

# SEARCHING FOR PEACE AND ACHIEVING JUSTICE: THE NEED FOR ACCOUNTABILITY

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*The world rests on three pillars: on truth, on justice[,] and on peace.*

Rabban Simeon ben Gamaliel, (Abot 1, 18)

A Talmudic commentary adds to this, saying: *"The three are really one. If justice is realized, truth is vindicated and peace results."*

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*If you see a wrong you must right it;  
with your hand if you can [meaning by action], or,  
with your words, or,  
with your stare, or  
in your heart, and that is the weakest of faith.*

Prophet Mohammed, Hadith (Saying)

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*If You Want Peace, Work For Justice.*

Pope Paul VI<sup>1</sup>

## I

### THE CONTEXT

Since World War II, the number of conflicts of an international character declined as did their harmful impact, in comparison to other types of conflicts whose harmful consequences increased. Indeed, the occurrence of conflicts of a non-international character and purely internal conflicts has dramatically increased in number, intensity, and victimization. In addition, tyrannical regimes produced systematic and large scale-victimization far exceeding quantitatively and qualitatively the harmful results generated by all other types of conflicts.<sup>2</sup>

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1. Celebration of the World Day of Peace, January 1, 1972, in *WAYS OF PEACE: PAPAL MESSAGES FOR THE WORLD DAYS OF PEACE (1968-1986)*, Vatican City.

2. See DANIEL CHIROT, *MODERN TYRANTS: THE POWER AND PREVALENCE OF EVIL IN OUR*

Conflicts of a non-international character, purely internal conflicts, and tyrannical regime victimization have occurred all over the world. That victimization has included genocide, crimes against humanity, and war crimes, along with, *inter alia*, extra-judicial executions, torture, and arbitrary arrest and detention, all of which constitute serious violations of fundamental human rights protected by international human rights law.<sup>3</sup>

During the course of the twentieth century it is estimated that conflicts of a non-international character, internal conflicts, and tyrannical regime victimization have resulted in more than 170 million deaths.<sup>4</sup> This is compared with an estimated 33 million military casualties.<sup>5</sup> It is estimated that since World War II, more than 250 conflicts of a non-international character, internal conflicts, and tyrannical regime victimization have occurred. These situations have resulted in an estimated 86 million casualties.<sup>6</sup>

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AGE (1994); PIERRE HASSNER, VIOLENCE AND PEACE: FROM THE ATOMIC BOMB TO ETHNIC CLEANSING (1995); RUDOLPH J. RUMMEL, DEATH BY GOVERNMENT (1994); *see also* ERIK HOBBSBAWM, THE AGE OF EXTREMES: A HISTORY OF THE WORLD, 1914-1991 (1995). The figure used by Mr. Hobsbawm is 187 million "people killed or allowed to die by human decision" for the "short century" that he examines. Hobsbawm notes that this accounts for about 10% of the global population at the year 1900. The category "by human decision" includes non-wartime politically-caused deaths such as those in the Soviet Union (1930s Ukrainian starvation and the "Gulag") and in China between 1949 and 1975 (the massive starvation of the "Great Leap Forward" and various "repression campaigns"). However, likely deaths in those two countries for political government-decided reasons are on the order of 35 million and 45 million respectively, or 80 million, for a total of around 205 million, rather than Hobsbawm's figure of 187 million.

3. For the applicable norms, see THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW (1989). *See also, e.g.*, HENRY J. STEINER, INTERNATIONAL HUMAN RIGHTS LAW IN CONTEXT: LAW, POLITICS, MORALS: TEXT AND MATERIALS (1996); RICHARD B. LILLICH & HURST HANNUM, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY AND PRACTICE (1991); FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS (1990).

4. *See* RUMMEL, *supra* note 2, at 3, 9 (reports a total of 72.521 million casualties).

5. *See id.*

6. *See* SIPRI YEARBOOKS 1975-1996. There were two reported studies in the PIOOM newsletter and progress report in 1994 and 1995: A.J. Jongman & A.P. Schmid, *Contemporary Conflicts: A Global Survey of High- and Lower Intensity Conflicts and Serious Disputes*, 7 PIOOM NEWSLETTER AND PROGRESS REPORT 14 (Winter 1995) (Interdisciplinary Research Program on Causes of Human Rights Violations, Leiden, Netherlands), and *Study*, 6 PIOOM NEWSLETTER 17 (1994); *see also supra* note 3; Alex P. Schmid, *Early Warning of Violent Conflicts: Causal Approaches*, in VIOLENT CRIME & CONFLICTS 47 (ISPAC 1997); *PIOOM World Conflict Map 1994-1995*, 7 PIOOM NEWSLETTER, *supra*.

The following are some illustrations of situations producing a high level of victimization (estimated conflict deaths), including genocide, crimes against humanity, and war crimes for which there has been no accountability:

(a) *Conflicts of an international character*: Afghanistan (1979-89) 1.5 m; Vietnam (1945-87) 3.7 m.

(b) *Conflicts of a non-international character*: Angola (1975-94) 1.5 m; Bangladesh (1971-73) .5 m; Burundi (1972) 250,000; Cambodia (1975-85) 1.5 m; Ethiopia (1961-91) 300,000; Mozambique (1978-92) 1 m; Rwanda (1994) 500,000; Somalia (1991-93) 400,000; Yemen (1962-65) 100,000.

(c) *Purely internal conflicts*: Argentina (1976-83) 25,000; Chile (1973-90) 30,000; El Salvador (1979-92) 70,000; Guatemala (1965-96) 60,000; Indonesia (1965) 450,000, (1980-95) 150,000; Lebanon (1975-90) 150,000; Liberia (1989-96) 150,000; Peru (1980-96) 50,000; Philippines (1968-86) 50,000.

(d) *Tyrannical regime victimization*: China (1945-75) 35 m; Iraq (1980-96) 300,000;

Yet notwithstanding this high level of victimization, there have been few prosecutions, whether at the international or national level. In fact, since the post-World War II prosecutions, there have been only two internationally established *ad hoc* investigatory commissions and two *ad hoc* tribunals for Yugoslavia and Rwanda respectively,<sup>7</sup> one international truth commission for El-Salvador<sup>8</sup> (which did not generate prosecutions, however), two national prosecution systems established in the aftermath of conflicts in Ethiopia and Rwanda, some select national prosecutions in Argentina<sup>9</sup> and Chile<sup>10</sup> where a national inquiry commission was also set up, and a special body called The Truth and Reconciliation Commission in South Africa,<sup>11</sup> from which some prosecutions may be generated. In some Eastern and Central European countries, “lustration” laws have been passed to remove persons of the past regime from office, but only a few prosecutions have taken place.<sup>12</sup> For all practical purposes, very little else has occurred, and even these accountability mechanisms have produced few tangible results. Only a few of the perpetrators of the crimes described above have ever faced justice, including those who committed *jus cogens* crimes such as genocide, crimes against humanity, war crimes, and torture for which there is a duty to prosecute and punish. Furthermore, even the basic truth of what happened in these conflicts—how they evolved and why, and by whom such victimization occurred, and what was the quantum of victimization—has also seldom been exposed by governmental bodies or international ones. That task has been mainly undertaken, with all its understandable limitations, by NGOs, dedicated journalists, and committed researchers, to whom so much is owed for fulfilling this needed task.

