

# COMING TO TERMS WITH ATROCITIES: A REVIEW OF ACCOUNTABILITY MECHANISMS FOR MASS VIOLATIONS OF HUMAN RIGHTS

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## I

### INTRODUCTION

The field of human psychology has taught the lay world a principle regarding personal emotion that is now taken as a given: To ensure good mental health and stability, it is crucial that individuals emerging from massive abuse and trauma develop appropriate mechanisms to confront and process that past experience, facilitating closure rather than repression. Figuring out which approach or mechanism will be most helpful to the healing process will vary from person to person, and will be determined in part by the background and makeup of the particular individual as well as by the nature of the trauma endured. But, for both victims and perpetrators of past abuse, dealing with the reality and consequences of its occurrence is essential.

In responding to such trauma, groups and nations tend to function similarly to individuals. Societies shattered by the perpetration of atrocities need to adapt or design mechanisms to confront their demons, to reckon with these past abuses. Otherwise, for nations, as for individuals, the past will haunt and infect the present and future in unpredictable ways. The assumption that individuals or groups who have been the victims of hideous atrocities will simply forget about them or expunge their feelings without some form of accounting, some semblance of justice, is to leave in place the seeds of future conflict.

Dealing with the grieving, with accountability and forgiveness, and with the rehabilitation of victims and perpetrators will be a painful and delicate process. It will take time—certainly longer than the time generally allotted for technical tasks like the post-conflict separation and reduction of military forces. The process of coming to terms with past atrocities will, as a rule, far outlast the presence of foreign peacekeepers. But doing nothing in response to war crimes and related atrocities adds to the injury of victims and perpetuates a culture of impunity that can only encourage future abuses. Victims may harbor deep

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resentments that, if not addressed through a process of justice, may ultimately be dealt with through one of vigilante justice and retribution. A public airing and condemnation of these crimes may be the best way to draw a line between times past and present, lest the public perceive the new order as simply more of the same.

Recent years have seen a paradigm shift, which is still underway, in attitudes toward the need for accountability and confrontation with a nation's own painful past. While diplomats and negotiators involved in efforts to curtail violent disputes previously might have dismissed any focus on past atrocities as an obstacle to stability and the resolution of conflict, today, it is increasingly recognized as an integral and unavoidable element of the peace process. As examples, although recent peace accords to conclude civil wars in El Salvador, Bosnia, and, most recently, Guatemala may each have their respective weaknesses regarding accountability, each reflects this paradigm shift by incorporating various mechanisms to deal with the legacy of past violations and recognizing that a durable peace would be unobtainable without them.

The last fifty years have seen the development, in nearly as many countries, of a variety of mechanisms of accountability for mass abuses. The present essay will offer some observations as to the effectiveness of some of these approaches, as well as some modest guidelines for appropriate application.<sup>1</sup>

## II

### CRIMINAL TRIALS

In helping societies deal with a legacy of past mass abuses, the process of criminal accountability can serve several functions. Prosecutions can provide victims with a sense of justice and catharsis—a sense that their grievances have been addressed and can hopefully be put to rest, rather than smoldering in anticipation of the next round of conflict. They provide a public forum for the judicial confirmation of the facts. They can also establish a new dynamic in society, an understanding that aggressors and those who attempt to abuse the rights of others will henceforth be held accountable. Perhaps most importantly for purposes of long-term reconciliation, this approach makes the statement that specific individuals—not entire ethnic or religious or political groups—committed atrocities for which they need to be held accountable. In so doing, it rejects the dangerous culture of collective guilt and retribution that often produces further cycles of resentment and violence.

Legal or political protection from prosecution following the commission of mass crimes only gives confidence to those who would contemplate perpetrating them. It also conveys to victims a very real sense that their

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1. The present essay deals only with mechanisms of accountability. By definition, these are focused on the perpetrators of abuse and their allies. Although not examined in the essay, a comprehensive and wholistic approach to dealing with a legacy of past atrocities should also include a range of victim-focused efforts, such as programs for compensation and rehabilitation, the establishment of memorials, and the organization of appropriate commemorations.

powerlessness and helplessness are genuine. Although a variety of factors may ultimately require limiting prosecution to senior key individuals or certain categories of perpetrators, total impunity, in the form of comprehensive amnesties or the absence of any accountability for past atrocities, is immoral, injurious to victims, and in violation of international legal norms. It can be expected not only to encourage new rounds of mass abuses in the country in question but also to embolden the instigators of crimes against humanity elsewhere. In short, criminal prosecution in some form must remain a threat and a reality.

### III

#### INTERNATIONAL PROSECUTION OF MASS ABUSES

When trials are undertaken, are they better conducted by an international tribunal—like those in Nuremberg and Tokyo or those for the former Yugoslavia and Rwanda—or by the local courts of the country concerned? There are sound policy reasons for each approach.

An international tribunal is better positioned to convey a clear message that the international community will not tolerate such atrocities, hopefully deterring future carnage of that sort both in the country in question and worldwide. It is more likely to be staffed by experts able to apply and interpret evolving international standards in a sometimes murky field of law. It can more readily function—and be perceived as functioning—on a basis of independence and impartiality rather than one of retribution. Relative to the often shattered judicial system of a country emerging from genocide or other mass atrocities, an international tribunal is more likely to have the necessary human and material resources at its disposal.

An international tribunal can also do more than local prosecutions to advance the development and enforcement of international criminal norms. The Nuremberg trials established several key principles that continue to inform international conduct. Among these, of course, are the notions that the human rights of individuals and groups are a matter of international concern, that the international community's interest in preventing or punishing offenses against humanity committed within states qualifies any concept of national sovereignty, that not just states but individuals can be held accountable under international law for their role in genocide and other atrocities, and that "following orders" is no defense to such accountability. More recently, the International Criminal Tribunal for the former Yugoslavia has confirmed the norm that the use of mass rape constitutes a war crime under certain circumstances.

Finally, where the majority of senior planners and perpetrators of these atrocities have left the territory where the crimes were committed or are otherwise inaccessible for apprehension and prosecution by national authorities (as is the case in both Rwanda and Bosnia), an international tribunal stands a greater chance than local courts of obtaining their physical custody and extradition. The corollary to this point, not always apparent in the approach of

the international tribunals for the former Yugoslavia and for Rwanda, is that these international entities, as the only bodies able to do so, should focus their energies more heavily on the investigation and prosecution of the leadership ranks of those responsible for the atrocities in question rather than on the rank and file.

The Yugoslavia and Rwanda tribunals are in several ways an improvement on the Nuremberg model. Their rules of procedure incorporate positive developments over the past fifty years with respect to the rights of criminal defendants under international law. To the extent that Nuremberg was perceived as a prosecution of World War II's losing parties by the victors, the current tribunals are nothing of the sort. The Yugoslavia tribunal, for example, is a truly international exercise, and the countries that supply its judges and prosecutors are not parties to the conflict. In addition, it is committed to the investigation and prosecution of war crimes committed by persons from each side in the war.

The authorities in charge of the Nuremberg and Tokyo trials had complete control of the field. A crucial lesson from the experience of the current international tribunals for Rwanda and especially for the former Yugoslavia is demonstrated by the challenge of enforcement of the tribunals' orders. There may be an international doctrine gradually emerging which holds that, at least in the aftermath of widespread atrocities, justice is a necessary element of any stable peace. If so, this is nothing less than a sea change in international thinking on this question. But sea changes occur gradually, and there is not yet an accompanying doctrinal acceptance of the responsibilities that come with establishment of these international criminal tribunals. States and municipalities cannot expect their courts to enforce criminal law on their own without the enforcement power of the police; the international community must similarly recognize that it cannot create these international criminal tribunals without providing these institutions with assistance and police powers to enforce their orders and decisions. This problem has, of course, been most clearly manifested in the international community's reluctance to assist in the apprehension of those indicted by the tribunals—an issue that undermines the credibility of international resolve and, by October 1996, drove the President of the Yugoslavia tribunal to threaten his own resignation and that of his colleagues unless the situation with respect to apprehension improved by the spring of 1997. Recent months have seen some improvement on this issue; it remains to be seen if this trend will continue.

