FOREWORD

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The mid-1990s have witnessed a remarkable resurgence in national and international efforts at prosecutions for crimes of mass violence such as genocide, war crimes and crimes against humanity. The establishment in 1993 of the International Criminal Tribunal for the former Yugoslavia (ICTY) was followed in 1994 by the creation of the International Criminal Tribunal for Rwanda (ICTR). Large-scale national prosecutions for genocide-related cases were begun in Rwanda in 1996, the same year during which the government of Ethiopia commenced trials of members of the Mengistu regime for genocide and crimes against humanity. Comparable efforts at prosecutions for such crimes have not been seen since the aftermath of World War II.

These developments in international criminal law have spurred debate concerning the most appropriate and efficacious roles for national and international justice systems in responding to crimes of mass violence. To address these issues, the Duke University School of Law, in conjunction with the Office of the Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY/R), convened an international conference entitled "Justice in Cataclysm: Criminal Tribunals in the Wake of Mass Violence."[1] The Conference was comprised of over two hundred participants from twenty-six countries. The articles in this Symposium capture the themes and insights that emerged from the Conference presentations.

The ambition of the Justice in Cataclysm Conference was to evaluate comprehensively the use of criminal prosecutions as an approach to handling crimes of mass violence. In recent years, there has been extensive consideration of the progress of the ICTY/R. Less attention has been focused on national-level prosecutorial efforts such as those in Ethiopia and Rwanda or, in a very different context, the former Yugoslavia. The interrelationship of national and international tribunals has received surprisingly little analysis.

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1. The Conference was held on July 20-21, 1996 in Brussels, Belgium.

By viewing the legal handling of mass crimes in a comprehensive manner, taking into account the permutations and interactions of national and international efforts, the Conference allowed for development of greater insight into the problems and available approaches in this field.

A primary theme emerging from the Conference discussions concerns the need to tailor legal responses to the specific circumstances of the mass crimes in question. While the broad principles of justice and deterrence apply across contexts, decisions as to whether to prosecute, how many defendants to target, how to select defendants, whether to prosecute at national or international levels or both, whether to plea bargain, and a myriad of other issues must be made with due regard to the legal, political and social circumstances in which the goals of justice are sought.

A threshold decision in the prosecution of mass crimes is whether prosecutions should be pursued at the national or international level or both. Distinctive difficulties confront national justice systems in the handling of crimes of mass violence. These difficulties often include a paucity of qualified judicial personnel and, not infrequently, some continuing military threat that constrains the prosecution process. Such prosecutions typically require enormous prosecutorial and judicial resources at a time when the nation's resources are already overburdened. In addition, bias or the appearance of bias will often be associated with national-level prosecutions, particularly since the prosecuting government often will be a transitional one that has taken power from the regime under which the crimes were committed (as in the cases of Rwanda, Ethiopia, Argentina, and many others). In light of this range of recurrent problems confronting national prosecutorial efforts, several Conference participants questioned whether valuable national prosecutions generally are a realistic possibility.

One alternative or adjunct to national-level prosecutions is trial before an international tribunal such as the ad hoc ICTY/R. Mark Ellis's article discusses the crucial role of defense counsel in international prosecutions and recommends measures for overcoming current obstacles to provision of effective counsel. Gary Sharp's article examines the obligations of states to secure the arrest and transfer of defendants indicted by the ICTY. William Fenrick discusses the legal issues and practical hurdles to prosecution before the ICTY for unlawful attacks on civilians.

The ultimate success of the International Tribunals will turn on a

complex set of factors relating both to the functioning of the Tribunals per se and to the interrelationship of those Tribunals with the national governments with which they share jurisdiction. In my own contribution to this Symposium, I examine the issues arising from the shared jurisdiction of the ICTR and the government of Rwanda, with particular focus on the distribution of defendants between the two fora. Payam Akhavan's article considers the importance of the concurrent jurisdiction of the ICTR and the Rwandan national courts within the broader context of justice and reconciliation in the African Great Lakes region.

Frederik Harhoff observes that more effective communication between national authorities and the International Criminal Tribunal for Rwanda may foster more fruitful relations between the two. He also contends, however, that national and international jurisdictions may ultimately have conflicting interests. This would be true where what best fosters restoration of peace and justice within the particular nation affected may be inconsistent with that which best fosters peace and justice on an international level in the longer term.

In addition to issues regarding the distribution of defendants between national and international jurisdictions, concurrent jurisdiction also raises complex issues regarding cooperation in investigations and the sharing of evidence. While close national and international cooperation in investigations and evidence-gathering would afford obvious advantages in efficiency and effectiveness, difficulties concerning confidentiality of evidence, witness protection, due process standards, and the like raise a myriad of complex problems. As William Schabas notes in his article, concurrent jurisdiction also raises potential problems in sentencing equity between national and international fora, particularly where the national justice system (but not the international tribunal) employs capital punishment.

Notwithstanding the important role of criminal prosecutions in the legal handling of crimes of mass violence, criminal prosecutions of all suspected perpetrators may not, on balance, be desirable or possible in many cases in which mass crimes have occurred. Political and military realities may preclude extensive prosecutions (as has been the case in several South American countries). Or the sheer number of perpetrators may militate against thoroughgoing prosecutions. (Some would argue that Rwanda is such a case.) Or a strategy for national reconciliation (such as that adopted in South Africa) may reserve criminal prosecutions for a small range of cases.

One supplement or alternative to criminal prosecutions is the

use of an impartial commission of inquiry or "truth commission" to ascertain, record, and make public an accurate history of the crimes committed and their context. Such commissions may be particularly valuable where crimes were committed covertly and remain shrouded in denial and silence.

Creation of a permanent International Criminal Court (ICC) has been under discussion since World War II. Michael Scharf's suggestion that a permanent international *truth commission* be established is, however, a possibility that has not been previously explored. Professor Scharf observes that an international truth commission would provide a greater guarantee of neutrality than a national commission in a highly polarized environment, would be likely to operate in a more secure environment than would a national commission, and would ensure a relatively rapid investigation.

Those arguments favoring a permanent truth commission parallel some of the arguments favoring an ICC and constitute powerful points in both contexts. A fundamental question to be asked in considering establishment of a permanent international truth commission is how an "ITC" would interact with an ICC in order to provide an appropriate complement to criminal prosecutions without becoming a convenient mechanism for the evasion of international obligations to prosecute international crimes.

There is every indication that we are currently entering a new era in the legal treatment of crimes of mass violence. The establishment of the ICTY/R and the increasingly real prospect of establishment of an ICC make the regular utilization of a truly international criminal tribunal a more realistic possibility than one would have imagined less than a decade ago. The current preponderance of internal over international armed conflicts also may be expected to continue into the foreseeable future, making it more pressing to resolve issues concerning the extent of international jurisdiction over internal conflicts. The pace and direction of developments in this field suggest that more extensive exercise of concurrent national and international jurisdiction may be expected in coming years, necessitating the delineation of workable and coherent policies governing the interaction of such bodies. In moving constructively into the future in this quickly developing area, a dual perspective will have to be maintained: identifying and articulating guiding principles to be coherently applied across cases while at the same time remaining keenly cognizant of the political, military, and social factors specific to each case in order to design the carefully tailored mechanisms best

suited in each context to achieving the greatest possible degree of peace and of justice.