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Recommended Citation

Orentlicher, Diane. "Settling Accounts' Revisited: Reconciling Global Norms with Local Agency." *The International Journal of Transitional Justice* 1, no.1 (2007): 10-22.

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'Settling Accounts' Revisited: Reconciling Global Norms with Local Agency

Diane F. Orentlicher*

Abstract

In the mid- to late-1980s, the discourse of transitional justice was shaped above all by the experience of countries in Latin America, where military forces continued to exercise autonomous power even after ceding formal authority to democratically elected governments. In this setting, while human rights professionals agreed that fledgling democracies should undertake prosecutions in accordance with their international legal obligations, they were divided over the question of whether further development of international obligations in respect of punishment was desirable. Nor was it clear what, precisely, international law already required.

Writing in the early 1990s, the author of this essay concluded that States parties to certain international treaties were in general required to prosecute specific crimes. More generally, she argued, wholesale impunity for atrocious crimes was generally incompatible with States' responsibility to ensure that individuals subject to their power enjoyed fundamental rights. But these duties, she wrote, should not be interpreted to require action incompatible with a nascent democracy's political or legal capacity.

In this essay, the author describes how her views have evolved in the past 15 years. Noting that international legal norms against impunity have grown increasingly strong and arguing that this trend has itself proved a powerful antidote to impunity, the author nonetheless affirms 'the central importance of promoting the broad participation of victims and other citizens in the process of designing as well as implementing programmes of transitional justice' and addresses the inherent tension between these values and norms.

Introduction

Among human rights professionals, few issues have proved as vexing as the set of challenges bound up in the notion of transitional justice. Should – must? – societies attempt to bring to justice those who bear key responsibility for past atrocities? Does justice inevitably entail prosecutions or does its meaning instead turn upon each society's historically and culturally specific experience? Besides trials, what roles can truth commissions, reparations programmes and other measures of transitional justice play in transforming a society that has been shattered by unspeakable crimes? Should – does? – international law constrain or shape

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States' responses to crimes of the past? How do the answers to these questions turn upon the political constraints that define a nation's transition? These questions only begin a long, and ever-lengthening, catalogue of quandaries that vex societies confronting the challenges bound up in political transition and the professionals who seek to assist them.

Decades of practice toiling in the field of transitional justice have hardly eased its dilemmas. Instead, deepening global experience has brought home the unique complexity – and, often uniquely inspiring story – of each country's experience.

In this setting, the editors of the *International Journal of Transitional Justice* invited me to cast a backward glance at how my views on issues of transitional justice have evolved since the 'early days' of global human rights engagement with this subject. Although scarcely the only issue that has consumed my generation of participants in the global discourse of transitional justice, one question has long loomed large in our work and, certainly, much of my own: Is it helpful for international law to mandate particular responses to past atrocities and thereby narrow the scope of local variation in responding to similar atrocities? Or, instead, is the best response invariably particular to each society?

In large part because I am widely associated with a view that is supportive of a strong international duty to prosecute past abuses (though, as I will explain, many attributions of this position hardly correspond to my actual views), I will take this question as the organizing issue of this essay. I wish to make clear, however, that I do not consider this to be in principle the most urgent or important issue of transitional justice, although it may be just that in some societies.

The Early Days: Combating Impunity

For my generation of professionals addressing the challenges of transitional justice, the 'early days' unfolded in the 1980s, when transitions from military rule to nascent or restored democracy swept Latin America in particular while touching countries in other regions. This context is crucial in explaining not only the evolution in my thinking, but also that of many of my contemporaries. For while each country's story was unique, a common quandary defined most Latin American countries' democratic transitions and framed the central dilemma of transitional justice two decades ago: Although military juntas had formally ceded political power to democratically elected governments, armed forces continued to occupy an autonomous realm of power with the potential for imperiling their countries' fragile transition if the new government breached their citadel of impunity.

In many countries in Latin America, the price exacted for the end of military rule was society's acceptance of the outgoing junta's self-amnesty; in others, impunity for past crimes was the military's implicit but unambiguous price for remaining in the barracks as fragile democracies took root. Yet for the newly elected successor governments to honor nakedly self-serving claims of untouchability would betray the very principles they had pledged to restore and safeguard.

