

The Intersection of Dispute Systems Design and Transitional Justice

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I. INTRODUCTION

Dispute Systems Design (DSD), the process of creating structures to deal with repeated or systemic disputes, can be applied to both the most mundane and the most horrific of conflicts. When dealing with these most horrific disputes, DSD has the opportunity to be informed by research in international law, international relations, human rights law and transitional justice. This particular essay examines some of the challenges faced by the discipline in response to human rights violations around the world.

We know that human rights violations can be perpetrated by governments or non-state actors, can be regional or national, and can be targeted against a particular group or have random victims. We know that these violations can occur as a spurt of extreme violence over a short time or can last for generations. We also know, historically, of many different methods by which to deal with human rights violations. Beginning with the Nuremberg and Tokyo trials after World War II and continuing through today, one typical response has been the use of prosecution through courts. The International Court for the Former Yugoslavia (ICTY) and the International Court for Rwanda (ICTR) were established virtually simultaneously in 1994 to deal with the horrors of the Yugoslav civil war and the Rwandan genocide.¹ The trend for more courts continued at the end of the 1990s and into this century with tribunals established in Sierra Leone, East

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1. For the Rwanda tribunal, see United Nations, International Criminal Tribunal for Rwanda, <http://69.94.11.53/> (last visited June 26, 2008); for the Yugoslav tribunal, see United Nations, International Criminal Tribunal for the Former Yugoslavia, <http://www.un.org/icty> (last visited June 26, 2008).

Timor, and elsewhere² culminating in the creation of the International Criminal Court (ICC) through the Rome Treaty.³

Other countries have used variations of a truth commission to report on human rights violations. Several South American countries published reports on the atrocities carried out during their civil wars and dictatorships. Most famously, South Africa chose to create its Truth and Reconciliation Commission (TRC), where parties could tell their stories in exchange for amnesty, to focus on getting the entire history of apartheid abuses told.⁴ Still other choices exist—from widespread amnesty in exchange for relinquishing power, to arbitration panels, to more traditional community reconciliation efforts.

From all of these varieties, we may learn some general lessons and advice for how to proceed. As this symposium has outlined, “[g]overnments, institutions, and individuals look to lawyers for assistance in situations such as these and many more, yet most lawyers have little if any formal training on how to approach such complex problems in a systematic and holistic way.”⁵ The goal of this article is to bring together different experiences around the world in international, human rights, transitional justice, restorative justice, and dispute resolution to outline the challenges lawyers face when dealing with these complex international situations.

Among the many challenges that dispute systems designers face when dealing with human rights violations are the following:

1. *Should* we be setting up a DSD at all? How can we design systems that both acknowledge the need for justice *and* promote peace on the ground as soon as possible?

2. See JANE STROMSETH ET AL., *CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS* (Cambridge University Press 2006); see also *The Special Court for Sierra Leone*, <http://www.sc-sl.org/> (last visited June 26, 2008); *Commission for Reception, Truth and Reconciliation for East Timor*, <http://www.cavr-timorlese.org> (last visited June 26, 2008).

3. Rome Statute of the International Criminal Court, available at <http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/Rome+Statute.htm> (last visited June 26, 2008).

4. See, JAMES GIBSON, *OVERCOMING APARTHEID: CAN TRUTH RECONCILE A DIVIDED NATION?* 266-68, 284-88 (Russell Sage Foundation 2004); see also Erin Daly, *Transformative Justice: Charting a Path to Reconciliation*, 12 INT'L LEGAL PERSP. 73, 156-57 (2002); For the actual documents establishing the TRC, see *Promotion of National Unity and Reconciliation Act*, No. 34 (1995) (S. Afr.), available at <http://www.doj.gov.za/trc/legal/act9534.htm>

5. Robert C. Bordone, Introduction to Dispute Systems Design, Presentation at Harvard Negotiation Law Review Symposium: Dispute Systems Design Across Contexts and Continents (Mar. 7, 2008), available at <http://blogs.law.harvard.edu/hnmcp/ADR/alternative-dispute-resolution/dispute-systems-design-symposium/>.

2. *Who* designs and implements the DSD? How can we design systems that are almost inevitably implemented from the top down while recognizing that the best healing occurs from the bottom up?
3. *How* is the system designed? How can we as designers be efficient and use the best practices of the past while still customizing each dispute system to take unique account of each individual conflict?
4. *What values* are promoted by the DSD? How can we explain the push for judicialization of international disputes at the same time that trial rates in the U.S. continue to drop?
5. *What remedies* are provided by the DSD? How can we design systems for the future while recognizing that the people most affected often need to cope with the past violations before looking to the future?

This essay will first explain the challenge posed by each of the questions above, and then suggest some approaches to these challenges based on what we have seen thus far in international and domestic DSD.

II. *SHOULD A DISPUTE SYSTEM BE SET UP AT ALL?*—JUSTICE V. PEACE⁶

As conflicts end, politicians often wonder whether we need an official response or structure to resolve disputes or, perhaps, other responses would be more appropriate. After World War II, Stalin famously suggested that instead of the Nuremberg Tribunal, the Allies could just take the Germans out back and shoot them. On the other hand, in many countries, it seems to be enough if the political leadership changes, perhaps amnesty is granted, and the population at least appears to be willing to move on. Due primarily to cold war politics, blanket amnesty for dictators and war criminals was the norm prior to 1993.⁷ In Argentina, Chile and several other South American countries, amnesty was granted to the military leadership

6. Note that in transitional justice literature, this dichotomy is often phrased as “truth v. justice” but that phrase tends to refer to the balance between prosecution versus a truth commission. “Peace v. justice” is a broader umbrella term encompassing the choice of doing nothing.

7. Larry Johnson, *Peace vs. Justice: Ending a Conflict at the Price of Impunity*, Lecture at New York University Robert F. Wagner Graduate School of Public Service, (Apr. 5, 2007), available at http://uc.princeton.edu/main/index.php?option=com_content&task=view&id=1795.

in exchange for stepping down.⁸ As Professor Carlos Nino has stated, “a legal duty selectively to prosecute human rights violations committed under a previous regime is too blunt an instrument to help successor governments who must struggle with the subtle complexities of re-establishing democracy.”⁹

Today, the need for immediate peace between the parties, the desire for swift justice, and the long-term goal of a more lasting peace among the warring groups regularly provides conflicting concerns for scholars and international dispute systems designers alike.¹⁰ Is it more important to stop the violence or to pursue justice by punishing those responsible for human rights violations?¹¹ In the quest to end conflicts, can the international community achieve peace and justice without granting amnesty to war criminals? The tension arises because, arguably, oppressive dictators and war criminals will not want to give up power (and thus stop the violence) if they will be hauled into court the next day.

The recently-ended twenty-year civil war in Uganda between the government and the notorious Lord's Resistance Army (LRA) provides a clear example of the tension between peace and justice. The leader of the LRA, Joseph Kony, was offered a total amnesty by political leaders in Uganda, despite having committed horrific war crimes, if he would end the vicious rebellion in northern Uganda. In the midst of ongoing domestic negotiations, the International Criminal Court (ICC) indicted him and four of his deputies throwing the peace

8. Note that in Argentina and Chile, the outcomes were quite different. In Argentina, there was relatively complete regime change as most of the military stepped down from leadership. In Chile, on the other hand, Pinochet and other military officers stayed in political life. As I discuss later, both of these amnesty laws have since been repealed.

9. Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put Into Context: The Case of Argentina*, 100 YALE L.J. 2619, 2638 (1991).