Determining the appropriate location for an international tribunal warrants careful attention. At the time of the creation of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), location of the seat of the tribunal in the *locus delicti* was plainly not an option. A war was raging in the former Yugoslavia and the crimes in question were still being committed. In this context, the Hague was a reasonable place to put the new tribunal.

Following the 1994 genocide in Rwanda, the physical infrastructure of the

country was in a shambles. The genocidaires had absconded with most that was not nailed down, and gutted much of what was. In examining options for the international tribunal, some in the United Nations also felt that it would be difficult to ensure the safety of tribunal staff in a country still in the early throes of clearing the dead and the rubble and trying to cobble together a new order. Given these considerations of logistics and security, the United Nations chose to place the seat of the Rwanda tribunal in Arusha, Tanzania.

As many of us suggested at the time, this was probably an unfortunate decision. Although the tribunal is intended to establish or confirm principles that should inform behavior worldwide, it was created to “contribute to the process of national reconciliation and to the restoration and maintenance of peace.”<sup>2</sup> This objective highlights the fact that the tribunal ultimately has a primary audience, namely, the people of Rwanda. They, more than the rest of the world, need to see the tribunal at work, to be reminded on a daily basis that the international community is committed to the establishment of justice and accountability for the heinous crimes of 1994.

There is good reason why the post-World War II international prosecution of war criminals took place in Nuremberg and Tokyo, not in the Hague or some other foreign location. The Nuremberg principles would still have been established, but no doubt with a less immediate impact on the ground. For an international tribunal to be maximally effective, victims and perpetrators should be able to feel that its activities are not far removed from them.

The basic principle applies not only to criminal tribunals, but also to other international bodies addressing past abuses. The effectiveness and local impact of the UN Truth Commission for El Salvador was undoubtedly enhanced by its extended physical presence in that country. The Commission’s international staff was located in El Salvador for six of the Commission’s eight months of work, and the three Commissioners were in the country two weeks per month on average.<sup>3</sup> It is axiomatic that the weaker the connection between the international operation and the local population, the easier it will be for its work to be ignored or dismissed as an alien effort irrelevant to concerns in the country.

The charter of the International Criminal Tribunal for Rwanda (“ICTR”) authorizes it to sit outside of Arusha as it deems appropriate; the tribunal would be well advised to exercise that authority and conduct some of its proceedings in Rwanda. Particularly for a country like Rwanda, where a substantial percentage of the population cannot benefit from newspaper or television coverage of the trials, the process of justice should be accessible and visible. In addition, at a time when some Western observers raise concerns over due process in Rwanda’s domestic genocide trials, hearings of the tribunal inside the country would also serve as an important visible model and

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2. UN Security Council Resolution 955 (November 8, 1994)

3. See Thomas Buergenthal, *The United Nations Truth Commission for El Salvador*, 27 VAND. J. TRANSNAT’L L. 498, 499-504 (1994).

standards-setter for the local efforts. At the same time, sitting for tribunal cases inside Rwanda would more readily convey the concept that the international and domestic trials are complementary parts of an integrated, wholistic, and multifaceted approach to justice.

When an international tribunal determines that it cannot hold its sessions in the country where the alleged crimes took place, it is extremely important to ensure maximum access for the people of that country—again, both the victims and the perpetrators—through means other than physical attendance at hearings. Efforts undertaken to broadcast proceedings from the Hague into the former Yugoslavia, and to enable witnesses to participate in some ICTY hearings via video links, are important steps in this direction.

In the case of the Rwanda tribunal, minimal outreach and public relations meant that, particularly for its first couple of years, most Rwandans—the people to whom it was most important that the ICTR communicate its message—received little if any information about what the tribunal was doing. It took far too long to arrange even brief radio transmissions from the trial proceedings in Arusha into Rwanda. This was further exacerbated by the inability to generate international press coverage of the tribunal. In contrast, the press has been something of an ally of the Yugoslavia tribunal. Press coverage has informed the international public about the cases and struggles of the ICTY, has educated the public in a way that contributes to discussion of a permanent international criminal court, and has helped to generate some pressure for international assistance to the tribunal, the last especially with respect to apprehension of indictees. Inside the former Yugoslavia, unfortunately, local media tends to provide distorted information about the ICTY to fit the propaganda slant of ethnic nationalists on each side of the conflict.

This dilemma is certain to repeat itself. International prosecution of atrocities will most often be necessary in precisely those cases in which a country has been devastated by war and/or by the abuses in question. These cases can be expected to be characterized by loss of physical infrastructure, logistical basics, and qualified personnel. Security conditions may still be somewhat questionable. If international tribunals are to be effective, however, more attention needs to be given to both the physical accessibility of proceedings and the dissemination of objective information to the local population.

#### IV

##### THE DOMESTIC COMPONENT

Prosecution of war crimes before domestic courts can also serve some important purposes, distinct from those that underlie international trials. It can enhance the legitimacy and credibility of a fragile new government, demonstrating its determination to hold individuals accountable for their crimes. Because these trials tend to be high profile proceedings that receive

significant attention from the local population and foreign observers, they can provide an important focus for rebuilding the domestic judiciary and criminal justice system, establishing local courts as a credible forum for the redress of grievances in a nonviolent manner. Finally, as noted in 1994 by the U.N. Commission of Experts appointed to investigate the Rwandan genocide, domestic courts can be more sensitive to the nuances of local culture, and resulting decisions “could be of greater and more immediate symbolic force because verdicts would be rendered by courts familiar to the local community.”<sup>4</sup>

In addition, the reality is that not all cases of war crimes will result in the creation of another international judicial entity. Atrocities committed by the Mengistu regime in Ethiopia, for example, are today being handled by a Special Prosecutor’s Office established for this purpose by the new government. Various countries have provided technical and financial assistance to this process, but a separate international body was not deemed necessary.

Finally, even where an international tribunal has been established to prosecute war crimes, an additional factor motivating separate local efforts at justice is the sheer pressure of numbers. For reasons of both practicality and policy, the international tribunals for Rwanda and the former Yugoslavia can be expected to limit their prosecutions to a relatively small number of people. By way of comparison, the Nuremberg operation had vastly more substantial resources than its two contemporary progeny. At peak staffing in 1947, for example, the Nuremberg proceedings employed the services of nearly 900 allied personnel and about an equal number of Germans.<sup>5</sup> The authorities at Nuremberg had virtually complete control of the field of operations and sources of evidence, and the prosecution team had the benefit of paper trails not matched in the Yugoslav and Rwandan cases. Even with these advantages, the Nuremberg trials ultimately involved the prosecution of only some 200 defendants, grouped into thirteen cases and lasting four years. It is doubtful that the two current international tribunals *combined* will ultimately prosecute this many cases; even half the number will be a major success.

This means that, even if the international bodies achieve their maximum effectiveness, thousands of additional cases of war crimes and related atrocities will be left untouched. In the case of the former Yugoslavia, the cases of thousands of war criminals—Bosnian Serbs, Croats, and Muslims—and tens of thousands of their victims will not be addressed by the international tribunal, and reconciliation requires that Bosnian society come to terms in some fashion with this legacy and these people. Seven cantonal prosecution offices in the Federation of Bosnia and Herzegovina are actively pursuing war crimes cases, primarily involving abuses perpetrated against Muslims. The fact is that

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4. Preliminary Report of the Independent Commission of Experts Established in Accordance with Security Council Resolution 935 (1994) (29 September 1994), p. 31.

