parties involved in the crime work together in order to try to achieve restoration, healing, and, under the Judeo-Christian model, forgiveness.<sup>44</sup> These programs are commonly known as Victim Offender Reconciliation Programs (VORP), and in their “classic” form<sup>45</sup> work independent from, yet in cooperation with, already established criminal justice systems.<sup>46</sup>

Typically, criminal cases that enter such programs are those where the offender has accepted responsibility for the crime committed by admitting to the charged offense, so the issue mediated is the “sentencing” for the admitted offense.<sup>47</sup> Under a restorative paradigm, “sentencing” does not follow traditional forms of punishment; rather, mediation’s goals are reparation of the harm done and restitution to the victim of the crime.<sup>48</sup> Once an offender has made an admission to a charged offense, therefore, they are given the opportunity to meet with the victim and a mediator in a setting designed to focus on three elements: facts, feelings, and agreements.<sup>49</sup> In this setting, both parties are encouraged to tell their side of the story, ask questions to try to discover exactly what happened and perhaps why it happened, and talk about the impact and consequences of the crime in their lives.<sup>50</sup> Once this discussion has taken place, the parties discuss what can and should be done in order to repair the situation, to the degree that reparation is possible.<sup>51</sup> When the parties reach an agreement regarding what should be done, they sign a written contract.<sup>52</sup> Often reparation takes the form of financial restitution, but there are many other possible agreements parties can reach.<sup>53</sup> Perhaps the victim simply wants an apology for

---

43. *Id.* at 5 (noting that there are over 300 victim-offender reconciliation programs in operation across the United States); see also ZEHR, *supra* note 37, at 158-74 (stating that in addition to the programs in operation in the United States, there are several dozen victim-offender mediation programs in Canada, and programs are also in operation in England, Germany, France, Finland, and Holland).

44. Hutchison & Wray, *supra* note 9, at 5.

45. Several hybrids of the original VORP idea are in existence today. ZEHR, *supra* note 37, at 160.

46. *Id.* VORPs in their “classic” form consist of a face-to-face encounter between the victim and the offender in cases in which the defendant has already admitted to the offense. *Id.*

47. *Id.* at 161.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

the harm done. Or, the victim may desire that the offender work for them or for the community.<sup>54</sup>

### III. CURRENT RESPONSES TO CRIME AND CONFLICT ON AN INTERNATIONAL LEVEL

#### A. *The International Criminal Court*

In order to develop an international restorative justice forum, it is important to examine forums currently in existence that deal with crime and conflict on an international level. From an examination of these current forums, the basic framework for an alternative forum can be developed. One such forum is the International Criminal Court (ICC).

Over the past 50 years, the world has witnessed significant development in the area of international human rights law.<sup>55</sup> With the development of this area of law has come the need for the development of systems through which this law can be enforced. This has led to the permanent International Criminal Court.<sup>56</sup> The first international criminal court was created more than half a century ago, when the Nuremberg Trials were held to bring Nazi war criminals to justice.<sup>57</sup> This was the first time in history that an international court of any type was created, "a court whose law would be greater than that of individual nations."<sup>58</sup> Since the Nuremberg Trials, other international courts have been created, including the Yugoslav War Crimes Tribunal (ICTY)<sup>59</sup> and the Rwandan War

---

54. *Id.*

55. Van Ness, *supra* note 8, at 17.

56. See generally *Coalition for the International Criminal Court*, at <http://www.igc.org/icc> [hereinafter *CICC Homepage*].

57. CNN, *Burden of Proof: Millennium 2000: Would an International Criminal Court Help or Hinder Pursuit of Global Justice?* (CNN television broadcast, Jan. 2, 2000), at <http://www.cnn.com/TRANSCRIPTS/0001/02/bp.00.html> [hereinafter *Burden of Proof*].

58. *Id.*

59. United Nations, International Criminal Tribunal for the Former Yugoslavia, *The ICTY at a Glance*, at <http://www.un.org/icty/glance/index.htm>.

The International Criminal Tribunal for the former Yugoslavia (ICTY) was established by Security Council resolution 827. This resolution was passed on 25 May 1993 in the face of the serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, and as a response to the threat to international peace and security posed by those serious violations.

*Id.*

Crimes Tribunal (ICTR),<sup>60</sup> international criminal courts created by the United Nations in 1993 and 1994, respectively. All of the criminal tribunals that have operated up to this point have been temporary and have had a limited reach.<sup>61</sup> A permanent world court, The Hague, exists, but it makes only non-binding decisions regarding civil disputes between nations.<sup>62</sup>

The Rome Statute of the International Criminal Court, adopted by the United Nations in July 1998, is the statute that proposed and set forth the framework for a permanent international criminal court.<sup>63</sup> This statute created the ICC, which will function as a global judicial institution, "an international jurisdiction complementing national legal systems."<sup>64</sup> This institution will investigate and bring to justice individuals who commit particularly egregious human rights violations, "the most serious crimes of concern to the international community, such as genocide, war crimes, and crimes against humanity—including widespread murder of civilians, torture and mass rape."<sup>65</sup> For the ICC to be implemented, ratification by at least 60 countries was required.<sup>66</sup> As of May of 2002, 67 countries had ratified the Statute,<sup>67</sup> entering the Rome Statute into force and putting the creation of the ICC on schedule to be fully functional by mid-2003.<sup>68</sup>

---

60. United Nations, International Criminal Tribunal for Rwanda, *General Information About the Tribunal*, at <http://www.icttr.org>.

Recognizing that serious violations of humanitarian law were committed in Rwanda, and acting under Chapter VII of the United Nations Charter, the Security Council created the International Criminal Tribunal for Rwanda (ICTR) by resolution 955 of 8 November 1994. The purpose of this measure is to contribute to the process of national reconciliation in Rwanda and to the maintenance of peace in the region. . . . The International Criminal Tribunal for Rwanda was established for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between 1 January 1994 and 31 December 1994. It may also deal with the prosecution of Rwandan citizens responsible for genocide and other such violations of international law committed in the territory of neighboring States during the same period.

*Id.*

61. *Burden of Proof*, *supra* note 57.

62. *Id.*

63. See United Nations, *Rome Statute of the International Criminal Court*, at <http://www.un.org/law/icc/index.html> [hereinafter *Rome Statute Web Site*].

64. See *Coalition for the International Criminal Court: The Court*, at [http://www.iccnw.org/html/the\\_court.htm](http://www.iccnw.org/html/the_court.htm).

65. *Id.*

66. ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT pt. 13, art. 126, at <http://www.un.org/law/icc/statute/romefra.htm> [hereinafter *ROME STATUTE*].

67. See *Rome Statute Web Site*, *supra* note 63, at *Ratification Status* (last visited Oct. 15, 2002) (listing all of the countries that have ratified the statute).

68. *CICC Homepage*, *supra* note 56.