10. See generally John Paul Lederach, *Cultivating Peace: A Practitioner's View of Deadly Conflict and Negotiation*, in CONTEMPORARY PEACEMAKING: CONFLICT, VIOLENCE AND PEACE PROCESSES 33-35, 37 (John Darby & Roger MacGinty eds., 2003); Carrie Menkel-Meadow, *Peace and Justice: Notes on the Evolution and Purposes of Legal Processes*, Inaugural Lecture of the A.B. Chettle, Jr. Chair In Dispute Resolution and Civil Procedure (2006) in 94 GEO. L. J., at 553-580. See also Eric Blumenson, *The Challenge of a Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court*, 44 COLUM. J. TRANSNAT'L L. 801 (2006); Kristin Henrard, *The Viability of National Amnesties in View of the Increasing Recognition of Individual Criminal Responsibility at International Law*, 8 MSU-DCL J. INT'L L. 595 (1999); Michael P. Scharf, *From the eXile Files: An Essay on Trading Justice for Peace*, 63 WASH & LEE L. REV. 339 (2006).

11. See Andrea Kupfer Schneider, *Barriers to Peace in the Middle East: The Day After Tomorrow: What Happens Once a Middle East Peace Treaty is Signed?*, 6 NEV. L.J. 401, 408 (2005).

negotiations into disarray.¹² Many political leaders accused the ICC of preventing peace in the region by interfering with their own domestic negotiations.¹³

But, with a longer view of most conflicts, it seems apparent that this peace versus justice dichotomy is a false one. In most situations of gross human rights violations, the populations and the government need both peace and justice for the country to be able to move on.

A. *Justice Without Peace*

Justice, without peace or healing, has proven to be only a temporary fix to conflict. Although Japan faced a war crimes tribunal after WW II, the peace between Japan and its neighbors—including China, Korea, and others—never really occurred. As the focus of the Allies turned to propping up the Japanese government against communism, there was little dialogue between Japan and its victims, little truth-seeking, no immediate apologies or acknowledgments of wrongs committed. Japan's neighbors remained suspicious of Japan's true recognition of the human rights violations carried out in its name. Every visit to the cemetery holding some of the Japanese war criminals and every change to the Japanese textbooks becomes an international incident.¹⁴ Even in domestic dealings with Okinawa (the Japanese island where Japanese soldiers convinced native Okinawans to commit mass suicide rather than be captured by the Americans), the Japanese government is treated with suspicion, as it has not acknowledged what actually happened.¹⁵

In Bosnia as well, dealing with the atrocities committed during the Yugoslav civil war, cases have been brought to the ICTY that have established groundbreaking law regarding human rights and

12. Cecily Rose, *Looking Beyond Amnesty and Traditional Justice and Reconciliation Mechanisms in Northern Uganda: A Proposal for Truth-Telling and Reparations*, 28 B.C. THIRD WORLD L.J. 345, 349-50 (2008). See also *Peace Versus Justice: War Crimes in Africa*, THE ECONOMIST, Jul. 8, 2006, at 59.

13. See KINGSLEY CHIEDU MOGHALU, *GLOBAL JUSTICE: THE POLITICS OF WAR CRIMES TRIALS* 152-53 (Praeger Security International 2006). See also THE ECONOMIST, *supra* note 12, at 59.

14. See generally MOGHALU, *supra* note 13; Norimitsu Onishi, *In Japan's New Text, Lessons in Rising Nationalism*, N.Y. TIMES, Apr. 17, 2005, §4, Week in Review, at 4; Joseph Kahn & James Brooke, *Chinese Official Cuts Short Japan Trip to Protest Shrine Visit*, N.Y. TIMES, May 24, 2005, at A4; Norimitsu Onishi & Howard W. French, *Ill Will Rising Between China and Japan as Old Grievances Fuel New Era of Rivalry*, N.Y. TIMES, Aug. 3, 2005 at A7; Norimitsu Onishi, *South Korean Leader Tells Japan's Leader to Stop Visiting Shrine*, N.Y. TIMES, Nov. 19, 2005, at A5.

15. Norimitsu Onishi, *Okinawans Protest Japan's Plan to Revise Bitter Chapter of World War II*, N.Y. TIMES, Oct. 7, 2007, at A6.

war crimes.¹⁶ The ICTY has now prosecuted many of the top political and military leaders; the prosecutors, defense attorneys, and judges are of the highest caliber; and the law established has been dramatic and clear. And yet the impact of these cases on the ground is mixed.¹⁷ There is little ethnic reconciliation among the various ethnic groups and nationalities.¹⁸ One could argue that ethnic cleansing was achieved in some respects as the populations hardly interact today. Some have even argued that ethnic tensions have increased in the past few years as the perceived unfairness of the ICTY tribunal against the Serbs fuels their antagonism.¹⁹ Textbooks are now completely different, the histories of the war are different, and efforts to establish either a “truth” or common history of the human rights violations have been stymied—even by the court itself.²⁰

B. *Peace Without Justice*

Unfortunately, on the other side, peace without justice also does not seem to provide a long-term solution. In some situations, peace was accomplished through a peaceful transition to a new government with the granting of amnesty to the previous government. When Pinochet finally stepped down as the president of Chile with his Senator-for-Life designation, he was supposed to be immune to prosecution. The militaries in Argentina and elsewhere were granted amnesty for their actions in exchange for agreeing to step down without overthrowing the elected government. In other countries, a combination of amnesty and truth commissions were used. In El Salvador, at the end of the civil war which claimed 75,000 lives, the new government promised a truth commission to investigate allegations of human rights violations. The commission could report names but amnesty was granted within a few days of the report’s release.²¹ In Guatemala, the international experts serving on the

16. Patricia M. Wald, *ICTY Judicial Proceedings: An Appraisal from Within*, 2 J. INT’L CRIM. JUST. 466, 471-72. (2004)

17. See generally JOHN HAGAN, *JUSTICE IN THE BALKANS: PROSECUTING WAR CRIMES IN THE HAGUE TRIBUNAL* (2003); LYNNE JONES, *THEN THEY STARTED SHOOTING: GROWING UP IN WARTIME BOSNIA* (2005).

18. See JANE STROMSETH ET AL., *supra* note 2, at 109.

19. But see Wald, *supra* note 16, at 467.

20. Human rights activists were divided over whether to set up a truth commission in addition to the court because some worried it would draw resources, time, and attention away from the court. See, e.g., PRISCILLA HAYNER, *UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS* 207 (Routledge 2002).

21. See Thomas Buergenthal, *The United Nations Truth Commission for El Salvador*, 27 VAND. J. TRANSNAT’L L. 497, 521-22, 537-38 (1994).

truth commission could not actually include the names of those responsible in their report. Yet, twenty years later, some of these countries have started to revisit those amnesty decisions and to prosecute.²² Even with “peace” and a shift to democracy, it is clear that the populations have been waiting for a true accounting of the violations and some kind of prosecutions or acknowledgments from that time.²³

Even the TRC in South Africa has faced the problem of providing truth but not justice. Most commentators noted that wide-scale prosecution for human rights violations under apartheid was unfeasible²⁴ and the TRC provided the best of what all international DSDs were designed to do—allow victims to tell their stories, allow perpetrators to convey what actually happened, allow a full history of the apartheid era to be written, and allow a new government to *peacefully* transition to power. In many ways, South Africa is one of the greatest DSD stories out there. And yet, the part of the TRC design that provided for justice—in the form of economic development and land redistribution—never fully occurred. And so, while the “truth” part of the TRC has been handled rather well, the “reconciliation” part waits for economic reality.²⁵ The studies conducted by James Gibson and others have demonstrated that citizens’ views of the TRC vary widely depending on the respondent’s race and how their economic situation changed since the TRC.²⁶ If the economic situation improved, then the respondent thought the TRC had accomplished its goals. On the other hand, if the respondent still lived in the townships with limited economic changes and opportunities, his or her view of the TRC was primarily negative.²⁷ So even in South Africa, peace through truth-telling is a fleeting peace unless justice through

22. See e.g., Larry Rohter, *Argentine Ruling Revives Cases of ‘Dirty War’ Victims*, N.Y. TIMES, July 15, 2005, at A3.; Larry Rohter, *Chilean Court Revokes Pinochet’s Immunity from Prosecution*, N.Y. TIMES, May 29, 2004, at A5.