5. With a total of 434 people (including secondees and interns), the Yugoslavia tribunal has less than a quarter the number of staff. Bulletin of the International Criminal Tribunal for the former Yugoslavia, No. 18 (1997).

atrocities were committed by members of each ethnic faction, and Bosnian Serb and Croat authorities each have their war crimes cases as well. My own recent discussions with Bosnian authorities from each of the three ethnic groups indicate that they collectively claim at least 25,000 war crimes cases and regard some 5,000-8,000 of these as appropriate for prosecution. This dimension of the problem of war crimes in Bosnia has received surprisingly little attention in the Western policy community, particularly considering its potential impact. But it is a reality that Bosnia needs to deal with whether by prosecution or otherwise.

## V

### MANAGING THE NUMBERS

Where prosecutions are undertaken, how widely should the net be cast? There is a growing consensus in international law that, at least for the most heinous violations of human rights and international humanitarian law, a sweeping amnesty is impermissible.<sup>6</sup> International law does not, however, demand the prosecution of every individual implicated in the atrocities. A symbolic or representative number of prosecutions of those most culpable may satisfy international obligations, especially where an overly extensive trial program will threaten the stability of the country. This approach has been adopted, for example, in Argentina, Malawi, and in some of the countries of Central and Eastern Europe in dealing with the legacy of massive human rights abuses by their ousted regimes.

In several cases ranging from Nuremberg to Ethiopia, given the large number of potential defendants, an effort has been made to distinguish three categories of culpability, and design different approaches for each. Roughly, these classifications break down into: (1) the leaders who gave the orders to commit war crimes and those who actually carried out the worst offenses (inevitably the smallest category numerically); (2) those who perpetrated abuses not rising to the first category; and (3) those whose offenses were minimal. The severity of treatment then follows accordingly. In most cases, given the huge pool of potential defendants and the limited capacity of national or international prosecution efforts to handle them, actual trials may be limited to those in categories (1) and part of (2). The leaders of atrocities of course need to be held accountable for prosecution to provide a comprehensive sense of justice. Reunified Germany, for example, experienced a certain discomfort at the thought that only young border guards who actually followed orders and shot East Germans trying to flee to the West would be prosecuted. There was a recognition that those who gave the orders and created the system needed to be held accountable as well.

It will usually be difficult to prosecute everyone in category (2). A policy of criminal accountability that too readily ignores those in this second tier of

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6. See, e.g., Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537-615 (1991).



culpability, however, would imply that “simply killing” during a genocide, for example, will not put one at risk of winding up in the dock, a message that should certainly not be conveyed. Finally, in most cases of mass abuse, those whose offenses were minimal should probably be handled through a non-criminal mechanism, some of which are discussed below.

The Rwandan case demonstrates the need for pragmatism to temper an absolutist approach to prosecution. In one of the most horrific genocidal massacres in recent memory, up to one million Rwandan Tutsis and moderate Hutus were brutally slaughtered in just fourteen weeks in 1994. Throughout their first year in office, many senior members of the new government insisted that *every person* who participated in the atrocities should be prosecuted and punished. This approach, however, would put more than 100,000 Rwandans on trial, a situation that would be wholly unmanageable and certainly destabilizing. To compound the problem, the criminal justice system of Rwanda was decimated during the genocide, with some ninety-five percent of the country’s lawyers and judges either killed or currently in exile or prison. By mid-1997, some 115,000 Rwandans were detained in prisons built to house a fraction of that number on allegations of involvement in the genocide, while the national Ministry of Justice still had just seven attorneys on its staff. Justice for war crimes in Rwanda requires a creative approach that takes into account the staggeringly large number of potential cases and the overwhelmingly small number of available personnel to process them.

After extensive deliberation and input from a number of experts in various countries, the Rwandan government enacted legislation in 1996 which attempts to respond to this challenge.<sup>7</sup> The law creates four levels of culpability for the genocide: (1) the planners and leaders of the genocide, those in positions of authority who fostered these crimes, particularly notorious killers and sexual torturers; (2) others who killed; (3) those who committed other crimes against persons; and (4) those who committed offenses against property. All those in the first category are subject to full prosecution and punishment. Provision of a series of incentives for people in categories (2) and (3)—by far the largest categories—to come forward voluntarily and confess will hopefully shift some of the burden of preparing cases away from prosecutors and investigators, rendering the number of cases remaining for prosecution slightly more manageable. Specifically, those in these two groups who participate in the “confession and guilty plea procedure,” which includes a full confession of their crimes, including information on accomplices or co-conspirators, will benefit from an expedited process and a significantly reduced schedule of penalties. Notably, Rwanda has also introduced an intriguing innovation. Unlike South Africa’s amnesty program, in which perpetrators need only confess to their crimes (and some have done so accompanied by a vigorous defense and

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7. See William A. Schabas, *Justice, Democracy, and Impunity in Post-genocide Rwanda: Searching for Solutions to Impossible Problems*, 7 CRIM. L.F. 523 (1996) (describing the development and substance of the Organic Law on the Organization of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes against Humanity).

justification of their actions), those Rwandans who confess to their role in the 1994 genocide in exchange for lenient treatment need to do one more thing: They need to formally apologize to their victims. In managing overwhelming numbers, the Rwandan program assumes that victims will more easily accept leniency for those who committed atrocities if the latter express some remorse. It assumes that, in this way, the process of criminal accountability may be more effective in facilitating national reconciliation. Finally, those in category (4) will not be subject to any criminal penalties.

## VI

### ENSURING FAIRNESS AND TRANSPARENCY IN DOMESTIC TRIALS

The mere holding of trials will not, by itself, automatically achieve a sense of justice or process of reconciliation; in addition to supplementing trials with some of the other mechanisms discussed below, these twin goals need to be consciously incorporated into the strategy of prosecution. Adherence to universal norms regarding fair trials is an essential element in this equation. The Bosnian case is illustrative.

In a situation like Bosnia, however, one confronts a still deeply divided society, both politically and structurally. Jurisdiction over domestic prosecution rests in the authorities of two ethnically dominated substate entities, that is, the Federation of Bosnia and Herzegovina and Republika Srpska. Should each side hold its own people accountable for wartime atrocities committed by them? This would plainly be preferable to cross-ethnic trials. If authorities in Republika Srpska, for example, brought charges in a public judicial proceeding against those Bosnian Serbs who had tortured, raped, or murdered their Muslim and Croat neighbors, it would be perceived as a collective *mea culpa* of sorts, a potent acknowledgment and repudiation of such sordid crime committed by one's compatriots in the name of ethnic nationalism.

Unfortunately, too many players in Bosnia today view trials for war crimes not as a method of advancing accountability and reconciliation, but rather as one more means of continuing the conflict. On one side of the ethnic divide, the Bosniak/Croat-dominated Federation has emphasized the prosecution of Serbs for wartime atrocities; in the trials in Republika Srpska, the defendants have been Bosniaks. These trials can still serve an important and constructive societal function, but need some course corrections to do so.

In Republika Srpska, defendants in one prominent case sought to be represented by counsel of their own choosing from the Federation. Despite significant pressure from various international agencies in Bosnia (in particular by the Office of the High Representative<sup>8</sup>), however, Srpska authorities refused to accredit these Federation defense attorneys, pointing to a provision of

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8. The Office of the High Representative is the primary institution responsible for implementing the civilian aspects of the Dayton accords.

