

FACILITATING ACCOUNTABILITY: THE POTENTIAL VALUE OF INTERNATIONAL GUIDELINES AGAINST IMPUNITY

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We strive to overcome impunity for international crimes such as genocide, war crimes, and crimes against humanity. Our reasons may include a vision of justice and perhaps a hope for deterrence.

Notwithstanding our aspirations to establish a regime of accountability, impunity remains a recurrent pattern. Where an effort at accountability is undertaken at all, it consistently is approached through a second-best alternative to full and complete accountability — some form of partial accountability and, hence, partial impunity. I will begin by briefly examining the reasons for this consistent pattern of compromise and then consider what contribution international guidelines on accountability might make in moving toward a regime of consistent and meaningful accountability.

Holding perpetrators fully accountable for their crimes would include appropriate trial and punishment of each individual responsible for the crimes committed, together with appropriate reparations made by perpetrators to victims. In many contexts, one would wish also to utilize some form of truth commission to ensure the credible and authoritative revelation, documentation and memorialization of the events in question as a comprehensive whole.

But that ideal of full accountability for international crimes is never, in practice, attained. National and international efforts at achieving accountability for such crimes typically resort to means designed to render something less than full accountability. This occurs for three identifiable reasons.

First, the resources required to achieve full accountability often are prohibitive. The offenses in question typically involve large numbers of perpetrators and victims. Prosecutions and other accountability mechanisms as well as victim compensation schemes all therefore demand extensive financial, physical, and human resources. Often, those demands arise in post-conflict contexts in which the nations affected suffer from a

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dearth of resources. Rwanda provides perhaps the most extreme example. There, tens of thousands are suspected of participation in genocide. The Rwandan judiciary, along with much of the national infrastructure, was destroyed in the course of the 1994 genocide and war. The resources required to achieve full accountability in each case in Rwanda would quickly overwhelm national capacities.

The second reason for the pattern of compromise is that political considerations may constrain the extent to which accountability is pursued. Such constraints arise from the need to continue to live with (and perhaps to share power with or even to work toward reconciliation with) the perpetrator population or constituency. Argentina and South Africa exemplify two faces of this phenomenon. In Argentina, threats of military insurrection halted the Alfonsín government's prosecutorial efforts to hold accountable perpetrators of human rights abuses committed under the former military regime. In South Africa's transition from apartheid, a negotiated settlement to a political conflict that had already involved bloodshed and had the potential to involve much more included a rather robust amnesty provision. Such precarious balances of power, sometimes involving military threats, often place political constraints upon the degree of accountability to be sought.

Third and finally, all too often accountability fails for lack of will at national or international levels. In such cases, there may be a denial that the crimes were committed or crimes may be acknowledged, but resource limitations or political constraints such as those just discussed may be used as a pretext for inaction that is actually born of a lack of will. Failures of will at the international level clearly have impeded the efficacy of the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY/R) since their inception. Lack of commitment to the success of the ICTY/R on the part of elements of the international community has been reflected in a paucity of funding, failure to arrest indictees, and other forms of obstructionism.

Because of these factors of resource limitations, political constraints, or lack of will (or some combination of the three), national and international bodies charged with the handling of international crimes typically adopt a compromise or second-best approach. That approach usually is comprised of some or all of the following elements. First, a decision may be made to pursue accountability only for some subset of the individuals responsible for the crimes. The ICTY/R, for example, is expected to prosecute at most a few hundred of the thousands of perpetrators in the former Yugoslavia and Rwanda. The remaining bulk of the perpetrators will have to be prosecuted in national courts or not at all. And in South Africa, for instance, an amnesty is made available under

specified conditions to all perpetrators of the relevant crimes except for some few whom the amnesty-granting authority determines committed crimes disproportionate to their political purpose.

A second element of a compromise approach may be some form of plea-bargaining. Rwanda, for example, has passed specialized legislation offering all but the most culpable category of perpetrators a substantial sentence reduction in return for a full confession and guilty plea.

Third, a sentence-reduction may be provided for *all* perpetrators, quite *apart* from a plea-bargain program. This may be done to relieve the state of the long-term burden of supporting a massive prison population or may be done in the interests of reconciliation.

Fourth, legal action may be taken against perpetrators for lesser offenses than the genocide, war crimes or crimes against humanity actually committed. One version of this is prosecution for ordinary crimes (such as murder or rape) where national legislation provides only for such offenses and not for the greater, international crimes. Another frequently used mechanism for taking legal action for a lesser offense is deprivation of citizenship or immigrant status and, possibly, deportation on the ground that the individual violated immigration regulations by failing to disclose his criminal acts when applying for immigrant status or citizenship.

Second best approaches are taken not only in place of full criminal prosecution but also in place of civil reparations from perpetrators to victims. One such compromise is the award of an unenforceable (or probably unenforceable) civil judgment (for example, where the perpetrators' assets are outside of the country). Another compromise approach to reparations is where a successor government (or the international community) provides reparations to victims rather than the perpetrators being made to do so. While often indispensable for purposes of acknowledgment and rehabilitation of victims, this approach makes no inroads against the impunity of perpetrators.

Finally, there are those approaches to accountability that are not inherently compromises but are second-best when adopted in lieu of, rather than in conjunction with, other mechanisms for accountability. These include lustration and truth commissions, both of which may serve important functions, but since they provide neither for criminal liability nor for reparations, they cannot provide anything approaching full accountability.

