INSTITUTIONS AND PRACTICES FOR RESTORING AND MAINTAINING PUBLIC ORDER

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I. INTRODUCTION

In the wake of the atrocities committed in Cambodia, southern Sudan, the former Yugoslavia, Rwanda and Haiti, many in the international community have called for the creation of ad hoc or standing international criminal courts to deal with some types of international delicts. Courts are indispensable institutions in many domestic criminal and civil systems, and any polity, no matter how structured, must have arrangements, of varying degrees of institutionalization, to apply the law to concrete cases. But lest we fall victim to a judicial romanticism in which we imagine that merely by creating entities we call "courts" we have solved major problems, we should review the fundamental goals that institutions designed to protect public order seek to fulfill. Goal clarification is especially important when our passions are engaged, as indeed they should be, upon encountering atrocities such as those of Rwanda. Indignation can be a powerful and productive source of political energy, but only if we tap it to stimulate the design of institutions that protect, restore, and improve public order.

National legal systems allocate different responsibilities to criminal and tort law, but common to all legal systems is a set of fundamental sanctioning goals for the protection, restoration, and improvement of public order. While these fundamental goals have been expressed in many versions, they may be synthesized into seven specific goal programs:[1]

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1. *See generally* RICHARD ARENS & HAROLD D. LASSWELL, IN DEFENSE OF PUBLIC ORDER (1961); MYRES SMITH MCDOUGAL ET AL., LAW AND PUBLIC ORDER IN SPACE (1963).

(1) *Preventing* discrete public order violations that are about to occur;
(2) *Suspending* public order violations that are occurring;
(3) *Deterring*, in general, potential public order violations in the future;
(4) *Restoring* public order after it has been violated;
(5) *Correcting* the behavior that generates public order violations;
(6) *Rehabilitating* victims who have suffered the brunt of public order violations; and
(7) *Reconstructing* in a larger social sense to remove conditions that appear likely to generate public order violations.

Preventing is an anticipatory public order function. It anticipates the imminent rupture of public order and seeks to intervene before the rupture eventuates, with the aim of obviating it. Once a rupture has occurred, *suspending* seeks to arrest the injuries by focusing on the agent of the violation. It involves an immediate response to the breach of public order, terminating the breach and containing the destructive effects of the act. While preventing and suspending are specific to particular violations of public order, *deterring* is more general. Deterring involves the use of various conjectural devices to craft current responses that encourage putative violators in the future to refrain from violations. Deterrence may be accomplished by credible threats of consequences for violations and/or indulgences and rewards for compliance. *Correcting* involves identifying and adjusting individual or group patterns of behavior that have generated or may generate ruptures of public order. *Rehabilitating* focuses on the victims and may involve compensation in various forms designed to redress injuries. *Social reconstructing* involves identifying social situations that generate or provide fertile ground for violations of public order, and introducing resources and institutions that can obviate such situations.

These seven goals are cumulative in the sense that an efficient public order system performs all of them, though the achievement of some goals, such as prevention and deterrence, will reduce the importance of some of the others. The common denominator of all of these goals, however, should be to protect, reestablish or create a public order characterized by low expectations of violence and a heightened respect for human rights. When the institutions assigned to fulfill these goals are effective, disruptions of the public order will be minimized and the destructive consequences of those that do occur will be contained.

For those who would design institutions for the protection of

public order, a mode in which the international community currently finds itself, the challenge is not to imitate or transpose but rather to shape institutions that, in their idiosyncratic context, will fulfill the protective goals of public order.

II. INSTITUTIONAL PRACTICES TO PROTECT PUBLIC ORDER

A wide range of international institutions and practices are currently used in different combinations for accomplishing the goals discussed above. Although a variety of international practices can be used in the proper context to protect public order, there are eight institutional practices and arrangements that are particularly important:

(1) human rights law, the law of state responsibility, and the developing law of liability without fault;
(2) international criminal tribunals;
(3) universalization of the jurisdiction of national courts for certain delicts, called international crimes;
(4) nonrecognition or the general refusal to recognize and to allow violators the beneficial consequences of actions deemed unlawful;
(5) incentives in the form of foreign aid or other rewards;
(6) commissions of inquiry or truth commissions;
(7) compensation commissions; and
(8) amnesties.