Republika Srpska law which only permits lawyers from the Republika to provide representation.<sup>9</sup> At the end of April, the seven Bosniak defendants were convicted by the court in the town of Zvornik at the end of a two-day trial.

On the other side of the “inter-entity boundary line,” Serb defendants on trial for war crimes in Federation courts have sought to call defense witnesses from Republika Srpska. Fearing for their security if they cross the line, these witnesses have been unwilling to travel to Federation territory to participate in the trials. Although legally permitted to sit outside their regular courtroom where appropriate in the interests of justice, Federation judges have similarly refused to travel to Republika Srpska to hear the testimony of these defense witnesses. Efforts by the Office of the High Representative to broker a solution to this stalemate have failed thus far.

In both instances, trials conducted under such circumstances are hardly ideal vehicles for achieving a sense of justice, healing or confidence-building between the parties. Instead, they can have the opposite effect, contributing to the tension and suspicion that already exist.

Given the extent to which such war crimes trials will automatically be suspect on each side of the conflict as political exercises, prosecution authorities are well advised to conduct prosecutions that are public and accessible to all and that uphold international fair trial standards—including the right to counsel and the introduction and examination of evidence and witnesses. The Bosnian domestic trials, *if* they are conducted in accordance with such standards, will necessarily facilitate communication and participation across the ethnic divide. The trials could expose people in each community to the fairness of the criminal justice process on the other side, including its respect for the defense rights of ethnic minorities. They could also expose each ethnic community to the facts of wartime abuses suffered by the other.

Prosecution and judicial authorities in Bosnia’s Muslim, Croat, and Serb communities recognize the need to move in this direction. The credibility and constructive impact of their respective efforts in the war crimes area will be greatly enhanced by measures to more aggressively ensure the rights of the accused and to expand opportunities for victims on each side to have accurate information about, and participate in, trials on the other. This issue was addressed at a July 1997 *Roundtable on Justice and Reconciliation in Bosnia and Herzegovina*, which brought together for the first time a group of twenty-two senior officials from each of the three Bosnian ethnic communities responsible for dealing with war crimes to discuss collectively how the legacy of war crimes will be addressed in their divided country. Among the concluding recommendations of the participants were the following:

The right to counsel of one’s choosing is absolute and should be guaranteed in all cases. This is particularly important to ensure the credibility of war crimes

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9. The jurisprudence of the European Court and Commission of Human Rights, which should inform practice in Bosnia and Herzegovina, prohibits such limitations on choice of counsel.

prosecutions. In keeping with the jurisprudence of the European Court of Human Rights, accreditation of defense counsel should not be subject to restrictions based on ethnicity, residence, or citizenship. If an administrative procedure is not available to accredit counsel, Republika Srpska law on defense counsel should be amended accordingly.

... A feeling of insecurity has precluded the participation of defense witnesses from one entity of Bosnia and Herzegovina in war crimes trials undertaken by the other entity. To ensure the transparency, credibility and fairness of the criminal justice process, it is imperative to put in place mechanisms to facilitate such participation. Among the options discussed were the provision of security escorts for witnesses, travel of judges from one entity to the other to hear testimony, and if necessary (as has been done by ICTY), the provision of testimony via videoconference.<sup>10</sup>

Even where war crimes trials are characterized by fairness, transparency and public access, any positive impact on public sentiment can still be undermined by a politicized, non-objective local press. In Bosnia, for example, the media constitutes an obstacle to the process of justice as a means to reconciliation. Local media should provide objective information regarding wartime atrocities and their prosecution on all sides, thereby providing the kind of exposure and public education regarding the trial process and the suffering inflicted on others referred to above. Instead, the media dominated by each ethnic group routinely and rapidly lionizes every member of that group accused of war crimes, automatically portraying them as heroes and martyrs regardless of the facts available or the fairness of the trial process. In such cases, it is vital that a program of media training on the process of justice be undertaken, so that the media can provide responsible coverage and serve a positive function in the process of justice and reconciliation.<sup>11</sup>

## VII

### NON-CRIMINAL SANCTIONS

In virtually all cases of mass abuses, accountability via criminal trials must necessarily be selective. Mass atrocities can only be perpetrated by a large number of people. Prosecution of every single participant in the planning, ordering, or implementation of the atrocities in question—not to mention all those who collaborated with them—would be politically destabilizing, socially

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10. The Roundtable, convened from July 2-4 in Strasbourg, was jointly sponsored by the United States Institute of Peace, the OSCE Office for Democratic Institutions and Human Rights, and the Secretary-General of the Council of Europe. The Bosnian participants included the Minister of Justice of Republika Srpska, judges of the Supreme Courts of the Federation of Bosnia and Herzegovina and of Republika Srpska, chief prosecutors, cantonal ministers of interior, and leaders of the three respective war crimes commissions. Other participants included senior officials from the International Criminal Tribunal for the Former Yugoslavia, the Office of the High Representative and the International Police Task Force, experts with relevant experience from other countries that have grappled with this difficult question (*e.g.*, a member of South Africa's Truth and Reconciliation Commission), and those engaged in legal institution-building in Bosnia. For further information on the Strasbourg meeting and its conclusions, see UNITED STATES INST. OF PEACE, SPECIAL REPORT: JUSTICE AND RECONCILIATION IN BOSNIA AND HERZEGOVINA (forthcoming 1997).

11. At the Strasbourg roundtable referred to above, some Bosnian participants went further and suggested that regulation of, or pressure on, those who control local media may be required to supplement such training.

divisive, and logistically and economically untenable.

As a consequence, the approach to accountability that is often applied to the largest number of people in societies dealing with the aftermath of war crimes, repression, or other mass abuses is the use of a variety of non-criminal sanctions. Because of positions held in the former regime, or because of nominal implication or a more significant role in the machinery of abuse, individuals may be excluded from certain elected or appointed offices. They may be excluded from positions outside the government sector from which they might be able to have an influence on society; depending on the country, this has ranged from senior posts in the banking industry to the press to jobs as schoolteachers. Such exclusions are often temporary, allowing a “cooling off” period to rebuild confidence in these institutions before allowing anyone from the old order to participate anew.

Examples of the use of non-criminal sanctions are numerous. In the Czech Republic, Lithuania, and post-communist Germany, administrative purges have temporarily removed those affiliated with past abuses from certain positions in the public sector, with a particular emphasis on those who are alleged to have collaborated with the former secret police. In post-war France, the process of “epuration” affected tens of thousands of people. Nearly 1,000 politicians, 6,000 teachers, and 500 diplomats were vetted for possible collaboration with the Vichy regime. Such measures were not limited to positions in government, but were extended to the private sector as well. Separate purge committees were set up for writers, composers, artists, the press, and entertainers, among others. Italian authorities dismissed some 1,600 government employees following its own “epuration” process. The Greek government’s handling of accountability for abuses committed during the 1967-74 rule by a military junta, separate from the prosecution of more than 400 former officials or members of the military, involved the administrative dismissal of as many as 100,000 people.

A little-noticed and little-enforced provision of the Dayton peace accords includes a confidence-building measure that obligates the parties to promptly undertake “the prosecution, dismissal or transfer, as appropriate of persons in military, paramilitary, and police forces, and other public servants, responsible for serious violations of the basic rights of persons belonging to ethnic or minority groups.”<sup>12</sup> It is significant that this provision for accountability extends to a much broader class of individuals than simply those indicted for the commission of war crimes. This recognizes a simple reality: Even though it is not necessary or possible to prosecute everyone who committed abuses, how secure will a community member feel if the local police include the very criminals who last year tortured his son or gang-raped his wife? What confidence can returning refugees be expected to have in the new order if the current mayor personally helped torch their homes in the campaign of ethnic cleansing?