The dilemma thus presented was agonizing, and the professional human rights community was acutely conscious of the complexity of its challenges. Exploring these challenges at a landmark seminar in 1988 organized by the Aspen Institute, an international group of experts agreed on several core principles, notably including the central importance of establishing and acknowledging the truth about past violations. Thus while experience with official truth commissions – and international institutions’ commitment to the ‘right to know’ the truth about past abuses – have grown exponentially in recent years, even in the ‘early days’ human rights and other professional experts saw disclosure of the truth about past abuses as a non-negotiable moral obligation of governments.

But if the Aspen assembly coalesced on this and other points, we staked out a range of views about the scope of states’ moral and legal duties to punish violations of the past.¹ Even on this subject, however, there was broad agreement on two principles relating to prosecution of past abuses.

First, even those who favored broad scope for local determination in confronting abuses of a prior regime typically added an important qualification, reiterated so often that it soon took on a talismanic quality: Of course, they said, governments must comply with their international legal obligations.² But while some of my contemporaries had fairly well-developed views about what international law required, most believed that further study and analysis was needed. In the course of the Aspen seminar, many participants urged me to take up that challenge. I did, and my initial conclusions were published in a 1991 article in the *Yale Law Journal*, which I summarize below.

Another point of broad agreement emerged implicitly from discussion of a question that evoked a notably wide range of views among human rights professionals – whether the international community should press successor governments to mount at least some prosecutions of past atrocities. Implicit in the debate over this question was a broad, if ill-defined, consensus that successor governments *ideally* should undertake at least some prosecutions of a prior regime’s atrocious crimes. This is, I believe, reflected in the way that José Zalaquett, one of the leading voices for broad local discretion in addressing past crimes, summarized his view of what the international community should demand of successor governments: ‘The whole truth and as much justice as is possible.’³

As the second half of Zalaquett’s formulation suggests, the fulcrum of debate 20 years ago did not concern the general desirability of prosecuting atrocious crimes (though we debated rather intensively the justifying aims of punishment in a context of transition). Rather – and here I am oversimplifying what was a far richer debate than I can reflect in this essay – the issue that vexed us most was whether it was prudent to press fragile democracies to mount prosecutions that they may not

¹ See Alice Henkin ed., *State Crimes: Punishment or Pardon* (Queenstown: Aspen Institute, 1989).

² See for example, José Zalaquett, ‘Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints,’ in Henkin, *ibid.*, at 23–69.

³ See Stanley Cohen, ‘State Crimes of Previous Regimes: Knowledge, Accountability, and the Policing of the Past,’ *Law & Social Inquiry* 20 (1995): 7–50, p. 43.

yet have sufficient power to survive. Indeed, even a brief dip into the literature of the time would reveal a preoccupation with issues of political power of successor democracies vis-à-vis the outgoing military regime.

This preoccupation did not displace other considerations: far from it. But in a fundamental way, it framed the transitional justice debate of the 1980s. For many of those who counseled caution in pressing transitional societies to mount prosecutions, the overriding paradigm was not so much one of transitional justice as transitional politics. If prosecutions threatened to imperil a transition to democracy, their potential value was outweighed by their attendant risks. For others, the dominant paradigm was one of impunity: If the principal reason for hesitating to prosecute those responsible for crimes against the basic code of humanity was the perpetrators' impunity, the task for international law and nongovernmental organizations (NGOs) was to mount effective strategies against impunity. Those who were strongly influenced by this paradigm – and I came to count myself among them – were hardly opposed to values, often associated with amnesties, bound up in processes of social reconstruction. But we came to regard with suspicion amnesties covering atrocious crimes that were justified as measures of national reconciliation. Grappling with these issues in the shadow of Latin American self-amnesties, there was ample reason to see 'reconciliation' as a watchword for impunity.