The question arises as to why there have been so few instances of prosecution and other accountability mechanisms? The answer is that justice is all too frequently bartered away for political settlements. Whether in international, non-international, or purely internal conflicts the practice of impunity has be-

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North Korea (1948-87) 1.6 m; ; Uganda (1971-86) 600,000; USSR (1917-89) 30 m;  
Yugoslavia (1943-45) 500,000, (1991-95) 250,000.

7. M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 13 (1997).

8. See FROM MADNESS TO HOPE: THE 12-YEAR WAR IN EL SALVADOR, REPORT OF THE UNITED NATIONS COMMISSION ON THE TRUTH FOR EL SALVADOR, U.N. Doc. S/25500 (1993).

9. See NUNCA MÁS, INFORME DE LA COMISION SOBRE LA DESAPARICION DE PERSONAS (1985); CARLOS SANTIAGO NINO, RADICAL EVIL ON TRIAL (1996).

10. See REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION (Philip E. Berryman trans., 1993); Edward C. Snyder, *The Dirty Legal War: Human Rights and the Rule of Law in Chile*, 2 TULSA J. COMP. & INT'L L. 253, 279 (1995).

11. See Lynn Berat & Yossi Shain, *Retribution or Truth-telling in South Africa? Legacies of the Transitional Phase*, 20 L. & SOC. INQUIRY 1, 163 (1995); Ziyad Motala, *The Promotion of National Unity and Reconciliation Act, the Constitution and International Law*, 28 COMP. & INT. L. J. S. AFRICA 338 (1995).

12. See generally III TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES (Neil J. Kritz ed., 1995); Maria Loñ, *Lustration and Truth Claims: Unfinished Revolutions in Central Europe*, 20 L. & SOC. INQUIRY 1, 117 (1995); Adrienne M. Quill, *To Prosecute or Not to Prosecute: Problems Encountered in the Prosecution of Former Communist Officials in Germany, Czechoslovakia, and the Czech Republic*, 7 IND. INT'L & COMP. L. REV. 1, 165, 188-91 (1996).

come the political price paid to secure an end to the violence of ongoing conflicts or as a means to ensure tyrannical regime changes.<sup>13</sup> In these bartered settlements, the victims' rights become the objects of political trade-offs, and justice becomes, depending upon one's perspective, the victim of the means of *Realpolitik*.

Bartering away justice for political results, albeit in the pursuit of peace is the goal of most political leaders who seek to end conflicts or facilitate transitions to non-tyrannical regimes. The grim reality is that in order to obtain peace, negotiations must be held with the very leaders who frequently are the ones who committed, ordered, or allowed terrible crimes to be committed. Thus, the choice presented to negotiators is whether to have peace or justice. Sometimes this dichotomy is presented along more sophisticated lines: peace now, and justice some other time.<sup>14</sup> The choice is, however, frequently fallacious and the dichotomy may be tragically deceptive. Surely no one can argue that peace is unnecessary and preferable to a state of violence. But the attainment of peace is not necessarily to the exclusion of justice, because justice is frequently necessary to attain peace.

The question thus arises as to the meaning of the word peace, its scope, goals, and duration. Indeed, the word peace is freely used in the context of ending conflicts or ensuring transition to non-tyrannical regimes but without being defined or, more particularly, without any identification of what the peace goal is or how long the purported peace is designed to last. There is therefore a wide range to what peace can mean. In the political discourse of ending conflicts it ranges from the cessation or absence of hostilities to popular reconciliation and forgiveness between social groups previously in conflict with one another. It also includes the removal of a tyrannical regime or leader, and the effectuation of a regime change. The processes of attaining peace, whatever the intended outcomes may be, vary in accordance with the type of conflict, its participants, the level of victimization, the manner in which the victimization occurred, other destructive conduct by opposing groups, and popular

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13. See *Progress Report on the Question of Impunity of Perpetrators of Human Rights Violations*, prepared by Mr. Guissé and Mr. Joinet, pursuant to Sub-Commission Resolution 1992/23, Sub-Commission on Prevention and Protection of all Minorities, 45th Sess., Item 10(a) (July 19, 1993) E/CN.4/Sub.2/1993/6, at 29; *Progress Report on the Question of the Impunity of Perpetrators of Violations of Human Rights (civil and political rights)*, prepared by Mr. Joinet, pursuant to Sub-Commission Resolution 1994/34, Sub-Commission on Prevention and Protection of all Minorities, 47th Sess., Item 10 (June 28, 1995) E/CN.4/Sub.2/1995/18; *Question of the Impunity of Perpetrators of Violations of Human Rights (civil and political rights): Final Report* prepared by Mr. Joinet, pursuant to Sub-Commission Resolution 1995/35, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 48th Sess., Item 10 (June 29, 1996) E/CN.4/Sub.2/1996/18, at 5; NAOMI ROHT-ARRIAZA, *IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE* 14 (1995); Stephen P. Marks, *Forgetting the Policies and Practices of the Past: Impunity in Cambodia*, FLETCHER F. 17 (1994); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991); Michael P. Scharf, *Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?*, 31 TEX. INT'L L.J. 1 (1996); Robert O. Weiner, *Trying to Make Ends Meet: Reconciling the Law and Practice of Human Rights Amnesties*, 26 ST. MARY'S L.J. 857, 867 (1995).

14. For a critical appraisal of that practice, see Luc Huyse, *Justice After Transition: On the Choices Successor Elites Make in Dealing with the Past*, 20 L. & SOC. INQUIRY 1, 51, 77-78 (1995).

perceptions of what occurred, as well as the future expectations of popular reconciliation between, or co-existence among opposing groups. Peace, therefore, encompasses a wide range of policy options, some of which could be combined to attain it. But in a world order based on the rule of law and not on the rule of might, the attainment of peace to end conflicts cannot be totally severed from the pursuit of justice whenever that may be required in the aftermath of violence. Granted, peace and justice are ideals founded on certain values whose meanings vary epistemologically and according to group and individual beliefs. Yet however relative these ideals and their outcomes may be, they are nonetheless subject to the world community's norms and standards which represent the threshold of international legality. If peace is not intended to be a brief interlude between conflicts, then in order to avoid future conflict, it must encompass what justice is intended to accomplish: prevent, deter, punish, and rehabilitate.

Realists and *Realpolitik* proponents argue that every conflict is *sui generis* and that the variables of each conflict are so diverse that they cannot be categorized or characterized in a way that a common international legal regime can apply to all these heterogeneous conflicts. However, while there is no doubt that every conflict has its own peculiarities, and can even be labeled *sui generis*, that in itself does not and cannot exclude the application of existing international legal norms such as those relative to the regulation of armed conflicts of an international character and of a non-international character as well as to "crimes against humanity," genocide, and torture—the latter three categories of international crimes being applicable in times of war and of peace, irrespective of the legal characterization and nature of the conflict.