23. Lisa J. Laplante, *Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes*, (manuscript on file with the author).

24. Note that a few high-level prosecutions were carried out for the most egregious crimes in South Africa.

25. See Lisa J. Laplante, *Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of violence through a Human Rights Framework*, 2 INT’L J. TRANSITIONAL JUST. 331, 339-40 (2008).

26. See GIBSON, *supra* note 4, at 257; TRUTH AND RECONCILIATION IN SOUTH AFRICA (Audrey R. Chapman & Hugo Van Der Merwe, eds., University of Pennsylvania Press 2008). See also Carrie Menkel-Meadow, *Remembrance of Things Past? The Relationship of Past to Future in Pursuing Justice in Mediation*, 5 CARDOZO J. CONFLICT RESOL. 97 (2004).

27. See GIBSON, *supra* note 4 at 257.

more extensive reparations in terms of economic development is accomplished.

C. *Peace and Justice*

Debates framing “peace versus justice” as a zero sum game disregard the complexity of the issues and the fact that most conflicts require both peace *and* justice in order to really move forward.²⁸ In many conflicts, the peace versus justice tension is more a trade of delayed justice for peace now: Alberto Fujimori, Peru’s ex-President between 1990-2000 is on trial for human-rights violations; Khieu Samphan, Cambodia’s president from 1976-1979 is awaiting his trial before a UN-backed tribunal; the president of Chad in the 1980’s, Hissene Habre, is awaiting trial for crimes against humanity in Senegal; and both Augusto Pinochet and Slobodan Milosevic only escaped trials by dying.²⁹

So, how can we deal with the need for both peace and justice? The answer is, not surprisingly, that different processes may be required to meet these different needs. Rwanda, with its perceived messy overlap of international & domestic processes, prosecution & truth commissions, formal & informal processes, may ironically be the success story of managing the peace and justice tensions.³⁰ The variety of processes in Rwanda include the ICTR, local Rwandan domestic prosecutions, other countries’ domestic prosecutions (Belgium, in particular), and indigenous gacaca courts. Initially, some commentators worried that the variety of prosecutions and processes would be confusing, would prevent the country from moving forward, and would generally be unhelpful. In fact, the variety of courts have permitted different types of more tailored and effective prosecutions. The “big” names (high command) went to the ICTR where important public law could be made. Several of the cases from the ICTR were groundbreaking in their holdings, including officially naming rape as

28. See STROMSETH ET AL., *supra* note 2, at 251-52.

29. See *Bringing Bigwigs to Justice: Charles Taylor in the dock*, THE ECONOMIST, Jan. 12, 2008, at 52.

30. In the mid-1990s, ethnic genocide was underway in Rwanda. Almost 15 years later, the country is still reeling from the events, and is still trying to bring those responsible to justice. This is an immensely difficult task, as the number of those believed to be responsible is nearly as great as those that were killed: the Rwandan government estimates that one million people were killed, and that as many as 800,000 were responsible. Over 80,000 people have been charged with genocide, many of whom have been waiting in prison for years. While a UN court was set up to deal with the leaders of the movement, the Rwandan courts were overwhelmed with trying to deal with those that remained. See ELIZABETH NEUFFER, *THE KEY TO MY NEIGHBOR’S HOUSE: SEEKING JUSTICE IN BOSNIA AND RWANDA* (Picador 2002).

a war crime and the conviction of the media in Rwanda for incitement.³¹ “Medium” figures were arrested by the thousands in Rwanda and the domestic courts have (slowly) moved through prosecuting them. And the gacaca system³² has helped on the local level to provide both truth and justice to the victims.³³ As Judge Patricia Wald has written, there are “drawbacks to the ‘big fish’ strategy” of only investigating and prosecuting the planners or instigators of the atrocities as was implemented in Yugoslavia.³⁴ This creates an “immunity gap” as she calls it where the lower level tormentors often get to return to their village and assume positions of power. So, in Rwanda, the variety of courts and gacaca, national and local prosecutions, and Western and indigenous methods has accomplished quite a bit³⁵—and more than those post-conflict situations which only chose one method.

III. WHO ACTUALLY DESIGNS & IMPLEMENTS THE SYSTEM?— TOP-DOWN V. BOTTOM-UP

A second conflict in international DSD is the problem of introducing solutions from the designer’s top-down perspective, when the process must take place from the bottom up. After all, the impact of any structure will be measured by more than its effect on the international community but rather how the DSD affected the post-conflict society.

In international DSD thus far, the most well-known structures have been designed by an international elite. The various ad hoc courts established by the UN for Yugoslavia and Rwanda are a clear example and have been criticized for their distance—physically and

31. See MOGHALU, *supra* note 13, at 271-74.

32. These gacaca courts are run locally, with the judges elected from the villages where the offenses took place. Often, the judges know both the victim and the accused. These trials are held outdoors and are observed by anyone that wants to be there. One of the key focuses of these trials is a confession and apology in which the accused often admits to what they did, and asks to be let back into the community. The judges then come up with what they consider to be a suitable punishment. There are currently about fifteen-thousand of these courts.

33. See generally Catherine Honeyman et al., *Establishing Collective Norms: Potentials for Participatory Justice in Rwanda*, 10 PEACE & CONFLICT: J. PEACE PSYCHOLOGY 1 (2004); Maya Goldstein Bolocan, *Rwandan Gacaca: An Experiment in Transitional Justice*, 2004 J. Disp. Resol. 355 (2004); Jessica Raper, *The Gacaca Experiment: Rwanda’s Restorative Dispute Resolution Response to the 1994 Genocide* 5 Pepp. Disp. Resol. L.J. 1 (2005).

34. Patricia M. Wald, *Foreword: War Tales and War Trials*, 106 MICH L. REV. 901, 915 (2008).

35. Of course, in Rwanda, given the numbers of people who participated in the genocide, even these multiple layers of processes do not reach all perpetrators.

psychologically—from the affected countries.³⁶ Even in the more recently created courts, this concern has not been fully met. Recognizing already some of issues raised by the ICTR and ICTY, the Sierra Leone hybrid court was designed to try to meet some concerns by creating a mix of international and local judges with a mix of international and local law.³⁷ But with only a few Leoneans at the top levels of the court and many of the local legal community avoiding it altogether, there were questions as to whether the decisions of the court will have any precedence within Sierra Leone or be enforceable at all.³⁸ Similarly, the tribunal for Khmer Rouge in Cambodia, designed by the international community, has also been unsuccessful in their battle for public perception.³⁹ The tribunal faced many challenges early on, including widespread allegations that some judges and staff were required to kick back part of their salary in order to keep their jobs.⁴⁰ Some have even argued that the UN did not investigate these claims in an attempt to keep the court moving forward.⁴¹

This top-down design has also been an issue for truth commissions. The truth commission in El Salvador, created relatively early in 1992, consisted entirely of international commissioners and staff members, purposely excluding Salvadoran natives because of the civil war.⁴² The truth commission was not trusted initially by the Salvadorans because it lacked the local perspective, having a staff that was totally international, and had to work hard to overcome that suspicion.⁴³

36. See, e.g., STROMSETH ET AL., *supra* note 2, at 268, 271; Patricia M. Wald, *International Criminal Courts—A Stormy Adolescence*, 46 VA. J. INT'L L. 319, 336 (2006).

37. MOGHALU, *supra* note 13, at 104-05.

38. See Tom Perriello & Marieke Wierda, *The Special Court for Sierra Leone Under Scrutiny*, in INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, PROSECUTIONS & CASE STUDIES SERIES 1, 2 (2006), available at <http://www.ictj.org/static/Prosecutions/Sierra.study.pdf>. However, the court has spent a lot of time and effort on outreach programs, and a recent poll shows that most Leoneans have a generally positive opinion of the court.

