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THE FUNDAMENTAL HUMAN RIGHT TO PROSECUTION AND COMPENSATION

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I. INTRODUCTION

The right to obtain financial compensation for a human rights abuse and to have the perpetrator of such an abuse prosecuted and punished is itself a fundamental human right that cannot be taken from a victim or waived by a government. Although it is sometimes tempting to enact a general amnesty in order to heal a nation's wounds, promote harmony, and "let bygones be bygones," such efforts rarely achieve their goals because the wounds fester and the victims need a just resolution to their suffering. The only way to bring true healing to a divided society is to face up to the wrongs that were committed, to prosecute those who violated the fundamental human rights of others, and to provide compensation to the victims.

II. THE SIERRA LEONE CIVIL WAR

> Time and time again, the United Nations' experience has shown that peace accords built on impunity are shaky and do not hold. In Angola, for example, six amnesties have been granted as part of the peace process, and each has served as little more than an invitation to further bloodshed and atrocities.[1]

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1. Peter Takirambudde, *UN Must Clarify Position on Sierra Leonean Amnesty* (July 1999), Human Rights Watch, *available at* http://www.hrw.org/press/ 1999/jul/s10712.htm.

The West African country of Sierra Leone has experienced an eight-year civil war led by rebels of the Revolutionary United Front (RUF) and the Armed Forces Revolutionary Council (AFRC).[2] Although the fighting began as a struggle among competing factions, in recent years it has been focused against the country's first President elected in a multi-party election, Ahmad Tejan Kabbah.[3] President Kabbah took office in March 1996, was forced from office 14 months later on May 25, 1997 by the AFRC/RUF rebel alliance, and then was reinstated in early 1998 as President by the Nigerian-led peacekeeping force formally called the Economic Community of West African States Monitoring Group (ECOMOG).[4]

The AFRC/RUF-led campaigns of terror, called "Operation No Living Thing" and "Operation Pay Yourself," have been designed to kill, destroy, and loot anything in their paths.[5] Civilians have been subjected to systematic and gross violations of human rights such as amputations by machete of one or both hands, arms, feet, legs, ears, or buttocks and one or more fingers; lacerations to the head, neck, arms, feet, and torso; gouging out of one or both eyes; gunshot wounds to the head, torso, and limbs; burns from explosives and other devices; injections with acid; rape and sexual slavery of girls and women including sexual mutilation where breasts and genitalia were cut off.[6] Often child soldiers too weak to hack off the entire foot have carried out the mutilations.[7] The victims would have to finish the amputation, or would be forced to participate in their own mutilation by selecting which body part they wanted amputated. Political messages were slashed into backs and chests, and amputees were told to take their limbs to President Kabbah.[8]

Children have often been the targets of brutal acts of violence – murdered, beaten, mutilated, tortured, raped, sexually enslaved, or forced forced to become soldiers for the AFRC/RUF.[9] Parents have been killed in front of their children.[10] Women and girls have been targets of systematic brutal gang rapes at gunpoint or knifepoint, or of rape by

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2. Peter Takirambudde, *UN Must Clarify Position on Sierra Leonean Amnesty* (July 1999), Human Rights Watch, *available at* http://www.hrw.org/press/ 1999/jul/s10712.htm.

3. *Id.*

4. *Id.*

5. *See generally Sierra Leone: Sowing Terror* (July 1998), Human Rights Watch, *available at* wysiwyg://130/http://www.hrw.org/reports98/sierra/Sier988.htm, and *Sierra Leone: Getting Away with Murder, Mutilation, Rape: New Testimony from Sierra Leone* (July 1999), Human Rights Watch, *available at* http://www.hrw.org/reports/1999/sierra/index.htm.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

foreign objects such as sticks or flaming logs.[11] Rapes have occurred in front of family members, or, in some cases, rebels have forced a family member to rape a sister, mother, or daughter.[12] Witnesses have reported seeing the mutilated bodies of pregnant women whose fetuses have been cut out of their wombs or shot to death in their abdomen.[13]

The AFRC/RUF forced many civilians into slavery, to serve the rebel forces' cause.[14] Women and girls have been required to become "wives" or sexual slaves and forced to cook for the soldiers.[15] Young men and boys have been forcefully recruited as soldiers, and required to commit armed attacks against Sierra Leone civilians, Civilian Defense Forces, and the ECOMOG.[16]

Members of the Civilian Defense Forces (CDF) supporting President Kabbah have also committed atrocities. The soldiers in the most powerful of these groups, the Kamajors, have carried out murders, mutilations, and obstructions of humanitarian aid, and they have demanded compensation at roadblocks for "liberating Sierra Leone from the AFRC/RUF forces."[17] Although the CDF apparently tried to limit their killings to soldiers and in some cases direct supporters of the AFRC/RUF, many witnesses tell horrific stories of the grotesque nature of their killings. In some instances victims were disemboweled, followed by the consumption of vital organs such as the liver or heart, apparently to transfer the strength of the enemy to those involved in the consumption.[18]

In January 1999, the RUF captured Freetown, the capital of Sierra Leone, from government troops and the ECOMOG, after three weeks characterized by the most atrocious and concentrated human rights violations committed against civilians in the eight-year civil war.[19] Then, on May 24, 1999, a cease-fire agreement was reached and in July 1999, a peace agreement was signed that contained a plan to develop a government consisting of members of all the fighting factions and a general amnesty to protect all groups from prosecution for war crimes and

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11. *See generally Sierra Leone: Sowing Terror* (July 1998), Human Rights Watch, *available at* wysiwyg://130/http://www.hrw.org/reports98/sierra/Sier988.htm, and *Sierra Leone: Getting Away with Murder, Mutilation, Rape: New Testimony from Sierra Leone* (July 1999), Human Rights Watch, *available at* http://www.hrw.org/reports/1999/sierra/index.htm..