Upon implementation, the proposed ICC's jurisdiction and functioning will be governed by the rules and limitations outlined in the Rome Statute.<sup>69</sup> Although proposed by the United Nations, under Article Two of the Rome Statute, "Relationship of the Court with the United Nations," it appears that the ICC will be governed not by the United Nations itself, but rather will be "brought into relationship with the United Nations through an agreement approved by the Assembly of States Parties to this Statute."<sup>70</sup> Thereafter, the ICC's administration and functioning will be left primarily to the Presidency of the Court.<sup>71</sup> The Presidency of the Court is one of the four organs of the ICC.<sup>72</sup> The other three organs, and the responsibilities and duties of all of the organs of the ICC are described in Part Four of the Statute, "Composition and Administration of the Court."<sup>73</sup> One of the other three organs is the office of the Prosecutor,<sup>74</sup> to which state parties will refer cases when it is suspected that an international crime of the type described in the statute has been committed.<sup>75</sup> Under Article 14, any state may request that the Prosecutor investigate a situation in which one or more crimes within the jurisdiction of the ICC appear to have been committed in order to determine who, if anyone, should be charged with the commission of such crimes.<sup>76</sup>

The Rome Statute originally designated the seat of the ICC (where it will be established physically and will operate from) as The Hague in the Netherlands.<sup>77</sup> The Statute explicitly states, however, that the ICC may try crimes anywhere in the world when another place seems preferable to The Hague.<sup>78</sup> For example, the Court may be established in a specific country where much conflict has occurred and therefore many trials are to take place.

The crimes under the jurisdiction of the ICC are described under Part 2, Articles 5 through 8 of the Rome Statute.<sup>79</sup> These crimes are broadly summarized under the categories of genocide, crimes against humanity, war crimes, and crimes of aggression.<sup>80</sup> In order for the ICC to be utilized by states that have ratified the Rome Statute, all state parties must adopt implementing legislation establishing

---

69. ROME STATUTE, *supra* note 66, pt. 1, art. 1.

70. *Id.* art. 2; *see also id.* pt. 4, art. 38.

71. *Id.* pt. 1, art. 2.

72. *Id.* pt. 4, art. 34.

73. *See id.* pt. 4.

74. *Id.* art. 34.

75. *Id.* pt. 1, art. 14.

76. *Id.*

77. *Id.* art. 3.

78. *Id.*

79. *See id.* pt. 2.

80. *Id.* pt. 2, art. 5.

cooperation with the ICC and recognizing the crimes described in the Rome Statute. This will allow the state to exercise primary jurisdiction over the crimes in the Statute, which is important because the ICC is supposed to be a "complementary" court that acts only when national courts are unwilling or unable to do so.<sup>81</sup>

### B. *The Use of Force: Armed Conflict*

Countries, or as is more often the case, groups of people within countries, most often respond to perceived injustice with force when force is within the power of the group being treated unjustly.<sup>82</sup> As such, it seems that force will always be the most common response to injustice. Alternatives in the outlets available to people to deal with perceived injustices could, however, lead to a comprehensive change in how people respond to injustice.

A brief overview of the armed conflicts in which countries are currently engaged throughout the world presents a bleak picture. At the end of 2001, for instance, there were 38 different armed conflicts being waged in almost as many countries.<sup>83</sup> The Center for Defense Information, as well as Project Ploughshares' annual *Armed Conflicts Report*, defines an armed conflict as

a political conflict in which armed combat involves the armed forces of at least one state (or one or more armed factions seeking to gain control of all or part of the state), and in which at least 1,000 people have been killed by the fighting during the course of the conflict.<sup>84</sup>

A geographic distribution of the wars being waged as of 2001 reveals that Africa and the Middle East are the most war-torn regions of the world, with 36 percent of each of those regions' countries currently experiencing warfare.<sup>85</sup> These high levels of armed conflict have been steady over the past five years.<sup>86</sup>

---

81. Lawyers Committee For Human Rights, *Final Report: Conference on Implementation of the Rome Statute in Senegal*, Oct. 23-26, 2001, at <http://www.igc.org/icc/html/ICC-Impl-Senegal-GL-Final.doc>.

82. See generally Project Ploughshares, *Armed Conflicts Reports 2002*, at <http://www.ploughshares.ca/content/ACR/acr.html> (chronicling the various conflicts around the world); Col. (Ret.) Daniel Smith, *The World at War—January 2002*, DEF. MONITOR, Jan. 2002, at 1, at <http://www.cdi.org/dm/2002/dm1-02.pdf> (chronicling the various conflicts around the world).

83. Smith, *supra* note 82, at 1.

84. *Id.* See also Ernie Regehr, *Introduction to Project Ploughshares, ARMED CONFLICTS REPORT 2001*, available at <http://www.ploughshares.ca/content/ACR/ACR00/ACR01PrefaceIntroduction.html>.

85. Regehr, *supra* note 84.

86. *Id.* See also Smith, *supra* note 82, at 1 (displaying that the ebb and flow of conflicts by region since 1989 shows little change in the number of conflicts that have been waging since the end of 1998).

Following the September 11, 2001 attacks on the Pentagon and the World Trade Center, the United States became the most recent addition to the growing list of countries currently involved in armed conflicts. This addition came as no surprise to restorative justice advocate Paul McCold.<sup>87</sup> McCold believes that the United States is gripped by an "addiction to the powerful drug of vengeance—the primary driving force behind current criminal justice policies."<sup>88</sup> This addiction can no doubt be seen as contributing to the U.S. response to the events of September 11. Rather than treat the attacks on the World Trade Center and the Pentagon as criminal acts, the attacks were immediately labeled as "acts of war,"<sup>89</sup> therefore justifying the forceful response of the United States. Many believe this was not the best response. Carol Bellamy, executive director of the U.N. Children's Fund and contributing author of Project Ploughshares' annual armed conflicts report, stated "[t]he human actions that give rise to violent conflicts, grounded as they are in short-sightedness, greed and ignorance, must no longer be acceptable choices. We should retire them to history and always and only seek alternative means to resolve disputes and conflicts."<sup>90</sup> An international restorative justice forum that would operate somewhat like truth commissions have operated in the past may be the alternative means needed in order to better resolve international disputes and conflicts.

#### IV. TRUTH COMMISSIONS

##### A. Definition

Truth commissions are a third current response to crime and conflict, although until recently they have been used only in response to conflicts on a national, rather than international, level.<sup>91</sup> "Truth commission" is the term commonly used to describe an official

---

87. See McCold, *supra* note 18, at 86.

88. *Id.* at 85.

89. See National Day of Prayer and Remembrance for the Victims of the Terrorist Attacks on September 11, 2001, 66 Fed. Reg. 47,945 (Sept. 14, 2001).

90. Carol Bellamy, *Preface to Project Ploughshares*, ARMED CONFLICTS REPORT 2001, at <http://www.ploughshares.ca/content/ACR/ACR00/ACR01PrefaceIntroduction.html>; see also *MECC Statement on the Escalation of Violence*, MIDDLE EAST COUNCIL OF CHURCHES POSITION AND PRESS (Oct. 10, 2001), available at [http://www.mecchurches.org/newsreport/vol13\\_3\\_4/violence.asp](http://www.mecchurches.org/newsreport/vol13_3_4/violence.asp) [hereinafter *MECC Statement*] (reporting MECC representatives' expression of the "great sadness" they felt in response to "the escalation of violence stemming from the Twin Towers terrorist atrocity of September 11th, and the tremendously increased likelihood that the innocent will continue to pay dearly").

