

# ALTERNATIVE RESPONSES TO SERIOUS HUMAN RIGHTS ABUSES: OF PROSECUTION AND TRUTH COMMISSIONS

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## I

### INTRODUCTION

Among the materials recorded in the main hall of the Holocaust memorial at Yad Vashem in Israel are the words of the great eighteenth century founder of modern Hasidism, Bal Shem Tov: "Forgetting lengthens the period of exile! In remembrance lies the secret of deliverance."<sup>1</sup> As the founders of Yad Vashem knew, remembrance is vital if bloody crimes like the Holocaust are to be addressed and their repetition prevented. This insight is critical as both successor regimes and the international community turn to consideration of the question of impunity. Heinous violations of human rights should never go unremarked. Their extent should be catalogued, their details exposed, and their causes explored. If carnage is ignored or forgotten, peace and justice are seriously jeopardized. It is only when misconduct is exposed and addressed that the law can begin to build a fence around it. The extension of the rule of law is premised upon the disclosure of misdeeds and societal response to that disclosure.<sup>2</sup>

How the national and world communities should approach egregious violations of human rights is a complex question. The classic response has been criminal prosecution. In the modern era, this choice is perhaps best exemplified by the trials conducted at Nuremberg after the fall of Hitler's Reich. These proceedings were conducted in a manner that was intended to prosecute and memorialize at the same time—to punish Nazi leaders while disclosing in a powerful documentary record the immensity of the Nazi regime's crimes.<sup>3</sup> The idea of using a criminal trial for these two purposes has been an attractive one. It has appealed to a number of nations struggling to address the crimes of the

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1. James E. Young, *Memory and Monument*, in BITBURG IN MORAL AND POLITICAL PERSPECTIVE 103, 111 (Geoffrey Hartman ed., 1986).

2. See generally E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT (1975).

3. See TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 43-55 (1972); Stephen Breyer, *Crimes Against Humanity: Nuremberg, 1946*, 71 N.Y.U. L. REV. 1161, 1162 (1996).

past and create a lasting record regarding them. It was the model adopted by the State of Israel in dealing with Adolf Eichmann and the Holocaust.<sup>4</sup> More recently, it appears to have been the model adopted by the United Nations to address the horrors of Bosnia<sup>5</sup> and Rwanda.<sup>6</sup>

The trial process, however, is not the only way to confront heinous human rights violations. At least since the fall of the military regime in Argentina,<sup>7</sup> some nations have employed an alternative approach, sometimes in addition to, and sometimes as an alternative to, criminal prosecution. This approach has often been described as the "truth commission" method. It has been used at least nineteen times over the past twenty-one years,<sup>8</sup> and has played a part in such diverse settings as Uruguay, Germany, Chad, and South Africa.<sup>9</sup> The truth commission does not prosecute but rather devotes its energies to assembling a full record concerning prior misdeeds. It seeks to describe what happened, who was responsible,<sup>10</sup> and what motives were at work. Once all this has been done, the results are published so that society will have a lasting record and, perhaps, a guide to avoid future infringement of human rights.

While truth commissions need not function as an alternative to prosecution, they have so operated in a large number of cases.<sup>11</sup> In such circumstances, they have been treated as the appropriate and exclusive response to the crimes of a prior regime. The recent South African example is perhaps the most powerful in this regard. There the truth commission was authorized to grant immunity from prosecution to those who would provide complete and accurate testimony about misdeeds carried out during apartheid.<sup>12</sup>

In light of the rapid expansion of the use of truth commissions, it seems appropriate to consider whether, and to what extent, commission proceedings

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4. See THE TRIAL OF ADOLF EICHMANN: RECORD OF PROCEEDINGS IN THE DISTRICT COURT OF JERUSALEM (Trust for the Publication of the Proceedings of the Eichmann Trial in cooperation with the Israel State Archives and Yad Vashem trans., 1992); GIDEON HAUSNER, JUSTICE IN JERUSALEM 291-92 (1966) (Chief Prosecutor Gideon Hausner said of the Eichmann trial: "There was, in fact, much more to it than a desire for a complete record. I wanted our people at home to know as many of the facts of the great disaster as could be legitimately conveyed through these proceedings.").

