



Online ISSN: 3006-5879 Print ISSN: 3006-5860

DOI: <https://doi.org/10.63468/jpsa.3.4.106>

Vol. 3 No. 4 (2025)

<https://journalpsa.com.pk/index.php/JPSA/about>



Recognized by: Higher Education Commission (HEC), Government of Pakistan

A Critical Examination of the Priority Given to Restorative Justice in Addressing Crimes Against Humanity

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ABSTRACT

Crimes against humanity represent some of the gravest violations of international criminal law, involving widespread or systematic attacks directed against civilian populations. The traditional response to such crimes has largely relied upon retributive justice mechanisms emphasizing criminal accountability, prosecution, and punishment. However, the increasing prominence of restorative justice within transitional justice discourse has generated significant debate regarding its suitability in addressing mass atrocities. This paper critically examines whether restorative justice should be prioritized when dealing with crimes against humanity. It evaluates the conceptual foundations of restorative and retributive justice and analyzes their applicability within the framework of international criminal law. The study further explores the role of international institutions, including the International Criminal Court and ad-hoc tribunals, in promoting accountability for such crimes. While restorative justice offers important contributions through reconciliation, victim participation, truth-telling, and societal healing, the paper argues that it cannot adequately replace retributive justice in cases involving large-scale atrocities. The gravity and organized nature of crimes against humanity necessitate strong punitive mechanisms to ensure deterrence, uphold international legal norms, and prevent impunity. Consequently, the paper concludes that restorative justice should function as a complementary mechanism within broader transitional justice frameworks rather than as the primary response to crimes against humanity.

Keywords: Crimes against Humanity; Restorative & Retributive Justice; Accountability; Deterrence; International Criminal Court; Reconciliation; Human Rights.

INTRODUCTION

Crimes against humanity comprise a wide range of organized and pervasive outrages, including ethnic cleansing, war crimes, agony, and crimes of apartheid, among others. These cruelties consist of serious violations of the rights of humans and their self-respect, having long-lasting scratches on civilizations and people. Article 7 of the Rome Statute of the ICC describes these atrocities as odious cruelties committed as an integral part of an organized violence against civilization without *discriminatory* intention.¹ ICTY through his initial pronouncement proclaimed these atrocities as having particular attributes bearing a higher level of ethical wickedness than a common brutality.² Conventionally, these cruelties should be dealt with severe punishments making the violator answerable by adopting all modes of punishments such as trial, confinement and much more. Retributive justice encompasses the punishment of individuals who have breached societal norms and the underpinning of the societal values infringed upon by the perpetrators.³ In retribution, punishment is contingent upon the presence of both elements of the crime, namely *actus-reus* and *men-rea*.

True deterrence doctrine, as per Jeremy Bentham's utilitarian philosophy, permits the punishment of guiltless persons if it serves a beneficial societal purpose, such as fostering the perception that crime is identified and penalized to deter others from engaging in criminal behavior. This notion is opposed by retributionists, who argue that punishment should solely target those who have violated laws.⁴ However, there is a growing acknowledgment of the limitations associated with punitive justice and the potential advantages offered by restorative approaches in addressing the intricate and deeply entrenched harms of crimes against humanity. Advocates of restorative justice contend that by involving the local community in addressing the needs of victims and the responsibilities of both the offender and the community, this approach is better equipped to comprehensively meet the requirements of justice. Moreover, they argue that restorative justice aligns with peace building efforts in war-torn societies and bridges the presumed gap between justice and peace. Supporters suggest that a restorative justice approach presents a more suitable theory of justice and garners considerably more support from local populations compared to retributive punitive-judicial approaches.

They also critique enforcing bodies like the International Criminal Court, pointing out issues such as the principle of complementarity.⁵ This paper critically

¹ David Luban. (2004). A theory of crimes against humanity. *Yale Journal of International Law*, 29(1), 85–168, 104.

² Prosecutor v. Duško Tadić, Case No. IT-94-1-A, Judgment, para. 271 (July 15, 1999).

³ Tom R. Tyler, Robert J. Boeckmann, Heather J. Smith, & Yuen J. Huo. (1997). *Social justice in a diverse society*. Westview Press.