39. Panel: *The Impending Extraordinary Chambers of Cambodia to Prosecute the Khmer Rouge*, 5 SANTA CLARA J. INT'L L. 326 (2007); Kathleen Claussen, *Up to The Bar? Designing the Hybrid Khmer Rouge Tribunal in Cambodia*, 33 YALE J. INT'L L. 253 (2008) [hereinafter Santa Clara Panel].

40. John A. Hall, *The Khmer Rouge Tribunal's Rebirth*, WALL ST. J. ASIA, Jun. 9, 2008, <http://online.wsj.com/article/SB121296112339255509.html>.

41. *Id.*

42. See Zinaida Miller, *Settling With History: A Hybrid Commission of Inquiry for Israel/Palestine*, 20 HARV. HUM. RTS. J. 293, 300 (2007).

43. *Id.* at 316-17.

Other times, these DSD's are established by the domestic elite—South Africa's Truth & Reconciliation Commission is an early example where the politicians created the system for the populace to use. The larger point is that the victims are often spread throughout the country, come from lower economic classes, while the structures are created by concentrated or foreign elite groups. At the same time, without international support, these structures will not be created at all.

A. *Need for External (Top-Down) Commitment to Process*

Both external and internal commitments to the process are needed to ensure both top down and bottom up compliance. First, the international community needs to be fully committed to the dispute system it creates—whether it is a court, truth commission, or hybrid. The external commitment from neighboring countries not to destabilize the situation—closing borders, not serving as havens for rebel groups (e.g. Congo)—provides support for the country to deal with its issues. The broader international community must also support the structure—with money and recognition, even sometimes with peacekeepers or extradition ability—so that the country can properly implement their process.⁴⁴ The lack of money, and its impact, has been well-documented in the tribunals for Rwanda, Sierra Leone and East Timor among others. In East Timor, for example, the new court had an annual budget of only \$6.3 million,⁴⁵ compared to the former Yugoslavia tribunal's budget which had an annual budget of \$276 million⁴⁶ and the Rwanda tribunal's budget of over \$255 million.⁴⁷ This lack of money leads to delays in investigation and resolution, and the potential breakdown of the process. In Sierra Leone,

44. See MOGHALU, *supra* note 13, at 120-22 (discussing the story of international pressure to get Nigeria to turn over Charles Taylor to the Special Court in Sierra Leone).

45. Herbert D. Bowman, *Letting the Big Fish Get Away: The United Nations Justice Effort in East Timor*, 18 EMORY INT'L L. REV. 371, 388-89 (2004); Suzanne Katzenstein, *Hybrid Tribunals: Searching for Justice in East Timor*, 16 HARV. HUM. RTS. J. 245, 258 (2003).

46. International Criminal Tribunal for the former Yugoslavia, <http://www.un.org/icty/glance-e/index.htm> (budget is over \$276 million for 2006-2007) but note that even this well-funded tribunal dealt with bureaucratic and financial issues. As Judge Wald noted, "I could not get a pencil sharpener because they were not on the procurement list." Wald, *supra* note 36, at 322.

47. <http://65.18.216.88/ENGLISH/geninfo/index.htm> (budget was \$255.9 million for 2004-2005). Note that the lack of funding for the Rwandan domestic Gacaca courts seriously hampers their effectiveness as well. See Honeyman et al., *supra* note 33.

funding was so scarce that the judges split their days between two trials at once since there were not enough judges. The tribunal has even been told it must limit photocopies of materials.⁴⁸ Perhaps hybrid tribunals and truth commissions will cost less than courts and might also lead to more creative structures. The multiple locations of the Liberian truth commissions, including in Minneapolis, is one such example.⁴⁹

B. *Internal Commitment—Ensuring Bottom-Up Impact*

Perhaps even more importantly, for real impact on the post-conflict community, the country's own government must be supportive. The internal commitment can be measured in three ways. First, the post conflict structure must be viewed as legitimate by the parties and by the populace of the countries.⁵⁰ If the government is not sufficiently stable or democratic to permit a full airing of the truth, that needs to be taken into account.⁵¹ The government that implements a truth commission or starts domestic prosecutions needs to be willing to have its own past carefully reexamined and, understandably, this is not always an easy decision for those who have newly gained power. Furthermore, the people themselves need to wish to explore the truth—if they want or need to move on, a truth commission or ad hoc tribunal does not serve them well.⁵²

For example, in South Africa, the TRC is viewed as playing a legitimate role at the end of apartheid. The TRC's reports and witnesses were given high credibility by the public. The process was also viewed as fair (albeit with many problems) by both observers and participants.⁵³ On the other hand, the ICTY was for some time seen

48. Andreas O'Shea, *Ad Hoc Tribunals in Africa*, 12 AFRICAN SECURITY REVIEW 2003 available at <http://www.iss.org.za/pubs/ASR/12No4/F2.html> (last visited June 26, 2008).

49. See e.g. <http://liberiatrc.mnadvocates.org/> outlining the Diaspora Project of the Liberian Truth and Reconciliation Project. See also Lisa J. LaPlante & Suzanne A. Spears, *Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector*, 11 YALE HUM. RTS. & DEV. L.J. 69 (2008) (discussing creative structures to negotiate between communities and companies investing in natural resources).

50. STROMSETH ET AL., *supra* note 2, at 132. See also Santa Clara Panel, *supra* note 39.

51. This is Carlos Nino's argument based upon the experiences in South America transitioning out of dictatorship into democracy. Nino, *supra* note 9. But see Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L. J. 2537 (1991).

52. See, e.g., AVISHAI, MARGALIT, *THE ETHICS OF MEMORY* (Harvard University Press 2002) (introduction which outlines this debate).

53. GIBSON, *supra* note 4, at 266-68, 284-88.

as unfair and biased against the Serbians. Trials and proceedings were not shown on Serbian television, and commentators decried the fact that, at least at the beginning, all of the defendants were Serbian.⁵⁴ In early gacaca courts in Rwanda, only crimes against Tutsis were considered, instead of including retaliation crimes against Hutus.⁵⁵ The importance of legitimacy cannot be underestimated in terms of effecting real change in the conflict.

Second, many experts have noted the important need to educate the population—particularly children—about the conflict in order to allow the society to move forward.⁵⁶ In interviews with Bosnian Serbian children after the war, very few of them understood the role (and fault) of their government and forces during the war.⁵⁷ This can be compared to the education of West German children after World War II which clearly outlined the human rights violations of their own government.⁵⁸ The role of the media in publicizing the trials and truth commission reports is crucial to ensuring post-conflict understanding and stability.

The third part of internal commitment is demonstrated through the political will of the post-conflict government in participating with the DSD. Unfortunately, cases showing a lack of will are relatively easy to find in post-conflict resolutions. The Serbian and Bosnian Serbian governments have only recently searched for and turned over some of the higher ranking officials.⁵⁹ In Indonesia, although the government has promised to prosecute violators of human rights, no indictments have actually been handed down. At the one trial in Indonesia thus far, all five army officers were acquitted.⁶⁰ And, as

54. One could, of course, argue that this was because most of the atrocities have been carried out by Serbians, but it did help in terms of internal commitment once the ICTFY started to prosecute a few Croats and Bosnians.

55. Honeyman et al., *supra* note 33. Christopher J. Le Mon, *Rwanda's Troubled Gacaca Courts*, 14 HUM. RTS. BRIEF 16, 17-18 (2007).

56. *But see After the Riots*, ECONOMIST, Dec. 17, 2005, at 47 (noting that the debate over textbooks in France can actually fuel the flames of conflict rather than controlling them).

57. *See* JONES, *supra* note 17. *See also Balkan History: A Better View of the Bad Guys*, ECONOMIST, Dec. 17, 2005, at 48 (outlining the progress made on “history manuals” for the Balkans which outline Balkan history from a variety of ethnic viewpoints).