These practices and institutional arrangements are not interchangeable. Each deals with a different aspect of the problem and may not be appropriate for all circumstances. Additionally, each practice or institution need not be consistent with all the sanctioning goals in every case. Some may provide high returns for certain goals in particular cases, but may also prove very costly for alternative goals in other instances. For example, major cash payments or other concessions may prevent an imminent violation or secure the release of hostages, but will have high costs for deterrence in the future, as other actors may calculate that they too can extort concessions from the community by threatening to violate public order. On the one hand, international criminal tribunals may serve to deter violations in future cases, but may increase the costs of suspending ongoing violations if violators conclude that continued resistance is preferable to facing a judgment by the tribunal. On the other hand, amnesties may facilitate suspension of ongoing violations, but amnesties also undermine deterrence, the law of state responsibility, and human

rights. Prospective violators may conclude that if they do not prevail, they can negotiate an amnesty.

Criminal tribunals involve the identification of perpetrators of violations of the law, confirmation of the norms that apply, and the imposition of penalties. Depending on the nature and goals of incarceration, criminal tribunals may be corrective. Although the international community often demands criminal tribunals when there are serious breaches of public order, tribunals only indirectly perform sanctioning goals. Punishment (far from certain) may have a deterrent effect and/or may suspend violations by depriving certain individuals of their liberty. In contrast, the focus of compensation tribunals or commissions shifts from the perpetrator of the crime to the victim of the crime, for whom some compensation is established and paid according to standards for the actors involved. Human rights law, the law of state responsibility, and the more recent "liability without fault" regime,[2] altogether provide substantive and procedural standards for state and nonstate actors as well as guidance for compensation tribunals. For instance, commissions of inquiry, now often referred to as "truth commissions", involve, with varying degrees of system and rigor, authoritative investigation and publication of violations of international norms. These institutions seek to perform a wide range of sanctioning goals.

Amnesties have been singled out recently as a technique for reestablishing internal public order after its violent disruption within a nation-state.[3] Their compatibility with sanctioning goals will depend on their design and other contextual features. Amnesties are especially useful tools for prison administrators and political negotiators. For the administrator of a prison, the authority to grant amnesty on a discretionary basis is a technique of internal control; many prisoners will behave well if they think that there is a high probability that they will be rewarded with a shortened sentence or complete amnesty. For the political negotiator, whether in a domestic or transnational conflict, the capacity to offer amnesty is also an indispensable tool. If the elite and substantial parts of the rank-and-file of one side anticipate that a consequence of a peace agreement

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2. *See generally Summary Records of the Meetings of the Fourty-Fourth Session*, [1992] 1 Y.B. INT'L L. COMM'N at 92, U.N. Doc. A/CN.4/SER.A/1992. (explanation of the concept of "international liability for injurious consequences arising out of acts not prohibited by international law").

3. For example, amnesties were the institution of choice in such countries as Argentina, Uruguay, Chile, Nicaragua, and El Salvador.

will be their prosecution for acts undertaken in the course of the conflict, they hardly will be disposed to lay down their arms. The strict application of law in these circumstances may result in continued intense conflict, with the consumption of the social values that the law entails, ended only by the elimination or the unconditional surrender of one side. Furthermore, because a political elite often will be highly dependent on the morale and commitment of its rank-and-file, the prospect of a negotiated settlement that secures amnesties for the leadership but not for those in the ranks well may prevent that leadership from concluding an agreement.

Amnesties also may be important as a technique for stitching together the wounds in civil society that precipitate and often result from conflicts. Article 6(5) of Protocol II Additional to the Geneva Conventions of 1949 provides:

> At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.[4]

However, there are significant protective public order costs to amnesties.

The jurist may have the luxury of time to foresee long-term strategy while the political negotiator usually faces sharp time demands requiring quick tactical decisions. Thus the jurist is more likely to appreciate that the most urgent objective in the application of law is not to punish those who may have violated it, but to sustain the expectations of law's effectiveness in the minds of all other potential violators. Acts of kindness or grace to current violators may have very high, long-term costs: potential violators may assume that, threats of strict application of law notwithstanding, when the time comes for settlement, they, too, can strike a bargain in which they will be forgiven.

III. INSTITUTIONAL PRACTICES APPLIED

How have the seven fundamental goals for the protection,

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4. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* June 8, 1977, 1125 U.N.T.S. 609, 614.

restoration, and improvement of public order been realized in recent practice? I propose to consider, very briefly, three institutions in three different areas that present, in ensemble, a range of possibility and instructive experience.