91. See *infra* Part IV.B.

organization created to investigate and record human rights abuses that have occurred in a nation's past.<sup>92</sup> Such organizations have had many different titles in the various countries in which they have been implemented.<sup>93</sup> In the past 20 years, the concept and institution of the truth commission has been used to differing degrees by states emerging from a history of gross human rights abuses, as a way of dealing with that history.<sup>94</sup> Truth commissions represent an alternative response to dealing with a nation's violent past<sup>95</sup> when that past has resulted in human rights violations that occurred while these countries were caught up in racial, ethnic, class, or ideological conflicts over justice and power.<sup>96</sup> A truth commission may be used alongside other responses, including amnesty and criminal prosecution.<sup>97</sup>

### B. Goals

The goals and accomplishments of truth commissions have varied greatly from country to country, depending upon the specific historical context of the country and who had control of the country as reconstruction ensued.<sup>98</sup> For example, in Chile, where the military continued to hold considerable power when that country entered reconstruction, the truth commission's accomplishments were severely restrained because the commission could not wield any power over military personnel.<sup>99</sup> Truth commissions generally have similar goals, however, regardless of the historical context in which the commissions take place.<sup>100</sup> For instance, most truth commissions are organized for only a certain amount of time and for the specific purpose of investigating and recording human rights violations.<sup>101</sup>

Another common goal of truth commissions has been to help ease a state's transition from civil war and unrest toward a more democratic or participatory form of government.<sup>102</sup> Truth commissions are often implemented in states struggling to create a

---

92. Judith Baker, *Truth Commissions*, 51 U. TORONTO L.J. 309, 309 (2001).

93. Henry J. Steiner, *Introduction to HUMAN RIGHTS PROGRAM HARVARD LAW SCHOOL & WORLD PEACE FOUNDATION, TRUTH COMMISSIONS: A COMPARATIVE ASSESSMENT; AN INTERDISCIPLINARY DISCUSSION HELD AT HARVARD LAW SCHOOL IN MAY 1996* 1, 7 (1997) [hereinafter HUMAN RIGHTS PROGRAM].

94. *Id.*

95. Baker, *supra* note 92, at 309.

96. Steiner, *supra* note 93, at 7.

97. *Id.*

98. *Id.* at 8.

99. *Id.*

100. *See id.*

101. *Id.* at 8.

102. *Id.*

fundamental change in the state's current power structure and governance in favor of a more democratic structure, because a truth commission can be used to help emphasize the importance of human rights.<sup>103</sup> As more countries adopt a more democratic (and thus more human-rights oriented) form of government, therefore, there has been a corresponding increase in the utilization of truth commissions to help ease these transitions.<sup>104</sup>

Other common purposes and goals of truth commissions include helping promote reconciliation among different groups as the state seeks closure of its past in order to move beyond that past and unify as a nation, providing the opportunity for victims to be vindicated through publicly telling and memorializing their story, which meets the need for a sense of justice through official acknowledgment and condemnation of past atrocities, promoting forgiveness by victims of those who confess past actions, helping create a democratic moral framework by emphasizing the importance of human rights, and providing for retribution and deterrence through the naming of offenders.<sup>105</sup>

### C. *Methods Used to Achieve Goals*

To carry out the goals of examining past human rights violations, vindicating victims, and officially acknowledging and condemning past atrocities, truth commissions most often invite the victims of violations and the violators themselves to testify before a panel of individuals.<sup>106</sup> Testimony before these panels is then recorded in both private and public hearings, depending upon the investigative powers of the staff of the commission.<sup>107</sup> Ultimately, all testimony given during these hearings is recorded in documents made publicly available to some degree.<sup>108</sup>

---

103. *Id.*

104. *Id.*

105. *Id.* at 11.

106. *Id.* at 8; see also Peter Storey, *A Different Kind of Justice: Truth and Reconciliation in South Africa*, NEW WORLD OUTLOOK, July/August 1999, at 15. The individuals chosen to make up the hearing panels for South Africa's Truth and Reconciliation Commission were selected from over 600 nominations received from the public. *Id.* These 600 were narrowed down to 18 persons, who were chosen by President Nelson Mandela and his bipartisan cabinet. *Id.* The persons that made up the TRC's panels were chosen because they were people of "proven integrity and capable of impartiality, with a track record of commitment to human rights and the inner strength to cope with the emotional strain of the job. A balance of race, gender, region, and vocational or professional background was also crucial." *Id.*

107. Steiner, *supra* note 93, at 8.

108. *Id.* at 9.



## V. SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION (TRC)

A. *Background of the TRC*

The surge in the creation and utilization of truth commissions started in Argentina after that country's defeat in the Falkland Islands war.<sup>109</sup> Since then, more than 20 truth commissions have existed around the world in the past 20 years.<sup>110</sup> Out of all of the truth commissions that have operated since the surge began, South Africa's Truth and Reconciliation Commission (TRC) has emerged as the best example of restorative justice ideals and practices implemented on a national level.<sup>111</sup>

The idea that something like the TRC would be necessary in order to help ease South Africa's transition from the system of apartheid to a democratic system was first developed by nongovernmental organizations, religious leaders, and human-rights lawyers.<sup>112</sup> These groups of people believed that "in order for there to be a new, united South Africa, the nation must have a commonly acknowledged history."<sup>113</sup> They also believed that an acknowledgement of this history required honestly facing and dealing with the "brutal oppression of the apartheid years."<sup>114</sup> With these beliefs in mind, therefore, the creators of the TRC concluded that the implementation of a truth commission was the best route to use in order to achieve these goals.<sup>115</sup>

Upon deciding to proceed along the lines of a truth commission, the designers of the TRC first studied prior truth commissions.<sup>116</sup> This required looking to Latin America, where truth commissions had been used in Brazil, Argentina, Chile, and El Salvador.<sup>117</sup> The creators of South Africa's truth commission quickly realized that many of the truth commissions in Latin America failed to get the cooperation of the perpetrators of crimes that had been committed.<sup>118</sup> For example, Chile's truth commission, the Rettig Commission, possessed no judicial powers.<sup>119</sup> This lack of power meant that the

---

109. *Id.* at 7.