5. See Security Council Resolution 827, U.N. SCOR, 48th Sess., 3217th mtg. at 1, U.N. Doc. S/RES/827 (1993) (approving Statute for the Yugoslavia Tribunal).

6. See Security Council Resolution 955, U.N. SCOR, 49th Sess., 3453d mtg. at 1, U.N. Doc. S/RES/955 (1994) (approving Statute for the Rwanda Tribunal).

7. Although Argentina was not the first nation to use a truth commission to address the human rights violations of a predecessor regime, it "was the first to receive widespread international attention." Priscilla B. Hayner, *Fifteen Truth Commissions—1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597, 614 (1994). For a detailed discussion of the Argentine experience, see Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put Into Context: The Case of Argentina*, 100 YALE L.J. 2619 (1991).

8. See Priscilla B. Hayner, *Commissioning the Truth: Further Research Questions*, 17 THIRD WORLD Q. 19, 20 (1996).

9. See *id.*

10. There is a lively debate about whether truth commissions should disclose the names of the perpetrators of prior misdeeds because of potential due process problems. See Hayner, *supra* note 7, at 647-50; Jo M. Pasqualucci, *The Whole Truth and Nothing but the Truth: Truth Commissions, Impunity, and the Inter-American Human Rights System*, 12 B.U. INT'L L.J. 321, 335 (1994).

11. See Hayner, *supra* note 7, at 611-35.

12. See generally Tina Rosenberg, *Recovering from Apartheid*, NEW YORKER, Nov. 18, 1996, at 86.

may satisfy national and international expectations that serious human rights violations will be addressed by a successor regime. What follows seeks to assess this question while keeping in mind the broader problem of impunity.

## II

### SUCCESSOR REGIME RESPONSES TO THE HUMAN RIGHTS VIOLATIONS OF A PREDECESSOR

In recent years, triumphant democratic reformers in a number of countries around the world have had to face the difficult question of what steps to take in dealing with the human rights violations of predecessor regimes. While there is ample reason to conclude that the best response to such violations is, most often, the vigorous prosecution of perpetrators, this article will suggest that there may be situations in which, for practical reasons or on the basis of sound policy, prosecution is inappropriate and an alternative relying on the inquiry of a truth commission is acceptable. In succeeding sections, it will be argued, first, that prosecution is usually best, but, second, that if certain conditions have been met, the choice to rely instead on a truth commission may be a valid one. Third it will be argued that several categories of human rights violations should never be left to the exclusive assessment of a truth commission, and, finally, that with respect to violations that should not go unprosecuted, there is a need for an international tribunal, if, in a reasonably limited time frame, a successor regime has not prosecuted on its own.

#### A. The Benefits of Prosecution

Prosecuting the human rights violations of a predecessor regime can yield at least half a dozen significant benefits to a democratic government.<sup>13</sup> First, it can substantially enhance the prospects for the establishment of the rule of law. Holding violators accountable for their misdeeds signals all members of society that the law's authority is superior to that of individuals. Such a signal is of immense value in building a lasting tradition of respect for and adherence to the law, and has been identified by some commentators as the key to the development of truly democratic institutions.<sup>14</sup>

Second, prosecution can function as a means of educating the citizenry to the nature and extent of prior wrongdoing. Such education may serve both to inoculate the populace against lapses into oppressive behavior and as a means of establishing an accurate account of what actually transpired before the democratic regime came to power.<sup>15</sup> An accurate record can also serve as a powerful deterrent to later revisionism.

Third, prosecution is one of the most effective ways of identifying and cre-

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13. See Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2542-44 (1991).

14. See, e.g., THOMPSON, *supra* note 2.

15. See Juan Mendez, *Lawrence Weschler's A Miracle, a Universe: Settling Accounts with Torturers*, 8 N.Y.L. SCH. J. HUM. RTS. 577, 583 (1991) (book review).

ating the predicate for the compensation of victims of a predecessor regime's misdeeds. Prosecution will, by its nature, lead to the disclosure of the identity of victims, the nature of their injuries, and the persons responsible for those injuries. Such a presentation not only establishes a record upon which compensation may be awarded, but fixes a moral basis for such action. Prosecution, in this context, serves both the public's and the victim's interest in compensation. It addresses the informational needs of both and puts in their hands the tools that can help them secure needed relief.