A. El Salvador

The Commission on the Truth for El Salvador (the El Salvador Commission) was part of the 1991 peace agreement between the government and the Frente Farabundo Marti para la Liberacion Nacional (FMLN).[5] The United Nations instructed the El Salvador Commission to write, in six months, an investigative report about serious acts of violence that had occurred since 1980.[6] There were three commissioners and a staff of some twenty people.[7] Priscilla Hayner, in her study of fifteen truth commissions, writes that the El Salvador Commission,

> was created at the end of a bitter civil war that left much of the country polarized, such that it would have been extremely difficult to create a national truth commission, staffed and directed by Salvadorans. This was due to the fragile political foundation on which the transition towards peace depended . . . .[8]

The El Salvador Commission's report cited more than forty individuals for human rights violations.[9] Five days after the report, the government enacted a general amnesty; thus, there were no trials for human rights violations.[10] The fact of the amnesty makes it difficult to appraise the independent effect of the El Salvador Commission on the restoration of public order. The level of violence in El Salvador has markedly diminished, and the FMLN has been integrated into the political process. In this sense, public order can be said to have been restored. However, other sanctioning goals may not have been fulfilled. Because the El Salvador Commission's report had no "hard law" effect, but the amnesty certainly did, it is possible that the Commission unwittingly deflected criticism from the sweeping

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5. 1993 U.N.Y.B. 314, U.N. Sales No. E.94.I.1.

6. Priscilla B. Hayner, *Fifteen Truth Commissions - 1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597, 628 (1994).

7. *Id.*

8. *Id.*

9. *Report of the Commission on the Truth for El Salvador, From Madness to Hope: The 12-Year War in El Salvador*, U.N. SCOR, Annex, U.N. Doc. S/25500 (1993).

10. Hayner, *supra* note 6, at 629.

amnesty.

B. Former Yugoslavia

The United Nations Security Council established the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (the Tribunal). The purpose of the Tribunal was less to punish serious violators and to secure compliance with obligations under international law and more to press the parties to a peace agreement; to suspend, prevent and deter. Consider the sequence of resolutions that culminated in the establishment of the Tribunal. In Resolution 764 of July 13, 1992, the Security Council affirmed that all parties to the conflict were "bound to comply with the obligations under international humanitarian law and in particular the Geneva Conventions . . . ."[11] In Resolution 771 of August 13, 1992, the Council acknowledged that its previous resolution had gone unheeded and expressed alarm at the continuing reports of widespread violations.[12] At that time, the Council decided, acting under Chapter VII of the Charter, that all parties and others concerned in the former Yugoslavia and all military forces in Bosnia-Herzegovina should comply with the terms of Resolution 764.[13] If they did not, the Council would take further action. Once again, those parties whose cooperation was necessary did not cooperate.

In Resolution 780 of October 6, 1992, the Security Council requested the Secretary-General to establish an impartial commission of experts to examine and analyze the information that had been requested in Resolution 771.[14] The Secretary-General submitted the results of that commission's inquiry to the Security Council in a letter on February 9, 1993, in which he noted that the commission had concluded, not surprisingly, that grave breaches and other violations of international humanitarian law had been committed.[15] The Security Council subsequently resolved in Resolution 808 of February 22, 1993, that the widespread violations of humanitarian law constituted a "threat to peace" within the meaning of Article 39 of the

11. S.C. Res. 764, U.N. SCOR, 47th Sess., 3093rd mtg., U.N. Doc. S/RES/764 (1992).
12. S.C. Res. 771, U.N. SCOR, 47th Sess., 3106th mtg., U.N. Doc. S/RES/771 (1992).
13. *Id.*
14. S.C. Res. 780, U.N. SCOR, 47th Sess., 3119th mtg., U.N. Doc. S/RES/780 (1992).
15. *Letter Dated 9 February 1993 from the Secretary-General Addressed to the President of the Security Council*, U.N. SCOR, 48th Sess. at 1, U.N. Doc. S/25274 (1993).