'Settling Accounts'

It was in this context that I wrote 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,'⁴ whose principal aim was to identify the *scope* of states' obligations under international law when it comes to prosecuting human rights violations of a prior regime. The article also addressed the question of whether an international policy on prosecutions – reflected, ultimately, in law – was desirable. (Parenthetically, I have often regretted the article's subtitle, which may have contributed to a widespread – but quite inaccurate view – that my article found in international law a rigid and universally applicable duty to prosecute all human rights violations of a prior regime. A more accurate subtitle would have begun 'The *scope* of States' duties ...').

On the question of what international law required at the time of publication, in brief: 'Settling Accounts' found that States that had adhered to certain human rights treaties were generally required to ensure that criminal proceedings were instituted against those suspected of specified violations of human rights, such as genocide and torture. As for customary international law – the law that would apply to virtually all States, regardless of which specific treaties they had ratified – I concluded that States' general obligation to ensure the enjoyment of fundamental rights was incompatible with wholesale impunity for atrocious crimes but did not require prosecution of every offense.

⁴ *Yale Law Journal* 100 (1991): 2537–2615.

Turning from general obligations⁵ to the context of political transitions described earlier, I identified various ways in which international law should accommodate the constraints commonly confronted by democracies that succeed military regimes. Even with respect to States that had ratified treaties that seemed to require prosecution of every violation of its criminal prohibitions, I argued, States parties operating under the constraints commonly associated with political transition could satisfy their treaty obligations through exemplary prosecutions – focusing, for example, on those who appear to bear principal responsibility for systemic atrocities or on individuals believed to have committed notorious crimes that were emblematic of a regime’s depredations. Asserting that governments should not be called upon to ‘press prosecutions to the point of provoking their own collapse,’⁶ I raised concerns about whether international law adequately takes account of the autonomous realm of power often occupied by military forces and the resulting constraints this imposed on a government’s field of action.⁷

Even so, when it came to the perennially vexing question of how international law and policy should align itself in relation to the quandaries that then dominated the discourse of transitional justice, I placed striking confidence in international law itself. The crux of my argument in this regard was twofold: First, just as domestic law can take account of complexities, so too can international law. In effect, I argued, international law is capable of making appropriately nuanced judgments.

Second, and more fundamental to my claim, I argued that, through appropriately defined obligations, international law could assist rather than thwart the aims of fragile democracies tentatively seeking to reconstruct the norms and institutions of a full-fledged democracy. Although I did not put the case in these terms, I argued that international obligations in support of prosecutions could enlarge a fledgling democracy’s political space for confronting past violators and that such prosecutions served important values as long as the effort did not provoke a reversal of hard won advances. In short, I saw international law as a potential counterweight, however limited, to the enduring power of impunity – not a panacea, but another weight added to the scales on the side of justice.

In pressing this claim, I took very much to heart the entreaties of colleagues from Argentina and other countries that had been reckoning with crimes of their recent past, some of whom had played leading roles in national efforts to mount prosecutions. These colleagues wanted me to understand, above all, that they would have been better equipped to confront the inevitable military backlash against prosecutions if international law stood firmly in their court – if, i.e., they

⁵ Here I mean *general* in the sense of a rule that would ordinarily apply under its terms of application but which might be subject to exceptions rather than in the sense of a rule applicable to all States.

⁶ Orentlicher, *supra* n 4 at 2548.

⁷ *Ibid.*, at 2606–12. In light of these claims, which were central to the position I developed in ‘Settling Accounts,’ I have been perplexed by some authors’ attribution to me of a position that ‘demands’ prosecution no matter the consequences. See, for example, Helena Cobban, *Amnesty After Atrocity? Healing Nations after Genocide and War Crime* (Boulder: Paradigm, 2007), 198–99.

could credibly invoke a mandate for their work in international law. Some of the strongest claims in my article were, in fact, prompted by their views.⁸

At the same time, I had no illusions about the power of prosecutions by themselves to advance a fledgling democracy's transition – although, rereading my article, I can understand why some readers have discerned in my writing greater confidence in prosecutions as a centerpiece of a democratic transition than I ever possessed. I focused on prosecutions in 'Settling Accounts' because the scope of States' obligations in respect of punishment was the subject of my article, not because of a belief that prosecutions mattered more than any other measure of transitional justice⁹ and certainly not because I believed that the potent alchemy of prosecutions could by itself transform a society that had descended into the abyss of State-organized depredations.