Fourth, prosecution can provide a means of punishing wrongdoers for their criminal conduct. It makes possible the sort of retribution seen by most societies as an appropriate communal response to criminal conduct. It may also satisfy victims' desires for vengeance. Moreover, punishment serves to stigmatize malefactors and facilitate their isolation from the society that suffered because of their actions.

Fifth, prosecution can enhance a society's ability to deter future violations of human rights. If potential wrongdoers believe that they are likely to face punishment for their misdeeds, they may be persuaded not to initiate such activity.

Finally, prosecution may be essential to healing the social wounds caused by serious human rights violations. It has been argued that society cannot forgive what it cannot punish. If that argument is correct, the first real step to restoring social harmony comes with prosecution.

#### B. Practical Reasons to Forgo Prosecution

Despite the strength of the arguments in favor of prosecution, a great number of budding democracies from Latin America to Southern Africa and from Eastern Europe to South Asia have rejected prosecution in favor of one or another form of public inquiry. It appears that their decisions to forgo prosecution, have, at least in part, been motivated by the most compelling of practical considerations.

Many fledgling democracies have simply not had the power, popular support, legal tools, or conditions necessary to prosecute effectively. In some cases, governments have simply been too weak to pursue powerful defendants. Often such defendants are an integral part of an intact military establishment fully capable of bringing down the government if too directly threatened.<sup>16</sup> The choice to prosecute in such cases may mean the demise of democracy rather than the punishment of human rights violators.

In other cases, governments have found themselves lacking a popular mandate to pursue defendants. This has often been the situation in countries that have participated in a brokered ending to a civil war. Defendants in such situa-

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16. The case of Chile after Pinochet is one that clearly illustrates this point. See Jorge Correa, *Dealing with Past Human Rights Violations: The Chilean Case After Dictatorship*, 67 NOTRE DAME L. REV. 1455 (1992); Jose Zalaquett, *Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations*, 43 HASTINGS L. J. 1425, 1432-33 (1992).

tions may be drawn from both sides in such numbers or at such high levels as to provoke the citizenry or the former combatants to resist prosecution, thereby unraveling a painstakingly arranged peace. Alternatively, the very basis for the end of hostilities may have been the reconciliation of all combatants and their full reintegration into society. Prosecution may mean the destruction of a fragile compromise.<sup>17</sup>

Still other new democracies have found their adjudicatory mechanisms too weak, unskilled, biased, or corrupt to carry out the difficult task of overseeing fair and expeditious trials. The lack of an adequate judiciary, or the interposition of a suspect military justice system, may taint prosecutions that do go forward or delay prosecutions for such extended periods as to undermine their credibility or popular support. In such cases, the judicial mechanism itself needs to be fixed, and reliance on the tainted institution will serve only to compromise the integrity of the new regime.<sup>18</sup>

In practical terms, opting for a broad factual inquiry may be the best means of encouraging stability and avoiding the uncertainties that criminal prosecutions create. It is no secret that uncertainty invites turmoil, a risk that a society, with good reason, may wish to avoid. Fact-gathering without prosecution may speed the healing process while inconclusive prosecutions may drag on for years allowing doubts and disputes to fester. Inflated expectations, raised by a series of high profile prosecutions may, if disappointed, produce a serious backlash against democratic institutions.

Moreover, prosecutions raise a number of fairness issues themselves. The difficult problems of adjudicator competence and bias were canvassed above. Other issues arise as well. Closely linked to adjudicator bias is the charge that prosecutions are nothing more than "victors' justice," a settling of scores by those who have won the contest. This sort of prosecution sets the stage for revanchism rather than democracy and casts doubt upon the wisdom of proceeding, at least in some cases.

Prosecution also raises a very difficult set of questions concerning the selection of defendants. It is likely to be impossible to prosecute all human rights violations. Therefore, some subset of possible cases will have to be selected. That subset may include a few powerful defendants and/or a group of malefactors whose deeds are particularly visible or egregious. If only the highest echelons are prosecuted, it is possible that those further down the ladder will conclude that they are free to act as they choose so long as they avoid becoming too prominent. If only defendants connected with especially terrible acts are selected for prosecution, it is possible that they will be perceived as scapegoats for a much larger body of defendants, including those in highest authority.<sup>19</sup>

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17. See Stephen P. Marks, *Forgetting "The Policies and Practices of the Past": Impunity in Cambodia*, 18 FLETCHER F. WORLD AFF. 17 (Summer/Fall 1994) (noting that the Cambodian populace appeared to regard peace as far more important than prosecutions).