## II

### THE NORMATIVE FRAMEWORK

The normative framework that applies to armed conflicts, whether of an international or non-international character and to internal conflicts, has certain weaknesses and gaps. While conflicts of an international character are adequately covered by the four Geneva Conventions of 1949<sup>15</sup> and Protocol I of 1977,<sup>16</sup> conflicts of a non-international character are less adequately covered under common article 3 of the Geneva Conventions but more so under Proto-

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15. See the Four Geneva Conventions of Aug. 12, 1949: Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field (Geneva Convention No. I), Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (Geneva Convention No. II), Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War (Geneva Convention No. III), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Times of War (Geneva Convention No. IV), Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 28. For "grave breaches," see articles 49 (I), 129 (III), 146 (IV), and for conflicts of a non-international character, see common article 3.

16. Protocol I Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, Art. 4, 1125 U.N.T.S. 3, *reprinted in* 16 I.L.M. 1391 [hereinafter Protocol I]. See especially arts. 11, 85, 86.

col II of 1977.<sup>17</sup> Furthermore, purely internal conflicts and tyrannical regime victimization are not subject to these and other aspects of the regulation of armed conflicts, including the customary law of armed conflicts.<sup>18</sup> Nevertheless, crimes against humanity,<sup>19</sup> genocide,<sup>20</sup> and torture<sup>21</sup> apply to all these contexts,

17. Protocol II Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 609, *reprinted in* 16 I.L.M. 1442 [hereinafter Protocol II].

18. *See* Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, *signed at Paris*, 13 January 1993, S. TREATY DOC. NO. 103-21, 32 I.L.M. 800, *entered into force* 29 April 1997; Convention on Prohibitions and Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to have Indiscriminate Effects, *concluded at Geneva*, 10 October 1980, U.N. Doc. A/CONF.95/15, 1342 U.N.T.S. 7, 19 I.L.M. 1523, *entered into force* 2 December 1983, including Protocol on Non-Detectable Fragments to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons [Protocol I], *adopted at Geneva*, 10 October 1980, U.N. Doc. A/CONF.95/15 (1980), 19 I.L.M. 1529, *entered into force* 2 December 1983, Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, Appendix C, [Protocol II], *adopted at Geneva*, 10 October 1980, U.N. Doc. A/CONF.95/15 (1980), 19 I.L.M. 1529, *entered into force* 2 December 1983, and Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons [Protocol III], *adopted at Geneva*, 10 October 1980, U.N. Doc. A/CONF.95/15 (1980), 19 I.L.M. 1534, *entered into force* 2 December 1983 with provisions; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, *signed at Washington, London and Moscow*, 10 April 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163, 11 I.L.M. 309, *entered into force* 26 March 1975; the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict and certain weapons conventions such as: Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare, *signed at Geneva*, 17 June 1925, 26 U.S.T. 571, 94 L.N.T.S. 65, 14 I.L.M. 49; Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907 [hereinafter 1907 Hague Convention].

19. *See* Code of Crimes Against the Peace and Security of Mankind: Titles and texts of articles on the Draft Code of Crimes Against the Peace and Security of Mankind adopted by the International Law Commission at its forty-eighth session (1996), U.N. GAOR Int'l Law Comm., 48th Sess., U.N. Doc. A/CN.4/L.532 (1996), July 15, 1996, *revised by* U.N. Doc. A/CN.4/L.532/corr. 1, U.N. Doc. A/CN.4/L.532/corr.3; Statute of the International Tribunal for Rwanda, *adopted at* New York, Nov. 8, 1994, S.C.Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994), *reprinted in* 33 I.L.M. 1598, 1602; Statute of the International Tribunal for the Former Yugoslavia, *adopted at* New York, May 25, 1993, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., at 1-2, U.N. Doc. S/RES/827 (1993), *reprinted in* 32 I.L.M. 1159, 1192; European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes (Inter-European), *signed at* Strasbourg, Jan. 25, 1974, Europ. T.S. No. 82, 13 I.L.M. 540, *not yet entered into force*; Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, *opened for signature at* New York, Nov. 26, 1968, G.A. Res. 2391, U.N. GAOR, 23d Sess., Supp. No. 18, at 40, U.N. Doc. A/RES/2391 (1968), 754 U.N.T.S. 73, 8 I.L.M. 68, *entered into force* Nov. 1970; Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, *adopted at* Geneva, July 29, 1950, 5 U.N. GAOR Supp. (No. 12), at 11, U.N. Doc. A/1316 (1950), 44 AM. J. INT'L L. 126 (1950); Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal (United Nations General Assembly Resolution), *adopted at* New York, Dec. 11, 1946, U.N. G.A. Res. 95(I), U.N. Doc. A/64/Add.1 (1946); International Military Tribunal for the Far East, *proclaimed at* Tokyo, 19 Jan. 19, 1946 and amended Apr. 26, 1946, T.I.A.S. No. 1589, 4 Bevans 20; Control Council Law No. 10 (Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity), *adopted at* Berlin, Dec. 20, 1945, Official Gazette of the Control Council for Germany, No. 3, Berlin, Jan. 31, 1946, *reprinted in* BENJAMIN B. FERENCZ, 1 AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE 488 (1980); Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis [London Charter], *signed at* London, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, 3 Bevans 1238, *entered into force* Aug. 8, 1945.

20. *See* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 1

irrespective of legal characterization or the nature of the conflict. Yet crimes against humanity have yet to be embodied in a specialized convention that would clarify certain ambiguities relative to its earlier formulation in Article 6(c) of the International Military Tribunal's Statute.<sup>22</sup> In addition, both genocide and crimes against humanity also have certain normative weaknesses. As to genocide, certain groups are not included in the Convention's protective scheme, and the requirement of a specific intent required by the Convention is a high threshold, which frequently is difficult to prove. Lastly, there is an obvious overlap between genocide and crimes against humanity, as well as an overlap between these two crimes and war crimes. These overlaps need to be clarified.

Notwithstanding the weaknesses and gaps in the normative framework of the three major categories of international crimes, namely genocide, crimes against humanity, and war crimes (irrespective of context), there is also a significant weakness in the practice of states with respect to the carrying out of the underpinning of these normative proscriptions, namely the duty to prosecute or extradite and for states to cooperate with each other in the investigation, prosecution, and adjudication of those charged with such crimes and the punishment of those who are convicted of such crimes.<sup>23</sup> Although the duty to prosecute or extradite exists in the Genocide Convention,<sup>24</sup> the Geneva Conventions of 1949,<sup>25</sup> and Protocol I of 1977,<sup>26</sup> it does not exist in conventional law with respect to crimes against humanity due to the fact that there is no specialized convention for such crimes.<sup>27</sup> Nor do these obligations explicitly exist with re-

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U.N. GAOR Res. 96 (Dec. 11, 1946) 78 U.N.T.S. 277; *see also* Statute of the International Tribunal for Rwanda, *adopted at* New York, Nov. 8, 1994, S.C.Res. 955, U.N.SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994), *reprinted in* 33 I.L.M. 1598; Statute of the International Tribunal for the Former Yugoslavia, *adopted at* New York, May 25, 1993, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., at 1-2, U.N. Doc. S/RES/827 (1993), *reprinted in* 32 I.L.M. 1159.

21. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. G.A. Res. 39/46, *opened for signature at* New York, Feb. 4, 1985, *entered into force* June 26, 1987, *reprinted in* 23 I.L.M. 1027; *see also* Treaty or European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Inter-European), *opened for signature at* Strasbourg, Nov. 26, 1987, Europ. T.S. No. 126, 27 I.L.M. 1152, *entered into force* Feb. 1, 1989; Inter-American Convention to Prevent and Punish Torture, *done at* Cartagena de Indias, Dec. 9, 1985, AG/Res. 783 (XV-0/85), O.A.S. General Assembly, 15th Sess. IEA/Ser.P. AG/Doc. 22023/85 rev. 1 at 46-54 (1986), O.A.S. Treaty Series, No. 67, *entered into force* Feb. 28, 1987, *reprinted in* 25 I.L.M. 519; United State Standard Minimum Rules for the Treatment of Prisoners (ECOSOC Resolution), *adopted at* Geneva, 1955, ECOSOC Res. 663C (LXIV), July 31, 1957, and 2076 (XXII), May 13, 1977, U.N. Doc. A/CONF.6/1, Annex I.A.

22. The 1945 International Military Tribunal to Prosecute the Major War Criminals of the European Theatre [hereinafter IMT].

23. *See* M. Cherif Bassiouni, *Modalities of Inter-State Cooperation in Penal Matters*, in INTERNATIONAL CRIMINAL LAW (M. Cherif Bassiouni ed., forthcoming 2d rev. ed. 1997); *see also* EUROPEAN INTER-STATE CO-OPERATION IN CRIMINAL MATTERS (Ekkehart Mühlner-Rappard & M. Cherif Bassiouni eds., 1993).

24. *Supra* note 20.

25. *Supra* note 15.

26. *Supra* note 16.

27. *See* M. Cherif Bassiouni, "Crimes against Humanity": *The Need for a Specialized Convention*,

spect to common articles 3 of the 1949 Geneva Conventions and Protocol II,<sup>28</sup> applicable to conflicts of a non-international character even though it can be argued that such obligations exist implicitly. It should be noted, however, that in 1971 the United Nations General Assembly adopted the Resolution on War Criminals,<sup>29</sup> affirming that a State's refusal "to cooperate in the arrest, extradition, trial, and punishment" of persons accused or convicted of war crimes and crimes against humanity is "contrary to the United Nations Charter and to generally recognized norms of international law,"<sup>30</sup> and in 1973 a resolution was adopted by the United Nations General Assembly entitled *Principles of International Co-operation in the Detention, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity*.<sup>31</sup> However, no specialized international convention has been passed on that subject, and therefore the duty to prosecute or to extradite, while argued for by scholars, must nonetheless be proven part of customary international law in the absence of a specific convention establishing such an obligation.<sup>32</sup>

Of course, the duty to prosecute or to extradite could not be effective if statutes of limitations applied. Thus in 1968 the United Nations adopted a Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity,<sup>33</sup> and, similarly, in 1974, the Council of Europe adopted a European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes (Inter-European).<sup>34</sup> It is disturbing, however, that the U.N. Convention has been ratified by only fifty-four states,<sup>35</sup> and the European Convention by one state,<sup>36</sup> thus indicating a certain reluctance on the part of the 185 member states of the United Nations to support the proposition that no time prescriptions should apply to these crimes, thus making more difficult their prosecution. Surely the existence of statutes of limitations weakens the underpinnings of a normative scheme that already has certain troublesome gaps.

There exists another impediment to the national enforcement of genocide,

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31 COLUM. J. TRANSNAT'L L. 457 (1994).

28. See *supra* note 17.

29. G.A. Res. 2840 (XXVI) 26 U.N. GAOR Supp. (No. 29), at 88, U.N. Doc. A/8429 (1971).

30. See M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 499-527 (1992).

31. G.A. Res. 3074 (XXVIII), 28 U.N. GAOR Supp. (No. 30) at 78, U.N. Doc. A/9030 (1973).

32. See M. CHERIF BASSIOUNI & EDWARD M. WISE, AUT DEDERE, AUT JUDICARE (1995).

33. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, *opened for signature* at New York, Nov. 26, 1968, G.A. Res. 2391, U.N. GAOR, 23d Sess., Supp. No. 18, at 40, U.N. Doc. A/RES/2391 (1968), 754 U.N.T.S. 73, 8 I.L.M. 68, *entered into force* Nov. 1970.

34. See European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes (Inter-European), *opened for signature* at Strasbourg, Jan. 25, 1974, Europ. T.S. No. 82, 13 I.L.M. 540, *not yet entered into force*.

35. See M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW CONVENTION AND THEIR PENAL PROVISIONS 451-54 (in print 1997).

36. EUROPEAN INTER-STATE CO-OPERATION IN CRIMINAL MATTERS, *supra* note 23.

crimes against humanity, and, in some respects, war crimes: the limited recognition and application of the theory of universal jurisdiction to such crimes.<sup>37</sup> Indeed, few states recognize the application of the theory of universality.<sup>38</sup> Surely, if more states would recognize and apply this theory of jurisdiction, national criminal justice systems would have the competence to exercise their jurisdiction for such crimes.<sup>39</sup> Furthermore, few countries have enacted national legislation needed to prosecute genocide and crimes against humanity.<sup>40</sup>

Crimes against humanity, genocide, war crimes (under conventional and customary regulation of armed conflicts), and torture are international crimes that have risen to the level of *jus cogens*.<sup>41</sup> As a consequence, the following duties arise: the obligation to prosecute or extradite; to provide legal assistance; to eliminate statutes of limitations; to eliminate immunities of superiors up to and including heads of states. Under international law, these obligations are to be considered as *obligatio ergo omnes*, the consequence of which is that impunity cannot be granted.<sup>42</sup> The crimes establish inderogable protections and the mandatory duty to prosecute or to extradite accused perpetrators, and to punish those found guilty, irrespective of locus since universal jurisdiction presumably applies. And, as stated above, there can be no statutory limitations for

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37. M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 356-66 (3d ed. 1996).

38. See Kenneth Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 834 (1988); Luc Reydam, *Universal Jurisdiction over Atrocities in Rwanda: Theory and Practice*, 1 EUR. J. CRIME. CRIM. L. & CRIM. JUST. 18 (1996).

39. In such cases, however, national legal systems would have to adopt substantive national legislation to prosecute persons accused of genocide, crimes against humanity, and war crimes, as well as torture.