Still, my argument was profoundly shaped by a core belief that exemplary prosecutions, if prudently pursued, could help dispel the toxic effects of impunity. By condemning past crimes through the strongest sanction used by the institutions of government to condemn, exemplary trials could send a message to the future: This will not be tolerated again. Space does not permit a more elaborate account of the affirmative values I thought such trials could help secure, but one negative consideration played a key role in my thinking. Summarizing the 'case for prosecutions', I wrote: 'Above all, the case for prosecutions turns on the consequences of *failing* to punish atrocious crimes committed by a prior regime on a sweeping scale. If law is unavailable to punish widespread brutality of the recent past, what lesson can be offered for the future?'¹⁰

In the years since I wrote this, I have often been reminded of the profound importance of this point to victims of unspeakable crimes across the globe. As I write this essay, my mind echoes with the words of victims of 1990s-era 'ethnic cleansing' in Bosnia and Herzegovina, whom I have been interviewing in recent weeks¹¹ in an effort to understand what the work of the International Criminal Tribunal for the former Yugoslavia (ICTY) has meant to them. Virtually every person I interviewed spoke of his or her disappointments in the ICTY – yet all of them spoke passionately about what they considered the *necessity* of the Tribunal's work. Imagine, they implored, if the ghastly crimes they endured were to go unpunished! Whatever the Tribunal's shortcomings, the victims I interviewed believed its work essential (though hardly sufficient) to ensure their country's ability to restore fundamental norms of human decency and to secure the moral integrity of future generations.

⁸ An example is the claim: 'Because trials secure preeminent rights and values, governments should be expected to assume reasonable risks associated with prosecutions, including a risk of military discontent.' Orentlicher, *supra* n 4 at 2548–49 (footnote omitted).

⁹ To the extent it may suggest a view I never held, I regret the fleeting treatment of truth commissions in 'Settling Accounts,' which addressed this form of transitional justice principally by way of arguing that truth-telling processes should not be seen as a substitute for exemplary trials. See *ibid.*, at 2546 n 32. As with many claims in 'Settling Accounts,' this one was responsive to a particular context – one in which truth commissions were sometimes presented as a 'second best' alternative to prosecution when the latter were seen to be too destabilizing.

¹⁰ *Ibid.*, at 2542 (emphasis in original).

¹¹ These interviews were conducted in Bosnia and Herzegovina in December 2006.

From an International to a Cross-Cultural Perspective

Inevitably, my views on transitional justice have evolved with the broadening and deepening of global experience. Some aspects of this evolution so nearly track broader trends in the field of transitional justice that I can briefly note them without substantial elaboration for the readers of this journal:

First, with others who have worked in fields bearing on transitional justice for an extended period, I inevitably have a deeper appreciation for the multifaceted nature of transitional justice and the special contribution that nonjudicial measures, when effective, can make to a broader process of political and social transition. If societies that have descended into the abyss of inhumanity bear a special burden of reckoning with their past, the work of highly respected truth commissions can facilitate a broader and more complex understanding of the machinery of mass atrocity than the circumscribed verdict of a criminal proceeding can do. At their best, moreover, truth commissions can advance a process of social inclusion and empowerment of previously marginalized – even brutalized – sectors of society, who may figure prominently in the work of a commission. Just as trials are not the stuff of magical transformation, no truth commission, however inspiring, can by itself set a country that has been deformed by widespread depredations right again. But an effective truth commission can engage society in an inclusive process of reckoning and repair. Truth commissions can, moreover, speak to the future through their recommendations for institutional reform.