18. In El Salvador, a U.N. international truth commission concluded that the national judiciary was incapable of dealing with prior human rights violations. See Pasqualucci, *supra* note 10, at 341.

19. On the problems of selectivity in prosecution, see Nino, *supra* note 7, at 2626-27.

This analysis should not be understood as suggesting that the problem of selection makes prosecution impossible, but rather that a society might reasonably conclude that in the context of its experience, there may be good reason to avoid the problems posed by the inevitable selectivity of prosecution.

Governments have been prevented from prosecuting not only by serious internal problems, but by external threats, as well. Of course, when a new democracy is fighting for its life in a military conflict with an external foe, there may be reason to forgo prosecutions that could substantially weaken the effectiveness of the country's defenders. The same may be true if a disastrous economic situation has brought the country to its knees and threatened the existence of democratic institutions. In such emergencies, prosecution may be destructive of the fabric of society.<sup>20</sup>

Practical problems of a wholly different sort may raise serious questions about the efficacy of prosecution. The attitudes of the populace and even their representatives may be so intensely hostile as to render a fair trial impossible. Prosecutions must be, and must be perceived to be, fair in order to be useful to a society. When the tide of popular feeling runs too high to allow for fairness, wisdom may counsel against proceeding. Bloody "show trials" undertaken in haste and resulting in draconian punishment will not yield the benefits described in the preceding section of this paper.<sup>21</sup> It is best to avoid trials that make a mockery of justice or set a provocative example that will fuel revanchist reaction.

Finally, the misdeeds of a predecessor may be so extensive or difficult to document as to make the independent gathering of information about them impossible. In these circumstances, it may be necessary, if society is to uncover the whole truth, to provide incentives to potential defendants to tell what they know. Such incentives may include immunity from prosecution. Sometimes, societies may find it appropriate to barter prosecution for full disclosure.<sup>22</sup>

### C. Policy Reasons to Forgo Prosecution

Separate and apart from practical concerns, there are a number of policies that might justify forgoing prosecution and substituting the inquiry of a truth commission. First, it may be the overwhelming majority's view that prosecutions will not serve the best interests of society. When this conclusion is expressed at the ballot box, either through a plebiscite or the election of representatives who have campaigned on such a platform, it is questionable whether a democratic government can ignore popular political sentiment.<sup>23</sup> The very es-

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20. A number of international conventions recognize the propriety of action in derogation of various rights in circumstances of "public emergency." See Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. REV. 449, 485 (1990).

21. It is doubtful that the "show trial" prosecution and execution of Nicolae Ceauscscu in Romania served in any way to advance the cause of concern for human rights.

22. See Rosenberg, *supra* note 12.

23. The amnesty plebiscite in Uruguay raises many of these issues. See Nino, *supra* note 7, at 2619; Zalaquett, *supra* note 16, at 1432.

sence of a democracy is that it openly discusses and decides such monumental questions as the nature of justice and the proper course to be pursued by government. If the populace has freely and fairly chosen a path that leads away from prosecution, outsiders should be very cautious about condemning that choice. This is not to say that every criminal case ought to be put to a vote, but rather that when a transformative event occurs in a society, the majority of its members ought to have a critically influential voice in deciding the new direction to be taken.

What substantive policies might motivate a society to choose to avoid zealous prosecution is not a huge mystery. Many of the great religions of the world have concluded that “an eye for an eye” is a sterile sort of justice that is far less satisfactory than breaking the cycle of violence or vengeance once and for all. It is certainly legitimate to argue that “turning the other cheek” or freely pardoning offenses is a better means of managing affairs and establishing lasting peace than is a strict accounting through criminal prosecution. The pardoning of offenses may be the best means of healing the deepest wounds. It may provide a new sort of precedent for dealing with old hatreds.<sup>24</sup>