⁴ Jon'a F. Meyer. (2014, September 12). Retributive justice. In *Encyclopedia Britannica*. [Britannica article](#)

⁵ Terry Beitzel, & Tammy Castle. (2013). Achieving justice through the International Criminal Court in Northern Uganda: Is indigenous/restorative justice a better approach? *International Criminal Justice Review*, 23(1), 41–56.

discusses whether adopting a restorative justice approach should be a priority in handling crimes against humanity. It examines the principles and practices of restorative and retributive justice as well, their applicability to crimes against humanity, potential benefits, challenges, and ethical considerations. Through an analysis of literature and case studies, this paper argues that while restorative justice offers valuable insights and opportunities, it should be integrated alongside, rather than replacing, traditional punitive mechanisms in addressing crimes against humanity.

Nature and Jurisdiction on Crimes against Humanity

Crimes against humanity are perpetrated by individuals only when they are perceived as participating in a widespread or systematic assault. Perpetrators must recognize that their victims are part of a group targeted by the broader attack. Thus, crimes against humanity are inherently group oriented. They are inflicted upon individuals solely in connection to the group to which these individuals belong, precluding the notion that isolated offenses can qualify as crimes against humanity. Crimes against humanity invariably target both individuals and their affiliated group simultaneously.⁶ According to the traditional perspective, the collective and policy elements, constituting the contextual aspect of crimes against humanity, are integral to understanding the gravity of these offenses. Crimes against humanity are deemed exceptionally abhorrent because they are not isolated incidents but rather form part of a systematic or widespread policy aimed at perpetrating atrocities against members of a specific group. The severity of these crimes is what typically designates them as international crimes. Due to their extreme nature, they cannot go unpunished even if domestic courts fail to prosecute them. These crimes are considered so repugnant that they transcend ordinary criminality,⁷ due to it the autonomy of a country cannot save them from trial and reprimand.⁸ According to the Rome Statute for the International Criminal Court, domestic courts hold primary jurisdiction over crimes against humanity, while the International Criminal Court (ICC) plays a secondary role in prosecuting these offenses. This relationship is governed by the principle of "complementarity." The ICC can only intervene and exercise jurisdiction over crimes specified in the Rome Statute if domestic states are incapable or unwilling to prosecute these crimes, or if their prosecution efforts lack genuineness and fairness.⁹

Legal Framework for Dealing with Crimes against Humanity

The legal structure for addressing crimes against humanity is predominantly shaped by international agreements, treaties, and customary international law. Essential instruments include the Rome Statute of the International Criminal Court (ICC), the Genocide Convention, and the Geneva Conventions. These documents

⁶ Larry May. (2005). *Crimes against humanity: A normative account* (pp. 84–90). Cambridge University Press.

⁷ David Luban. (2004). A theory of crimes against humanity. *Yale Journal of International Law*, 29(1), 85–168.

⁸ Prosecutor v. Duško Tadić, Case No. IT-94-1-T, Judgment, para. 653 (May 7, 1997).

⁹ Jann K. Kleffner. (2008). *Complementarity in the Rome Statute and national criminal jurisdictions*. Oxford University Press.

delineate the responsibilities of nations to prevent and penalize crimes against humanity, as well as delineate the jurisdiction of international and domestic courts in prosecuting those accountable for such acts. Hannah Arendt described the Holocaust as "a crime against humanity perpetrated upon the body of the Jewish people."¹⁰ During 1991 to 2001, extensive human rights violations occurred in the Western Balkans.¹¹ Following these atrocities, the United Nations Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY).

The ICTY's mandate was twofold: to ensure accountability for the crimes committed in the Balkans and to facilitate reconciliation among the former Yugoslav states, thereby fostering regional stability. Likewise, the International Criminal Court (ICC) pursued prosecutions of individuals like Thomas Lubanga, aiming to uphold justice and deter future atrocities¹² and the prosecutions of Jean-Pierre Bemba for war crimes and crimes against humanity in the Democratic Republic of the Congo by the International Criminal Court (ICC) exemplify the global community's dedication to combating impunity and ensuring accountability.