110. Baker, *supra* note 92, at 309.

111. Hutchison & Wray, *supra* note 9, at 6.

112. Storey, *supra* note 106, at 15.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 16.

117. *Id.*

118. *Id.*

119. *Id.*

commission could not establish culpability or impose penalties.<sup>120</sup> As a result of this lack of power and consequent lack of cooperation by the perpetrators of crimes, "many of the crimes carried out by the Pinochet regime . . . were not mentioned in the 'official history of the repression.'"<sup>121</sup> Furthermore, the lack of culpability and accountability meant that there was also a lack of repentance by the perpetrators of the crimes—something the creators of the TRC believed would be very important to a successful truth commission.<sup>122</sup>

### B. *Creation of the TRC*

Upon examination of past truth commissions and conclusion that the cooperation of those who had committed offenses throughout South Africa's history of apartheid was of primary importance to a successful truth commission in South Africa, the creators of the TRC set out their specific aims.<sup>123</sup> These aims were to "produce a record of the violations of the past and make recommendations to prevent them from ever happening again; to acknowledge the suffering of the victims and assist in the rehabilitation of those victims; to offer amnesty to past perpetrators; and to facilitate healing and reconciliation for the nation."<sup>124</sup>

The foundation for these aims was articulated in the epilogue to the interim *Constitution of the Republic of South Africa, 1993*.<sup>125</sup> The creators of the interim constitution believed that it provided a "historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex."<sup>126</sup> This bridge to the future set its goals as "the pursuit of national unity, the well-being of all South African citizens and peace" and the reconstruction of South African society—goals that required reconciliation between those who had been a part of or supported the apartheid regime of South Africa and the victims and resisters of apartheid.<sup>127</sup> This reconciliation would be partially achieved, the leaders of the new South Africa believed, through the creation of a

---

120. *Id.*

121. *Id.*

122. *Id.*

123. See S. AFR. INTERIM CONST., ch.16 (Apr. 27, 1994), available at <http://www.truth.org.za>.

124. Storey, *supra* note 106, at 16-17.

125. See S. AFR. INTERIM CONST., ch.16.

126. *Id.*

127. *Id.*

truth commission, the parameters of which were expounded in the remainder of the epilogue.<sup>128</sup>

The purposes of the TRC were to help the people of South Africa “transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.”<sup>129</sup> The TRC would be based on the belief that transcending the divisions of the past required “understanding but not . . . vengeance, . . . reparation but not . . . retaliation. . . .”<sup>130</sup> In order to advance the goals of understanding and reparation, which the creators of the TRC felt required the cooperation of those who had committed human rights violations during the apartheid years, the creators of the interim constitution decided that amnesty would be granted for acts, omissions, and offenses committed during the apartheid regime if those acts had political objectives and were committed in the course of the conflicts of apartheid.<sup>131</sup>

With its authority, goals, and means already broadly established in South Africa’s interim constitution, the TRC was formally established through an act of parliament in 1995.<sup>132</sup> The purpose of the TRC as articulated in that act was 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 the period from 1 March 1960 to the cut-off date contemplated in the Constitution, within or outside the Republic, emanating from the conflicts of the past, and the fate or whereabouts of the victims of such violations; . . . grant[] amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective committed in the course of the conflicts of the past during the said period; afford[] victims an opportunity to relate the violations they suffered; . . . tak[e] . . . measures aimed at the granting of reparation to, and the rehabilitation and the restoration of the human and civil dignity of, victims of violations of human rights; report[] to the Nation about such violations and victims; . . . mak[e] . . . recommendations aimed at the prevention of the commission of gross violations of human rights; and for the said purposes . . . provide for the establishment of a Truth and Reconciliation Commission, a Committee on Human Rights Violations, a Committee on Amnesty and a Committee on Reparation and Rehabilitation; and . . . confer certain powers on, assign certain functions to and impose certain duties upon that Commission and those Committees. . . .<sup>133</sup>

---

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. Promotion of National Unity and Reconciliation Act, No. 34 of 1995, at <http://www.doj.gov.za/trc/legal/act9534.htm>.

133. *Id.*

Of the three committees established in the Truth and Reconciliation Commission Act, the Amnesty Committee was the most controversial.<sup>134</sup> Under the regulations created for this committee, only individuals, not groups of persons, could apply for amnesty, and full disclosure was required.<sup>135</sup> Also, in order for amnesty to be considered, the confessed abuses had to meet two requirements—the crimes committed must have been perpetuated to further a political aim, and those crimes must have been “proportional”; that is, if a confessed crime had been committed in response to an offense committed by an opposing party, it had to have been proportional to that offense in order for the perpetrator of the offense to be considered for amnesty.<sup>136</sup> In order to elicit “truthtelling,” the committee followed a regulation that stated that if amnesty was not granted, the disclosures that had been made could not be used in any subsequent court prosecution.<sup>137</sup> To encourage offenders to fully disclose their past criminal actions, the Committee warned that those who did not seek amnesty would be forced to live the rest of their lives “in fear of being hunted down or fingered by the evidence of a former colleague.”<sup>138</sup> These motivating factors seemed effective; as the deadline to apply for amnesty approached, around 8,000 applications were submitted to the Committee.<sup>139</sup>

Some victims’ families unsuccessfully challenged the Amnesty Committee’s provisions in South Africa’s highest court on due process grounds, arguing that the new constitution’s guarantees of due process and justice for all were denied by granting amnesty to offenders.<sup>140</sup> Eventually, however, people began to see that even with amnesty the offenders were judged.<sup>141</sup> Victims in South Africa came to understand that “there [wa]s a difference between *impunity*, implying escape from accountability, and *amnesty*, which carried profound inward and social consequences.”<sup>142</sup> Still, some have been highly critical of the absence of repentance in many amnesty applications.<sup>143</sup> The legislation, however, only required truth, not repentance.<sup>144</sup>

Although the perpetrators of crimes committed during the apartheid years were originally the focus of the TRC, as the TRC

---

134. Storey, *supra* note 106, at 17.

135. *Id.* at 16.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

developed, the victims became its primary priority.<sup>145</sup> This was evidenced through the development of the two TRC committees that focused on meeting victims' needs. One committee, the Gross Human Rights Violations Committee, was created for the sole purpose of giving victims from across South Africa the opportunity to tell their stories.<sup>146</sup> This Committee's job was to make sure that victims' suffering was "heard, recognized, and revered by the nation."<sup>147</sup> In order to achieve this goal, TRC members held hearings in local city halls and rural community centers.<sup>148</sup> The TRC members felt that going to the victims, rather than making the victims go to a central location to tell their stories, would better honor them.<sup>149</sup> Beyond these formal hearings, victims were also "empowered by *Khulumani* ('speak-out') groups of fellow victims and [were] assisted by hundreds of volunteer statement-takers."<sup>150</sup> Also, because the Committee felt it was important that victims on *all* sides of South Africa's past struggles be allowed to tell their stories, those who suffered at the hands of the apartheid system, liberation forces, and the African National Congress were all invited to share their experiences through these hearings.<sup>151</sup>

As the TRC's focus shifted away from the perpetrators and toward the victims of the apartheid conflict, the creators of the TRC also strove to be more successful in aiding the healing of victims than prior truth commissions had been.<sup>152</sup> This led to the creation of the Committee on Reparation and Rehabilitation. Through this Committee, the creators of the TRC found ways to make sure that victims' stories were heard and acknowledged by an official body, so as to better enable victims to achieve catharsis and healing.<sup>153</sup> As a result, all hearings of both the Gross Human Rights Violations Committee and the Amnesty Committee were public, which meant that victims' individual stories were heard and shared by the nation, which promoted the healing of those victims and granted victims the

---

145. HUMAN RIGHTS PROGRAM, *supra* note 93, at 20.

146. Storey, *supra* note 106, at 16.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* A story told at a hearing regarding secret police torture could have been followed by "a White farmer's story of how his wife and children were killed by an ANC [African National Congress] landmine or by an account of abuses and torture in one of the liberation movement's training camps." *Id.* Storey believes that these stories sent the important message that "a morally justified struggle does not justify indiscriminate killing and deliberate brutality." *Id.*

152. See HUMAN RIGHTS PROGRAM, *supra* note 93, at 27.

153. *Id.*

opportunity to publicly face and ask questions of the perpetrators that came forward.<sup>154</sup>

### C. *Theological Parameters of the TRC*

Beyond granting amnesty to offenders in order to encourage cooperation by those offenders and trying to focus more on the needs of the victims of violations that occurred throughout South Africa's history of apartheid, another way the TRC was different from preceding truth commissions was its focus on reconciliation and reparation, a more restorative form of justice. The TRC best exemplifies how an international truth commission focused on the theological goals of restorative justice would look and function.