12. *Id*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

crimes against humanity.[20] The founder of the rebel movement, Foday Sankoh, instead of being prosecuted for unspeakable atrocities, was put in charge of a commission to oversee the country's rich mineral resources, and his commanders occupied four top cabinet positions.[21]

Was it realistic to expect this new government to function in a fair and orderly fashion without any accounting for the extraordinarily gross crimes that occurred? This deal appears to have been put into place because Sierra Leone was only marginally significant to the international community, because the new civilian government in Nigeria was eager to withdraw its troops, because the Kabbah government was outgunned and totally dependent on foreign aid, and because the people of Sierra Leone were so sick of the fighting that they were willing to pay almost any price to obtain peace and try to get on with their lives.[22] But the amnesty served as an invitation for further atrocities.[23] Finally, in the spring of 2000 Foday Sankoh was arrested and the United Nations commenced negotiations to establish a war crimes tribunal to bring him and his confederates to trial.[24]

III. THE RIGHT TO BRING A CLAIM IS A FUNDAMENTAL HUMAN RIGHT UNDER INTERNATIONAL LAW

In the civil law system, upon which the procedures used in international tribunals are primarily based, the distinction between a criminal prosecution and a civil claim for damages is not as clear as it is in the common-law system used in the United Kingdom and the United States. In the civil law system, victims participate actively in criminal proceedings and help to prosecute them. For that reason, the treaties and decisions that have addressed the rights of victims to redress have not always made a clear distinction between the right to ensure that a human-rights abuser is criminally prosecuted and the right to bring a claim for monetary compensation. Both these rights exist, and both are

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20. Norimitsu Onishi, *Freetown Journal: Survivors Sadly Say, Yes, Reward the Tormentors*, N.Y.TIMES, Aug. 30, 1999, at A4.

21. *Id.*

22. *Id.*

23. Human Rights Watch interviewed a woman from Ropolon village who described an attack that occurred on June 20, 1999, in which rebels hacked her Uncle Pa Mohammed, and two other males to death.

> A group of them dressed in full combats entered the town in the early morning. They were the same rebels who'd attacked us at least five times over the last several months . . . . This time they had machetes and knives and as I was running I heard them say 'just because it's a cease-fire it doesn't mean cease loot, or cease-cut-glass' (i.e. cut with machetes). I hid in the bush with my grandmother and new-born baby girl and when we came back several hours later we found my uncle and two more young men hacked and stabbed to death outside their houses.

24. Editorial, *Justice for Sierra Leone*, N.Y. TIMES, April 17, 2001 at A24.

crucial fundamental human right elements to obtain redress for violations of substantive human rights norms.

The right to bring a claim for a violation of internationally-recognized human rights is well established under international law. Article 8 of the Universal Declaration of Human Rights[25] says that "Everyone has the right to *an effective remedy* by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law" (emphasis added). Similarly, Article 2(3)(a) of the International Covenant on Civil and Political Rights,[26] which has been ratified by more than 140 countries, says that "Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have *an effective remedy*, notwithstanding that the violation has been committed by persons acting in an official capacity . . . .". [27]

Regional human rights treaties also emphasize the right to redress for human rights violations. Article 6(1) of the European Convention on Human Rights[28] says "In the determination of his civil rights . . . everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."[29] The European Court of Human Rights ruled in the *Golder Case*[30] that the right to bring a civil claim to an independent judge "ranks as one of the universally 'recognized' fundamental principles of law."[31] More recently, in *Mentes v. Turkey*,[32] the European Court of Human Rights ruled that Turkey violated the rights of citizens who were prevented from bringing a claim for the deliberate destruction of their houses and possession, noting that "the notion of an 'effective remedy' entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigative procedure."[33]

Similarly, Article 25(1) of the American Convention on Human Rights[34] says that:

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25. G.A. Res. 217, U.N. GAOR, 9th Sess., Pt. I, Resolutions, at 71, U.N. Doc. A/810 (1948).

26. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

27. *Id.* at 174 (emphasis added).

28. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 312 U.N.T.S. 221.

29. *Id.* at 228.

30. Golder Case, 18 Eur. Ct. H.R. (ser.A) (1974).

31. *Id.* at 17.

32. Mentes v. Turkey, Nov. 28, 1997, 37 I.L.M. 858.

33. *Id.* at 882.

34. American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673.

> Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.[35]

Decisions in the Inter-American system confirm that the right to an effective remedy is a continuing one that cannot be waived. The seminal case of the Inter-American Court of Human Rights is *The Velasquez Rodriguez Case*,[36] which holds that the American Convention on Human Rights imposes on each state party a "legal duty to . . . ensure the victim adequate compensation." The court explained that each country has the duty to protect the human rights listed in the Convention and articulated this responsibility as follows:[37]

> This obligation implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridicially ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must *prevent, investigate and punish* any violation of the rights recognized by the Convention . . . .[38]

Other decisions that confirm this result include *Report No. 36/96, Case No. 10.843*[39] (ruling that Chile's 1978 Amnesty Decree Law violated Article 25 of the American Convention on Human Rights because "the [human rights] victims and their families were deprived of their right to effective recourse against the violations of their rights")[40]; *Rodriguez v. Uruguay*[41] (stating that "amnesties for gross violations of human rights . . . are incompatible with the obligations of the State party" under the International Covenant on Civil and Political Rights and that each country has a "responsibility to provide effective remedies to the victims of those abuses" to allow the victims to gain appropriate compensation for their injuries)[42]; *Chanfeau Orayce and Others v. Chile*[43] (stating that Chile's amnesty law violated Articles 1.1, 2, and 25 of the American Convention on Human Rights and that countries have a duty to "investigate the violations committed within its jurisdiction, identify