#### D. The Truth Commission Alternative

Prosecution may not be the only means of securing most of the benefits detailed above. Analysts have, however, been drawn to it because it is the way things have “always” been done. As previously remarked, the prosecutorial approach was the one employed at the end of World War II to deal with Nazi and Japanese war criminals. The Nuremberg trials established a precedent that has served as the “model” since the 1940s. Most efforts to address serious human rights violations have been measured against that model ever since. Nuremberg was, however, an unusual case. The Nazis had been utterly defeated. They had unconditionally surrendered. Their society was in ruins and in need of reconstruction from the ground up.<sup>25</sup> The victors included a number of nations that had, in preceding decades, had significant experience with “show trials”<sup>26</sup> or deep-seated cultural allegiance to the trial format. It may not be inappropriate to point out that these circumstances are unlikely to obtain in a broad range of modern cases and that this casts doubt on the universality of the Nuremberg paradigm.

The alternative to the criminal trial that has been used with remarkable frequency by emergent democracies is the truth commission. Commissions have been charged by almost twenty societies with the mission of gathering as complete as possible a factual record about predecessor regime violations of human rights with the objective of recording and, in most cases, publicizing prior

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24. Stephen Marks stresses the point that “Cambodian Buddhism teaches reconciliation in a way that does not necessarily require justice or retribution,” in explaining why Cambodians may not support prosecution with respect to the grave crimes of the Khmer Rouge. Marks, *supra* note 17, at 38.

25. See Zalaquett, *supra* note 16, at 1428.

26. On the Soviet predilection for show trials, see ROBERT CONQUEST, *THE GREAT TERROR* (1968).

abuses. While truth commissions have been controversial, they have been a powerfully attractive alternative to prosecution.

Truth commissions may provide most of the benefits ascribed to the prosecutorial approach. They can insist upon and carry out a thorough examination of past conduct. They can identify and hold up to social criticism prior violations of the rule of law. In this way, their work can reinforce respect for the rule of law. These activities offer a reasonable substitute for prosecution except insofar as the credibility of the law *requires* the imposition of actual punishment. While it is difficult to judge whether disclosure and criticism of lawless conduct create a lasting basis for respect for law in individual cases, it is reasonable to anticipate that public shaming and emphatic declarations of principle will generally advance the rule of law.<sup>27</sup> Moreover, forbearance may enhance the appearance of fairness and break cycles of vengeance.

Truth commissions can serve even more effectively than trials to educate the citizenry to the nature and extent of prior wrongdoing. Since they are not limited to the individualized facts of a set of prosecutions, they can marshal and disseminate all the relevant facts about an oppressive regime. The record a truth commission can develop is the most powerful tool available to inoculate a society against dictatorial methods.<sup>28</sup> Moreover, since a commission is not necessarily designed to convict anyone, its reports may make a strong claim to impartiality—an especially telling point in responding to revisionists intent upon attacking democratic foundations.

Truth commissions are at least as effective a tool for identifying victims and establishing a predicate for compensation as trials. The latitude allowed a commission to pursue the whole story may, in fact, make it a superior vehicle for this purpose.<sup>29</sup> Prosecution is designed to concentrate on the accused's acts. The victim may be important, but his or her suffering is not the central concern of proceedings. Truth commissions can make such issues their main concern and, indeed, may even be structured to enhance the therapeutic benefit of testifying.<sup>30</sup>

The truth commission's one real shortcoming is that it cannot match prosecutions with respect to the fulfillment of the important policy goals regarding punishment. Truth commissions are generally designed to avoid the punishment issue and often barter immunity for information. The greater the felt need for punishment, the more seriously the prosecution option must be con-

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27. See Rosenberg, *supra* note 12, at 95 ("Shame is a rare and precious thing. 'You cannot legislate repentance,' Desmond Tutu says, 'That is where faith comes in.' The Truth Commission is likely to inspire more genuine repentance than any other approach yet tried, but it will still reach only a small portion of apartheid's criminals and bystanders.").

28. See Hayner, *supra* note 8, at 22.

29. The Chilean Commission for Truth and Reconciliation developed a massive record concerning the fate of 3,000 victims of the Pinochet military regime utilizing input from "social, religious, and political organizations, as well as the expertise of human rights organizations in Chile and abroad." Zalaquett, *supra* note 16, at 1434.