Observers of South Africa's TRC have noted, "the TRC's hearings seem[ed] to reach beyond the limitations of secular law, exploring new potentials for forgiveness and national reconciliation. Nowhere else has secular legislation produced such an unsecular and almost scriptural understanding of what it takes to heal a nation."<sup>155</sup> Others who have studied the TRC note that TRC "[n]egotiators created a process that evoke[d] biblical reconciliation, a process that proceeds according to this rubric: 'It is necessary to both remember and judge—and forgive.'"<sup>156</sup> In other words, the TRC negotiators created a process that closely reflected the process used in victim-offender reconciliation programs.<sup>157</sup> Through the Gross Human Rights Violations Committee hearings, victims and offenders both were able to tell their side of the story, ask questions, and talk about the impact and consequences of the offense in their lives in order to try to achieve healing. This form of healing was not sought primarily through material reparation, which some consider to be a failure of the TRC,<sup>158</sup> but rather through forgiveness, a primary goal of the theological form of restorative justice.<sup>159</sup> This theological influence in the restorative process partially occurred due to religious leaders' participation in the TRC.<sup>160</sup> Andre du Toit, a professor at the University of Cape Town who was closely involved with preparatory discussions and planning for the TRC, recognized that "[a]s religious leaders and churches became increasingly involved in the

---

154. Storey, *supra* note 106, at 16.

155. *Id.* at 15.

156. *Id.*

157. See *supra* Part II.C.

158. See Hutchison & Wray, *supra* note 9, at 6.

159. *Id.* at 4-5.

160. See HUMAN RIGHTS PROGRAM, *supra* note 93, at 20.

commission's work, the influence of religious style and symbolism supplanted political and human rights concerns."<sup>161</sup>

Perhaps the primary reason the Gross Human Rights Violations Committee hearings took on a religious restorative style, however, was because religious leader Desmond Tutu chaired those hearings.<sup>162</sup> Through this position Reverend Tutu was able to bring a decidedly religious quality to the hearings.<sup>163</sup>

He . . . wept with the victims and marked every moment of repentance and forgiveness with awe. Where a jurist would have been *logical*, [Tutu] [did] not hesitate[ ] to be *theological*. He . . . sensed when to lead audience members in a hymn to help a victim recover composure and when to call them all to prayer.<sup>164</sup>

Many criticized Tutu's approach and the "God-language" he used.<sup>165</sup> Tutu, however, knew that the nation needed a healing deeper than what the usual legal response could provide.<sup>166</sup> The nation needed to be restored, a form of healing that cannot come about through simple vindication. So, under Tutu's leadership, "[r]ather than denying justice, the TRC process . . . explor[ed] justice in a larger, more magnanimous form . . . *restorative* justice as opposed to *retributive* justice."<sup>167</sup> Peter Storey, former president of the Methodist Church of South Africa and a member of the selection committee for the TRC, felt that Tutu's unique approach "point[ed] beyond conventional retribution into a realm where justice and mercy coalesce. . . an area more consistent with Calvary than the courtroom[,] . . . where the guilty discover[ed] the pain of forgiveness because the innocent [were] willing to bear the greater pain of forgiving."<sup>168</sup>

---

161. *Id.*

162. Storey, *supra* note 106, at 16.

163. *See id.*

164. *Id.* at 17.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

## VI. RESTORATIVE JUSTICE: A BETTER RESPONSE TO CRIME AND CONFLICT

### A. *Promoting an End to International Crimes and Conflicts*

Forgiveness, a central element of the theological ideals of restorative justice, is essential to a victim's healing process.<sup>169</sup> Without forgiveness, bitterness and a desire for vengeance often hold a person captive, preventing that person from healing and thus moving on, out of the cycle of violence.<sup>170</sup> Forgiveness, therefore, is a victim's means of "letting go of the power the offense and the offender [may] have" over the victim.<sup>171</sup> It is empowering and healing.<sup>172</sup> Without it, conflict, through a cycle of violence and revenge, is allowed to continue. Forgiveness, therefore, is necessary to promoting an end to conflict, by cutting off the cycles of retribution and vengeance that so strongly define human responses to injustice in the world today.

### B. *Current Responses: Failure to Promote an End to International Crimes and Conflicts*

Retributive systems of justice do not promote forgiveness. In fact, such systems encourage responding to injustice with force or violence. As a result, such systems do not promote an end to conflict. Both of the current predominant international responses to crime and conflict have grown out of a retributive framework. As a result, neither of the current responses promotes an end to international crimes and conflicts.

#### 1. The Use of Force: Armed Conflict

The first and most common response to international crime and conflict is to respond through armed conflict.<sup>173</sup> This response perpetuates cycles of violence through its very nature. People respond to injustice by attempting, when they are able to do so, to defend themselves through armed conflict, which may lead to the

---

169. ZEHR, *supra* note 37, at 45 (stating that for genuine healing to take place in a crime victim's life, the two preconditions of repentance and forgiveness must be met).

170. *See id.* at 47.

171. *Id.*

172. *Id.*

173. *See Project Ploughshares*, at <http://www.ploughshares.ca>.



perpetuation of conflict in countries or among groups of people for decades or even centuries with no end to the fighting in sight.<sup>174</sup>

In a statement released by the Middle Eastern Council of Churches regarding the world's reaction to the events of September 11, 2001, representatives voiced their disapproval of the use of force in response to violence.<sup>175</sup> At the same time, however, these representatives did not seem at all surprised by that response, stating, "[n]ation states are, by nature, morally juvenile, and customarily respond at the lowest common denominator of responsibility . . . that is the basic foundation upon which military elites and military institutions exist. They express the collective propensity of humanity to do violence to one another. . . ."<sup>176</sup> The council members went on to attribute this reaction to what they felt was "the altogether too common assumption that this condition is inescapable, that violence is, perversely, humanity's way of life."<sup>177</sup>

Restorative justice proponent Paul McCold agrees that people tend to assume violence is a way of life, saying "[t]he pain and fear caused by crime results in ever-greater demands for punishment of offenders, *as if there is no other way to stop the violence.*"<sup>178</sup> He attributes this attitude to the addictive nature of violence, stating, "[i]t is important to realize that blaming is fun. Anger is fun. Hatred is fun. And like any pleasurable activity, it is habit forming—you get hooked on it."<sup>179</sup> As a result of this addiction to violence and the attitude that follows from it, the "myth that punishment can prevent violence rarely seems to be challenged,"<sup>180</sup> so attempts at punishing those who have caused harm continues, causing further violence.