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35. American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673, 682.
36. 4 Inter-Am.Ct. H.R. (ser.C) (1988), *reprinted in* 28 I.L.M. 291.
37. *Id.*
38. *Id.* (emphasis added).
39. Case 10.843, Inter-Am. C.H.R., October 15, 1996.
40. *Id.*
41. U.N. Doc. CCPR/C/51/D/322/1988, Annex (Human Rights Committee, 1994).
42. *Id.*
43. Cases 11.505 et al., Inter-Am. C.H.R. 512, OEA/ser.L/V/II.98, Doc. 7 rev. (1997).

those responsible and impose the pertinent sanctions on them, as well as ensure the adequate reparation of the consequences suffered by the victim").[44]

The Human Rights Committee in Geneva, established by the International Covenant on Civil and Political Rights, has also gone on record opposing amnesties: "The Committee has noted that some States have granted amnesty in respect of acts of torture. *Amnesties are generally incompatible with the duty of States to investigate such acts;* to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future."[45]

U.S. decisions also support the conclusion that claims cannot be waived or dismissed because of some other foreign policy goals. The case of *Dames & Moore v. Regan*[46] involved the argument of a U.S. company that its claim for damages against Iran after the 1979 Iranian revolution had been unlawfully extinguished by the 1981 Algiers Accords which freed the U.S. hostages.[47] In response to the argument made by Dames & Moore that its claim had been "taken" in violation of the Fifth Amendment to the U.S. Constitution, Justice Rehnquist's opinion for the Court noted that claimants were not denied the right to pursue their claim, but rather were required to use an alternative forum, the Iran-U.S. Claims Tribunal in The Hague, Netherlands.[48] The Court affirmed the requirement that Dames & Moore utilize this alternative forum, but held in abeyance the taking claim, and indicated a willingness to take another look at it should the alternative tribunal not prove effective.[49]

Another relevant case is *Ware v. Hylton*,[50] where Justice Chase rejected the idea that a government can waive private claims without compensation to the claimants:

> That Congress had the power to sacrifice the rights and interests of private citizens to secure the safety or prosperity of the public, I have no doubt; but *the immutable principles of justice*; the public faith of the States, that confiscated and received

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44. Cases 11.505 et al., Inter-Am. C.H.R. 512, OEA/ser.L/V/II.98, Doc. 7 rev. (1997)..

45. General Comment No. 20 (on Article 7), in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev. 1 at 30 (1994) (emphasis added).

46. Dames & Moore v. Regan, 453 U.S. 654 (1981).

47. *Id.*

48. *Id.*

49. Indeed, the Court's opinion noted that if plaintiffs could later establish "an unconstitutional taking by the suspension of the claims, we see no jurisdictional obstacle to an appropriate action in the United States Court of Claims under the Tucker Act." *Id.* at 689-99. *See also* Coplin v. United States, 6 Ct.Cl. 115, 122 (1984), *rev'd on other grounds*, 761 F.2d 688 (Fed. Cir. 1985) (stating that the *Dames & Moore* opinion "noted that the abrogation of existing rights might constitute a taking").

50. Ware v. Hylton et al, 3 U.S. 199 (1796).

> British debts, pledged to the debtors; and the rights of the debtors violated by the treaty all combine to prove, that ample compensation ought to be made to all the debtors who have been injured by the treaty for the benefit of the public. *This principle is recognized by the Constitution*, which declares, 'that private property shall not be taken for public use without just compensation'.[51]

Justice Chase thus cited both "the immutable principles of justice" and the Fifth Amendment of the U.S. Constitution to support the conclusion that the U.S. government cannot waive claims, even as part of a peace settlement, without compensating those whose claims have been violated.[52] Justice Iredell wrote in the same case that "these rights [are] fully acquired by private persons during the war, more especially if derived from the laws of war . . . [and] against the enemy, and in that case the individual might be entitled to compensation."[53] He added that if Congress had given up the rights of private persons in a peace treaty "as the price of peace," the private individuals whose "rights were sacrificed" might well "have been entitled to compensation from the public" for their loss.[54] In that case, the Supreme Court ruled decisively that British subjects were entitled to use the judicial system to collect the debts owed to them.[55]

State courts in the United States have also recognized the validity of such claims. In *Christian County Court v. Rankin*,[56] the court granted private compensation in an action against Confederate soldiers for burning the courthouse in violation of the "laws of nations," saying that "[f]or every wrong the common law provides an adequate remedy . . . on international and common law principles."[57]

The right to pursue claims for compensation exists for wartime atrocities just as it exists for abuses that occur in peacetime.[58] Human rights are not suspended during wartime; indeed it would be repellent

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51. Ware, 3 U.S.at 245 (emphasis added).

52. *See also* Ware, 3 U.S. at 229 ("It is admitted, that Virginia could not confiscate private debts without a violation of the modern law of nations . . . .") and *id.* at 242 ("If the treaty had been silent as to debts, and the law of Virginia had not been made, I have already proved that debts would, on peace, have revived by the law of nations").

53. Ware, 3 U.S. at 279.

54. *Id.*

55. *Id.* at 245.

56. Christian County Ct. v. Rankin & Tharp, 63 Ky. (2 Duv.) 502 (1866).

57. *Id.* at 505-06.