Understanding Restorative Justice

The variance in approach between retributive or criminal justice and restorative justice is deemed necessary because numerous individuals believe that the procedures of retributive justice exacerbate wounds and disputes rather than fostering healing or peace.¹³ Restorative justice operates on a foundational set of principles that propose an alternative approach to addressing wrongdoing. This paradigm emphasizes healing, reconciliation, and repairing the harm caused by offenses, diverging from the punitive focus of traditional justice systems. Rather than solely punishing offenders, restorative justice involves all affected parties—victims, offenders, and communities—in a process of dialogue, accountability, and restoration. Key principles of restorative justice include recognizing the inherent dignity of all involved, fostering open communication and understanding, and empowering victims in decision-making processes.

Recent research findings on restorative justice further advocate for its consideration in contexts marked by violence,¹⁴ research indicates that restorative justice is more operative than retributive-punitive approaches,¹⁵ workings for grave and vicious crimes¹⁶, is more probable to be viewed as reasonable by both the target and the wrongdoer,¹⁷ suggestions indicated increased satisfaction among both victims

¹⁰ Barry Gewen. (2006, May 14). The everyman of genocide [Review of the book *Becoming Eichmann*, by D. Cesarani]. *The New York Times*, 10.

¹¹ International Center for Transitional Justice. (n.d.). Kosovo. [ICTJ Kosovo page](#)

¹² Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06 (2006).

¹³ Howard Zehr. (2002). *The little book of restorative justice*. Herald Press.

¹⁴ Stephen Kua, Daniel Longmire, & Steven Cuvelier. (2010). An empirical assessment of the process of restorative justice. *Journal of Criminal Justice*, 38(2), 318–328.

¹⁵ Lawrence Sherman, & Heather Strang. (2007). *Restorative justice: The evidence*. The Smith Institute.

¹⁶ John Braithwaite. (2002). *Restorative justice and responsive regulation*. Oxford University Press.

¹⁷ Burt Galaway. (2003). A review of empirical research on psychological outcomes of restorative justice. *Utah Law Review*, 2003(1), 167–204.

and accused with an intervention-based process compared to an adjudicated one,¹⁸ has contributed to the reduction of crime rates in numerous countries,¹⁹ and diminishes inclinations toward revenge and the urge for retribution. Restorative approaches offer a structure for all involved parties' victims, offenders, and communities to assess the necessary steps to address their needs and devise a plan to achieve them. Thus, a restorative approach to justice appears deserving of attention in Northern Uganda and other conflict-ridden regions, both from the standpoint of international third-party entities and local victims and communities.²⁰

Understanding Retributive Justice

Retributive justice is rooted in the concept of fair consequences, where punishment aligns with the gravity of the wrongdoing. This method aims to ensure that wrongdoers are held responsible for their deeds and that legal principles are upheld. Crimes against humanity, recognized as a peremptory norm in international law, impose a duty on States to either prosecute or extradite offenders located within their jurisdiction, irrespective of where the crime occurred or who the direct victims were.²¹

Throughout history, retributive justice has been utilized across diverse legal systems worldwide, underscoring the significance of punishment as a means to deter wrongdoing and express societal disapproval. Philosophers like Immanuel Kant and Robert Nozick have provided theoretical justifications for retributive justice, highlighting the inherent value of individual autonomy and the ethical obligation to uphold legal principles. Kant posited that individuals bear a responsibility to honor the rights of others, and transgressors should face punishment commensurate with their actions. Conversely, Nozick defended retributive justice from a libertarian perspective, asserting that individuals possess the right to administer justice through punitive measures.²²

Applicability of Restorative Justice to Crimes against Humanity, a Daunting Task

One of the central debates surrounding restorative justice in the context of crimes against humanity is its applicability to offenses of such magnitude and scale.²³ Opponents suggest that restorative justice might not be apt for addressing crimes marked by mass violence, systematic oppression, and extensive victimization. They argue that the intricacy and severity of such offenses demand strong punitive actions to guarantee accountability and deter future wrongdoing. However, examples like the

¹⁸ Daniel Van Ness. (1993). New wine in old wineskins: Four challenges of restorative justice. *Criminal Law Forum*, 4(2), 251–276.