40. Germany and Italy have included genocide as part of their criminal codes. France, Canada, the United Kingdom, and Australia have developed specialized legislation which includes retrospective application to World War II events, although Australia has not been successful in any prosecutions. (There have been three cases, all of which resulted in acquittal before trial: *DPP v. Polyukhovich*; *Malone v. Berezowsky*; *Heinrich Wagner*. See THE LAW OF WAR CRIMES: NATIONAL AND INTERNATIONAL APPROACHES 130-34 (Timothy L.H. McCormack & Gerry J. Simpson eds., 1997). The United Kingdom is in the process of prosecuting one case (Szymon Serafinowicz) under the United Kingdom War Crimes Act 1991, France has prosecuted three with one pending, and one case (*R. v. Finta*) has been prosecuted in Canada under the Canadian Criminal Law Amendment Act 1985 S.C., 1985, c.19 which amends the Canadian criminal code. See THE LAW OF WAR CRIMES, *supra*, at 29; DICK DE MILDT, IN THE NAME OF THE PEOPLE: PERPETRATORS OF GENOCIDE IN THE REFLECTION OF THEIR POST-WAR PROSECUTION IN WEST GERMANY (1996); Leila Sadat-Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 COLUM. J. TRANSNAT'L L. 289 (1994).

41. See BASSIOUNI & WISE, *supra* note 32; see also BASSIOUNI, *supra* note 30, at 489-99; LAURI HANNIKAINEN, PEREMPTORY NORMS (*JUS COGENS*) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS 713-18 (1988); Gordon A. Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society*, 28 VA. J. INT'L L. 585 (1988); Karen Parker & Lyn Beth Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411, 429-35 (1989).

42. See ANDRE DE HOOGH, OBLIGATIONS *ERGA OMNES* AND INTERNATIONAL CRIMES 45-46 (1996). For different perspectives on government obligations, see Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Human Rights Violations in International Law*, 78 CAL. L. REV. 449 (1990), which strongly supports such a duty, and José Zalaquett, *Confronting Human Rights Violations Committed by Previous Covenants*, 13 HAMLINE L. REV. 623 (1990), which is more flexible with respect to such a duty.

these crimes. What is needed therefore is the uniform application of these norms to the same types of victimization irrespective of the contexts in which they occur and regardless of how they are legally characterized, but the enforcement of these norms requires their non-derogation through political settlements and peace arrangements. The protections afforded victims and the responsibility befalling perpetrators and their leaders should not be bound by the legal characterization of the nature of a given conflict, nor should they be bound by the expectations of political settlements and peace arrangements.

Even though the weaknesses and gaps of the normative scheme discussed above must be resolved, this does not mean that existing norms are insufficient to apply to the crimes in question. There are indeed sufficient norms; what is lacking is the political will to enforce them. The establishment of a permanent international criminal court would certainly contribute to the enhancement of international enforcement.<sup>43</sup> But even when an international criminal court is established, it will have to be considered as being on the same continuum as national criminal courts and all these legal systems will have to work in a complementary way to reinforce one another in order to achieve effective deterrence.

### III

#### ACCOUNTABILITY MECHANISMS

The relevance of prosecution and other accountability measures to the pursuit of peace is that through their effective application they serve as deterrence, and thus prevent future victimization. Their relevance to justice is self-evident.

International and national prosecutions are not the only methods of accountability. There are other options that must be examined, though in the opinion of this writer there exists a duty to prosecute whether at the international or national level, for genocide, crimes against humanity, war crimes, and torture.<sup>44</sup>

Accountability measures fall into three categories: truth, justice, and redress.<sup>45</sup> Accountability must be recognized as an indispensable component of

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43. See *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Vols. I & II, U.N. GAOR, 51st Sess., Supp. No.22, U.N. Doc. A/51/22 (1996) [hereinafter *Preparatory Committee Report*]; M. Cherif Bassiouni, *Draft Statute International Criminal Tribunal*, 9 *Nouvelles Etudes Pinales* (1993).

44. Whether such cases should be prosecuted before an international or national body is essentially relevant to the issue of primacy of competence and to the issue of effectiveness and fairness of national prosecution. Another relevant question arises as to the prosecution of decision-makers, senior executors and perpetrators of particularly heinous crimes and other violators. A policy could be established to prosecute the former before an international criminal court as a first priority, leaving lesser violators to be prosecuted by national bodies. In addition, the question arises as to the possibility of lesser sentences or alternatives to traditional criminal sentences for lesser offenders and for national bodies to resort to various forms of conditional release, pardons, or amnesties after conviction of lesser offenders. These measures would not be contrary to the principle of non-derogation to the duty to prosecute.

45. For a survey of various accountability measures from a criminological perspective, see Stanley Cohen, *State Crimes of Previous Regimes: Knowledge, Accountability and the Policing of the Past*, 20 L.

peace and eventual reconciliation. Accountability measures that achieve justice range from the prosecution of all potential violators to the establishment of the truth.

Accountability is the antithesis of impunity, which occurs either *de facto* or through amnesties. But amnesty is essentially a form of forgiveness,<sup>46</sup> granted by governments, for crimes committed against a public interest. But how can governments forgive themselves for crimes they have committed against others? And how can governments forgive crimes committed by some against others? The power to forgive, forget, or overlook in the cases of genocide, crimes against humanity, war crimes, and torture is not that of the governments but of the victims.

While amnesty is a deliberate positive action (the act of amnesty), impunity is an act of exemption, an exemption from punishment, or from injury or loss.<sup>47</sup> Amnesty can occur after a person or a group of persons have been convicted, not beforehand. The recurrence of pre-prosecution amnesty is therefore an anomalous phenomenon developed as part of a policy of impunity.

Impunity can also result from *de facto* conduct, occurring under color of law when, for example, measures are taken by a government to curtail or prevent prosecutions. As a *de facto* act it can be the product of either the failure to act or through more deliberate procedural and practical impediments that preclude prosecution.<sup>48</sup> It is also possible to achieve impunity through other practical impediments.<sup>49</sup> The attainment of truth, justice, and redress raises a host of issues, addressed by others in this study.<sup>50</sup>

The accountability options include the following:

(1) *International prosecutions*

This includes prosecutions before a permanent international criminal court

& SOC. INQUIRY 7 (1995).

46. "Forgiveness, Forgetfulness, or Intentional Overlooking," THE NEW SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 67 (Lesley Brown ed. 1993).

47. *Id.*

48. For example, a short term statute of limitation can preclude prosecution.

49. For example, in the situation involving rape in the former Yugoslavia, prosecutions are in the Netherlands while victims may be refugees in different countries. If the victims are required to travel to the Netherlands without speaking the language, without proper support (familial, social, psychological, medical, emotional), and are to be cross-examined there, then they may elect not to testify, the result being impunity for the crimes committed. M. Cherif Bassiouni & Marcia McCormick, *Sexual Violence: An Invisible Weapon of War in the Former Yugoslavia* (Occasional Paper # 1, 1996, International Human Rights Law Institute, DePaul University). This is the case in the *Tadic* case before the ICTY, where the defendant was acquitted of charges of rape because the victims were fearful of testifying. *Prosecutor v. Tadic*, Case No. IT-94-1-T (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, May 7, 1997) (McDonald, J., dissenting).