Charter, and determined to put an end to such crimes.[16] Rather than designing a program of prevention, the primary goal in the protection of public order, the Security Council said that it would establish an international tribunal to prosecute persons responsible for serious violations of international humanitarian law.[17]

The Tribunal was established not by treaty, but rather by a decision taken under Chapter VII. Because Article 25 of the Charter makes such decisions binding on all Member States, the net result was in effect a universal treaty establishing a tribunal. The speed and simplicity of creating the Tribunal under the authority of Chapter VII is not without cost. Once the contingency for action under Article 39 ceases, the legal basis of the Tribunal vanishes as quickly as Cinderella's coach disappeared at the stroke of midnight. The Secretary-General's report states, with remarkable equanimity, that

> [a]s an enforcement measure under Chapter VII, however, the life span of the international tribunal would be linked to the restoration and maintenance of international peace and security in the territory of the former Yugoslavia, and Security Council decisions related thereto.[18]

Thus, the moment a peace agreement was secured between the warring factions, the life of the Tribunal would end. But in the ordinary course of events it is precisely at the end of a conflict that the operation of an international criminal tribunal comes into operation. The Tribunal may, in fact, surmount this genetic limitation. People drive institutions, and gifted and dedicated personnel can make an institution acquire an organic life of its own. It could then serve as precedent justifying the expansion of Security Council power beyond the contingencies of urgency in Article 39 and stimulate opposition on that ground. If, as I read the Secretary-General's report, the purpose and essential design of the institution was to accomplish multiple goals, then wind down when those goals were secured, the constitutional problem of the expansion of Security Council power will not arise.

It is certainly too early to appraise the degree of success or failure of the Tribunal in achieving the goals of its creators. The Tribunal has

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16. S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/RES/808 (1993).

17. *Id.*

18. *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. SCOR, 48th Sess. at 8, U.N. Doc. S/25704 (1993).

not been effective as a deterrent to date; despite its operation, atrocities continue to occur with alarming regularity, and there may have been more "ethnic cleansing" in the Krajina and in Bosnia and Herzegovina since the Tribunal's establishment than before it. The Tribunal is not an instrument in the dispute resolution process, and could be an impediment to such processes when they get under way. Whether tribunals and possible convictions change this pattern remains to be seen.

C. Iraq

Another technique that is available to the international community as to crimes of war focuses less on the punishment of the perpetrator and more on the compensation and rehabilitation of the victim. The Iraq War Crimes Commission (the Iraq Commission) is a good example of this technique, for it focuses primarily on making whole those who suffered as a result of the Iraqi aggression. In this regard, the Iraq Commission addresses the goals of restoring, rehabilitating, and reconstructing, but in a way that frustrates the goals of preventing and deterring. This curious contradiction occurs because although a collective entity called Iraq is to pay damages, there is a perverse lack of logic in who is actually making the payment.

Reparations make economic and moral sense. They help victims to repair themselves while compelling aggressors to contribute to the reconstruction. For reparations to achieve their goals, however, they must be distributed to those who were injured and come from those responsible for the injury. The United Nations reparations plan for the Gulf War fails in this respect.

The Security Council designated Iraq the guilty party and hopes to create an enormous fund by taking, indefinitely, anywhere from ten to fifty percent of Iraq's oil revenues.[19] The Iraq War Crimes Commission will divide the fund among victim states and their nationals.[20]

Saddam Hussein reportedly takes a five percent cut on every barrel of oil sold by Iraq and has stashed billions in foreign banks and enterprises.[21] Jules Kroll, of Kroll Associates, an international

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19. S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg., U.N. Doc. S/RES/687 (1991).

20. *Report of the Secretary-General Pursuant to Paragraph 19 of Security Resolution 687*, U.N. SCOR, 46th Sess. at 8, U.N. Doc. S/22559 (1991).

21. Charles Bremner, *CIA of Wall St. Tracks Down Dictator's Multibillion Hoard*, THE TIMES (London), Mar. 26, 1991, at 10.

detective firm specializing in financial crimes, has reported that Hussein siphoned off about $10 billion, or 5 percent of Iraq's oil revenues, during the 1980s.[22] Every time Iraq has concluded a deal with Japan, according to Kroll, 2.5 percent of receipts go into a Japanese bank account for Hussein.[23] According to Kroll,

> [t]his is an organised crime activity that has been going on for a long time. . . . He's [Saddam] put together a network through some very clever colleagues that is as extensive and as far-reaching and as pernicious as we've seen.[24]

The U.N. plan does not target Hussein's hoard; it targets the Iraqi people's future earnings. The Iraqi people will not only have to pay the United Nation's ten to fifty percent, but Saddam Hussein's five percent as well. Long into the future, Iraqis, themselves victims, will strain to pay off this debt as they try to rebuild their shattered country. Meanwhile, Hussein and his colleagues will cry injustice—all the way to the bank. By making "Iraq" the aggressor and requiring its political economy to foot the bill, the Security Council actually punishes one of the victims while it protects the truly guilty perpetrators. The compensation scheme frustrates the moral and political value of the whole exercise.