58. *See* Kadic v. Karadzic, 70 F.3d 232, 236-37 (2d Cir. 1995), *cert. denied*, 116 S.Ct. 2524 (1996) (allowing torture and rape victims to bring claims for brutal acts carried out "in the course of the Bosnian Civil War"); *see also* Linder v. Portocarrero, 963 F.2d 332 (11th Cir. 1992) (allowing a claim to be brought on behalf of a person allegedly tortured and murdered "during the civil war between the Sandanistas and the contras" in Nicaragua).

to hold that responsibility is sacrificed when the individual is most imperiled.[59] Article III of the 1907 Hague Regulations[60] recognizes the duty to compensate for injuries caused during war in the following language: "A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."[61] The Treaty of Versailles[62] implemented this requirement by establishing mixed arbitration tribunals for private claimants to present their damages against Germany, even against the wishes of their own governments.[63] These principles were codified once again in the Geneva Conventions of 1949 which forbid countries from "absolving themselves of liability" for grave breaches.[64]

It is also settled law that a government can channel such claims, like other claims, toward an alternative forum for resolution,[65] or even settle the claims on behalf of the claimants by a lump-sum settlement that might not be fully satisfactory for each claimant, because a settlement always involves accepting an immediate amount in exchange for foregoing the possibility of a larger amount at a later time.[66] In cases where the government does channel or settle claims, however, the government's action must be fair to the claimants, and if the settlement or alternative forum is not fair, the claimants will have a claim for a taking of their property.[67] Justice Powell said in his concurring opinion in *Dames & Moore* that "the Government must pay just compensation

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59. The Special Rapporteur for the United Nations Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities has written:

> The Special Rapporteur reiterates that in order to end impunity for gross violations of international law committed during armed conflict, the legal liability of all responsible parties, including Governments, must be acknowledged, and the victims must be provided with full redress, including legal compensation and the prosecution of the perpetrators.

Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery, and Slavery-Like Practices During Armed Conflict at 19, para. 75 (1999).

60. Laws and Customs of War on Land (Hague IV) and Annexed Regulations, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.

61. Laws and Customs of War on Land (Hague IV) and Annexed Regulations, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.

62. The Treaty of Versailles, June 28, 1919, 2 Bevans 43.

63. *Id.*

64. Geneva Convention I of 1949, art. 51, 6 U.S.T. 3114, 3148, 75 U.N.T.S. 31 (armed forces in the field); Geneva Convention II of 1949, art. 52, 6 U.S.T. 3217, 3250, 75 U.N.T.S. 85 (armed forces at sea); Geneva Convention III of 1949, art. 131, 6 U.S.T. 3316, 3420, 75 U.N.T.S. 135 (prisoners of war); Geneva Convention IV of 1949, art. 148, 6 U.S.T. 3516, 3618, 75 U.N.T.S. 267 (civilians).

65. Dames & Moore, *supra* note 46, at 686-87.

66. *See* Shanghai Power Co. v. United States, 4 Cl. Ct. 237 (1983), *aff'd without opinion*, 765 F.2d 159 (Fed Cir. 1985), *cert. denied*, 474 U.S. 909 (1985).

67. Ware, 3 U.S. at 245 (Justice Chase), 279 (Justice Iredell); Dames & Moore, 453 U.S. at 689-90.

when it furthers the Nation's foreign policy goals by using as 'bargaining chips' claims lawfully held by a relatively few persons and subject to the jurisdiction of the courts."[68]

It is clear, therefore, that claims based on violations of law are a form of property that cannot be cavalierly waived by a nation to serve some other foreign policy goal. Claims based on torture, murder, physical abuse, racial persecution, and other violations of basic norms of human decency are particularly important, and both international and U.S. law explicitly protects those claims against government neglect, duplicity, or abuse. Treaties and amnesty agreements purporting to waive claims or exonerate human rights abusers thus have no more validity than the efforts by the Chilean government to immunize its military leaders from claims brought by the Chilean citizens who were tortured and murdered.[69] Although claims can be postponed or transferred to a different venue for resolution, they cannot be extinguished without violating fundamental principles of international and U.S. constitutional law, as well as basic precepts of fairness.

IV. THE YEARNING FOR JUSTICE AND A TRUE "RECONCILIATION" THROUGH INVESTIGATION, PROSECUTION, AND COMPENSATION

The amnesty offered in 1999 to those who perpetuated human rights atrocities in Sierra Leone was not an isolated situation, but it is increasingly becoming atypical, because the drive to investigate, prosecute, and provide compensation has a momentum like a rising tide. Each fact situation, and each political context, is different, so generalizations are difficult. But in most parts of the world we now see a commitment to address human rights abuses, to punish the perpetrators of such actions, and to bring justice, compensation, and a sense of closure to the victims. In those places where amnesties have been offered – like Chile and Argentina[70] – the yearning for an accounting remains and will not go away. In places where the governing regime wants to put the past behind it and focus on building a better future – like Cambodia – the people and the international community refuse to let the past be

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68. Dames & Moore, *supra* note 46, at 691. *See also* Gray v. United States, 21 Ct. Cl. 340, 392-93 (1886) (ruling that an individual claim survives a settlement by the government, and that a claimant not treated fairly can bring a claim against the claimant's own government: "the citizen whose property is thus sacrificed for the safety and welfare of his country has his claim against that country; he has a right to compensation, which exists even if no remedy in the courts or elsewhere be given him").

69. *See* Regina v. Bow Street Metro, Stipendary Magistrate, Ex Parte Pinochet, 2 All E.R. 97, 98 (1999).