If the passage of time has reinforced the need for a comprehensive approach in addressing systemic abuses of the past in which various measures – among them truth commissions; trials; institutional, social and economic reforms; and reparations programmes – play a distinct and unique part, it has also underscored the interdependence of these measures: to a considerable degree, the effectiveness of each of these measures turns upon the broader context in which it unfolds, including its relationship with other dimensions of transitional justice. Trials, for example, may seem an outsized expenditure of precious national resources if a society's basic social and economic needs remain unmet. And the expressive function of prosecutions will surely be undermined in the absence of public measures that institutionalize a government's commitment to fundamental rights. In larger perspective, as Laurel Fletcher and Harvey Weinstein have reminded us, 'an approach that does not integrate trials with . . . other capacity-building measures is insufficient to attend to social repair.'¹²

Recent experience has also brought home the need for concerted efforts to ensure that, when prosecutions or truth commissions are instituted, their work is known and understood by the societies on whose behalf they operate. If, with Bishop Berkeley, we might wonder whether a tree really fell in the forest if no one heard it fall, we may wonder whether prosecutions constituting a crucial pillar in

¹² Laurel E. Fletcher, and Harvey M. Weinstein, 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation,' *Human Rights Quarterly* 24 (2002): 573–639, p. 580.

a programme of transitional justice can play their intended role if they operate at a remote distance from the public and speak only in the largely inaccessible language of legal judgment. This point has, of course, assumed particular importance with the operation of international courts that operate outside the physical territory and political/legal culture of countries where atrocious crimes occurred, but is relevant as well to national and 'hybrid' courts. Indeed, if court officers and staff do not meaningfully engage with the communities most affected by their work, the field of interpretation may be occupied instead by local leaders bent upon distorting the work of prosecutions in the service of divisive political agendas.

Another important development since the 'early days' of global engagement in processes of transitional justice is the unprecedented, if still inadequate, attention to the special concerns of women, children and marginalized minority communities in programmes of transitional justice. Among the notable achievements in this regard, prosecutions before the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY/R) have brought crimes of sexual violence – mostly ignored in postwar prosecutions – out of the proverbial shadows. In another arena of progress, their terms of reference have directed some truth commissions to give special attention to crimes of sexual violence; a number of recent commissions have held focused hearings on these types of abuse.¹³

These developments mark a sea change in public awareness; in the 'early days,' leading voices in the discourse of transitional justice were largely blind to these issues. (Unpardonably, I did not so much as allude to them in 'Settling Accounts'). Still, there remains a glaring need to invigorate efforts to incorporate the experiences of women, children and minorities into programmes of transitional justice. Even the pathbreaking precedents of the ICTY/R in addressing crimes of sexual violence have proved fragile: early achievements in this area hardly ensured that these crimes would receive similar attention in later cases.¹⁴

These points I believe to be relatively uncontroversial. Far more vexing issues are implicated in the question whether there are some core obligations of transitional justice that apply to all societies and, if so, under what conditions they should be subject to what international lawyers would call 'derogation' in the face of an overriding imperative, such as the desire to secure an end to armed conflict.

Before setting forth my own views, it may be helpful first to note the broad arc of relevant developments in international law and policy. Crucially in my view, in the past dozen years or so international law and policy have advanced on two tracks simultaneously, with inevitable tensions between the two paths they represent. As I will explain shortly, those tensions lie at the heart of my own thinking.

¹³ See *Independent study on best practices, including recommendations, to assist States in strengthening their domestic capacity to combat all aspects of impunity*, by Professor Diane Orentlicher, UN Doc. E/CN.4/2004/88, ¶ 19(f) (27 February 2004).

¹⁴ See Binaifer Nowrojee, "'Your Justice Is Too Slow': Will the ICTR Fail Rwanda's Rape Victims?" (United Nations Research Institute for Social Development, Occasional Paper 10, 2005).

On the one hand, international law and policy have provided increasingly strong support for the principle ‘that the most serious crimes of concern to the international community as a whole must not go unpunished,’ in the words of the preamble of the Rome Statute of the International Criminal Court (ICC). In ‘Settling Accounts,’ I reasoned that, to the extent that they foreclosed prosecution of certain human rights violations, amnesties would be incompatible with various human rights treaty obligations. In the years since I wrote this, relevant treaty bodies and other important sources have explicitly affirmed this position.¹⁵ Moreover the establishment of several international and hybrid courts since 1993, including a permanent international court, is emblematic of international resolve to ensure that those most responsible for crimes against the basic code of humanity do not escape punishment.