30. See *id.* at 1437 ("At first, we did not realize that the very process of seeking the truth was thus also a patient process of cleansing wounds, one by one."); Rosenberg, *supra* note 12, at 90.



sidered. Truth commissions are not, however, without any ability to achieve punishment-like goals. Their reports can bring shame upon wrongdoers and lead to their ostracism from society.<sup>31</sup> This is far from complete retribution, but is of some value, especially where prosecution is not a practical possibility.

Commissions may be capable of constructing factual records that generate social opprobrium of sufficient strength to deter future misconduct, or encourage steps that help heal the deep wounds caused by a prior government's misdeeds. Commission work may produce the sort of "truth" that can "set men free." The threat of disclosure and ostracism may provide a weighty deterrent (not all that different from the sort of deterrence associated with a free and robustly inquisitive press).<sup>32</sup> Much may turn on the identity of potential malefactors and the importance they attach to good reputation.

#### E. Conditions Restricting the Acceptability of Truth Commissions

The decision whether to prosecute the human rights violations of a predecessor regime is often among the hardest an emerging democracy must face. While there may be valid reasons for choosing factual inquiry rather than prosecution, the latter is generally superior and should be chosen when possible. To avoid creating an easy escape route for governments that desire to choose political expediency over justice and the obligations of international law,<sup>33</sup> limits on the use of the truth commission alternative ought to be insisted upon by the international community. If certain criteria are not met, international bodies as well as individual nations should challenge any government's decision not to prosecute in cases of serious violations of human rights.

The first of these criteria is that the commission alternative not be adopted unless it is the embodiment of the will of the majority of the members of a society as manifested either by a direct vote of the people or the decision of duly elected representatives who stand to be judged by the electorate for their decision. The efforts of an undemocratic predecessor regime to grant itself immunity should be treated as invalid, as should attempts to thwart prosecutions that have been ordered by appropriately elected bodies.

The second requirement is that a truth commission should never be accepted unless it has been established and empowered to investigate prior misdeeds *fully and effectively*. An appropriate commission is one that is required to make a record of its findings and publish that record so that all citizens, but most particularly victims of prior abuse, have unimpeded access to it. A commission should be accepted as legitimate only if it has sufficient staff and funding to perform its work,<sup>34</sup> as well as complete independence from political inter-

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31. See *supra* note 27.

32. See Hayner, *supra* note 7, at 608-09.

33. This section is predicated upon the proposition that there are treaty obligations, international agreements, and international law that require nations to address serious human rights violations. See Orentlicher, *supra* note 13; Roht-Arriaza, *supra* note 20.

34. See Hayner, *supra* note 7, at 644.

ference.<sup>35</sup>

A third condition on the acceptability of an alternative to prosecution is that the alternative be coupled with an effective program for the identification and compensation of the victims of prior abuses. Those whose lives have been torn apart by a predecessor regime should, at a minimum, be provided with compensation for their loss. Their well-being should not be sacrificed in the interests of national reconciliation.

How might we calculate the overall acceptability of the truth commission alternative? Perhaps we should reject such an approach in the following circumstances:

- (1) the commission is not structured to make a thorough inquiry or exacerbates delay;
- (2) compensation is not paid to victims;
- (3) the commission is not the product of democratic decision-making;
- (4) the commission does not yield at least four of the six benefits of prosecution as described above; and
- (5) exigent social, economic, or political factors make more complete compliance impossible.

#### F. Human Rights Violations That May Never Be Excused

The international community should declare that there are certain sorts of human rights violations that will never be tolerated and for which prosecution is obligatory. First and foremost among these is genocide. There is an international treaty regarding genocide that imposes the most serious of obligations on the entire world to prevent or punish this offense.<sup>36</sup> That obligation is of such importance that the interests of a single nation should never be allowed to thwart prosecution. The threat of genocide in the modern world is of such scope that it should never be accepted.

Another set of crimes that should be viewed as beyond reconciliation is that committed against the citizens of a foreign state. When a state acts against outsiders, it should be held to the highest standards. The Geneva Conventions set limits that nations should never be allowed to violate.<sup>37</sup> The political process

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35. See Hayner, *supra* note 8, at 25.

36. See Convention on the Prevention and Punishment of the Crime of Genocide, 9 Dec. 1948, 1 U.N. GAOR Res. 96, 78 U.N.T.S. 277.