70. For a survey of the approaches countries have taken toward human rights abuses committed by authoritarian regimes after they return to democratic rule, *see* Jon M. Van Dyke and Gerald W. Berkley, *Redressing Human Rights Abuses*, 20 DENVER J. INT'L L. & POL'Y 243 (1992).

forgotten and insist on orderly investigations and prosecutions.[71]

The list of current efforts to achieve justice is long, and is worldwide in geographic scope.[72] The goal in each case is to achieve a "reconciliation" to allow the country to go forward together, without always returning to the past for a reexamination resulting from a sense of a people wronged. "Reconciliation" is a powerful word. It is not just a feel-good concept, which can be achieved by a few words of sorrow followed by some handshakes or hugs. It requires making right the wrong that occurred. It requires a full and fair acknowledgment of the wrong, followed by a real settlement, usually requiring the transfer of money and/or property, and the punishment and/or disgrace of those who committed the wrongs.

The strategies utilized to bring a sense of closure and reconciliation can be categorized into the following four approaches: (1) an apology for the wrong, which can be general or specific; (2) an investigation and accounting; (3) compensation for the victims, either through a general class approach, or through individual determinations, or both; and (4) prosecution of the wrongdoers. These approaches are described below, with examples from recent history.

A. Apology

A formal apology is a crucial element of any reconciliation process. Recent examples include former President Clinton's apology for the U.S. support of the military in Guatemala.[73] Secretary of State Madeleine Albright apologized for U.S. support for the 1953 coup that restored Shah Mohammed Riza Pahlevi to power in Iran and its backing of Iraq during the war with Iran in the 1980's.[74] Pope John Paul II issued a sweeping apology on March 12, 2000 for the errors of the Roman Catholic Church during the previous 2,000 years, acknowledging intolerance and injustice toward Jews, women, indigenous peoples,

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71. Editorial, *Justice for the Khmer Rouge*, N.Y. TIMES, April 13, 2000 at A24.

72. Examples of "reconciliations" that involve substantial financial transfers include Canada's "Statement of Reconciliation" issued January 7, 1998, establishing a $245 million "healing fund" to provide compensation for the thousands of indigenous children who were taken from their homes and forced to attend boarding schools where they were sometimes physically and sexually abused, and Canada's transfer in August 1998 of 750 square miles in British Columbia, just south of Alaska, to the 5,000-member Nisga'a Tribe. Anthony DePalma, *Canada Pact Gives a Tribe Self-Rule for the First Time*, N.Y. TIMES, Aug. 5, 1998, at A1. The basis for the "Statement of Reconciliation" can be found in Benjamin C. Hoffman, *The Search for Healing, Reconciliation, and the Promise of Prevention* (presented to the Reconciliation Process Implementation Committee in 1995, and documenting physical and sexual abuse at St. Joseph's and St. John's Training Schools for Boys), and Douglas Roche and Ben Hoffman, *The Vision to Reconcile* (1993).

73. *See infra* notes 83-84.

74. Agence France-Presse, *Iranians Respond to Overture from the U.S. with Mixed Signals*, N.Y. TIMES, March 19, 2000, at A13.

immigrants, and the poor.[75] In 1993, the United States apologized for the participation by its military and diplomats in the illegal overthrow of the Kingdom of Hawai'i in 1893.[76] The United States apologized for the internment of Japanese-Americans during World War II.[77]

B. Investigation and Accounting

Documentation of the wrongdoing serves the important purpose of recognizing the suffering and acknowledging that wrongdoing occurred. The two most significant accountings in recent years are those that took place in Chile and South Africa,[78] but others have occurred as well.

* Chile's situation was unique in that General Augusto Pinochet allowed elections to take place in the late 1980's, but retained firm control over the military and kept a watchful eye on the new government. The new President, Patricio Aylwin, was effectively blocked from prosecuting Pinochet and his military associates, but he wanted nonetheless to acknowledge and honor the victims, and so appointed a Commission of Truth and Reconciliation which prepared a comprehensive report documenting 2,000 human rights abuses.[79]

* In South Africa, a Truth and Reconciliation Commission met for two and a half years to document as many of the human rights abuses as possible and issued a report blaming both sides for abuses. Persons who came forward with truthful accounts of their participation in violent acts linked to a political objective were pardoned as part of the national healing effort, but others have been prosecuted for their role in these atrocities.[80] As of the end of 1999, 6,037 individuals had applied for political amnesty, with 568 receiving pardons and 815 applications still under consideration.[81] Of the 568 who were pardoned, 383 were

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75. Alessandra Stanley, *Pope Asks Forgiveness for Errors of the Church Over 2,000 Years*, N.Y. TIMES, March 13, 2000, at A1.

76. Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Pub. L. 103-50, 107 Stat. 1510 (1993).

77. Civil Liberties Act of 1988, 50 U.S.C. sec. 1989.

78. Van Dyke and Berkley, *supra* note 70, at 249-51 (discussing Chile and the Report compiled by the Commission of Truth and Reconcilitation); TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT (5 volumes 1999).

79. *See* Van Dyke and Berkley, *supra* note 70, at 249-51.

80. A challenge to the legitimacy of granting amnesties was rejected in Azanian Peoples Organization v. The President of the Republic of South Africa, 1996(8) BCLR 1015 (CC). The court justified its conclusion by explaining that the amnesty was not "a uniform act of compulsory statutory amnesia," but was appropriately linked to promoting "a constructive transition towards a democratic order" and was "available only where there is a full disclosure of all facts" and for acts committed "with a political objective." *Id. See generally,* TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT, *supra* note 78.