Notably, the political bodies of the United Nations as well as human rights bodies have, in the words of the UN Security Council, affirmed the responsibility of States ‘to end impunity and to prosecute those responsible for genocide, crimes against humanity and serious violations of humanitarian law.’¹⁶ On the perennially challenging question whether there is an exception to this general rule in situations where an amnesty would bring an end to armed conflict, the UN Secretary-General summarized United Nations policy this way in a 2000 report: ‘While recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict, the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law.’¹⁷

But while these trends signify powerful affirmation of a global norm in support of criminal accountability for atrocious crimes, professional practitioners of transitional justice are more aware than ever before that there cannot be a one-size-fits-all approach to transitional justice. So, too, are officials of the same United Nations that has affirmed with ever-strengthening conviction ‘the position that amnesties cannot be granted in respect of international crimes.’¹⁸ Given the extraordinary range of national experiences and cultures, how could anyone imagine there to be a universally relevant formula for transitional justice?

In recent years, when I have had the opportunity to contribute to the articulation of international standards in respect of transitional justice (principally through my appointment as a United Nations expert on combating impunity), I have been at pains to emphasize this point.¹⁹ As I wrote in a 2004 UN report, ‘The

¹⁵ Some of these developments are summarized in *Independent study on best practices*, supra n 13.

¹⁶ UN Doc. S/PRST/2002/41, p.1.

¹⁷ UN Doc. S/2000/915, ¶ 22 (footnote omitted).

¹⁸ *Ibid.*, Notably, the Secretary-General affirmed both the inappropriateness of a one-size-fits-all approach to transitional justice and the United Nations’ opposition to amnesties for international crimes in the same report. See *Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies*, UN Doc. S/2004/616, p. 1; 10, 32 (2004).

¹⁹ See, for example, *Report of the independent expert to update the Set of Principles to combat impunity*, Diane Orentlicher, UN Doc. E/CN.4/2005/102 ¶ 9 (18 February 2005); *Independent study on best practices*, supra n 13.

unique historical experience of each society that has endured [serious violations of human rights] will inevitably shape its citizens' understanding of justice.²⁰

Closely related to this point, I believe passionately in the central importance of promoting the broad participation of victims and other citizens in the process of designing as well as implementing programmes of transitional justice. I summarized some of the reasons why in a 2005 UN report:

Their participation helps ensure that policies for combating impunity effectively respond to victims' actual needs and, in itself, 'can help reconstitute the full civic membership of those who were denied the protection of the law in the past'. Broad consultations also help ensure that policies for combating impunity are themselves rooted in processes that ensure public accountability. Finally, programmes that emerge from national consultations are, in the words of a recent report by the [UN] Secretary-General . . . , more likely than those imposed from outside 'to secure sustainable justice for the future, in accordance with international standards, domestic legal traditions and national aspirations.'²¹

This emphasis reflects something of an evolution in my thinking. In 'Settling Accounts,' I challenged the view that an amnesty would be legitimate if, among other conditions, it were democratically approved. My principal reason turned on the operation of a relevant rule of international law²² but I also argued that a political majority should not be able to surrender the rights of a minority and that vulnerable minorities typically figure prominently among victims of past atrocities.²³ While this approach asserted the primacy of a victims' perspective, it did not reflect the emphasis I would now place on victims' agency in defining their own interests and preferences and in participating in national processes aimed at designing policies of transitional justice.

This perspective naturally raises the question, where does this leave the previously mentioned norms of international law that generally seem to require prosecution of at least those who bear primary responsibility for atrocious crimes? If victims' agency is a crucial value, does it not follow that victims should be able opt out of these international norms if, say, in their culture and immediate circumstances they would prefer to reintegrate rebels who have committed atrocities into their community through a traditional ceremony of reconciliation than to prosecute them?