58. *See, e.g.*, GITTA SERENY, *THE GERMAN TRAUMA: EXPERIENCES AND REFLECTIONS, 1938-1999* (2001).

59. Nicholas Wood, *Prosecutor Says No. 1 War Crimes Suspect is Hiding in Belgrade*, N.Y. TIMES, Feb. 12, 2004, at A8.

60. STROMSETH ET AL., *supra* note 2, at 280-81; Wald, *supra* note 36, at 332-333; *See, e.g.*, Agence France-Presse, *Indonesian Wins Appeal Against Rights Verdict*, N.Y. TIMES, Nov. 6, 2004, at A6.

pointed out earlier, truth commissions in South America only operated at the expense of prosecutions.

The most successful systems have tried to balance the fact that the elite international or domestic community helps establish the system while strongly promoting local, bottom-up, participation. For example, East Timor's Commission for Reception, Truth and Reconciliation took a different approach than other truth commissions by traveling throughout East Timor to get the perspectives of the people and by establishing reconciliation processes with the local governments. Through this they brought in traditional settings, which helped make the people more comfortable.⁶¹ Similarly, Liberia's truth commission is taking testimony in a variety of locations.

IV. HOW IS THE SYSTEM DESIGNED?—STANDARDIZATION V. CUSTOMIZATION

A third challenge in creating international DSD is that as these models of tribunals and truth commissions are used, a conflict can arise between standardization and customization. The challenge is how to deal with large scale violations and problems where each case and crime is painfully individual. Legal models transferred with little thought from one crisis to the next will not work, as the evolution to hybrid tribunals demonstrates. Hence, we can see the evolution of Nuremberg to Yugoslavia and Rwanda to locally hosted hybrid tribunals. However, customizing each aspect of a tribunal or TRC is time-consuming and expensive. And, as we can see from the various financial crises faced by the newer ad hoc courts, the international community has a funding limit. The standing ICC may relieve some of the funding burden but might not be able to meet the broader healing needs of each community. We can examine both domestic and international dispute systems for lessons in dealing with striking the right balance between efficiency and individuality.

61. Jane E. Stromseth, *Pursuing Accountability for Atrocities After Conflict: What Impact on Building the Rule of Law?*, 38 GEO. J. INT'L L. 251, 292 (2007).

A. *Lessons from Mass Tort Dispute System Design*

The handling of mass tort claims in the past few decades has some very clear lessons that we can glean and transfer to international DSD.⁶² First, we can learn what *not* to do from asbestos litigation. One of the huge problems of asbestos litigation⁶³ has been that there has not been a widespread system put into place for how to compensate the victims. Instead, the court system and existing structures of tort law were relied upon, resulting in a very mixed record of success. For example, those victims only slightly affected were grouped with those seriously affected and received bulk settlements that were worked out in advance with the target companies. Those that were most seriously injured often had difficulty getting proper compensation. Neither deterrence nor compensation has been successfully achieved. Because it was built case-by-case over time, without thinking of to how the future might look, it had become a procedural nightmare for all parties involved.⁶⁴

More recently designed mass tort systems provide better lessons. In the Dalkon Shield litigation, the personal arbitration hearings on harm provided needed customization while efficiencies of scale were also utilized. Payout grids gave rough calculations of what injuries were worth. Arbitrators were trained together. This system provided the opportunity for each person to tell their story while remaining efficient.⁶⁵ Even more dramatically, the 9/11 Commission worked very hard to balance needed efficiency—processing claims, providing compensation, operating under timelines—while ensuring that each grieving family member was given time to tell their story.⁶⁶ After the attacks, a fund was established to provide around \$7 billion to the

62. Of course, these claims are primarily private claims against private companies and thus not really human rights violations per se.

63. Asbestos was used in a huge variety of products because of its flame-retardant properties, starting early in the twentieth century. However, exposure to asbestos causes a number of serious respiratory problems that generally don't develop for 20-30 years. Because of the widespread use, the delayed onset, and the seriousness of the conditions, the prospects for damages were immense.

64. See, e.g., DEBORAH R. HENSLE ET AL., *ASBESTOS IN THE COURTS: THE CHALLENGE OF MASS TOXIC TORTS* (1985). FOR MORE ON ONE SUCCESSFUL FEATURE OF ASBESTOS LITIGATION, THE WELLINGTON CLAIM FACILITY, SEE DEBORAH R. HENSLE, *A Glass Half Full, A Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 *Tex. L. Rev.* 1587, 1608 (1995).

65. Carrie Menkel-Meadow, *Taking the Mass Out of Mass Torts: Reflections of a Dalkon Shield Arbitrator on Alternative Dispute Resolution, Judging, Neutrality, Gender, and Process*, 31 *LOY. L.A. L. REV.* 513 (1998).

66. See KENNETH R. FEINBERG, *WHAT IS LIFE WORTH? THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11* (Public Affairs 2005).

victims of 9/11.⁶⁷ Remarkably, over 7000 claims here handled within 3 years.⁶⁸

B. *Lessons from International Dispute Systems*

We also need to learn from past international examples. The Yugoslavia and Rwanda tribunals are similar in their laws, jurisdiction, requirements for proof, etc., and started with the basis of Nuremberg. The next evolution was to ad hoc tribunals like in Sierra Leone culminating in the standing tribunal of the ICC. Similarly, truth commissions have developed a common model over the past decades as they too have been implemented around the world. Truth commissions tend to have four main characteristics: (1) a focus on the past, (2) an investigation of a pattern of abuse, (3) a temporary body, and (4) are sanctioned or empowered by the state.⁶⁹

How can we reconcile the joint need for standardization and customization? We can create default legal frameworks—for courts, tribunals, and truth commissions—with best practice manuals for the lessons gleaned from around the world. This should at least include a few basic principles.⁷⁰ First, what is our best advice for jurisdictional time frame? We learned that having only six months to investigate a twenty-year civil war in Guatemala was too short for the truth commission. Also, Designers must recognize though that closed versus open sets of victims must be handled differently. The 9/11 Commission had the advantage of a closed set of cases (the victims were known, the event was known, future plaintiffs were unlikely to emerge) and could plan for a determined future with a clear ending

67. James C. Harris, *Why the September 11th Victim Compensation Fund Proves the Case for a New Zealand-Style Comprehensive Social Insurance Plan in the United States* 100 NW. U. L. REV. 1367, 1376 (2006). The average settlement was designed to range from \$300,000 to \$4 million, with the average being around \$2 million. Anyone who claimed money from the fund, though, would not be able to bring any sort of suit against the airlines, rescue workers, or the city stemming from injuries caused by or in response to the attacks. Ninety-seven percent of those calculated to have been affected made claims towards the fund, while the other three percent decided to file suit. Though not much information is available as to the results of that three percent, the fact that very few chose that option seems to suggest that the victims were satisfied with the proposed settlement. Additionally, having the option to go outside the settlement and sue the companies directly seems to provide a good pressure valve.