81. Dean E. Murphy, *Ex-Apartheid Minister Offers Lone High-Ranking Voice of Re-*

members of the African National Congress, who were seeking to overthrow the apartheid government, 124 were members of the apartheid security forces, 28 were in the Zulu-based Inkatha Freedom Party, and one (Adriaan Vlok – who had been Minister of Law and Order from 1986 to 1994 and confessed to ordering a bomb attack in 1987) was a member of the governing apartheid National Party.[82]

* In February 1999, an independent United-Nations-sponsored Historical Clarification Commission concluded an 18-month investigation and reported that the Guatemalan military – with U.S. money and training – committed "acts of genocide" against the indigenous Mayan community in Guatemala during the country's long civil war and were responsible for 42,000 human rights violations, including 29,000 deaths or disappearances.[83] The next month, former President Clinton apologized for the U.S. participation saying that "support for military forces and intelligence units which engaged in violence and widespread repression was wrong, and the United States must not repeat that mistake."[84]

* In late 1999, investigators began looking closely at the actions of U.S. forces in wartime situations, focusing on an incident that occurred during the Korean War, in July 1950, when U.S. soldiers apparently killed hundreds of Korean refugees, many of them women and children, who were trapped beneath a bridge at a hamlet called No Gun Ri.[85]

C. *Compensation for the Victims*

International law has always been clear that reparations are essential whenever damages result from violations of international law. This principle is securely rooted in the decision of the Permanent Court of International Justice in the *Chorzow Factory Case,*[86] and it was reaffirmed in 1999 by the International Tribunal for the Law of the Sea in the *M/V Saiga Case*.[87] Reparations are just as important and just as mandatory in cases of human rights abuses as in any other cases. The requirement of appropriate compensation is being recognized increasingly in a wide variety of contexts.

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morse, L.A. TIMES, Dec. 17, 1999, at A2.

82. Dean E. Murphy, *Ex-Apartheid Minister Offers Lone High-Ranking Voice of Remorse*, L.A. TIMES, Dec. 17, 1999, at A2.

83. Mireya Navarro, *Guatemalan Army Waged 'Genocide,' New Report Finds*, N.Y. TIMES, Feb. 26, 1999, at A1.

84. John M. Broder, *Clinton Offers His Apologies to Guatemala*, N.Y. TIMES, March 11, 1999, at A1.

85. Sang-Hun Choe, Charles J. Hanley, & Martha Mendoza, *U.S. Massacre of Korean Refugees Bared*, HONOLULU ADVERTISER, Sept. 30, 1999, at A1.

86. Factory at Chorzow, Merits, Judgment No. 13, 1928 P.C.I.J., Series A, No. 17, at 47 (Sept. 13).

87. The M/V Saiga Case (Saint Vincent and the Grenadines v. Guinea), para. 170 ITLOS 1999 (July 1), *available at* http://www.un.org/Depts/los/ITLOS/ Saiga_cases.htm (last visited March 22, 2000).

* In 1992, after more than 2,000 human rights abuses were documented by a Chilean commission, the Chilean Legislature enacted a law providing a wide range of economic benefits for the victims and their families.[88]

* The Japanese-Americans interred in World War II received $20,000 each,[89] and those persons of Japanese ancestry brought to camps in the United States from Latin America have received $5,000 each.[90]

* Canada has provided a reparations package for the First Nation children who were taken from their families and transferred to boarding schools where they were denied access to their culture and frequently physically mistreated.[91]

* New Zealand established a process to address the wrongs committed by the British against the Maori people in the late 1800's and has returned lands and transferred factories, fishing vessels, and fishing rights to the Maori groups to compensate them for their losses.[92]

* In Puerto Rico, Governor Pedro J. Rossello publicly apologized and offered restitution of up to $6,000 each to thousands of "independentistas" and others who were spied on by a police intelligence unit starting in the late 1940's.[93]

* In 1994, Florida Governor Lawton Chiles signed into law a bill providing for the payment of $2.1 million in reparations to the descendants of the black victims of the Rosewood massacre, in which white lynch mobs killed six blacks and drove others from their homes to destroy a prosperous black community.[94]

* Lawsuits have been filed in the United States by victims of human rights abuses for compensation.[95] One of the prominent cases was brought by 9,500 victims of human rights abuses in the Philippines

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88. Law Nr. 19,123 Creating the National Corporation for Reparation and Reconciliation (Chilean National Congress 1992).

89. Civil Liberties Act of 1988, 50 U.S.C. § 1989 (2000).

90. Settlement Agreement, Mochizuki v. United States, 43 Fed. Cl. 97 (1997); *WWII Internees Get 5,000 Dollars, Official Apology*, Yomiuri Shimbun, Jan. 11, 1999.

91. *See supra* note 72.

92. For an example of the settlement obtained by one Maori group, *see Ngai Tahu - New Zealand Maori Tribe Website, available at* http://www.ngaitahu.iwi.nz/.