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12. General Framework Agreement for Peace in Bosnia and Herzegovina, Dec. 14, 1995, Annex 7, art. I, para. 3(e), *reprinted in* 35 I.L.M. 75, 137.

Although the accountability mechanism of non-criminal sanctions may be the most broadly applied, it has received little scholarly analysis and evaluation. For example, while much foreign attention has focused on the international truth commission in El Salvador, less has been accorded to the quieter body that established accountability for human rights abuses in that country. The "Ad Hoc Commission" established under the peace accord and composed of three Salvadoran civilians, reviewed the human rights record of military officers, and, in a confidential report to the President and the U.N. Secretary-General, recommended the removal or demotion of more than one hundred of them—including the Minister and Deputy Minister of Defense—on the basis of their involvement in past abuses. Implementation of these recommendations meant a greater degree of accountability than many in El Salvador had thought possible.

It is certain that non-criminal sanctions will continue to be employed. If properly administered, they can serve many important functions. They obviously make much more plausible the processing of large numbers of cases. They can provide society with a sense that justice and accountability have been established, and can generate greater confidence in the credibility in the institutions and personnel of the new order. They give victims the knowledge that those responsible for their suffering will not be permitted to remain in their positions of influence.

Arguably, however, non-criminal sanctions against those implicated in past abuses have rarely been applied fairly. By their nature, administrative purges tend to be large-scale and do not generally afford those affected anywhere near the level of due process protections provided to defendants in criminal proceedings. Because of their less formal and less public method, purge processes are also more easily subject to manipulation to serve inappropriate political purposes of the new regime to ensure its consolidation of power. Finally, if extended too broadly, purges can have the destabilizing effect of creating a large, ostracized, and unemployed element within society.

In his final report on the question of the impunity of perpetrators of human-rights violations, Louis Joinet has proposed that in societies grappling with a history of past abuses, officials "with important decision-making power and therefore an obligation of loyalty to the process in progress"—particularly in the army, the police, and the judiciary—may be vetted and ultimately suspended, transferred, demoted, offered early retirement, or dismissed.<sup>13</sup> Although a start, the Joinet principles leave numerous questions with respect to the proper use and limitation of such measures.<sup>14</sup>

The future International Criminal Court ("ICC") will need to deal with the

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13. *The Administration of Justice and the Human Rights of Detainees: Question of the impunity of perpetrators of violations of human rights (civil and political rights)*: final report prepared by Mr. L. Joinet pursuant to Subcommission resolution 1995/35, U.N. Doc. E/CN.4/Sub. 2/1996/18 (June 29, 1996), Principles 48-50.

14. The United States Institute of Peace plans to undertake a comprehensive comparative analysis, beginning in 1998, of the use of non-criminal sanctions in transitional societies.

application of non-criminal sanctions in the context of the ICC's principle of complementarity. If a society reckons with its past demons through a non-prosecutorial accountability mechanism, such as administrative vetting and civil sanctions, should that preclude the international court from investigating and prosecuting the same cases? Administrative penalties, after all, are not the same as impunity. Or should this be precisely the sort of situation that might trigger ICC involvement, given that national authorities may have settled for administrative measures because criminal prosecution was politically impossible? A framework needs to be developed to assist that assessment, because the issue will surely confront the ICC.

## VIII

### HISTORICAL ACCOUNTABILITY: THE USE OF TRUTH COMMISSIONS

Over the past decade, several countries attempting to deal with the aftermath of massive repression have established commissions of inquiry or "truth commissions," generally comprised of eminent citizens charged with investigating the violation of human rights under the old regime (or during the civil war, as the case may be) and producing an official history of those abuses. In many of these countries, much of what had occurred was already generally known; what truth commissions can add is a meaningful *acknowledgment* of past abuses by an official body perceived domestically and internationally as legitimate and impartial. Such an entity cannot substitute for prosecutions—and rarely affords those implicated in their inquiry the due process protections to which they are entitled in a judicial proceeding—but it can serve many of the same purposes, to the extent that it (1) provides the mandate and authority for an official investigation of past abuses; (2) permits a cathartic public airing of the evil and pain that has been inflicted, resulting in an official record of the truth; (3) provides a forum for victims and their relatives to tell their story, have it made part of the official record, and thereby provide a degree of societal acknowledgment of their loss; and (4) in some cases, establishes a formal basis for subsequent compensation of victims<sup>15</sup> and/or punishment of perpetrators. An increasingly standard feature of the truth commission mandate has been to analyze and report not only on individual abuses, but also on the broader context in which they occurred and the structural elements of the government, security forces, and society that made this pattern of violations possible—a context not generally obtainable in a criminal trial. Based on this assessment, the commission is then charged with proposing specific steps that ought to be taken to deal with past abuses and to preclude their repetition.

An advantage of the truth commission approach is that it can be organized and can visibly begin functioning relatively quickly. To the extent that the

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15. This approach was utilized, for example, in Chile, where one's identification in the report of the Commission on Truth and Reconciliation was automatic proof of one's eligibility for the compensation program. This prevented victims from having to go through a new and potentially painful process of proving their victimization to administrators of this assistance.

international criminal tribunals for the former Yugoslavia and Rwanda serve as guides, it can take years for trials before such tribunals to begin. It will similarly take time to rebuild a weakened domestic criminal justice system to the point where it can undertake credible trials for war crimes or similar mass abuses. A truth commission can more promptly begin holding hearings and collecting testimony and documentation, which can then be turned over for use in prosecutions. In this sense, a commission of inquiry can also “buy time,” relieving some of the immediate pressure for action while the courts and prosecutions are being organized.

Related to the time within which a truth commission can be organized is the amount of time allotted for its task. A truth commission should facilitate a degree of national consensus and closure regarding the facts of a troubled history. It should provide the basis for practical and symbolic measures to deal with past abuses as well as to prevent their recurrence. To be an effective catalyst for these key next steps, it is important that a truth commission’s mandate be of limited duration. In Uganda, by way of illustration, the Commission of Inquiry into Violations of Human Rights was created in mid-1986 to undertake the formidable task of examining the abuses committed under the governments of Milton Obote and Idi Amin from 1962-86. Supreme Court Justice Arthur Oder chaired the six-member body, the public hearings of which were accompanied by extensive television, radio, and newspaper coverage. Although Ugandans and foreign observers hoped for a significant contribution to the process of consensus-building and closure, the Commission’s effectiveness over time was arguably reduced in inverse relation to its longevity. Rather than completing its work in a timely manner and stimulating concrete corrective measures in response to past abuses, the Commission of Inquiry dragged on for nearly a decade (partly owing to funding shortages, despite infusions from various foreign governments and foundations). People lost confidence or lost interest in the Commission’s potential as a mechanism for accountability and change. The report of the Commission of Inquiry was only completed at the end of 1994. Most copies of the report remain in warehouses in Uganda.<sup>16</sup>

On the other end of the spectrum, with respect to timing and truth commissions, a mandate must be realistic in allowing a commission to properly fulfill its mission. The recently established Clarification Commission in Guatemala, provided for under the 1996 peace accords, has the daunting task of examining the “human rights violations and incidents of violence” committed over a thirty-six-year period,<sup>17</sup> during a civil war, which left up to 150,000 dead or disappeared and more than one million driven from their homes.<sup>18</sup> It is

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16. This information is based on interviews conducted in Uganda by Priscilla Hayner in late 1996.

17. See Agreement on the Establishment of the Commission for the Historical Clarification of Human Rights Violations and Incidents of Violence that have Caused Suffering to the Guatemalan Population (June 23, 1994) [hereinafter Guatemala Agreement].

