Recent decades have seen increasing attention to the issue of accountability for international crimes such as genocide, war crimes, crimes against humanity, and serious violations of human rights. These crimes generally are characterized by their mass scale and, hence, their impact on whole societies. Typically, crimes of this scale feature some form of central organization, often at the state level.

The purposes of seeking accountability for this sort of criminal activity largely include, but also differ somewhat from, the purposes for bringing “ordinary criminals” to account. Deterrence, incapacitation, and retribution may figure prominently among these purposes, while rehabilitation may be less central when addressing crimes of this magnitude. Setting universal minimum humanitarian standards, on the other hand, may be a particularly significant function of accountability in the context of these crimes of mass violence.

A wide variety of mechanisms are available for achieving various aspects of accountability for crimes of mass violence. In recent decades, we have seen the utilization of criminal prosecutions, at both national and international levels; truth commissions of various sorts, both national and, on occasion, with international participation; civil sanctions, including lustration and other administrative measures; as well as victim compensation schemes, some more symbolic, others more concrete. Alongside the use of these accountability mechanisms, we have also witnessed in recent decades grants of amnesty for some or all perpetrators as well as other forms of complete or partial impunity, de jure or de facto.

The crucial questions to be addressed are: Which of the available mechanisms for accountability should be used in which circumstances? And, how can
the efficacy of those mechanisms be assured? A fundamental question is when
criminal prosecution and punishment is to be required. That is, are there any
situations in which complete or qualified amnesties or pardons may be issued
for crimes of mass violence? Secondly, where criminal prosecutions are
required, which defendants are to be prosecuted? How many of the often multi-
tudinous perpetrators shall actually be prosecuted, and how shall those defen-
dants be selected from among all of the suspected parties? Thirdly, what is to
be the relationship between national accountability or amnesty mechanisms
and international criminal jurisdiction? How should defendants be distributed
between national and international fora? Under what circumstances and to
what extent, if any, should international tribunals such as the International
Criminal Tribunals for the former Yugoslavia and Rwanda or a future Interna-
tional Criminal Court defer to or cooperate with national programs of am-
nesty? Should the answer be different if such programs of amnesty are con-
ducted in conjunction with truth commissions (including where amnesty is
conditioned upon cooperation and confession before such a truth commission,
as in South Africa)? Should the answer be different where amnesties have
been granted in conjunction with programs of civil sanctions? And, finally,
what are the minimum standards for reparations to be made to victims of the
sorts of crimes in question?
These are the issues that recurrently arise in the legal handling of crimes of
mass violence. To date, these issues have been confronted very much on a case
by case basis, with substantial borrowing of knowledge between cases, but
without any consistent or articulated set of principles or guidelines applied
across cases.
Currently, a number of efforts are underway to develop such guidelines for
this area. The utility of crafting such guidelines at all, as well as the proper
thrust of guidelines, if they are to be crafted, is itself a matter of considerable
controversy. A threshold question is whether to “codify compromise.” In
practice, the ideal of full accountability, including thoroughgoing criminal
prosecutions, is virtually never attained. Some argue that this reality must be
acknowledged and forthrightly confronted in guidelines that will chart the best
path for attaining the greatest possible degrees and most appropriate forms of
accountability in the myriad factual circumstances in which accountability must
be sought. That is, in those inevitable situations in which there will unavoida-
bly be failure to achieve the ideal, we should not be left suddenly unrurdered
and without recognized and legitimate principles to govern policy and optimize
outcomes. The domestic analogy here would be to the prosecutorial discretion
openly exercised by prosecutors in common law systems. Historically, as
prosecutorial discretion regarding charging, plea bargaining, immunity, and the
like came to be recognized and publicly acknowledged, fuller guidelines were
developed legislatively and within prosecutorial agencies to guide that discre-
tion. The exercise of prosecutorial discretion thus became somewhat less arbi-
trary in its application and more transparent in its processes. Arguably, a
similar process would be valuable in the international context.
There is, however, a potential danger to codifying guidelines for attaining second-best outcomes in an area, such as accountability for crimes of mass violence, in which the fundamental standards of law themselves are not yet fully entrenched, established, and recognized. We may undermine establishment of the rule of law by codifying and legitimizing second-best outcomes that fail to comply with the higher standards to which we aspire. To avoid the erosion of nascent and hard-won standards of accountability, some argue, it would be preferable to maintain “constructive ambiguity” at this time, thereby leaving leeway for compromise in particular contexts without crystallizing compromise as law (or even as “soft law”). Better, in this view, to stake out the “right” position, and to let failures to comply be seen as failures to comply, even while working informally to optimize second-best outcomes in those cases.

The articles in this Symposium address these and other dilemmas in this rapidly developing area of law and policy. The authors thoughtfully consider the broad range of issues involved in accountability for genocide, war crimes, crimes against humanity, and serious violations of human rights. The Symposium thus brings together some of the best thinking on these issues in the hope of advancing theory and, hence, practice in this field.