50. These issues include: Need redress always be found through traditional monetary or prosecutorial mechanisms? What level of compensation should be given, and to whom? Can it not, particularly in financially poorer countries, be achieved in a non-monetary form? Many of the crimes involve the potential accountability of many people, maybe large sectors of a society. How many people do you prosecute to attain justice? How can the interest and support of the general population be maintained?

or before an *ad hoc* international criminal court. As a matter of policy, international prosecutions should be limited to leaders, policy-makers, and senior executives; however, this does not preclude prosecutions of other persons at the national level, which may be necessary to achieve particular goals.<sup>51</sup> There must be prosecution for at least the four *jus cogens* crimes of genocide, crimes against humanity, war crimes, and torture. There can be no impunity for these crimes and therefore prosecution is essential. Why prosecution at the international level? One reason is that international prosecution may be the only way to reach the leaders, senior executives, and policy makers, who may otherwise be *de facto* beyond the reach of local law.<sup>52</sup>

(2) *International and national criminal investigatory commissions*

These include internationally established commissions or designated individuals assigned to collect evidence of criminality in addition to other fact finding information of a more general nature.<sup>53</sup> They can be of importance both as the basis for future national and international prosecutions as well as to document from a particular perspective what has happened.

(3) *Acknowledgment of responsibility through national mechanisms such as investigative and truth commissions and reconciliation hearings and findings, both national and international*

This is the acknowledgment of the facts through mechanisms such as truth commissions and fact-finding investigative bodies. These commissions, which can be established internationally, regionally, or nationally, have the mandate to discover the entirety of the truth or a portion thereof. Truth Commissions, however, should not be deemed a substitute for prosecution for the four *jus cogens* crimes of genocide, crimes against humanity, war crimes, and torture. Although these commissions may run in conjunction with prosecutions, their role is to establish a record of what has happened, and to disseminate this information widely at both the national and the international level.<sup>54</sup> Their goals are essentially to serve the end of peace and reconciliation, and they may sometimes be less relevant to criminal justice, though by no means less important to that purpose. The advantage, however, of these commissions is that they establish

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51. It may be important to prosecute lower level actors in order to generate information regarding the actions and identities of higher level officials.

52. Victims should also be allowed to participate as *partie civile*, which is provided for in civilist legal systems in order to have the right to claim compensatory damages. See *infra* note 59 and accompanying text.

53. Such as The Commission of Experts for the former Yugoslavia. See *The Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, U.N. SCOR, 49th Sess., Annex, U.N. Doc. S/1994/674 (1994); Annexes to the *Final Report*, U.N. SCOR, 49th Sess., U.N. Doc. S/1994/674/Add.2 (1994); see also M. Cherif Bassiouni, *The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, 88 AM. J. INT'L L. 784-805 (1994); M. Cherif Bassiouni, *The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia*, 5 CRIM. L. F. 279-340 (1994). The Commission on Human Rights and the Sub-Committee on the Prevention of Discrimination and Protection of Minorities established respectively Rapporteurs and Special Rapporteurs whose work and contribution over the years has proven invaluable.

54. See Priscilla B. Hayner, *Fifteen Truth Commissions—1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597, 607 (1994).

the broader context of a given conflict, thus eliminating the need at national and international prosecutions to provide that broader context or to use a given trial as a means to establish a historical context<sup>55</sup> that could in some cases be deleterious to the case under prosecution or the due process quality of the trial. It is to be noted that an international or national truth commission is not necessarily a reconciliation commission. Some of these commissions can also be of a hybrid nature, taking on investigatory features.<sup>56</sup>

(4) *National prosecution*

National prosecutions should include all persons who have committed criminal acts, subject however to reasonable and justified prosecutorial discretion. This includes persons who have committed the four *jus cogens* crimes of genocide, crimes against humanity, war crimes, and torture,<sup>57</sup> and there should be a principle of no general amnesty for these four crimes. For crimes other than these four, the national system may develop criteria for selectivity or symbolic prosecution consistent with their laws provided these criteria are not fundamentally unfair to the accused. This does not preclude prosecutorial discretion when the evidence is weak or the criminality tenuous, or where a plea bargain can lead to the prosecution of more culpable offenders. It is subject to standards whereby the exercise of discretion against prosecution unless legally or factually justifiable should result in remanding the individual to another accountability mechanism. For example, persons may receive sentences other than the privation of liberty, including the personal payment of reparations or compensation to the victims, the undertaking of some form of community service, or the making of a public apology. Other options could include the serving of limited sentences, or the serving of only partial sentences, followed by an amnesty or pardon, provided there are no *a priori* blanket amnesties or pardons that fail to take into account the criminality of the act, and the consequences applicable to each individual receiving such an amnesty or pardon. It is also suggested that victims should be allowed to participate as *partie civile* in relevant legal proceedings in order to have the right to claim compensatory damages in an appropriate legal forum.

(5) *National lustration mechanisms*

National lustration is a purging process whereby individuals who supported or participated in violations committed by a prior regime may be removed from their positions and barred from positions of authority or elective positions. Though punitive in nature, these mechanisms are essentially used as a political sanction that carries moral, social, political, and economic consequences, but they do not avail individuals of their due process rights. The dangers with such mechanisms is that they tend to deal with classes or categories of people without regard to individual criminal responsibility, and thus lustration may tend to produce a number of cases of individual injustice. Furthermore, when lustra-

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55. GIDEON HAUSNER, JUSTICE IN JERUSALEM 3-4 (1966) (commenting on the *Eichmann* case).

56. See, e.g., Berat & Shane, *supra* note 11, at 186.

57. See *supra* note 40 regarding national legislation.

tion laws result in loss of any type of earning capacity, this creates secondary victimization of dependents of these individuals who fall within the ambit of the lustration legislation. Lastly, these laws tend to have a stigmatization effect which carries beyond those who may have deserved such stigmatization and onto innocent third parties or family members.<sup>58</sup>

(6) *National civil remedies*

National civil remedies are the development within civil legislation of the right to bring suit by victims and their heirs, which enable them to obtain certain civil remedies.<sup>59</sup> For example, individuals should be able to institute legal actions to compel the inclusion of a person in national criminal prosecution or in the category of those falling under lustration laws. Certain types of injunctive remedies can also be contemplated. National civil remedies can also include compensation whether as a result of individual or group legal action or as part of a national program that provides remedies. Persons having certain rights under civil law should also be allowed to join in national prosecutions as *partie civile* in criminal proceedings.