18. See Larry Rohter, *Guatemalans Formally End 36-Year Civil War*, Central America’s Longest and Deadliest, N.Y. TIMES, Dec. 30, 1996, at A8.



expected to produce a report of “objective information about what transpired during this period [including] all factors, both internal and external” and recommend specific “measures to preserve the memory of the victims, to foster an outlook of mutual respect and observance of human rights, and to strengthen the democratic process.”<sup>19</sup> The Commission is granted a mere six months to accomplish this,<sup>20</sup> hardly a realistic timeframe if it is to take its task seriously. The life of the commission may be extended up to an additional six months,<sup>21</sup> an extension that will unquestionably be necessary.

A common misperception is that the use of truth commissions and the holding of trials are mutually exclusive. This is not necessarily the case. The first truth commission of note, established in Argentina in 1983, produced significant amounts of information, which was then utilized by the authorities in prosecuting members of the military junta that had ruled the country. The two processes complemented one another.

South Africa has introduced a major innovation in its truth commission. In stark contrast to the blanket amnesties adopted in various Latin American countries emerging from periods of repression, amnesty is provided on an individual basis in South Africa for abuses committed under apartheid. The price of such amnesty is that individuals must apply and provide full details of their crimes to the Truth and Reconciliation Commission<sup>22</sup>—a powerful incentive to come forward and assist the Commission in its work. Still, South Africa has not completely opted for truth-telling and amnesty instead of prosecution. Arguably, the only reason that the Truth and Reconciliation Commission has been as effective as it has been in eliciting thousands of confessions of apartheid-era crimes is because the threat of prosecution remains real.<sup>23</sup> Any individual who did not apply for amnesty and submit a confession by the designated deadline is now at far greater risk of prosecution, given the extensive amount of inculpatory evidence obtained by authorities through the confessions of others. The degree to which criminal trials will expand following the conclusion of the Commission’s amnesty application review process remains to be seen.

A powerful example of the utility of truth commissions in establishing a societal consensus on the history of past abuses, and of their ability to co-exist with and complement criminal trials, can be found today in Bosnia and Herzegovina. Three separate war crimes commissions exist, dominated respectively by Bosniak, Serb, and Croat members and interests. Each has served some of the functions of a truth commission, insofar as it has provided a

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19. *Guatemala Agreement*, *supra* note 17.

20. *See id.*

21. *See id.*

22. *See* Promotion of National Unity and Reconciliation Act, Act 34 of 1995 (July 26, 1995), Chapter 4.

23. By late August 1997, approximately 7,000 amnesty applications had been submitted. Of those applications that had been processed, only 3% were granted amnesty. *See Statement by Dr. Alex Boraine on Winding Up of Commission*, Truth and Reconciliation Commission press release, Aug. 20, 1997.

cathartic opportunity for victims from its respective ethnic community to come forward and tell their stories, ensuring that the suffering they endured and atrocities committed against their friends and relatives are formally memorialized. It is the intention of each of these commissions that its work will contribute to the prosecution of war crimes. At the July 1997 roundtable referred to earlier, leaders of the three commissions acknowledged, however, that they are in the process of creating three separate truths, three conflicting versions of history, the dissemination and perpetuation of which will facilitate a hardening of the conflict between their ethnic communities, rather than reconciliation. If the commissions can find ways to work together, with each side being exposed to the abuses committed against the other two, verifying and acknowledging the victimization of their neighbors and producing one consensus on the atrocities suffered on all sides during the war, the process can be an important component in realizing the goal of achieving accounting and justice. The participants (including local and international prosecutors) declared the current situation unacceptable and called for the creation of one joint Bosnia-wide truth commission to achieve this historical consensus.<sup>24</sup>

It bears noting that the use of truth commissions is still a relatively new phenomenon.<sup>25</sup> Although some research and analysis has been done with respect to this mechanism for dealing with past abuses, many of the assumptions made about the effects and value of truth commissions, including those relied upon in the present essay, are based to some degree on instinct and anecdotal evidence, primarily from members and staff of the commissions and those who testified before them. In order to fully understand the implications of truth commissions, additional research and the development of more reliable empirical evidence will be necessary. What were the effects of the truth commission on the much larger number of people in the countries in question—whether victims, perpetrators, or other members of society—who chose not to participate in the commission's investigations? What is the long-term impact on accountability and reconciliation where the truth-telling process was accompanied by a minimal program of criminal accountability? Further research and the passage of time will provide for more reliable evaluation of the value of truth commissions among the panoply of accountability mechanisms.

## IX

### THE RELATIONSHIP BETWEEN INTERNATIONAL AND NATIONAL EFFORTS

For every country emerging from the horror of genocide, war crimes, crimes against humanity, or other massive abuses of human rights, achieving justice requires a determination of the proper balance between domestic and

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24. By late 1997, a large number of key government, religious, and civic leaders had endorsed the proposed establishment of the joint commission.

25. Argentina's National Commission on Missing Persons, arguably the first truth commission of note, was established in late 1983.

international treatment of the problem. That balance point shifts from case to case owing to a variety of factors. Criteria need to be developed to evaluate objectively the availability and effectiveness of domestic procedures in each case, and to decide where the international community should intervene in a formal, institutionalized manner and where it would be wiser to let local institutions and society grapple on their own with the legacy of past abuses.

The charters of the two current international tribunals recognize the role of domestic accountability mechanisms, providing for concurrent jurisdiction with national courts over the crimes in question, although each international tribunal can assert its primacy over the domestic judicial process and require the national courts to defer to it whenever appropriate.<sup>26</sup> The draft statute for the permanent international criminal court grants greater deference to the domestic component, declaring that the international body is to be “complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective.”<sup>27</sup> This concept of “complementarity” is one of the more nettling problems facing those designing this permanent institution. As the present essay suggests, however, the basic tone and balance implied are correct.

There are obviously times when an international institutional response is necessary, either as a complement or as an alternative to a country’s domestic reckoning with its own past abuses and atrocities. El Salvador, Bosnia, and Rwanda arguably each fit this category. Unfortunately, however, this has resulted in an almost reflexive inclination in some circles to internationalize the accountability solution. This automatic preference for international responses should be resisted.

#### A. The Need for Better Interaction Between Those Involved in Parallel Processes of Prosecution

The international community and the institutions for accountability that it creates too often forget this point concerning complementary roles and adopt a somewhat condescending and dismissive attitude toward national efforts at achieving justice. This was particularly evident, for instance, in the case of the International Criminal Tribunal for Rwanda. It is, of course, essential that an international tribunal maintain an arm’s-length relationship with local authorities, maintaining both the reality and appearance of neutrality and independence. During its first two years, however, the tribunal exceeded that

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26. See Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, art. 9, *reprinted in* 32 I.L.M. 1159 (1993); Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December, art. 8, *reprinted in* 33 I.L.M. 1600 (1994) 1994 [hereinafter Statute of the International Criminal Tribunal for Rwanda].

27. *Report of the International Law Commission on the Work of its Forty-Sixth Session*, U.N. GAOR, 49th Sess., Supp. No. 10, at 44, U.N. Doc. A/49/10 (1994).

standard, with staff at times barred from having *any* contact with Rwandan authorities, including victims whose interests the tribunal should serve, those who were eager to see the tribunal and local prosecutions effectively complement one another, and those national officials who possessed information that would have been valuable to the tribunal, such as intelligence information regarding the whereabouts and movements in various countries of several senior leaders of the genocide. The result was an aggravation of tension and mutual suspicion between Rwandan authorities and the tribunal. In addition, tribunal staff did not make contact with non-governmental organizations of genocide survivors in Rwanda, which were valuable sources of information and evidence and which comprised an important channel for communicating information about the tribunal. At times during the period from 1995 to 1997, it was almost as though a nation still reeling and traumatized by a horrific genocide was completely irrelevant to tribunal officials—this despite the fact that the Security Council created the tribunal because of “the particular circumstances of Rwanda,” in order to “contribute to the process of national reconciliation and to the restoration and maintenance of peace” in the country.<sup>28</sup> Establishing an appropriate balance in the relationship with Rwandan authorities and Rwandan citizens was assigned too low a priority for too long. Fortunately, recent months have seen some important course corrections and a notable improvement in this relationship.