93. Mireya Navarro, *Freed Puerto Rican Militants Revel in Life on the Outside*, N.Y. TIMES, Jan. 27, 2000, at A14.

94. RANDALL ROBINSON, THE DEBT: WHAT AMERICA OWES TO BLACKS 225 (2000) (citing House Bill 591).

95. *See* Trajano v. Marcos (In re: Estate of Ferdinand E. Marcos Litigation), 978 F.2d 493 (9th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993); In re Estate of Ferdinand Marcos, Human Rights Litigation – Hilao v. Estate of Ferdinand Marcos ("Estate II"), 25 F.3d 1467 (9th Cir. 1994); Hilao v. Estate of Ferdinand Marcos ("Estate III"), 103 F.3d 767 (9th Cir. 1996).

against Ferdinand E. Marcos when was exiled to Hawai'i in 1986, and continued against his estate after he died in 1989.[96] A federal court jury ruled that Marcos was liable for the torture, murder, and disappearances that these victims suffered, and ordered his estate to pay $775,000,000 in compensatory damages and $1,200,000,000 in exemplary damages.[97]

* The German government has funded various compensation programs to pay victims of the World War II Holocaust, and to make payments directly to the State of Israel as well.[98] More recently, lawsuits were filed in U.S. courts by the victims of slave- and forced-labor during World War II against the German banks and companies that profited from such abuses,[99] and in December 1999 an agreement was reached to provide $5.1 billion to the 250,000 members of this victimized class.[100]

D. Prosecution of the Wrongdoers

The Trials at Nuremberg and in the Far East after World War II still stand as models for systematic and conscientious prosecutions of those who have violated the laws of war and fundamental human rights principles. But for almost half a century after those trials, no other international trials took place. Then in the early 1990's, the United Nations Security Council established tribunals to prosecute those who violated fundamental norms during the fighting in the former Yugoslavia and Rwanda.[101] These tribunals were slow in establishing their procedures, but seem now to be proceeding steadily through their caseload. As of February 2000, the Rwandan Tribunal had delivered seven verdicts and was holding 39 people in custody in Arusha, Tanzania.[102] In December 1999, NATO peacekeepers in Bosnia arrested (using a sealed indictment) retired Maj. Gen. Stanslaw Galic, who had commanded the

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96. *See* In re Estate of Ferdinand E. Marcos Human Rights Litigation, 910 F. Supp. 1460, 1462-63 (D. Haw. 1995).

97. *Id.*

98. *See* Karen Parker & Jennifer F. Chew, *Compensation for Japan's World War II War-Rape Victims*, 17 HASTINGS INT'L AND COMP. L. REV. 497, 528-32 (1994).

99. *See, e.g.*, Burger-Fischer v. Degussa *AG*, 65 F.Supp.2d 248 (D.N.J. Sept. 13, 1999); *see also* Iwanowa v. Ford Moter Company, 57 F. Supp. 2d 41 (D.N.J. 1999).

100. Ron Grossman, *Germans OK Paying $5 Billion to War Slaves Deal Puts Pressure on U.S. Corporations*, CHICAGO TRIBUNE, Dec. 15, 1999, at A1.

101. *See Statute of the International Criminal Tribunal for the Former Yugoslavia*, S.C. Resolution 827, U.N. S.C.O.R., 3217th Mtg., U.N. Doc. S/RES/827 (1993) and *Statute of the International Criminal Tribunal for Rwanda*, S.C. Res. 995, U.N. S.C.O.R., 3453d mtg., U.N. Doc. S/RES/955 (1994). The Rwanda tribunal was established by the Security Council in response to the more than 500,000 minority ethnic Tutsi and Hutu opposition members who were killed during three months of slaughter in 1994 led by the Hutu-dominated government. *See generally* LOUIS HENKIN ET AL., HUMAN RIGHTS 618-30 (1999).

102. Associated Press, *Two Rwandans Held in Europe in 1994 Deaths*, N.Y. TIMES, Feb. 16, 2000, at A6.

Bosnian Serb forces that besieged Sarajevo from 1992 to 1994.[103] The following month, U.S. courts cleared the way for Elizaphan Ntakirutimana to be turned over to the Rwandan tribunal for prosecution. He was a church leader accused of offering refuge to ethnic Tutsi and then turning a Hutu death squad loose on them.[104] Then, in February 2000, three high-ranking Rwandan officers were arrested in Europe on warrants issued by the Rwandan Tribunal.[105]

*General Augusto Pinochet, the dictator of Chile from 1973 to 1989, was held under house arrest in England for 16 months, fighting his extradition to Spain to be prosecuted for the torture and murder of Chileans, but he was finally returned to Chile in February 2000 after British officials concluded that he was medically unfit to stand trial.[106] Although this protracted episode did not lead to an international trial of Pinochet, the British House of Lords reached a significant decision during the period of house arrest, ruling that Pinochet's status as a former head-of-state did not give him an immunity from prosecution and that prosecution for his egregious "universal" crimes would be appropriate in any country.[107] Although he apparently will now not face trial for his actions, his political power has vanished, and he has been disgraced in the eyes of the world and the people of Chile.[108] Chile's courts are also pursuing cases against military officers who served in the Pinochet government. [109]

* In November 1999, Judge Baltasar Garzon, the same Spanish magistrate who had been pursing General Pinochet, charged 98 former Argentine officers with genocide, terrorism, and torture in connection with the atrocities perpetrated by the military dictatorship that controlled Argentina from 1976 to 1983, when between 9,000 and 30,000 persons died or disappeared.[110] Previously, Judge Garzon ordered the arrest of Adolfo Scilingo, an Argentine officer who testified in the Spanish court that he had thrown dissidents from planes during the Argen-

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103. Craig R. Whitney, *NATO Arrests Serb Ex-General on War Crimes Charges*, N.Y. TIMES, Dec. 21, 1999, at A10.

104. Barbara Crossette, *Way Clear for U.S. to Deliver Rwanda War Crimes Suspect*, N.Y. TIMES, Jan. 25, 2000, at A3.

105. *Two Rwandans Held in Europe in 1994 Deaths, supra* note 102, at A8. Francois-Xavier Nzuwonemeye was arrested in Montauban, in southwest France, Innocent Sagahutu was arrested in Ringkobing, Denmark, 200 miles west of Copenhagan, and Tharcisse Muvunyi was arrested in Britain.