If reparations are to make sense and to be consistent with all protective public order goals, aggressors, and not victims, must pay. Iraq certainly should disgorge what it seized from Kuwait, but if Iraq is required to sacrifice a large part of its oil revenues, the reparations may hinder Iraq's reconstruction—a reconstruction that is critical to its own internal amelioration and to regional stability. It would make much more sense, in terms of sanctioning goals, to target the money Saddam Hussein and his associates have spoliated.[25]

Saddam Hussein and his crew should be forced to surrender their ill-gotten gains. The Security Council has the authority under the U.N. Charter to create an international commission to track the Iraqi leader's accounts and to oblige banks around the world to surrender them. The United Nations should use that authority to protect the people and not the thieves masquerading as their government.

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22. *Id.*
23. *Id.*
24. *Id.*
25. *See* W. Michael Reisman, *Harnessing International Law to Restrain and Recapture Indigenous Spoliations*, 83 AM. J. INT'L LAW 56 (1989).

The Iraqi illustration underlines the importance of taking account of *all* sanctioning goals when designing institutions to protect public order. While, in the Iraqi case, compensation is secured for the victims, the arguably more important goals of prevention and deterrence are frustrated. There is no incentive for would-be lawbreakers to refrain from their plans, for failure will cost them nothing.

IV. CONCLUSION

The design of institutions for protecting and reestablishing public order at the international and national levels often fails to take sufficient account of the theoretical and policy problems involved in these tasks. There is no general institution that can be applied as a paradigm for all circumstances. In each context, an institution appropriate to the protection and re-establishment of public order in the unique circumstances that prevail must be fashioned such that it provides the greatest return on *all* the relevant goals of public order. The situations in Rwanda and Haiti are object lessons. Substantial pressure has come, largely from the non-governmental organization (NGO) community, for the establishment of international criminal tribunals in each of those states. One may wonder, considering the context and the set of goals that must be addressed in the design of such institutions, whether a criminal tribunal is the optimum modality for restoring public order. In Rwanda, where the victorious group is enthusiastically in favor of such a tribunal, the exercise is in danger of becoming a technique by which the ruling elite, with international blessing, purges the leadership of the opposition. In such circumstances, a truth commission may provide more of a return on the public order goals at issue. The situation in Rwanda is particularly disquieting, for reports indicate that arms continue to flow into militia camps in Zaire in preparation for another round of conflict.

In circumstances in which the international community is prepared to defeat an adversary, application of a criminal law model, through an international tribunal, makes sense. It directs the condemnation, of violations of international law, at the defeated government officials and legitimizes a process of social reconstruction. In circumstances in which the international community is not prepared to defeat the party deemed in violation of international law but ultimately must negotiate a settlement with that party, the criminal law model makes no sense because it only delays the inevitable negotiation. Unquestionably, the tribunal model is much more

satisfying in a moral and legal sense because it provides vivid confirmations of international authority. But if the international community is unwilling to pay the price for this satisfaction, it must settle for something less, like a truth commission.

In Haiti, too, some have called for the establishment of an international criminal tribunal. As in Rwanda, there is no question that the leadership has committed or is responsible for dreadful violations of human rights. Yet, whether such a tribunal will assist in the reestablishment of public order must be examined, and whether such a tribunal will prevent and deter in the future remains to be determined.

The lesson to be learned from this review, I submit, is that the varied circumstances of the international community are such that, rather than a single institution, a toolbox of different institutions should be on hand. These tools may be adapted and used in particular circumstances to fulfill, in the most optimal fashion possible, the fundamental goals of international law: the protection and reestablishment of public order. In circumstances in which the international community is prepared to defeat an adversary, an international tribunal, applying an approximation of the domestic criminal law model, is an effective strategy. In circumstances in which the international community is unwilling to make such an investment—and such reluctance seems to be more often than not the order of the day—it is preferable to emphasize techniques that reestablish public order as quickly as possible and fulfill feasible sanctioning goals of public order.