Both of the current experiments in international prosecution demonstrate that improved lines of communication between international tribunals and local prosecution officials are essential. In the case of the Yugoslavia tribunal, as of the Summer of 1997, confusion regarding the division of labor and authority between the two remains. At the July 1997 roundtable, which included both Bosnia officials responsible for war crimes prosecutions and senior officials of the ICTY, participants confirmed this ongoing uncertainty regarding such matters as the “rules of the road,” which regulate local arrests and criminal proceedings; they were unanimous in identifying the need for regularized communication between local prosecutors and the tribunal.

There are several reasons to assign a higher priority to effective interaction between an international tribunal and the domestic authorities and population of the country in question. First, the latter constitute the principal target “audience” for the tribunal’s work. Victims and perpetrators of war crimes alike have to be able to see both that the international community will not tolerate genocidal atrocities, and that all accused will be treated fairly and objectively. Second, it must be recognized that one of the first casualties (if not causes) of widescale abuses is the ineffectiveness of local institutions of accountability. In keeping with the medical imperative to “do no harm,” international responses to these abuses need to be structured so as not to further undermine their credibility by usurping their authority and dismissing the vital role to be played by local institutions of justice. Third, the

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28. Statute of the International Criminal Tribunal for Rwanda, *supra* note 26.

international tribunal should serve as a reasonably accessible model of judicial and prosecutorial professionalism and standards of criminal procedure for the local system of justice. To do so, it needs to be less resistant, in fact more consciously proactive, in its interaction with domestic justice officials than has tended to be the case in the past few years. The ultimate goal must be to make the local system sufficiently robust so as to help prevent the occurrence of future atrocities.

Consideration should also be given to increased contact between the judges and staff of international tribunals and their local counterparts on matters unrelated to the coordination of their respective war crimes work. Neutrality does not require being continuously cocooned inside the tribunal. In fact, such an approach arguably undermines support. If, as should be the case, international tribunals are staffed by highly qualified, seasoned professionals with a commitment to justice and a knowledge of their own legal systems, then they can help reconstruct the system of justice in their host country through a variety of forms of interaction, such as participation in discussions and exchanges on due process and fair trial standards, lectures at local law schools or judicial training academies, or interaction with the general public. This could be accomplished without taking their time away from their primary mission and without compromising the tribunal's neutrality. To the contrary, if done well, actively engaging with the public will be a useful tool in promoting awareness of and support for the tribunal's work.

#### B. A Framework for Determining When International or National Mechanisms Are Called For

When widescale abuse of human rights is occurring, local mechanisms of accountability are not generally available. The independence of the judiciary and the role of police and prosecutors in ensuring justice tend to be severely compromised and eroded by the time these atrocities begin. To the extent that they do still remain viable and attempt to deal with the abuses, their personnel are imperiled and may become the object of such abuses themselves. During this phase, therefore, it is incumbent upon the international community to take on the task of accountability for the abuses in question.

To prevent the continuation of mass abuses, the response must be prompt, a quality that has not characterized recent efforts at international criminal accountability. Delays in funding, staffing, and organization of the two international tribunals for the former Yugoslavia and Rwanda have undercut their impact to date. It took a year and a half for the Yugoslavia tribunal to issue its first indictment<sup>29</sup>; in the Rwandan case, while the architects of genocide moved about in various countries with relative impunity, the international tribunal did not manage to open its first trial until some two and one-half years

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29. The tribunal was established by the U.N. Security Council, in Resolution 827, on May 25, 1993. It issued its first indictment, against Dragan Nikolic, on November 8, 1994.

after the genocide.<sup>30</sup>

This argues strongly in favor of creating a permanent international criminal court, which would presumably not be hampered by the kind of start-up delays that have accompanied ad hoc tribunals. A standing ICC would be able to initiate an investigation upon the first evidence of war crimes, genocide or crimes against humanity, issue indictments promptly, and serve as a threat and deterrent to those contemplating the perpetration of these atrocities by making it clear from the outset that they would be held internationally accountable.

Once the core crimes in question have already occurred and ceased, any number of unique circumstances may affect the handling of accountability in the particular case. As a general matter, however, the following prioritization may be useful in determining the appropriate division of labor between international and domestic players.

In the best case scenario, the domestic system of the country involved would be able to undertake a program of accountability fairly and expeditiously on its own. In practical terms, this is essentially a theoretical case. If the national institutions of justice were actually functioning properly and upholding basic rights and the rule of law, the atrocities in question would not likely have occurred; these institutions will hardly be capable of moving rapidly into action to deal with atrocities immediately upon their cessation. Where they do, there will be legitimate concerns regarding their independence and objectivity as well as the actual and perceived fairness of any trials that ensue. In virtually every country emerging from a period of massive abuses, the personnel, facilities, and culture of the legal system will have to be put on the right track (again or for the first time) through a multi-year process. In the rare instance where the domestic system does undertake the task on its own, it is vital that the international community assume an active monitoring role, both to ensure the fairness and credibility of the process as well as to reinforce the notion that even where the process is wholly internal, the international community has a strong interest in accountability for mass abuses.

In most cases, therefore, the best scenario would be for the international community to provide appropriate assistance to enable a society emerging from mass abuse to deal with the issues of justice and accountability itself. In every case, the ultimate goal is to establish the institutions, structures, and culture that combine to form the rule of law. This is the antithesis of, and antidote to, genocide, war crimes, and other mass abuses of human rights. National or local handling of accountability for these atrocities is an important first step in this process.

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30. In his final report to the Secretary of the Army on the Nuremberg proceedings, chief prosecutor Telford Taylor noted that after the initial IMT trial, the need to organize new structures, administration, and staffing for the twelve trials to follow delayed the war crimes program by almost a year. The delay had its cost. "If the trials ... had started and been finished a year earlier," observed Taylor, "it might well have been possible to bring their lessons home to the public at large far more effectively." Telford Taylor, Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials under Control Council Law No. 10 at 105 (August 15, 1949). These words ring at least as true half a century later.

The establishment of credible independent national courts that will adjudicate disputes, defend rights, and hold criminals to account, as well as the use of other domestic mechanisms of accountability, serve a function that cannot be over-emphasized: They allow a society that previously has been victimized and made to feel powerless against the atrocities which engulfed it to reclaim a sense of control over its own destiny. Wholly internationalized responses imply that the country in question is still powerless, still incapable of dealing with its own demons. Instead, for the lessons of an accountability process to be integrated into the life and culture of the country, the nation should feel a sense of ownership and investment in that process. This calls for a partnership role for the international community in the empowerment of a society victimized by abuse.

The role of outsiders may be an informal one. The Special Prosecutor's Office dealing with the abuses of the Mengistu era in Ethiopia, the genocide justice program in Rwanda, and the Truth and Reconciliation Commission in South Africa, as examples, are each completely domestic operations, designed, organized, and given their mandate by a national process. Nonetheless, each has also received extensive external assistance, both in the form of financial resources and of intellectual input, advice, and technical assistance from numerous foreign government agencies, NGOs, individual foreign experts, and U.N. bodies. This international assistance has played an important role in shaping these programs of accountability, while leaving the ownership of and responsibility for these programs in local hands. Under this arrangement, the international community must play the same monitoring role referred to above.