37. See the Four Geneva Conventions of 12 August 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; Arts. 50, 51, 130, 147, and Protocol I Additional to the Geneva Conventions of 12 August 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.

internal to any nation is not adequate to protect foreign nationals from serious violations of their human rights. It is simply too easy to disregard the claims of those who do not belong to the community.

The final question is whether and when prosecution should not be undertaken in response to crimes of a lesser but still extremely serious magnitude. In a world regularly confronted by the very worst of crimes, it is important to maintain a sense of proportionality. In the past, the world community virtually never acted to police even the most vicious of crimes committed by regimes against their own citizens. Although change is already "in the air," as demonstrated by events in Rwanda and Bosnia, actually establishing a new and effective international policing mechanism will be a major undertaking requiring great skill and tenacity. Concerned nations should choose their goals carefully and pursue an international response only with respect to the worst offenses. To try to do more by responding to a larger range of serious human rights violations is a strategy doomed to failure because of the absence of international consensus, a resultant lack of political will, and a serious shortage of prosecutorial resources. If the very worst cases are pursued, however, there is a chance that a new set of precedents, establishing a new tradition, may be forged. This is likely to occur only if states stay the course, which, in turn, is to be expected only if the prosecutions they pursue indubitably justify such a commitment. By concentrating on an international response to such events as the Rwandan and Yugoslav slaughters, we may create the foundation for a new legal order. One that can, by increments, be extended. Historically, this is the way the, at first, tenuous claims of the rule of law have evolved into the firmest strictures in a number of nations. Such a strategy is the one most likely to garner wide international support and positive publicity.

#### G. The Implicit Need for an International Tribunal

The existence of crimes that must always be punished, the serious pressures that lead nations to avoid prosecutions (both in those cases and in cases of other serious human rights violations), and the establishment of criteria by which to judge the propriety of the use of truth commissions all implicitly argue for the creation of an international criminal tribunal. Such a body is essential if prosecution of the most heinous crimes is to be guaranteed. It is vital to have an alternative forum when the site of the most atrocious criminal conduct is a society in turmoil and incapable of meting out justice.<sup>38</sup> While democratic states should be expected to act in appropriate ways and while the international community should generally respect democratically derived decisions, there will be times when the gravity of the offense or the impropriety of the process makes international prosecution essential. To do less may be to thwart the development of the rule of law on a global scale.

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38. See Nino, *supra* note 7, at 2638-39.

#### H. The Question of Time

In judging the efficacy of any nation's actions against human rights violators, the question of timing must be considered. As a preliminary matter, it should be noted that with respect to the sorts of abuses that may never be excused, no national statutes of limitations ought to be recognized. Those who have committed genocide, for example, should be subject to prosecution wherever and whenever they are found. A far more difficult question is how long nations ought to be given to prosecute crimes that the law requires be pursued. Major human rights violations cases take a long time to prepare and can be immensely costly to prosecute. States must be given latitude to mobilize resources especially when the crimes involved are of great scope or complexity. Yet a start on prosecution must be made within a reasonable amount of time, certainly no more than three years. Moreover, prosecution should be concluded in no more than twice that amount of time (six years). The international community needs to articulate benchmark time limits so that triggers are established for international action as well as guideposts for successor regimes.

### III

#### CONCLUSION

Criminal prosecution of egregious human rights violations is usually the wisest course for a successor regime. There are, however, circumstances in which an alternative may be superior, either because it preserves democracy, substantially strengthens democratic institutions, or responds more efficiently to immediate and pressing social needs. One of the most attractive alternatives to prosecution is the truth commission. Through such a body, past misdeeds may be disclosed and memorialized. The work of a truth commission may serve as the catalyst in promoting social healing and as a significant deterrent to future misconduct.

Truth commissions, though, are no panacea. They cannot, as a general rule, punish malefactors, and they may tempt some societies not to undertake the work required to bring justice to the polity. In light of these problems, the truth commission alternative should be sanctioned only when it reflects the democratic will, can fully and effectively investigate prior wrongdoing, is coupled with a program of compensation for the victims of wrongdoing, and, most importantly, does not seek to excuse the gravest sorts of crimes including genocide and sustained assaults on the civilian populations of foreign nations.