68. See FEINBERG, *supra* note 66.

69. HAYNER, *supra* note 20, at 14.

70. See e.g. Naomi Roht-Arriaza, *The New Landscape of Transitional Justice in Transitional Justice in the Twenty-First Century* (eds. Naomi Roht-Arriaza & Javier Mariezcurrena); See also <http://ictj.org/en/about/mission/> for the International Center for Transitional Justice website.

date.⁷¹ In an international DSD dealing with a limited time period (like Rwanda) or a limited segment of the population is affected (like Guatemala), the DSD may be able to act more like the 9/11 Commission and establish a set ending date. On the other hand, one could imagine a DSD set up for Israeli-Palestinian claims at some point which would have the potential to involve huge swaths of population and take large amounts of time.⁷² Further, and seemingly obviously, certain pieces of the process need to be customized by asking questions. Who committed the atrocities (segments of the population, race, ethnicity, the leadership etc.) How geographically widespread were the pattern of violations? Who is currently in power? What type of atrocities were committed (murder, disappearances, rape, imprisonment, torture, etc.)?⁷³ For example, in Chile, the truth commission could only investigate disappearances and murders. Torture victims who survived had no recourse through the commission, thus opening the commission to harsh criticism for missing a crucial part of the story.⁷⁴ Disappearances need to be dealt with by searching for truth and finding out what happened. Other violations may not be in that vein—we know the information and we just need to have it properly recorded. Continuing, who led the violators? Who carried out the violations and why? In Sierra Leone, for example, victims want to know why the war became so brutal. Why did mutilation become so common?⁷⁵

Aside from the legalistic and factual questions above, cultural differences also must be taken into account when customizing the DSD. A revealing story told by Professor Jane Stromseth from the establishment of the East Timorese tribunal reflects this concern. When setting up the tribunal for East Timor, UN experts found themselves in a quandary. In Timorese culture, defendants were expected to confess to the crimes truthfully with the expectation that sentences would be determined with compassion. In order to train the Timorese in the adversarial, Western model that is typical for criminal law, “the UN experts had to train the Timorese to lie.”⁷⁶ In setting up the Khmer Rouge tribunal, commentators have worried that the tribunal does not match the values of the Buddhist

71. See FEINBERG, *supra* note 66.

72. Perhaps this also explains the concerns with US tribunals for our own violations—how do you set a time limit for the effects of slavery?

73. International Convention for the Protection of All Person from Enforced Disappearance, Dec. 20, 2006.

74. HAYNER, *supra* note 20, at 73.

75. HAYNER, *supra* note 20, at 253.

76. MOGHALU, *supra* note 13, at 14.

Cambodian population.⁷⁷ And even the basic difference between civil law and common law countries must be recognized when setting up courts to understand how precedent and international law will interact with the domestic legal system.⁷⁸ Another practical issue is thinking about even where to set up offices for the tribunal or truth commission. Priscilla Hayner relates the story of how the truth commission in El Salvador set up its offices in the heart of the capital's wealthiest neighborhood causing serious stress to those victims visiting the offices.⁷⁹

V. WHAT VALUES ARE PROMOTED BY DIFFERENT SYSTEMS?—TRIALS
V. CONSENSUAL PROCESSES

After examining the challenges outlined above—peace v. justice, top-down v. bottom-up, efficiency v. individuality—the challenge of what structure works best for the conflict is clearly influenced by navigating all of those. This section of the essay notes that while the structure is important, the values promoted by the system are far more important. And, interestingly, these are the same values seen in the trend of international judicialization as in the trend to use consensual dispute resolution for private disputes.⁸⁰ What is the message for international DSD in these two patterns?

A. *Increased International Judicialization*

Even as the U.S. turns away from trials for many private disputes, the world continues to turn to trials for its most important international disputes. In addition to the caseload of the specialized and ad hoc tribunals already discussed earlier in this essay, the caseload of the standing courts for the European Court of Human Rights (ECHR) and the Inter-American Court of Human Rights (ICHR) continue to grow.⁸¹ The ICHR has seen an explosion in its

77. Santa Clara Panel, *supra* note 39, at 332; Virginia Hancock, "No-Self" At Trial: How to Reconcile Punishing the Khmer Rouge for Crimes Against Humanity with Cambodian Buddhist Principles, 26 WIS. INT'L L.J. 87, 87 (2008).

78. See e.g. Wald, *supra* note 36, at 323.

79. HAYNER, *supra* note 20, at 149.

80. Andrea Kupfer Schneider, *Not Quite a World Without Trials: Why International Dispute Resolution is Increasingly Judicialized*, 2006 J. DISP. RESOL. 119, 119 (2006).

81. *Id.*, at 121.

caseload with over half of its total cases arising since 2001.⁸² Similarly, the ECHR has dealt with a large number of cases, delivering more than twice as many judgments in 2007 alone as it did in its entire 42 year span from 1955-1997.⁸³

Additionally, the International Court of Justice (ICJ) continues the slow and steady increase in its caseload. While countries seemed reluctant to bring cases in the first few decades of its establishment, that reluctance has dissipated and the court is busier than ever.⁸⁴ The global push for courts has moved beyond economic and human rights issues to border and maritime disputes. The newly created Law of the Sea Tribunal has already started to hear cases.⁸⁵

The most significant sign of increased judicialization other than in human rights is in the economic field. One of the foremost examples of this judicialization is the World Trade Organization (WTO) which replaced a failing diplomatic system (the GATT) with arbitral panels and a standing appellate body to resolve economic disputes.⁸⁶ The WTO has continually expanded its caseload, with over 370 cases

82. The ICHR has seen 180 cases since it began in 1987 and over 90 of those of been seen since 2001. Inter-American Court of Human Rights, Jurisprudence: decisions and judgments, <http://www.corteidh.or.cr/casos.cfm> (last visited Mar. 18, 2009).

83. Additionally, the ECHR judgments of 2007 (1,503) are more than ten times as numerous as those made in 1998 (105). The ECHR has also seen more cases allocated to a decision body in 2007 (41,700) than it did in the entire 42 year period from 1955-1997 (39,047) and far in excess of the 5,981 allocated in 1998. European Court of Human Rights, *Annual Report 2007: History and Development of the Convention System*, E.C.H.R. ANN. REP. 11, 13 (2007), available at http://www.echr.coe.int/NR/rdonlyres/59F27500-FD1B-4FC5-8F3F-F289B4A03008/0/Annual_Report_2007.pdf.

84. International Court of Justice, Cases, <http://www.icj-cij.org/docket/index.php?p1=3> (last visited Apr. 24, 2009).

85. United Nations Convention on the Law of the Sea, Agreement Pertaining to the Implementation of Part XI of the Convention, Dec. 10, 1982, http://www.un.org/Depts/los/convention_agreements/convention_overview_part_xi.htm (last visited Mar. 19, 2009). Since 1997, the tribunal already has 15 cases on its docket. See International Tribunal for the Law of the Sea, Proceedings and Judgments – List of Cases, http://www.itlos.org/start2_en.html (follow “List of Cases” hyperlink under “Proceedings and Judgments”) (last visited Mar. 19, 2009).

86. Schneider, *supra* note 80, at 120 (citing Joel R. Trachtman, *The International Economic Law Revolution*, 17 U. PA. J. INT'L ECON. L. 33, 58 (1996); ERNST-ULRICH PETERSMANN, *THE GATT/WTO DISPUTE SETTLEMENT SYSTEM* (1997); Ernst-Ulrich Petersmann, *Constitutionalism and International Organizations*, 12 NW. J. INT'L L. & BUS. 398 (1997)).

since its inception in 1994.⁸⁷ Other organizations such as the European Court of Justice (ECJ)⁸⁸ and the World Bank's International Center for Settlement of Investment Disputes (ICSID)⁸⁹ have also evolved to serve as arenas for judicialized resolution of international economic disputes and they have likewise seen large caseloads. The ECJ had such a large caseload that the European Union (EU) created the EU Court of First Instance in 1989 and more recently, at the end of 2005, the EU Civil Service Tribunal was created from the jurisdiction of the Court of First Instance.⁹⁰

B. *The Vanishing U.S. Trial*

Despite this international judicialization, the United States is moving in the exact opposite direction. As we know from the numerous articles on the "Vanishing Trial" to the statistics themselves, it seems that the number of trials is dropping.⁹¹ In 1962, 11.5 percent of

87. World Trade Organization, *Chronological List of Dispute Cases*, http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited Jun. 15, 2008).

88. The ECJ has seen the largest caseload of the international economic dispute organizations with over 4000 new cases in the last eight years (2000-2007) and a record 580 new cases in 2007. The Court of Justice of the European Communities, *2007 Annual Report: Statistics of judicial activity of the Court of Justice*, E.C.R. ANN. REP. 77, 79 (2007), available at http://curia.europa.eu/en/instit/presentationfr/rapport/stat/07_cour_stat.pdf.