An array of compromise approaches to accountability thus has been employed over the years by international as well as national entities. Each compromise renders an outcome of partial accountability and, hence, partial impunity. The draft Statute for an International Criminal Court also does not offer a panacea of accountability, having strictly limiting

jurisdictional provisions, and making only a weak mention of anything approximating victim reparations. Accountability, thus, has not been and will not in the foreseeable future become an all or nothing question, but rather must be viewed as a matter of degree.

In sum, there is a spectrum of possible outcomes between complete impunity and full accountability. As I have discussed, outcomes that fall short of full accountability often are attributable to resource limitations and political constraints as well as to a lack of will. It is with these points in mind that I want now to consider the advisability of developing international guidelines on accountability.

Given the predictable obstacles to accountability and the spectrum of possible outcomes between complete impunity and full accountability, we must ask, in considering guidelines on accountability, what forms of accountability such guidelines would mandate. The guidelines might provide that the type and extent of accountability that states are obliged to establish would vary depending upon specified factors, which I will discuss. The guidelines might also very usefully include a set of *facilitative provisions* that would delineate mechanisms for the provision of assistance to the states bearing the primary responsibilities for accountability in order to facilitate their overcoming the predictable obstacles to accountability.

Several factors would be relevant in determining in each context the type of accountability mechanisms required of states and the extent of their necessary scope. The most obvious of these factors would be the nature of the offenses committed. Presumably, genocide, crimes against humanity and grave breaches of the Geneva Conventions would give rise to the strictest accountability requirements in guidelines that address a range of international crimes.

Additional factors determining the type and extent of accountability required would relate to the three chronic obstacles to accountability: resource limitations, political constraints, and lack of will. Resource limitations and political constraints may diminish the degree of accountability and redress that a state can realistically be required to achieve in a given context. For example, where the number of perpetrators is high and availability of resources is low, the number of defendants to be prosecuted may be smaller than the total number of perpetrators. However, a diminution in standards of accountability should be the very last resort, not the first response, to such obstacles. The first line of response should be the provision of international *facilitation* in overcoming those obstacles in order to achieve the greatest possible measure of accountability. Thus, rather than only clarifying and reiterating the mandate to achieve accountability, it may be useful for

guidelines on accountability to include facilitative provisions that focus on providing assistance in overcoming the predictable obstacles to accountability.

In this regard, the guidelines could delineate responsibilities of member states to facilitate the efforts of those states bearing the primary responsibility for accountability by providing resources (financial, human or physical) to a specified extent when delineated conditions arise warranting such assistance. In particular, the guidelines might provide for the creation of a judicial rapid reaction force or international legal assistance consortium prepared to reinforce, supplement, and assist in the rehabilitation of post-conflict national justice systems. Such an entity would be prepared to respond quickly with the specialized expertise required to help ensure accountability and judicial rehabilitation in a post-conflict environment.

The guidelines' facilitative provisions might also address what I will term a lack of political resources, which may often hamper national efforts at establishing accountability. A lack of political resources would be reflected in difficulties in gaining extradition, in obtaining evidence outside the country, or in gaining access to perpetrators' assets that are outside the country. The guidelines' facilitative provisions could help to overcome political resource limitations by providing for forms of judicial cooperation including special extradition or transfer arrangements, mechanisms for evidence provision, and methods for freezing and accessing perpetrators' offshore assets.

Addressing the second of the three major obstacles to accountability, *political constraints*, will be more complex. The parties might undertake to provide mediation or even military intervention to foster accountability under some circumstances. One can readily envision limits to what would be possible in this regard. The mixed results of peacekeeping and related missions trace those limits all too graphically. Nevertheless, diplomatic and military interventions can be effective in some contexts, and could be brought much more to bear in the cause of accountability.

A special problem, falling within the category of political constraints, is the risk of bias or the appearance of bias in the national accountability process. Where the regime administering accountability does so after prevailing in a conflict with those now being brought to justice, the reality or appearance of victors' justice may taint the proceedings, undermining their claim to legitimacy. One form of international facilitation that may help to ameliorate this potential problem would be the provision of international monitoring to help ensure the impartiality of the

accountability process. If the monitoring agency has the confidence of the parties (particularly of the party fearing bias), then the monitoring function may be valuable in minimizing the potential problem of bias or the appearance of bias in the accountability process.

Finally, the guidelines could address a lack of will to pursue accountability. A specific delineation of the extent and form of accountability mandated under specified conditions would clarify the parties' obligations. With obligations clarified, pressure for compliance could be brought to bear. At the same time, assuring assistance in overcoming resource limitations and political constraints would render those obstacles less readily available as pretexts for inaction actually born of a lack of will.

A set of guidelines on accountability could, in its preamble, articulate the aspiration of eliminating impunity. In their substantive provisions, the guidelines could clarify and articulate what is required nationally and internationally in the pursuit of accountability. The facilitative provisions could ensure assistance in overcoming the predictable obstacles to accountability. By doing all of that, the guidelines could eliminate ambiguities, obstacles and excuses so that appropriate pressure could be brought to bear on those who would otherwise lack the will to pursue accountability. By crafting guidelines that clarify national and international responsibilities to establish accountability and that also provide for facilitation and assistance to states bearing primary responsibility for establishing that accountability, the likelihood is heightened that some substantial measure of accountability will, in fact, be achieved. The key in drafting guidelines on accountability would be to facilitate as well as to demand the greatest degree of accountability that is realistically possible in order to maximize the degree of accountability achieved in each instance in which perpetrators must be called to account.