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FOREWORD

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Recent decades have seen increasing attention to the issue of accountability for international crimes such as genocide, war crimes, crimes against humanity, and serious violations of human rights. These crimes generally are characterized by their mass scale and, hence, their impact on whole societies. Typically, crimes of this scale feature some form of central organization, often at the state level.

The purposes of seeking accountability for this sort of criminal activity largely include, but also differ somewhat from, the purposes for bringing “ordinary criminals” to account. Deterrence, incapacitation, and retribution may figure prominently among these purposes, while rehabilitation may be less central when addressing crimes of this magnitude. Setting universal minimum humanitarian standards, on the other hand, may be a particularly significant function of accountability in the context of these crimes of mass violence.

A wide variety of mechanisms are available for achieving various aspects of accountability for crimes of mass violence. In recent decades, we have seen the utilization of criminal prosecutions, at both national and international levels; truth commissions of various sorts, both national and, on occasion, with international participation; civil sanctions, including lustration and other administrative measures; as well as victim compensation schemes, some more symbolic, others more concrete. Alongside the use of these accountability mechanisms, we have also witnessed in recent decades grants of amnesty for some or all perpetrators as well as other forms of complete or partial impunity, *de jure* or *de facto*.

The crucial questions to be addressed are: Which of the available mechanisms for accountability should be used in which circumstances? And, how can

the efficacy of those mechanisms be assured? A fundamental question is when criminal prosecution and punishment is to be required. That is, are there any situations in which complete or qualified amnesties or pardons may be issued for crimes of mass violence? Secondly, where criminal prosecutions *are* required, which defendants are to be prosecuted? How many of the often multitudinous perpetrators shall actually be prosecuted, and how shall those defendants be selected from among all of the suspected parties? Thirdly, what is to be the relationship between national accountability or amnesty mechanisms and international criminal jurisdiction? How should defendants be distributed between national and international fora? Under what circumstances and to what extent, if any, should international tribunals such as the International Criminal Tribunals for the former Yugoslavia and Rwanda or a future International Criminal Court defer to or cooperate with national programs of amnesty? Should the answer be different if such programs of amnesty are conducted in conjunction with truth commissions (including where amnesty is conditioned upon cooperation and confession before such a truth commission, as in South Africa)? Should the answer be different where amnesties have been granted in conjunction with programs of civil sanctions? And, finally, what are the minimum standards for reparations to be made to victims of the sorts of crimes in question?

These are the issues that recurrently arise in the legal handling of crimes of mass violence. To date, these issues have been confronted very much on a case by case basis, with substantial borrowing of knowledge between cases, but without any consistent or articulated set of principles or guidelines applied across cases.

Currently, a number of efforts are underway to develop such guidelines for this area. The utility of crafting such guidelines at all, as well as the proper thrust of guidelines, if they are to be crafted, is itself a matter of considerable controversy. A threshold question is whether to “codify compromise.” In practice, the ideal of full accountability, including thoroughgoing criminal prosecutions, is virtually never attained. Some argue that this reality must be acknowledged and forthrightly confronted in guidelines that will chart the best path for attaining the greatest possible degrees and most appropriate forms of accountability in the myriad factual circumstances in which accountability must be sought. That is, in those inevitable situations in which there will unavoidably be failure to achieve the ideal, we should not be left suddenly unruddered and without recognized and legitimate principles to govern policy and optimize outcomes. The domestic analogy here would be to the prosecutorial discretion openly exercised by prosecutors in common law systems. Historically, as prosecutorial discretion regarding charging, plea bargaining, immunity, and the like came to be recognized and publicly acknowledged, fuller guidelines were developed legislatively and within prosecutorial agencies to guide that discretion. The exercise of prosecutorial discretion thus became somewhat less arbitrary in its application and more transparent in its processes. Arguably, a similar process would be valuable in the international context.

There is, however, a potential danger to codifying guidelines for attaining second-best outcomes in an area, such as accountability for crimes of mass violence, in which the fundamental standards of law themselves are not yet fully entrenched, established, and recognized. We may undermine establishment of the rule of law by codifying and legitimizing second-best outcomes that fail to comply with the higher standards to which we aspire. To avoid the erosion of nascent and hard-won standards of accountability, some argue, it would be preferable to maintain “constructive ambiguity” at this time, thereby leaving leeway for compromise in particular contexts without crystallizing compromise as law (or even as “soft law”). Better, in this view, to stake out the “right” position, and to let failures to comply be seen as failures to comply, even while working informally to optimize second-best outcomes in those cases.

The articles in this Symposium address these and other dilemmas in this rapidly developing area of law and policy. The authors thoughtfully consider the broad range of issues involved in accountability for genocide, war crimes, crimes against humanity, and serious violations of human rights. The Symposium thus brings together some of the best thinking on these issues in the hope of advancing theory and, hence, practice in this field.