89. The ICSID has completed 141 cases since its creation and there are currently 126 pending cases. International Centre for Settlement of Investment Disputes, *List of ICSID Cases*, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ListCases> (last visited Jun. 15, 2008). See Susan D. Franck, *Integrating Investment Treaty Conflict and Dispute Systems Design*, 92 MINN L. REV. 161, 180-82 (2007).

90. The Court of First Instance heard more than 5,200 cases from 1981-2006. The Court of Justice of the European Communities, *The Court of First Instance*, http://curia.europa.eu/en/instit/presentationfr/index_tpi.htm (last visited Jun. 15, 2008). In 2007 the Court of First Instance heard an additional annual record 522 cases. The Court of Justice of the European Communities, *2007 Annual Report: Statistics concerning the judicial activity of the Court of First Instance*, E.C.R. ANN. REP. 169, 171 (2007), available at http://curia.europa.eu/en/instit/presentationfr/rapport/stat/07_trib_stat.pdf. The Civil Service Tribunal has heard a total 434 cases since its beginning in 2005. The Court of Justice of the European Communities, *2007 Annual Report: Statistics concerning the judicial activity of the Civil Service Tribunal*, E.C.R. ANN. REP. 217, 219 (2007), available at http://curia.europa.eu/en/instit/presentationfr/rapport/stat/07_fonc_stat.pdf. These two courts serve to take many employment, competition, and other smaller disputes out of the ECJ's docket.

91. Mark Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Court*, 1 J. EMPIRICAL LEGAL STUD. 459, 461 (2004). Galanter's figures are based on Table C-4 of the 1962 Annual Report of the Administrative Office of the United States Courts, available at <http://www.uscourts.gov/judbus2007/appendices/C04ASep07.pdf>. Note that the figures reflect the percentage

federal civil cases went to trial,⁹² but in 2007 only 4.3 percent did so.⁹³ Examining even the limited statistics of state courts shows a similar trend of decreased trials.⁹⁴ In the courts of general jurisdiction of 22 states (and the District of Columbia) the absolute number of jury trials fell one-third from 1976 to 2002 and the absolute number of bench trials fell 6.6 percent.⁹⁵ Parties in the US use negotiation and mediation to settle the vast majority of disputes.

C. *Core Values*

How can we reconcile the decrease in US trials with the increase in international trials? The goal of both movements is to find a procedurally just process that can produce satisfactory results. Tom Tyler wrote years ago that fairness is dependent on the process.⁹⁶ When individuals have a voice in the process, the process as well as the outcome will be perceived to be more fair by the participants.⁹⁷ This need for voice is not limited to domestic disputes, and can explain the trend toward trials internationally as well.

The move toward dispute resolution (DR or ADR for alternative dispute resolution) in the U.S. reflects a substantial interest in letting parties control their own destiny in disputes.⁹⁸ DR offers parties at least a perception of substantive control through the ability to speak for themselves and be heard in a respectful manner. Parties can decide when and how to settle, can meet their own needs for cost savings and quick resolution, and can craft a personalized agreement to meet their interests. Recent writing on DR also focuses on fairness of process and the need to give parties a voice in determining that

of total terminated cases that were terminated during or after trial including those that may have settled during or after trial.

92. Mark Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 8 (2006).

93. Galanter, *supra* note 91.

94. *Id.* at 508. (citing Brian J. Ostrom et al., *Examining Trial Trends in the State Courts*, 1 J. EMPIRICAL LEGAL STUD. 755 (2004)).

95. *Id.*

96. Tom R. Tyler et al., *Influence of Voice on Satisfaction with Leaders: Exploring the Meaning of Process Control*, 48 J. PERS. & SOC. PSYCHOL. 72, 80 (1985) (based on one field study and two laboratory studies, researchers concluded that voice heightens procedural justice judgments and leadership endorsement even when disputants perceive that they have little control over the decision); *See also* Tom R. Tyler, *The Psychology of Disputants' Concerns in Mediation*, 3 NEGOT. J. 367 (1987).

97. *But see* Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got To Do With It?*, 79 WASH. U. L.Q. 787, 807-09 (2001).

98. *See* Nancy A. Welsh, *Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 J. DISP. RESOL. 179.

process.⁹⁹ Research indicates that when parties perceive that they have exercised process control, they are also more likely to assume that they have a level of control over the outcome. And, even if the outcome is unfavorable, parties are more likely to perceive that outcome as substantively fair. On the other hand, when parties feel like they do not have a voice, the process is more likely to be seen as unfair.¹⁰⁰

In the international realm, this desire for voice, control and procedural justice has manifested itself in the creation of trials. The international economic courts are a prime example.¹⁰¹ At the WTO, where only states can bring cases, the dispute resolution system gives voice to countries in new ways. Less powerful countries, that had no previous ability to negotiate with more powerful countries when trade agreements were violated, can now bring cases and know they will be heard.¹⁰² The WTO process also ensures that equally powerful countries will not come to stalemates in negotiation but, rather, will adhere to the trade law for the benefit of all.¹⁰³

With the ECJ, the EU gives direct voice to citizens when there are laws that directly affect them.¹⁰⁴ The most unique feature of the EU is the ability of citizens themselves to bring cases in front of the ECJ. Citizens of member states can bring cases in their own domestic courts against the governments of other member states for violating treaty provisions (e.g. the country promises to lower a tariff and does not).¹⁰⁵ If the case concerns EU law, the domestic court has the ability to refer the case for a hearing in front of the ECJ (and must

99. See generally Nancy A. Welsh, *Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theory*, 54 J. LEGAL EDUC. 49 (2004).

100. Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Annexed Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1 (2001).

101. See Andrea Kupfer Schneider, *Getting Along: The Evolution of Dispute Resolution Regimes in International Trade Organizations*, 20 MICH. J. INT'L L. 697 (1999).

102. Judith L. Goldstein & Richard H. Steinberg, *Negotiate or Litigate? Effects of WTO Judicial Delegation on U.S. Trade Politics*, 71 LAW & CONTEMP. PROBS. 257 (2008).

103. See Andrea Kupfer Schneider, *Democracy and Dispute Resolution: Individual Rights in International Trade Organizations*, 19 U. PA. J. INT'L ECON. L. 587 (1998).

104. See Joseph H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991) ("Political theory, and historical experience (e.g. in the context of EC law and of the European Convention on Human Rights) confirm that granting actionable rights to self-interested citizens offers the most effective incentives for a self-enforcing liberal constitution.").

105. See, e.g., George Tridimas & Takis Tridimas, *National Courts and the European Court of Justice: A Public Choice Analysis of the Preliminary Reference Procedure*, 24 INT'L REV. L. & ECON. 125, 126 (2004); see, e.g., Id. at 128.

refer if the court is the court of last resort).¹⁰⁶ Over time, this provision has ensured that thousands of cases have been heard between individuals and governments. Historically, sovereign immunity would have prevented these cases from ever reaching courts, but a new understanding of how law needs to be created and enforced has given individuals “voice” and a place where they can be confident they will be “heard” in enforcing laws that most directly benefit them.

In disputes focused on human rights, the creation of trials—both prosecutions dealing with war crimes and cases brought by individuals against their government for violations—gives voice to individuals to enforce law. In both of these instances, giving individuals voice actually results in more enforcement of law. That may also explain why the push for trials at the international level has been so powerful.

While it appears contradictory that the US would be reducing the number of trials at the same time that the international community is searching for trials, both movements are in fact based on common values. The DR movement in the US is based on continuing to provide justice and enforce equality while increasing parties’ individual participation and self-determination. For international disputes, particularly those dealing with transitional justice, the rule of law must first be established in courts before the values of procedural justice can be realized in domestic consensual process. In other words, the process of DR does not inherently provide these values unless the settlements are based on core values of justice and equality. Otherwise, it is just another set of processes to be abused by those with power.¹⁰⁷ This is similar to the understanding (sometimes not always recognized) that democracy is not achieved by elections alone. The *process* does not create democracy but rather the laws upon which the process operates do so. For democracy, we need the equivalent of the Bill of Rights (rights for minorities, freedom of speech, association, protection from arbitrary detention etc.) Similarly, a voluntary process like DR without the backdrop of a legal system that operates to protect rights is unlikely to be a step forward.