¹⁹ John Haley. (1996). Crime prevention through restorative justice: Lessons from Japan. In B. Galaway & J. Hudson (Eds.), *Restorative justice: International perspectives* (pp. 349–372). Criminal Justice Press.

²⁰ Terry Beitzel, & Tammy Castle. (2013). Achieving justice through the International Criminal Court in Northern Uganda: Is indigenous/restorative justice a better approach? *International Criminal Justice Review*, 23(1), 41–56.

²¹ M. Cherif Bassiouni. (1998). The normative framework of international humanitarian law: Overlaps, gaps and ambiguities. *Transnational Law & Contemporary Problems*, 8, 199–245.

²² Jeffrey Bachman. (2017). *The International Criminal Court: Deterrence and the prevention of atrocities*. Cambridge University Press.

²³ Howard Zehr. (2005). *Changing lenses: Restorative justice for our times*. Herald Press.

South African Truth and Reconciliation Commission inclined how restorative methods can foster healing and reconciliation in societies grappling with post-conflict challenges.²⁴ Crimes against humanity inflict such extensive and severe harm on individuals and communities that the resulting damage is often profound and irreparable.

The seriousness of these offenses prompts inquiries into whether restorative justice methods can effectively address the harm inflicted and fulfill the requirements of victims and affected communities. Cases involving crimes against humanity are frequently intricate, featuring numerous perpetrators, victims, and intricate webs of accountability. Restorative justice methods, which focus on fostering dialogue and reconciliation,²⁵ could encounter challenges in tackling the complexities of such scenarios, particularly concerning accountability and the quest for justice on behalf of victims. While restorative justice underscores the involvement of victims in the legal process, the nature of crimes against humanity may pose obstacles to victim participation. Victims might confront security risks, trauma, and various hurdles that impede their effective engagement in restorative justice procedures. It is essential for restorative justice processes to prioritize the welfare and dignity of victims.²⁶ Nonetheless, there exists a potential danger that entering dialogue with perpetrators or partaking in restorative justice proceedings could rekindle trauma for victims or diminish their perception of justice and resolution.

Feasibility and Challenges of Restorative Justice in Dealing with Crimes against Humanity

Despite its potential advantages, incorporating restorative justice principles into the handling of crimes against humanity poses numerous obstacles. Among the foremost challenges is the enormity and severity of these crimes, which often entail extensive victimization and perpetration, along with intricate social and political intricacies. Safeguarding the safety and welfare of participants in restorative procedures, especially victims who may harbor concerns about retaliation or re-traumatization, is of utmost importance. Moreover, grappling with legal intricacies, such as ensuring adherence to international legal norms and safeguarding the rights of defendants, presents significant hurdles in applying restorative justice approaches within the realm of crimes against humanity.²⁷

Opponents contend that restorative justice methods might not possess the deterrence capacity required to avert future crimes against humanity. In the absence of definitive repercussions for wrongdoers, there exists a possibility that restorative actions alone might not effectively dissuade individuals or nations from perpetrating

²⁴ Heather Strang. (2005). Restorative justice and mass victimization. *European Journal of Criminology*, 2(2), 141–165.

²⁵ Naomi Roht-Arriaza, & Javier Mariezcurrena (Eds.). (2006). *Transitional justice in the twenty-first century: Beyond truth versus justice*. Cambridge University Press.

²⁶ Brandon Hamber, & Richard A. Wilson (Eds.). (2007). *Psychological approaches to transitional justice: Learning from experience, meeting the needs*. Routledge.

²⁷ United Nations General Assembly. (1998). *Rome Statute of the International Criminal Court* (A/CONF.183/9). [Rome Statute PDF](#)

comparable atrocities in the future. Adopting an exclusively restorative stance towards crimes against humanity could elicit worries regarding impunity. Should perpetrators remain unaccountable through legal avenues, there is potential for them to evade accountability and evade consequences for their actions, thereby compromising principles of accountability and legal order.²⁸ In post-conflict environments, there is frequently a conflict between the quest for justice and the advancement of reconciliation. Although restorative justice endeavors to foster reconciliation and recovery, it must be harmonized with the imperative for accountability and justice for victims of crimes against humanity.