In response to humanity's dependence upon and addiction to violence, The Middle Eastern Council of Churches ended its statement in the vein of the World Council of Church's commitment to a "decade to overcome violence" by

plead[ing] with [their] brothers and sisters in Christ around the world to speak urgently for the cessation of violence, and to address their

174. Examples of such conflicts include those that have been ongoing in Israel, where 35 years of Israeli occupation of Palestinian territories has been accompanied by as many years of armed conflict and terrorism (see Peggy Hutchison, *Wi'am Palestinian Conflict Resolution Center*, NEW WORLD OUTLOOK, July/August 1999, at 24) or Northern Ireland, where sectarianism has caused centuries of conflict and strife (see Gary Mason, *Barriers to Peace and Justice in Northern Ireland*, NEW WORLD OUTLOOK, July/August 1999, at 26).

175. See *MECC Statement*, *supra* note 90. MECC is a Christian organization affiliated with the World Council of Churches.

176. *Id.*

177. *Id.*

178. McCold, *supra* note 18, at 85-86 (emphasis added).

179. *Id.*

180. *Id.*

governments persuasively, convincing them that other instruments than the shedding of blood and the working of vengeance must be used if we are to see a day when the threat of terrorism will be overcome by justice and people will sense the true possibility of peace.<sup>181</sup>

The Decade to Overcome Violence is an initiative of the World Council of Churches, created in response to the Council's belief that "[v]iolence in the homes and on the streets, between ethnic and religious groups, within and between nations and societies, is the most powerful force destroying human community life."<sup>182</sup>

## 2. The ICC

The second major response to injustice on an international scale is adversarial legal trials. Trials conducted through international criminal tribunals and the ICC have limited functions that do not encourage forgiveness and healing.<sup>183</sup> They instead perpetuate cycles of violence by encouraging revenge or giving someone their "just deserts."<sup>184</sup> Revenge sought through a retributive system of justice, the goal of which is to make someone "pay" for their crime by putting them in jail or sentencing them to death, is simply another violent act in the cycle of violence. It does not, therefore, have the effect of promoting an end to conflict. Adversarial legal trials not only continue cycles of violence by punishing the offender, but victims also remain a part of that cycle through the harms they encounter.<sup>185</sup>

181. *MECC Statement*, *supra* note 90.

182. James Solheim, *World Council of Churches Declares Decade to Overcome Violence* (Sept. 14, 1999), at <http://www.episcopalchurch.org/ens/99-133D.html>. WCC General Secretary Konrad Raiser made this statement regarding his support of the WCC's proposed Ecumenical Decade to Overcome Violence, a program that encourages its member churches to "challenge the powers and principalities that perpetuate violence in our world." *Id.*

183. *See infra* Part VI.B.2.

184. ZEHR, *supra* note 37, at 65-82; *see also* McCold, *supra* note 18, at 86.

Only by renouncing the social values and institutions that promote the myth that violence can be overcome with punishment—evil with evil—and exposing the "myth of redemptive violence" can Americans ever hope to escape the cycles of vengeance and violence. . . . [A] punitive and vengeful approach to criminal conflict can only increase the level of violence that is already endemic to the culture.

*Id.*

185. McCold, *supra* note 18, at 86. Victims encounter harms in the adversarial legal system in a number of ways, one of which is the fact that their needs are not addressed. The restorative justice paradigm grew out of working with crime victims in efforts to help victims find a sense of healing, because "[f]orcing the perpetrator to suffer [did] not really alleviate the victim's distress, nor [did] degrading the wrongdoer erase the humiliation felt by the injured party." *Id.*; *see also* ZEHR, *supra* note 37, at 30-31 (stating that another way victims are harmed through adversarial legal systems is by criminal justice personnel and processes). When a victim presses charges, they

## a. Effect on Victims

Victims' needs are not addressed through traditional retributive responses to crime and violence.<sup>186</sup> This was shown through the experience of the victims seeking reparations through South Africa's TRC, who asked for little.<sup>187</sup> The majority of the victims of the violence that accompanied decades of apartheid in South Africa did not seek vengeance against those who had harmed them, and did not ask that offenders be jailed or put to death.<sup>188</sup> Often the bereaved simply wanted the return and proper burial of relatives' remains, or a memorial or small scholarship for orphaned children established in their village in their loved ones' memory.<sup>189</sup> "All agree[d] that the most important thing [wa]s to know the truth," not the punishment of offenders.<sup>190</sup> Some have criticized the TRC, however, for its lack of direct victim-offender encounter during the life of the TRC, and for the fact that little restitution in the form of monetary reparations was carried out by offenders.<sup>191</sup> An international truth commission, therefore, founded on restorative justice principles, needs to focus on improving these areas because, in a system of restorative justice, both direct dialogue between victims and offenders and restitution or reparation are considered vital to the restoration of the victim of an offense.<sup>192</sup>

The requests of those South African victims seeking reparation through the TRC were not unique. Other victims that have participated in restorative justice programs such as victim-offender reconciliation have made similar requests—as simple as an apology or the opportunity to tell the offender how the crime committed against them made the victim feel.<sup>193</sup> A prosecutorial or retributive system of justice, under which the ICC operates, does not address such needs.<sup>194</sup> Responding to crime through the ICC, therefore, will

---

are often provided little information about the case and have little say as to whether or how the case is prosecuted. *Id.* Many victims call their treatment in this process a "second victimization"; this neglect of victims "not only fails to meet their needs: it compounds the injury. . . . Instead of returning power to [the victim] by allowing them to participate in the justice process, the legal system compounds the injury by again denying [them] power. Instead of helping, the process hurts." *Id.*

186. See ZEHR, *supra* note 37, at 26-32.

187. Storey, *supra* note 106, at 16.

188. *Id.*

189. *Id.*

190. *Id.*

191. Hutchison & Wray, *supra* note 9, at 6. See also Storey, *supra* note 106, at 16 (stating that South Africa's battered economy could not afford large cash payouts to victims, so other methods of reparation had to be fashioned).

192. See Hutchison & Wray, *supra* note 9, at 5.

193. ZEHR, *supra* note 37, at 161.

194. See ROME STATUTE, *supra* note 66.

simply perpetuate existing problems in retributive systems. International crimes against humanity will continue to be committed as the further harms done to offenders through retributive forums create feelings of unjust treatment and the desire for revenge, and as ignorance of victims' needs allow feelings of fear, bitterness, and anger to continue.