(7) *International mechanisms for the compensation of victims*

Victim compensation is a necessity. When it is in the nature of a national or international program that allocates a certain amount to compensation, these programs must provide for a fair administrative method to determine actual damages as opposed to punitive damages. Monetary compensation should not be deemed the only outcome. Non-monetary forms of compensation should also be developed, particularly in societies where the economy is unable to sustain large monetary sums. Note that in 1985 the United Nations adopted a General Assembly resolution entitled *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*<sup>60</sup> and at the last Preparatory Committee meeting on the Establishment of an International Criminal Court, a proposal by Egypt stating the connection between victim compensation and the establishment of criminal liability was put forward.<sup>61</sup>

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58. See *supra* note 13.

59. See *e.g.*, U.S. Alien Tort Claims Act, 28 U.S.C.A. § 1350 (1988); see also *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 116 S.Ct. 2524 (1996); *Flartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

60. U.N. Doc. A/RES/40/34, Dec. 11, 1985, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*. For a discussion of this, see *International Protection of Victims*, 7 NOUVELLES ETUDES PINALES (M. Cherif Bassiouni ed., 1988). See also Security Council Resolution 808 establishing the ICTY: S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., at 1, U.N. Doc. S/RES/808 (Feb. 22, 1993). Resolution 808 stated that the Security Council "[d]ecides that an international criminal tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991."

61. *Preparatory Committee Report, ILC Draft*, Art. 43 (c) ("The judgement of the Court shall also include a determination of the scope and extent of the victimization in order to allow victims to rely on that judgment for the pursuit of civil remedies, including compensation, either in national courts or through their Governments, in accordance with international law.").

## IV

## POLICY CONSIDERATIONS

Which of these accountability measures or what combination thereof is appropriate in light of the circumstances of a given conflict, the expectations of the parties to the conflict, and the anticipated outcomes will depend on a variety of factors that must be weighed in the aggregate. This is obviously not an easy task. In the balance lies peace and justice. It is a task that is both challenging and fraught with dangers affecting the lives and well-being of many. But it is a task that must be guided by legal, moral, and ethical considerations. Accountability is among these considerations. The accountability mechanisms described above are not mutually exclusive, they are complementary. Each mechanism need not be taken as a whole. Rather, a portion may be used and combined with other mechanisms. No single formula can apply to all types of conflicts nor can it achieve all desired outcomes. Just as there is a range in the types of conflict and a range in types of peace outcomes, there is a corresponding range of accountability mechanisms. In the final analysis, whichever mechanism or combination of mechanisms is chosen, it is chosen to achieve a particular outcome which is, in part, justice, and, wherever possible, reconciliation, and ultimately, peace. And in this respect, we cannot look at each mechanism exclusively from the perspective of a crime control model but as an instrument of social policy that is designed to achieve a particular set of outcomes that are not exclusively justice based. So far, however, there exist no set of international guidelines by which to match the type of conflicts, expected peace outcomes, and eventual accountability mechanisms. Such guidelines are needed in order to constitute common bases for the application of these mechanisms and in order to avoid abuses of and denial of justice. What should be achieved is not only a sense of justice, but the elimination of a sense of injustice. In choosing these mechanisms, it must be remembered that among the goals of these accountability mechanisms is to educate and prevent and to shake people from a sense of complacency, one that bureaucracies, including military and police bureaucracies, tend to foster in a climate of silent conspiracy; the *omerta* of these bureaucracies must be eliminated.<sup>62</sup>

Accountability mechanisms, if they are to have a salutary effect on the future and contribute to peace and reconciliation, must be credible, fair, and as exhaustive of the truth as possible. Without that, the embers of yesterday's conflict can become the fire of tomorrow's renewed conflict. Truth is a means by which to cleanse, at least in part, the misdeeds of the past. The fundamental principle of accountability must take into account:

- (1) the cessation of the conflict and thereby the ending of the process of victimization;
- (2) prevention of conflicts in the future;

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62. See HANNAH ARENDT, *EICHMANN IN JERUSALEM; A REPORT ON THE BANALITY OF EVIL* 14-15 (1963).

- (3) deterrence of conflicts in the future (particularly conflicts which may be initiated directly after the cessation of a conflict being addressed);
- (4) rehabilitation of the society as a whole and of the victims as a group; and
- (5) reconciliation between the different peoples and groups within the society.

At a minimum, central truths, as relative as they may be, must be established in order to provide a historic record of what occurred to mitigate the simmering effects of the hardships and hardened feelings resulting from violent conflicts that produce victimization, to dampen the spirits of revenge and renewed conflict, to educate people, and ultimately to prevent future victimization.<sup>63</sup> Truth is, therefore, an imperative, not an option to be displaced by political convenience because, in the final analysis, there truly cannot be peace (meaning reconciliation and the prevention of future conflict arising out of previous conflictual episodes) without justice (meaning, at the very least, a comprehensive exposé of what happened, how, why, and what the sources of responsibility are). Forgiveness can follow only from the satisfaction of all parties, particularly those who have been victimized, after the truth has been established.

It should be noted in this context of the consideration stated above, however, that there is a difference between the qualities of mercy and the qualities of forgiveness. Whereas forgiveness is a change of heart toward a wrongdoer that arises out of a decision by the victimized person, and is therefore wholly subjective, mercy is the suspension or mitigation of a punishment that would otherwise be described as retribution, and is an objective action that cannot be taken only by the victim but by those entrusted with government.<sup>64</sup> Forgiveness is not a legal action; rather forgiveness is primarily a relationship between persons. The arena of resentment and forgiveness is individual and personal in a way that legal guilt and responsibility are not.<sup>65</sup> Institutions, states, and systems of justice cannot forgive: They can pardon and act in mercy.<sup>66</sup> The act of mercy may arise out of feelings of compassion or pity for the wrongdoer, however, these feelings are to be distinguished from those of forgiveness, which belong to the victim. What of the relationship of mercy to justice? Does the obligation of criminal justice to uphold the rule of law and to impose "just punishment" run counter to the act of mercy? Does the act of mercy toward the wrongdoer neglect the victim's need for justice? To what extent are these questions more imperative in the face of historical denial and its subtext of justification?<sup>67</sup> Le-

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63. See Mark J. Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U. PA. L. REV. 493 (1995).

64. See JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 33-34, 162-86 (1988).

65. See *id.* at 33.

66. See KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 181-97 (1989); see especially *id.* at 193.

67. Historical denial is characterized by claims of "nothing happened" or "whatever happened is

gal developments must address these questions and others because they are essential to both justice and peace.

## V

### PHILOSOPHICAL CONSIDERATIONS

History teaches us that humankind has evolved not only by the laws of God or the laws of nature, but by the laws of man. For some, these laws are inspired by higher ones as understood in the three monotheistic faiths, their differences notwithstanding. To others, they represent the laws of humanity to be understood as an expression of the lofty callings of humanism. More frequently, however, human practices have been nothing more than the elevation of atavistic predator instincts to self-justifying levels. It is the difference between these types of laws that distinguishes civilized *homo sapiens* from certain predator species of the animal world. The former is what the rule of law seeks to strengthen by means of institutional practices and social controls. The latter harnesses the worst of our instincts and limits the more harmful of our conduct despite the dilemma of right and wrong that confronts us individually and collectively. Law, legal, and social institutions control and mitigate the consequences of these contradictions: the contradiction of lion and lamb lying side by side within us and which are magnified by the collective us.