Reasons for Prioritizing Retributive Justice over Restorative Justice

Retributive justice acts as a deterrent by imposing substantial penalties on wrongdoers, thus dissuading future transgressions. The prospect of punishment can discourage individuals and regimes from committing atrocities, thereby aiding in the prevention of future crimes against humanity. An illustration of this is evident in the Nuremberg Trials post-World War II, which demonstrated the implementation of retributive justice by holding senior Nazi officials accountable for their involvement in orchestrating the Holocaust and other heinous acts. These trials set a precedent for individual criminal liability and delivered a clear message that perpetrators of crimes against humanity will be met with severe repercussions.²⁹ Studies conducted by scholars like Gary Becker and Steven Durlauf have investigated the efficacy of deterrence in deterring crimes against humanity. Becker's rational choice theory suggests that individuals assess the pros and cons of their actions before deciding, with the potential for punishment acting as a deterrent to criminal conduct.³⁰

Durlauf's practical examination of deterrence strategies in areas of conflict has revealed that the apprehension of legal repercussions can markedly decrease instances of violence and human rights violations.³¹ Retributive justice strengthens ethical certainty by decisively condemning the actions of perpetrators and reaffirming society's dedication to justice. By ensuring that individuals are held responsible for their offenses, retributive justice upholds the intrinsic worth of human life and the sanctity of human rights. The International Criminal Tribunal for the former Yugoslavia (ICTY) tried individuals for grave violations committed during the Yugoslav Wars, such as genocide, crimes against humanity, and war crimes. Through its rulings, the ICTY established individual culpability for severe breaches of international humanitarian law, thus advancing justice and accountability in the area.

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²⁸ Christian Tams, & Knut Dörmann. (2012). Crimes against humanity. In R. Wolfrum (Ed.), *Max Planck Encyclopedia of Public International Law*. Oxford University Press. <https://doi.org/10.1093/law:epil/9780199231690/e827>

²⁹ *Trials of war criminals before the Nuremberg military tribunals under Control Council Law No. 10* (Vol. 1, p. 65). (1949). U.S. Government Printing Office.

³⁰ Gary S. Becker. (1968). Crime and punishment: An economic approach. *Journal of Political Economy*, 76(2), 169–217.

³¹ Steven N. Durlauf. (2002). *Understanding criminology: Current theoretical debates*. Sage Publications.

³² International Criminal Tribunal for the former Yugoslavia. (2016). *The Prosecutor v. Radovan Karadžić – Judgment* (Case No. IT-95-5/18-T).

Retributive justice recognizes the severity of crimes against humanity by administering appropriate penalties that align with the harm caused. This acknowledgment emphasizes the gravity of the crimes and pays tribute to the victims' memory by ensuring that justice is delivered. The Rwanda Genocide trials, overseen by the International Criminal Tribunal for Rwanda (ICTR), addressed individuals accountable for the genocide that resulted in the deaths of around 800,000 Tutsis and moderate Hutus. Through its judgments, the ICTR censured the perpetrators' deeds and highlighted the enormity of genocide as a crime against humanity.³³ Legal positivist H.L.A. Hart acknowledges the necessity of a firm and authoritative proclamation, through moral censure and punishment, as the sole fitting reaction to criminal conduct.³⁴

The dignity of victims corresponds to the idea of a shared moral agreement, and the affirmation of ethical principles represents the concept of human values. Punishment carries symbolic weight in its affirmation of the dignity and value of the victim. When society overlooks or diminishes the suffering of victims, it reflects on the significance society attributes to those individuals. If the community fails to act against the wrongdoer, it implies a lack of concern for the victim regarding them merely as expendable or unworthy of protection. It is crucial to ensure that society treats the victim on par with everyone else, addressing the implicit disparity in human value between perpetrator and victim. This redress can reassure the victim that regardless of their status in society, they are acknowledged as someone whose dignity is affirmed.³⁵ If retribution aims to equalize the perpetrator with their victims, it also serves as a reminder to the perpetrator of the moral accountability expected of them. Retribution asserts that the perpetrator, except in cases of insanity or similar circumstances, is not considered incapable of behaving better. It upholds the perpetrator's autonomy and responsibility as a contributor to the common good. However, this expectation is a two-sided concept. It communicates to the perpetrator, "you are being punished because you had the capacity to behave differently."³⁶ Therefore, retribution is not about seeking revenge but rather about restoring the moral fabric of society. This includes ongoing evaluation of the effectiveness of punitive measures in achieving this objective. Retribution aims to reintegrate the perpetrator as a moral member of society.³⁷