Besides failing to provide for restitution or reparations, a retributive system also fails to satisfy a victim's need to tell her story.<sup>195</sup> One observer notes that victims in South Africa "do seem to have been helped by telling their stories. Many have said that they now feel able to move forward with their lives. Most important has been the 'reverencing' of their suffering. 'Today,' said an old Black man, 'the nation cried my tears with me.'"<sup>196</sup> Du Toit agrees that the TRC's policies that allowed victims to tell their stories were helpful to victims on all sides of the apartheid struggle.<sup>197</sup> Through his involvement in planning the TRC, he discovered that "[t]he most important definition of truth for the commission [was] acknowledgment. The people who came forward to testify at the public hearings of the Human Rights Violations Committee made this clear. They did not so much disclose new information as they seized the opportunity to tell their own stories."<sup>198</sup>

In an adversarial trial setting, a victim's opportunity to tell her story is denied. In such a setting, courtroom rules of evidence, discovery, and monetary and time constraints on the court rarely allow for, much less encourage, the victim or the accused to tell the whole story. This harms the victim by denying her the healing power of having her suffering officially acknowledged, as well as denying her the healing power of hearing the offender's story, which may allow the victim to better understand what happened and why.<sup>199</sup> Also, the victim's and accused's only opportunity to publicly tell their stories may be during the trial, so after the trial is over it is unlikely that the whole truth will ever be revealed or recorded and acknowledged so that all interested parties would have the opportunity to learn exactly what happened and why.

Additionally, an international criminal justice forum operating under the traditional retributive paradigm has the negative effect of telling the victim what is best for her, when in fact retribution may not meet the victim's need to heal and forgive.<sup>200</sup> Research in this area has led to the belief that "[f]orcing the perpetrator to suffer does

---

195. See Storey, *supra* note 106, at 17.

196. *Id.*

197. See HUMAN RIGHTS PROGRAM, *supra* note 145, at 20.

198. *Id.*

199. See Storey, *supra* note 106, at 15.

200. McCold, *supra* note 18, at 87.

not really alleviate the victim's distress, nor does degrading the wrongdoer erase the humiliation felt by the injured party."<sup>201</sup> Also, trials conducted under a retributive paradigm focus on the perpetrator, whereas restorative justice in the form of a truth commission can (and often does) focus more on the needs of the victim, which may be much more helpful to the victim's process of healing.<sup>202</sup> Too often those who choose to define and apply a legal paradigm assume, as the United Nations has assumed with the creation of the retribution-based ICC, that victims want or need retribution or a focus on the perpetrators of crime and the consequent punishment of those perpetrators.<sup>203</sup> This simply may not be what the majority of victims desire.<sup>204</sup> Du Toit, from his experience working with the TRC, found that "many victims are more interested in the restoration of their human and civic dignity" than the criminal prosecution of offenders.<sup>205</sup>

Relying on traditional responses to crime, therefore, will continue to delay and perhaps deny a victim's process of healing and understanding while, at the same time, delaying an end to conflict. Often, healing and forgiveness cannot occur for a victim until they are able to both tell their story and hear the offender's story and ask questions about the offense.<sup>206</sup> Prosecution of international crime

---

201. *Id.* at 86.

202. *Id.* at 87 (citing Howard Zehr's various studies in this area). McCold notes,

Crime victims have a variety of needs created by the harms they suffer in the course of the crime. The loss of control and orderliness experienced is often more damaging than any physical or material loss suffered. Victims need to bring meaning to the crime event in order to restore predictability and order in their lives. They need vindication that what happened to them was wrong and undeserved, and opportunities to express and have validated their anger and pain. . . . Crime victims also need their offender to understand the injury caused them, as well as their family and friends. If the offender can be made to appreciate the injury and to develop a sincere sense of lament, *the victim can have the chance to heal emotionally from the harm* and go on with his or her life.

*Id.* (emphasis added).

203. HUMAN RIGHTS PROGRAM, *supra* note 93, at 20.

204. *See id.*

205. *Id.*

206. ZEHR, *supra* note 37, at 27. Zehr states:

Information can be very important to victims, and answers to . . . questions [such as "what happened?" and "why did it happen to me?"] may provide an entrance on the road to recovery. Without answers to such questions, recovery may be difficult. In addition to . . . answers, victims need opportunities to express and validate their emotions. . . . Victims need opportunities and arenas [not only] to express their feelings and their suffering, but also to tell their stories. They need to have their "truth" heard and validated by others.

*Id.*

through an international criminal court, therefore, will simply allow existing problems for victims to continue, whereas a restorative paradigm would allow victims the unique opportunity to "get the facts" regarding exactly what happened in the crime or act of violence committed against them and perhaps discover why those criminal and violent acts occurred.<sup>207</sup>

b. Effect on Offenders

A victim is not the only party to a crime denied true justice, or an opportunity for healing to take place, through a retributive system. Offenders also suffer in many ways from the violence perpetuated through a retributive system of justice.<sup>208</sup> The first and most obvious way that an offender suffers at the hands of a retributive system is that the offender is treated violently through punishment. Punishment is likely another step in the cycle of violence the offender has experienced and perpetuated throughout his life. Punishment contributes to the cycle of violence, therefore, instead of contributing to the offender's healing and understanding by holding the offender accountable for the crime committed.<sup>209</sup> Holding the offender accountable under a restorative paradigm has a very different meaning than the idea of "accountability" under a retributive paradigm.<sup>210</sup> As mentioned previously, under a retributive paradigm, holding an offender accountable requires making him suffer, or "pay," for the crime committed.<sup>211</sup> Under a restorative paradigm, however, real accountability requires that the offender take responsibility for the results of the crime committed.<sup>212</sup>

Taking responsibility allows an offender to repent and seek forgiveness, which is as essential to his process of healing as it is to the victim's similar process.<sup>213</sup> The only way an offender can heal and be truly whole is through accepting responsibility for the crime committed by confessing his wrongdoing and acknowledging the harm done.<sup>214</sup> Only through acceptance is the stage set for true repentance, which is both essential to the offender's healing process and helpful to the victim's healing process.<sup>215</sup> Repentance also allows the offender the opportunity to be forgiven. Offenders need the opportunity to feel

---

207. *Id.* at 161.

208. *See* ZEHR, *supra* note 37, at 33-44.

209. *Id.*

210. *See* Pranis, *supra* note 7, at 495.

211. *Id.*

212. McCold, *supra* note 18, at 87.

213. ZEHR, *supra* note 37, at 50.

214. *Id.*

215. *Id.*

forgiven because, if denied that opportunity, any guilt they may feel may threaten their sense of self-worth and self-identity.<sup>216</sup> This, in turn, may lead the offender to deal with that guilt through a variety of defensive techniques used in order to maintain the offender's sense of self-worth.<sup>217</sup> This method of dealing with guilt can perpetuate the cycle of violence because offenders often express unforgiven guilt through anger, either toward themselves or toward others.<sup>218</sup>

*C. International Truth Commission: Promoting of an End to Conflict, Cyclical Violence and Revenge Through Healing, Forgiveness, and Understanding*

An international truth commission based on the ideals and goals of restorative justice, such as the TRC in South Africa, would provide a forum that could be used to help end international conflicts by ending cycles of violence. Such a forum, if used, would promote an end to cyclical violence by focusing on the restoration of the victim, the offender, and the community where the harm took place, rather than focusing on retribution. This type of forum would likely have to be available for an extended period of time before it would be widely used, because many countries would not initially elect to use such a forum due to deeply ingrained notions of justice perpetuated by retributive or vengeance-based models.<sup>219</sup>

Regardless of its initial popularity, however, such a forum is necessary for countries and groups currently prone to conflict to break free from the cycles of violence that consume the world.<sup>220</sup> Responding to violence through retributive means has led and always will lead to further violence against the offender, through the punishment handed down; against the victim, through denying the victim the opportunities she needs to heal from her experience; and against the community, where further harms will take place due to

216. *Id.* at 49.