History reveals that the crimes committed in the course of conflict usually occurred after a breakdown in social controls. Some ascribe it to cultural factors and argue that some cultures have a tendency to be more cruel or violent than others.<sup>68</sup> It is difficult to say, however, whether these cultural factors are endemic or whether they are produced by social and economic conditions and by the absence of effective legal and social controls. Accountability mechanisms are therefore important because they tend to shore up legal and social controls that are preventive, and tend to support the hypothesis of deterrence.

Human nature also has its darker side, and while evil can emerge on its own without external inducement, it no doubt tends to emerge more harmfully when external controls are reduced and inducements offered. Impunity is certainly one of these inducements, as is the prospect of indifference and the expectation that the worst deeds may be characterized as justified, reasonable, acceptable, or normal.

Victimization frequently involves the dehumanization of the prospective victims, frequently after a stage of psychological preparation by the perpetrators. Anyone "less than human" can therefore be dealt with as an animal or an

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exaggerated," the subtext of justification is characterized by the claim "it was justified" or "there was no other choice." See Israel Charny, *The Psychology of Denial of Known Genocide*, in 2 GENOCIDE (Israel Charny ed., 1988); Roger W. Smith, *Denial of the Armenian Genocide*, in 2 GENOCIDE (Israel Charny ed., 1988).

68. See, e.g., GEOFFREY BEST, *WAR AND LAW SINCE 1945* (1994); JOHN KEEGAN, *A HISTORY OF WARFARE* (1993).

object to which anything can be done, without fear or risk of legal or moral consequences. Another approach is for the perpetrators to characterize the victims as being the perceived threats, thus providing a rationalized justification for the ensuing victimization. Such characterization can even rise to the level of self-defense against individuals or a group of individuals who are portrayed or perceived as constituting a threat or danger of some degree of plausibility and immediacy. Thus, the victims can be portrayed and perceived as being responsible for the victimization inflicted upon them as if they had done something to justify it or had called for it by their conduct, or for that matter, as in the case of the Holocaust, for their very being.<sup>69</sup> This rationalization can even reach the point where the perpetrators can perceive themselves as forced to inflict the victimization. That reasoning can reach the absurd, where the perpetrators become the victims in their being “forced” by the actual victims to engage in victimizing conduct.

Such distorted intellectual processes may be the product of inherent evil. But they are most frequently the product of evil manipulation by the few of the many. From the days of Goebbels’ and Streicher’s propaganda to the 1994 Rwanda Hutu incitements to kill the Tutsis, the use of propaganda has been the main instrument of group violence. Obviously the less educated or the more gullible a society is, the more it is likely to be induced by such false beliefs. But there are many other factors that influence the credibility of such techniques, which use the accumulation of uncontradicted falsehood over time to produce their deleterious effect. And it is during that time that the international community should mobilize on the basis of certain early warning signals that group victimization is about to occur. Thus the prevention of such forms of victimization must be developed.

Accountability mechanisms appear to focus on events after the fact, and may appear to be solely punitive, but they are also designed to be preventive through enhancing commonly shared values and through deterrence. Accountability therefore has a necessary punitive aspect. However it is also integrally linked to prevention and deterrence. The weakness in the accountability argument is that it is after the fact, but its strength is that it has a crucial role to play in the formation and strengthening of values and the future prevention of victimization within society.

As stated above, impunity is the antithesis of accountability. To foster it or condone it can be illegal and immoral. Frequently it is also counterproductive to the ultimate goal of peace. Indeed, large-scale victimization arising out of international crimes is never safely tucked away in the limbo of the past. Instead, it remains fixed in time in an ongoing present that frequently calls for vengeance and longs for redress. Victims need to have their victimization acknowledged, the wrongs committed against them decried, and the criminal perpetrators, or at least their leaders, punished, and compensation provided for the survivors. Above all, the lessons of the past must instruct the future in or-

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69. See RAUL HILBERG, *THE DESTRUCTION OF THE EUROPEAN JEWS* (3 Vols. 1985).

der to avoid repeating the same mistakes, and to ensure some prevention and deterrence against similar occurrences.

A more outcome-determinative consideration of the processes of peace and the prospects of justice is to limit the discretion of leaders who are involved in political settlement processes that are intended to bring an end to conflicts. These leaders' values, expectations, personal ambitions, positioning for power, the degree of public support they possess, and above all their responsibilities in connection with the initiation of the conflict and the conduct of the hostilities, particularly when international humanitarian law violations have occurred, affect the outcome of political settlements and bear the most on the subsequent pursuit and integrity of justice processes. Leaders involved in conflict situations are those who negotiate political settlements, usually through the mediation efforts of other leaders. Without the involvement of leaders of conflict situations, there can be no cessation of hostilities, and that is why they are essential to the pursuit of peace. But, conversely, they may also be opposed to the pursuit of justice. That is the essence of the mediator's dilemma—how to bring about peace without sacrificing justice. In most conflicts, that dilemma has been resolved at the expense of justice. To avoid this dilemma in the future, the peace negotiators acting in good faith in the pursuit of peace must be immune from the pressures of having to barter away justice for political settlements. That card must not be left to them to play in the course of negotiating political settlements. Impunity must, therefore, be removed from the "tool box"<sup>70</sup> of political negotiators.

## VI

### CONCLUSION

Impunity for international crimes and for systematic and widespread violations of fundamental human rights is a betrayal of our human solidarity with the victims of conflicts to whom we owe a duty of justice, remembrance, and compensation. To remember and to bring perpetrators to justice is a duty we also owe to our own humanity and to the prevention of future victimization.<sup>71</sup> To paraphrase George Santayana, if we cannot learn from the lessons of the past and stop the practice of impunity, we are condemned to repeat the same mistakes and to suffer their consequences. The reason for our commitment to this goal can be found in the eloquent words of John Donne:

No man is an island, entire of itself; every man is a piece of the continent,

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70. W. Michael Reisman, *Institutions and Practices for Restoring and Maintaining Public Order*, 6 DUKE J. COMP. & INT. L. 175 (1995). Reisman notes that "[t]here 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." *Id.* at 185. The question is to what extent accountability mechanisms are deemed a part of "public order"? Where do such mechanisms rank; what is their value?

71. To paraphrase George Orwell: He who controls the past, controls the future; who controls the present, controls the past. By recording the truth, educating the public, preserving memory, and trying the accused it is possible to prevent abuses in the future. *See* Cohen, *supra* note 45, at 49.

a part of the main ....

Any man's death diminishes me because I am involved in mankind,

and therefore never send to know for whom the bell tolls; it tolls for thee ....<sup>72</sup>

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72. *Devotions upon Emergent Occasions XVII* (1624).