As I write, this issue looms large in the context of the ICC Prosecutor's indictment of five members of the notoriously savage Ugandan rebel group, the Lord's Resistance Army (LRA), including its leader, Joseph Kony. The ICC Prosecutor undertook his investigation of the LRA after the Ugandan government referred the situation to the Court in January 2004. His indictment apparently provided the incentive for LRA leaders to agree to a truce (long-standing negotiations

²⁰ Ibid.

²¹ Ibid., (footnotes omitted).

²² See Orentlicher, *supra* 4 at 2595–96.

²³ Ibid., at 2595 n 260.

between the Ugandan government and the LRA had thus far been unable to achieve this much). But the indicted commanders reportedly refuse to follow through on a peace settlement unless the ICC indictments are dropped.²⁴ Meanwhile, even before the imperatives of peace and justice reached this level of apparent tension, leaders of the Acholi people, who have been principal victims of LRA atrocities, asked the ICC Prosecutor to withdraw his arrest warrants and defer instead to traditional Acholi ceremonies of reconciliation and forgiveness.²⁵

Earlier in this essay, summarizing the position I advanced in 'Settling Accounts,' I wrote: 'By condemning past crimes through the strongest sanction used by the institutions of government to condemn, exemplary trials could send a message to the future: This will not be tolerated again.' The position I advanced in 'Settling Accounts' thus assumed that prosecutions are the 'strongest sanction used by the institutions of government to condemn' – a premise that I still believe accurately captures a norm common to most countries, assuredly including those whose experiences shaped my 1991 article. Suppose, though, a fundamentally different normative approach prevails among the Acholi? If, in their culture, a traditional ceremony of reconciliation and forgiveness is more likely than prosecutions to secure the end of savage armed conflict, how can international actors insist that prosecutions are indispensable?

As thus framed, the situation in northern Uganda seems to present a particularly compelling case for staying the hand of prosecution in deference to local preferences *and* peace imperatives. But the dilemma raised by this situation is more complex than I have suggested so far. To begin, it is not obvious that the views of Acholi leaders can be taken to represent those of 'the Acholi people.' An extensive survey of attitudes toward justice and peace undertaken in northern Uganda in 2005 found that most of those surveyed, including Acholi respondents, believed that those who had committed abuses should be tried judicially.²⁶ Among those who favored trials, 66 percent believed that LRA leaders should be tried.²⁷

The broader question of cultural relativism is, moreover, just as complex in respect of the perennial 'amnesty vs. prosecution' dilemma as in other contexts. In

²⁴ 'Will Kony come out of the bush? It will be hard to reconcile peace with justice in northern Uganda,' *The Economist*, October 21, 2006, 56–57.

²⁵ *Ibid.*

²⁶ International Center for Transitional Justice and Human Rights Center, University of Berkeley, California, *Forgotten Voices: A Population-Based Survey on Attitudes about Peace and Justice in Northern Uganda*, 2005, 30. Among the four communities surveyed, the percentage responding affirmatively to the question whether those who had committed abuses should be tried judicially ranged from 67 and 76 percent respectively in two Acholi districts to 86 and 90 percent respectively in two non-Acholi districts, *ibid.* The same survey found that a majority of those surveyed supported amnesty, *ibid.*, at 28. While this might suggest that most respondents prefer judicial punishment but would choose amnesty if necessary to achieve peace, the survey found that overall support for amnesty increased only slightly when respondents were asked, 'If the only road to peace was amnesty, would you accept that?', *ibid.*, at 29. A possible clue to the puzzle may lie in the fact that respondents were not asked how they understood the meaning of amnesty, *ibid.*, at 28 n 47. In any event, the large percentage of respondents who support judicial punishment belies reports that Acholi as a cultural group eschew prosecutions in favor of traditional forms of reconciliation.