217. *Id.*

218. *Id.*

219. See McCold, *supra* note 18, at 85-86.

220. *Id.* at 86 (citing various authors that have conducted studies regarding cyclical violence and criminal justice). McCold concludes:

Only by renouncing the social values and institutions that promote the myth that violence can be overcome with punishment—evil with evil—and exposing the “myth of redemptive violence” can [we] ever hope to escape the cycles of vengeance and violence. . . . [A] punitive and vengeful approach to criminal conflict can only increase the level of violence that is already endemic to [such] culture[s].

*Id.*

continued feelings of injustice.<sup>221</sup> Reacting to violence and oppression through restorative, rather than retributive, means is the only way these inherent harms will be avoided.

Such a forum could operate, as an entity, in much the same way the ICC will operate once it becomes fully functional. First, its rules and parameters could be set out in a statute created and adopted by the United Nations, which would then go through a ratification process similar to the ratification recently completed for the Rome Statute of the International Criminal Court.<sup>222</sup> Unlike in the ICC statute, the statute for a restorative justice forum should designate that the forum would "sit" wherever it was needed (i.e., in the country that wished to use such a forum) so that public, local hearings could be held to better honor the victims and better aid in their healing.<sup>223</sup> At these hearings, victims and offenders would meet face-to-face under the direction of mediators or facilitators, who could be chosen in much the same way the Gross Human Rights Violations Committee members were chosen for the TRC.<sup>224</sup> These mediators would be trained to negotiate, just as current mediators of victim-offender reconciliation programs are trained,<sup>225</sup> with a focus on promoting conversation and understanding between the parties.

This type of mediated conversation proved to be necessary in the healing experience of many in South Africa<sup>226</sup> and has done the same for many more individuals through victim-offender reconciliation programs throughout the world.<sup>227</sup> Restorative justice mediation has proven to be healing for many because the beliefs on which it is founded—that human beings need to forgive and be forgiven in order

---

221. See generally ZEHR, *supra* note 37, at 19-44.

222. ROME STATUTE, *supra* note 66, pt. 13, art. 126.

223. See Storey, *supra* note 106, at 16.

224. See *supra* note 106. However, if the right people for the job were not available within the country itself, persons could be brought in from surrounding countries or from a general panel selected by the U.N. to serve at these hearings, in order to ensure that the people on the hearings panels met the highest standards of impartiality and integrity.

225. See ZEHR, *supra* note 37, at 161.

226. See Storey, *supra* note 106, at 17; HUMAN RIGHTS PROGRAM, *supra* note 93, at 20.

227. ZEHR, *supra* note 37, at 166 (citing Robert B. Coates & John Gehm, *Victim Meets Offender: An Evaluation of Victim-Offender Reconciliation Programs* (Michigan City, IN: PACT Institute of Justice, 1985), a study of VORPs in the U.S. Midwest). In the study,

victims and offenders were asked what justice meant and whether they had experienced it. Almost 80 percent of both victims and offenders who had gone through VORP believed that justice had been served in their cases. Definitions of justice varied, but common themes were "making things right" . . . , holding offenders accountable, and "fairness and equity in settling disputes."



to be healed—are sound. Human beings are not meant to live lives consumed by feelings of bitterness, fear, hurt, and vengeance. Studies have shown that persons living such lives will be prone to perpetuating the violence that has been committed against them, which can in turn be self-destructive.<sup>228</sup> This type of reaction to violence and need for healing is consistent, regardless of whether the violence committed was in a one-on-one situation or on a greater scale. Therefore, there is no reason why restorative justice cannot work the same way for victims and offenders on an international level as it has for victims and offenders all over the world through reconciliation programs and truth commissions.

In order for restorative justice to succeed and for cycles of violence to end, however, victims and offenders must be willing to break free from their retributive mindsets and see the value in forgiveness and restoration. This will happen eventually, “[a]s the international community comes to recognize that there is no peace without confronting the hurts of history and without the healing of national and ethnic memories.”<sup>229</sup> South Africa’s recognition of this truth and the success of its restorative justice-based truth commission was the first step in this process. Now it is only a matter of time before other nations attempt to follow South Africa’s lead.

For some nations, however, any attempt to create a truth commission would be futile due to the lack of resources and leadership necessary to commit to undertaking such a creation. An international forum is needed so that those nations that would otherwise be unable to pursue a restorative justice based solution will have the opportunity to do so. As with the ICC, a representative of the country seeking resources in order to implement a restorative justice program would describe their situation and the need for a truth commission to a specific branch of the international commission. Representatives from the international truth commission would then further analyze the country’s situation, and, working with available leadership within the country, supply the resources necessary for establishing the truth commission. Arguably, the establishment of a truth commission would need to include, at a

---

228. See *id.* at 43-44, 77.

The assumptions of just deserts and the imposition of pain mean that offenders are caught up in a tit-for-tat world. This in turn tends to confirm the outlook and life experiences of many offenders. Wrongs must be repaid by wrong and those who offend deserve vengeance. Many crimes are committed by people “punishing” their family, the neighbors, their acquaintances.

*Id.*

229. Storey, *supra* note 106, at 17.

minimum, the three committees created for the TRC.<sup>230</sup> Beyond those three committees, the scope of the truth commission would vary by country according to the country's needs and specific situation.

## VII. CONCLUSION

In order to break free from cycles of violence and revenge, an alternative method for dealing with international human rights crimes and conflicts than those currently proposed (the ICC and other retributive legal systems) or in use (armed conflict) is necessary. This alternative should be an international truth commission, a discussion forum based on restorative justice goals such as restoration and reparation, through which countries and groups of people within countries could discuss their grievances with one another, with the aid of a mediator, in a way that promotes healing, forgiveness, and understanding. Like the ICC, the international truth commission could be implemented and run through the United Nations. Because of humanity's addiction to and reliance upon violence in order to deal with injustice, there will not initially be incentive to use such a forum. This forum would, however, allow countries the opportunity to take deliberate steps toward peace rather than resort to traditional, adversarial responses to international crime and conflict.

*Carrie J. Niebur Eisnaugle\**

---

230. See *supra* Part V.B.

\* B.A., Luther College, 1999; J.D. and M.T.S. candidate, Vanderbilt University Law School and Vanderbilt University Divinity School, 2003. To my husband, my parents, and all those who have listened to and helped clarify my ideas throughout the process of writing this note, I extend my sincerest gratitude. I also wish to thank Harmon Wray for introducing me to restorative justice theory, a way of thinking that has been pivotal in shaping my future.

\* \* \*