The genuine non-malicious retributionist does not adhere strictly to the principle of *lex talionis*, which dictates an "eye for an eye." Instead, they are willing to accept less severe measures, if the primary goal of restoring moral order and promoting the common good is achieved. This willingness to embrace less than

³³ International Criminal Tribunal for Rwanda. (1998). *The Prosecutor v. Jean-Paul Akayesu – Judgment* (Case No. ICTR-96-4-T).

³⁴ H. L. A. Hart. (1968). *Punishment and responsibility*. Clarendon Press.

³⁵ Charles Villa-Vicencio. (1999). The reek of cruelty and the quest for healing—Where retributive and restorative justice meet. *Journal of Law and Religion*, 14(1), 165–187.

³⁶ *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15 (2016).

³⁷ Diane Orentlicher. (1991). Settling accounts: The duty to prosecute human rights violations of a prior regime. *Yale Law Journal*, 100(8), 2537–2615.

perfect justice may involve displaying compassion and empathy toward the perpetrator. Alternatively, it could entail offering forgiveness or imposing lighter penalties for pragmatic reasons, such as maintaining peace or laying the groundwork for a more harmonious society. The final section of this paper anticipates the inherent connection between retributive and restorative justice, emphasizing that the aim of retribution is to rebuild society and enhance the welfare of all. Failure to recognize this could lead retribution to devolve into mere vengeance and bloodlust, which is inherently cruel. It underscores the moral and political duty of every member of society to contribute to the collective good, without allowing any individuals to exploit others or shirk their responsibilities. Retribution, from this perspective, is viewed as a means of upholding morality and fairness for the betterment of society.³⁸

CONCLUSION

In conclusion, while adopting a restorative justice approach holds promise in addressing crimes against humanity, it should not be viewed as a panacea or a replacement for punitive measures. Rather, it should be integrated into a comprehensive framework that combines elements of both restorative and punitive justice. Succinctly, retributive justice presents a more compelling framework than restorative theory for addressing crimes against humanity. Extensive research, including seminal works by scholars have underscored the pivotal role of deterrence mechanisms in dissuading individuals from perpetrating egregious acts. Becker's theory of rational choice highlights how the fear of punishment can act as a deterrent, shaping individuals' decision-making processes.³⁹ Moreover, Durlauf's empirical analyses in conflict zones have provided concrete evidence of the deterrent effect of legal consequences on reducing violence and human rights abuses.⁴⁰ Retributive justice, through its emphasis on accountability and punishment, reaffirms societal norms and values by unequivocally condemning perpetrators' actions. By holding individuals accountable for their crimes against humanity, retributive justice sends a clear message that such atrocity will not be tolerated,⁴¹ thus upholding the intrinsic worth of human life and the sanctity of human rights. While restorative approaches offer avenues for healing and reconciliation, the gravity and complexity of crimes against humanity necessitate a strong emphasis on accountability and deterrence. In this context, retributive justice emerges as a more fitting and effective means of pursuing justice and ensuring the protection of vulnerable populations.

³⁸ Jeffrie G. Murphy, & Jean Hampton. (1988). *Forgiveness and mercy*. Cambridge University Press.

³⁹ Gary S. Becker. (1968). Crime and punishment: An economic approach. *Journal of Political Economy*, 76(2), 169–217. <https://doi.org/10.1086/259394>

⁴⁰ Steven N. Durlauf. (2002). *Understanding criminology: Current theoretical debates*. Sage Publications.

⁴¹ *Prosecutor v. Jean Kambanda*, Case No. ICTR-97-23-S, Judgment (International Criminal Tribunal for Rwanda, September 4, 1998).

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