²⁷ *Ibid.*, at 30.

principle, I believe that an approach toward the LRA that is rooted in local culture is inherently more likely to be meaningful to victims – and in other important respects to 'work' – than prosecutions that seem alien to Acholi culture. But to the extent this would entail wholesale amnesty for those who bear primary responsibility for horrific crimes, my views have also been shaped by my African colleagues' efforts to overcome what they consider an enduring weakness in many of their countries – a culture of impunity conducive to violence.²⁸ In much the same way that many of my colleagues and I came to regard with suspicion attempts to justify Latin American amnesties as measures of 'reconciliation,' many of my African colleagues are disposed to regard with suspicion claims of African exceptionalism when it comes to international norms concerning justice. As I turn the prism from one vantage point to another, then, a fundamentally different frame comes into view.

In a similar vein, if asked whether I would insist on prosecutions if doing so would block a peace agreement that would end human carnage, I would respond (as I always have), 'Of course not!' Still, I would resist changing the normative default rule of international law in a way that may *encourage* the granting of amnesties to the extent they encompass atrocious crimes, at least with respect to those who bear leading responsibility for unleashing systemic violence. Norms matter: they are the indispensable foundation of the whole enterprise of combating atrocious behavior.

Conclusion

This is the place where, by reasonable expectation, I should set forth what I consider to be the best way to reconcile these competing normative pulls. Yet the complex considerations on which I have briefly touched do not admit of any facile reconciliation. Indeed, I can hardly imagine reaching a nirvana moment when the dilemmas of transitional justice appear to dissolve.

And yet, decisions must be made in the face of real-world dilemmas of transitional justice. Turning from practice to further normative development, I have from time to time been tasked with clarifying international legal norms (so far principally in the form of United Nations-endorsed principles) – a charge that requires some measure of resolution, however tentative, of the dilemmas to which I have alluded.

Thus far, I have resolved them by maintaining support for the broad trend in international law supporting criminal accountability for those who bear principal responsibility for atrocious crimes, while, as I have noted, insisting on the importance of local agency in fashioning and implementing policies of justice. Although the first part of this approach is informed by many considerations, three have

²⁸ These efforts loom large in the Africa programme of the Open Society Justice Initiative, on whose board I am a member. See generally Craig Timberg, 'Impunity on Trial in Africa,' *Washington Post*, May 2, 2006.

loomed especially large: First, across diverse cultures, I have seen human rights victims thirst for justice in the form of prosecutions. This is not to say that all victims want the same thing but it is to say that many who have endured unspeakable crimes have a powerful need for justice and, I have found, increasingly turn to the international community to stand with them in their pursuit of justice against seemingly insurmountable challenges.

Second, I have been repeatedly astonished to see how effectively human rights advocates have utilized the norms enunciated by the United Nations and other international bodies to breach seemingly impregnable barriers to accountability for atrocious crimes committed in their countries. Similarly, the work of global courts as well as States' increased resort to universal jurisdiction have had a remarkable impact in countries where the crimes concerned actually occurred. Augusto Pinochet's 1998 arrest in London ultimately did not lead to his prosecution abroad but it catalyzed efforts to hold him to account in Chile, where he had long remained legally untouchable for crimes committed during his rule. Although Pinochet died without facing trial, he spent his final years fending off a raft of investigations into human rights violations committed decades earlier. Likewise, efforts to prosecute former Chadian leader Hissène Habré in Belgium inspired African countries to act to ensure his prosecution in Senegal.

Finally – and related to the second point – experiences in Chile, Argentina and other countries have shown that societies that are unable to mount prosecutions (or, as the case of Argentina suggests, to sustain them) during the early years of their democratic transition may have greater political space to do so with the passage of time. Crucially, international legal norms concerning prosecution of atrocious crimes have played an important role in enabling such countries to overcome otherwise insurmountable barriers to prosecution.

Examples could be multiplied at some length, but the point is simple enough: International legal norms affirming that atrocious crimes ought to be punished have provided a powerful antidote to impunity. While there are of course times when those same norms cannot be enforced, it has seemed preferable to say 'not yet' than to reframe global norms in terms that suggest prosecuting atrocious crimes is nothing more than an option. For if we were to move entirely away from the language of legal obligation, we would take from those operating on the front-lines of their countries' struggle for decency one of the most potent weapons in their arsenal.