Alternatively under this second category, the international role in a domestic process may be a more formal one. One example of this approach is the "Clarification Commission" established in 1997 in Guatemala.<sup>31</sup> In negotiating the peace accords to conclude that conflict, the parties agreed that a necessary step in accounting for these abuses would be the creation of a truth commission similar to those employed elsewhere. As in El Salvador, it was determined that the polarization of the country would make a completely domestic commission non-viable. At the same time, there was a desire to have a more Guatemalan-owned and less external process of accounting. The result mandated by the peace accords is a national commission, with members representing different Guatemalan perspectives, with an international chairman. Along similar lines, some of the human rights and judicial institutions created in Bosnia under the Dayton accords are national institutions which include foreign membership.<sup>32</sup>

This type of arrangement may combine the best of both worlds: It focuses energy on the development of viable national systems of accountability and justice, the international role in which can be reduced and withdrawn when

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31. See Guatemala Agreement, *supra* note 17.

32. These include the Constitution Court of Bosnia and Herzegovina and the Commission on Human Rights. It should be noted that these institutions deal primarily with current abuses rather than wartime atrocities.

they are self-sustaining. An integral international presence can render the national mechanism more credible more quickly, ensure that the national process comports with international standards, and facilitate broader international financial and technical assistance to the national institution. In addition, this approach generally will cost far less than creation of a new international institution.

As an example of this question of allocation of international financial resources, the international community is currently spending approximately \$41 million a year on the International Criminal Tribunal for Rwanda. The tribunal serves several important functions, especially the indictment, apprehension, and eventual trial of several key leaders of the genocide who likely would not have been apprehended in their countries of refuge and returned for trial by Rwandan authorities. That said, \$41 million per year in the rebuilding and training of the Rwandan legal system could produce one of the better justice systems in the region. Although a permanent international criminal court will avoid the incurring of major start-up costs with each new case, the consideration of the cost of pursuing justice through the ICC versus a more substantial investment in the rebuilding of the domestic justice system of the country in question should, at least in some cases, enter into the calculation of which cases will be taken up by the international body.

To be helpful, the international community also needs to act responsibly with respect to the domestic trial process. This entails not only the donation of resources, but also requires a realistic and informed appraisal of the domestic situation in the country in question. Once again, the recent Rwandan experience demonstrates the point, and here a degree of comparative perspective is appropriate. The United States has half a million lawyers, and an economy and population that are vastly larger than those of tiny Rwanda; the prospect of 100,000 genocide defendants unquestionably would overwhelm and incapacitate the American legal system notwithstanding these advantages. Now add to this the burden of building, virtually from scratch, a system that could have a fraction of the capacity of the American system. Under optimal conditions and with an infusion of massive foreign assistance—neither were forthcoming in Rwanda—it would take years to rebuild a properly functioning legal system in a land so ravaged by genocide, draft and adopt new legislation, appoint and train new investigators, judges, prosecutors, and related staff, repair courthouses to usable condition, outfit them with, if not computers or typewriters, at least paper and pens for case records. These are but a few of the necessary measures antecedent to the holding of credible trials. Despite all of this, beginning very shortly after the 1994 massacres, some voices in the international community (which had stood by and permitted the genocide to proceed) continuously pressed the new Rwandan government on the need to begin the process of domestic prosecution promptly. When Rwandan authorities actually began the first trials in the beginning of 1997, many of the same voices in the international community harshly criticized the Rwandans for starting them too soon, complaining that the Rwandan criminal justice system



was not yet ready to ensure proper and fair proceedings. The international community could contribute far more productively to the domestic process of justice and accountability if it would be more forthcoming in its assistance to the domestic system and more pragmatic and realistic in its evaluation.

The next best arrangement is likely to be complementary international and national mechanisms of accountability. Again, Bosnia and Rwanda are the most obvious examples of this approach.

At least two situations would warrant this arrangement. First, without undermining the importance of bolstering national institutions and national ownership and integration of the process of accountability, there will be cases of crimes so horrific that the international community will be obliged, for its own sake and for the preservation of fundamental universal principles, to hold the key planners or perpetrators accountable to all of humanity.

In addition, at times there will be those cases that are too volatile for national mechanisms of accountability to handle properly. In particular, where the transition from the period of mass abuse is the result of a negotiation rather than the defeat and routing of those responsible, the principal leaders of the former regime may be beyond the political reach of the national system of justice. Even if trials of mid- or lower-level participants in past atrocities may be undertaken locally, the attempted prosecution of the principals by domestic authorities could be destabilizing to the new order. Pinochet in Chile, Karadzic and Mladic in Bosnia, Pol Pot in Cambodia, and possibly de Klerk in South Africa come to mind in this regard. In such circumstances, an international criminal court could serve a useful function by handling the cases which the domestic system cannot.

Finally, when national efforts at accountability are wholly implausible, an international mechanism becomes essential. For instance, this situation may occur where domestic capacity has been too heavily devastated to undertake the effort by the loss of personnel, the destruction of equipment and facilities, and the erosion of credibility. It may also be the case when the same elites behind the mass abuses in question continue to dominate the political scene, precluding any serious domestic effort at accountability. This was the case in El Salvador. In a bold move, the U.N. truth commission decided to issue conclusions regarding the culpability of specific individuals without the benefit and due process protections of a regular criminal procedure; the commission had determined that this step was necessary to establish some minimal level of accountability because none could be had in the corrupted Salvadoran courts.<sup>33</sup>

When these circumstances do apply, the establishment of a permanent international criminal court will enable the international community to take on this task far more promptly and effectively than the current arrangement of ad hoc tribunals. Assigning priority to national mechanisms of accountability and granting them some deference and support is generally preferable, but when there is no system to defer to, international institutions must be able to assume

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33. See Buergethal, *supra* note 3, at 522.

the task of rendering justice in an efficient manner.

The private sector can also play an important role in a nation's effort to acknowledge and establish accountability for past egregious abuses of human rights. Although it is preferable that mechanisms for reckoning with these abuses be official mechanisms that demonstrate the state's commitment to the process, where that commitment is not forthcoming, private initiatives take on heightened importance, whether on their own or as a complement to international efforts at accountability. A significant example of this approach is the transition from military rule in Brazil. When the new government took no action to deal with the legacy of the military regime's widescale violations of human rights, a project was undertaken under the aegis of the Catholic Church. The resulting report, *Brasil: Nunca Mais*, which used official documents to analyze the nature of the military regime and its abuses, sold more than 100,000 copies during the first ten weeks of its publication.<sup>34</sup>

## X

### CONCLUSION

In all likelihood, it will be the exceptional case in which the use of just one of the accountability mechanisms discussed herein will be the optimal solution. More often, the challenge will be to determine what is the best-suited mix of approaches: A truth commission followed by prosecution, like in Argentina? Both international and domestic prosecution, à la Rwanda? Trials for some and administrative sanctions for others, following the model of some of the post-World War II and post-Communist transitions? In the end, there will be no uniform, mechanistic solution applicable to all cases. With the aid of the international community, each society emerging from genocide, war crimes, or sustained mass repression will need to find the specific approach or combination of mechanisms that will best help it achieve the optimal level of justice and reconciliation.

Unfortunately, mass abuses yet to occur will no doubt provide opportunities for the evolution of whole new mechanisms for accountability that are not presently conceived. Eventually, if domestic and international efforts to ensure accountability for mass abuses become sufficiently well-coordinated and effective, hopefully someday they will be needed with less frequency.

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34. The English version of the report was published as *TORTURE IN BRAZIL: A REPORT BY THE ARCHDIOCESE OF SAO PAULO* (Joan Dassin ed. & Jaime Wright trans., 1986).