In the U.S., we are generally quite sure that the law will be enforced. So, even when we use DR, we know that we are bargaining in

106. See, e.g., *id.* at 126-30.

107. See Laura Nader & Elisabetta Grande, *Current Illusions and Delusions about Conflict Management—in Africa and Elsewhere*, 27 *LAW & SOC. INQUIRY* 573 (2002).

the shadow of a longstanding body of law we can count on.¹⁰⁸ However, international rights under human rights laws are new. Perhaps years from now when hundreds of precedents have been established, individuals will push for the ability to move away from trials at the international level. As we create international DSD's, we need to think carefully about the underlying legal structures, the law, and how it is implemented. Where the rule of law already exists, perhaps more domestic and consensual processes can be used. But, where inequality and lack of rights permeate the legal landscape, international courts and hybrid tribunals are a necessary first step.¹⁰⁹

VI. WHAT REMEDIES¹¹⁰ ARE PROVIDED BY THE SYSTEM?—PAST
V. FUTURE

A final issue that arises in DSD is that the design itself must look prospectively to future remedies in order to be effective, yet the participants, victims, and others are inherently looking backward to the incident. This tension exists in almost every kind of DSD. Inevitably, we end up designing systems that respond to problems already created—unhappy customers, litigation with employees, an explosion of medical mistakes, etc. In international conflicts, this tension between the past and future is even more profound.¹¹¹ Often there are grave violations of human rights about which to testify—in fact we argue that the ability to be heard, to tell the story, to establish the historical record, and to set the truth are all crucial parts of the process.¹¹² Yet as we design the process or processes, we focus on what will be needed for the future—the record, the effect of deterrence, the ability to set the law, remedies that meet the victims' needs. Different processes will, inevitably, provide different remedies. Often, in examining transitional justice cases, the tension appears to be between trials and truth commissions.

108. See generally Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, (1978).

109. See Lisa J. Laplante, *Bringing Effective Remedies Home: The Inter-American Human Rights system, Reparations, and the Duty of Prevention*, 22 NETH. Q. HUM. RIGHT 347 (2004) (explaining why in Peru, victims must go to the Inter-American Court for justice as the local courts provide no remedy).

110. The term “remedies” here refers to the traditional domestic understanding of remedies as in what will the victim receive as opposed to the use in international law and transitional justice which can use “remedies” to refer to the judicial options available to the victim (e.g. trial).

111. See generally Menkel-Meadow, *supra* note 26.

112. See e.g., MARGALIT, *supra* note 52; Maya Goldstein Bolocan, *Rwandan Gacaca: An Experiment in Transitional Justice*, 2004 J. DISP. RESOL. 355, 383 (2004).

A. *Past-Oriented Remedies—Why We Need Trials*

The traditional method for dealing with human rights violations (once the international community actually started to recognize these) has been the trial. And, as we know, Nuremberg, Tokyo, Rwanda, and Yugoslavia have been very important in establishing the principle that violators will be punished. But, as we also know from studies of these conflicts, the arguments outlined above, and even in the study of domestic criminal trials, punishment often does not actually heal the victims. International DSD, particularly when focused on transitional justice, needs to do more.

B. *Future-Oriented Remedies—Why We Need Trials, Part 2*

Even those who recognize that punishments cannot go far enough (or do not cover the full extent of the atrocities) argue in favor of trials for other reasons. First, only through international trials, will other leaders be dissuaded from committing atrocities. International trials, like domestic trials, serve a deterrent function in the operation of international law.¹¹³ Trials also create law, often new and important law, that serve to protect future victims and give individuals further rights against their oppressors. Finally, trials provide an objective record for history.

C. *Future-Oriented Remedies—Victim-Focused*

The challenge for international dispute system design, however, is that the scale of international atrocities often means that trials will not go far enough in either providing punishment or a historic record for the vast number of those killed. As we have already discussed, trials are unwieldy and costly and often focus necessarily on the “big fish” only. Yet, as Judge Wald relates, when the “little fish” is the one that killed your family, the big fish/little fish distinction becomes insulting to the victims.¹¹⁴ At the same time, traditional dispute resolution has not always been helpful in dealing with the past either. In mediation training, often mediators are taught that helping the parties focus on the future and try to move on from the past will help move the mediation closer to settlement. But, as Trina Grillo wrote early on in the history of domestic mediation, this deliberate elimination of the past can do great harm.¹¹⁵ If the past history

113. Santa Clara Panel, *supra* note 39.

114. See Wald, *supra* note 34, at 917.

115. Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 *YALE L.J.* 1545 (1991).

holds the story of why the parties are there in the first place, it can be frustrating and dehumanizing to not even be allowed to tell that story. Carrie Menkel-Meadow more recently outlined how new processes can balance the past with the future including recognizing that the past is an “essential part of justice.”¹¹⁶

So how can we create processes that are more victim-focused? Restorative justice domestically and overseas has useful lessons for international DSD.¹¹⁷ First, we can create structures than allow as many victims as possible to tell their story. This type of structure deals with multiple issues outlined above: truth-telling provides both peace and justice, it works to insure bottom-up participation and legitimacy, it allows individual stories to be told, it provides voice for the victims and has been one of the best processes for acknowledging the past. As Judge Wald wrote, perhaps the truth commissions cannot fully pacify the deep grievances of victims, but they may provide a more intimate and flexible forum that is more helpful.¹¹⁸

Second, courts themselves can start to become more creative with their approaches to victims. As Professor Thomas Antkowiak has noted in reviewing the history of the Inter-American Court, the Court has moved strikingly from early decisions that acknowledged the “wrongs” and ordered the state to pay compensation to now providing employment, medical and psychological care, education, and public apologies to the families of victims.¹¹⁹ Similarly, in Sierra Leone, the truth commission recommended health care and free education to victims.¹²⁰ These concrete remedies might be far more important to the victims of atrocities than a verdict of guilty in a foreign court and also start to meet the concerns left in South Africa where we now know that economic development is necessary to move a post-conflict society forward.

These more creative needs might not always be the focus of the international community. After all, guilty verdicts in international

116. Menkel-Meadow, *supra* note 27, at 104.

117. See generally, Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does it Work?* 3 ANN. REV. L. SOC. SCI. 161 (2007).

118. Wald, *supra* note 34, at 920; see also Ellen Waldman & Frederic Luskin, *Unforgiven: Anger & Forgiveness*, in THE NEGOTIATOR'S FIELDBOOK: THE DESK REFERENCE FOR THE EXPERIENCED NEGOTIATOR, 435 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006).

119. Thomas M. Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNAT'L L. 351 (2008).

120. STROMSETH ET AL., *supra* note 2, at 256.

courts are easier to measure and to explain to an international (funding) public. But these systemic needs and concerns of victims in the post-conflict society “must be addressed if a stable rule of law is to take root.”¹²¹

VII. CONCLUSION—AVOIDING POE’S PENDULUM

In some ways, this essay is a plea for moderation and, at the same time, a desire to have it all. There are numerous challenges faced by international dispute system designers when dealing with human rights crises and transitional justice issues. The tendency, in some cases, has been to lean strongly toward one side of the pendulum—peace or justice, past or future, elite or local, efficient or customized, adversarial or consensual, verdict or reparative remedies. But, particularly for the most heart-wrenching, public, and difficult situations, a more sophisticated dispute system design is required. And, with the new millennium started and a multitude of processes being implemented, dispute system designers seem on their way to meeting these challenges.

121. *Id.* at 257.