106. Clifford Kraus, *Freed by Britain, Pinochet Is Facing a Battle at Home*, N.Y. TIMES, March 3, 2000, at A1.

107. *See* Regina v. Bow Street Metro, Stipendary Magistrate, Ex Parte Pinochet, 2 All E.R. 97, 98 (1999).

108. *Chile: Court to Review Pinochet Ruling*, N.Y. TIMES, Aug. 22, 2001 at A6.

109. Clifford Kraus, *Pinochet Case Reviving Voices of the Tortured*, N.Y. TIMES, Jan. 3, 2000, at A1.

110. Associated Press, *Menem Rejects Spain's Bid to Try Ex-Leaders*, L.A. TIMES, Nov. 4, 1999, at A6.

tine "dirty war."[111] Jorge Rafael Videla, the Argentine dictator during this period, was rearrested in June 1998 for his participation in the systematic kidnapping of children, even though he had previously been pardoned (in 1990) after his life sentence (in 1985) for his role in the death squads.[112] In February 2000, Argentina's newly-inaugurated President, Fernando de la Rua, ordered a purge from the government payroll of some-1,500 military personnel and civilians connected with the "dirty war" from the 1976-83 period.[113]

* Brazil is finally addressing the abuses that occurred during the military dictatorship that lasted there from 1964 to 1985.[114] A new investigation is underway to determine what really happened on April 30, 1981, when two military personnel were killed by a bomb in the parking lot outside an arena containing 20,000 supporters of left-wing causes, to determine whether they were *agent provacateurs* trying to disrupt the event.[115] Further, the nomination of Joao Batista Campelo as the chief of the Federal Police was derailed recently when it was revealed that he had supervised torture in 1970.[116]

* In November 1999, the Leipzig appeals court upheld a manslaughter conviction against Egon Krenz, the last Communist leader of East Germany, and two other leading Politburo members, Gunther Kleiber and Gunther Schabowski, for their roles in the shootings of persons trying to escape to the West.[117] These convictions were also upheld by the European Court of Human Rights in Strasbourg.[118]

* South Korea prosecuted and imprisoned two of its recent Presidents, Chun Doo Hwan and Roh Tae Woo, for acts of corruption and for human rights abuses in connection with the suppression of a riot.[119]

As of this writing, a number of investigations are underway that may lead to prosecutions, and decisions are being made about what type of trial would be appropriate in some of the complex recent political up-

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111. Associated Press, *Argentine Arrested in Spanish 'Dirty War' Inquiry,* N.Y. TIMES, Oct. 8, 1997, at A4.

112. Sebastian Rotella, *Argenina Arrests Ex-Dictator*, L.A. TIMES, June 10, 1998, at A4.

113. Clifford Krauss, *New Argentine President Orders Purge of Remnants of 'Dirty War,'* N.Y. TIMES, Feb. 16, 2000, at A12.

114. Larry Rohter, *Past Military Rule's Abuse Is Haunting Brazil Today*, N.Y. TIMES, July 11, 1999, at A11.

115. *Id.*

116. *Id.*

117. Roger Cohen, *Verdict in Berlin Wall Deaths Is Upheld,* N.Y. TIMES, Nov. 9, 1999, at A10.

118. BBC NEWS, *Krenz Loses Berlin Wall Appeal*, March 22, 2001, *available at* http://news.bbc.co.uk/hi/english/world/europe/newsid_1235000/1235073.stm.

119. Nicholas D. Kristof, *A New Kind of Leader for South Korea, and Asia Too*, NY TIMES, Feb. 23, 1998, at A1 (They were both released from prison by Kim Dae Jung shortly after his election as President in 1997 as a gesture of national reconciliation).

heavals:

* The United Nations has been attempting to negotiate with Cambodia to establish a genocide tribunal that would be jointly run by the United Nations and the Cambodian government.[120] Under this approach, trials would be held for all the top Khmer Rouge leaders, who were responsible for the deaths of some 1.7 million Cambodians who were executed or died of starvation or disease during the 1975-79 regime.[121]

The United Nations has also worked to establish tribunals for East Timor and Sierra Leone. Militias connected to the Indonesional military drove an estimated 750,000 of East Timor's 880,000 people from their homes, forcing many to flee across the border to West Timor.[122]

These many situations illustrate the complexity of these issues. No one approach works for every historical event. Just as prosecutors exercise discretion to refrain from prosecuting in certain situations, and to accept plea agreements for reduced charges in many other situations, some historical episodes seem to justify a merciful approach, with reduced penalties or simply a full description of what actually happened. In some situations pardons appear to be justified after part of the sentence has been served to foster reconciliation. But in each situation, a full investigation and disclosure of what occurred seems essential to ensure that the culprits' deeds are known by all and to prevent them from ever exercising power again. And for a true "reconciliation," the transfer of property from those who have benefited to those who have suffered seems essential to bring the matter to a just resolution.

V. THE INTERNATIONAL CRIMINAL COURT

As explained above, the international community has established *ad hoc* tribunals to address the widespread atrocities that have occurred in this decade in the Former Yugoslavia and in Rwanda.[123] They have functioned effectively, after faltering starts, and now are trying indicted criminals in a systematic and orderly fashion.

In order to avoid having to establish a new tribunal every time an international crisis occurs, enlightened diplomats came together in the summer of 1998 to draft a treaty to establish a permanent International

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120. Denis D. Grey, *Hun Sen Plans Khmer Rouge Tribunal*, AP ONLINE, Nov. 4, 1999, *available at* 1999 WL 28135768; *UN Makes Last Attempt on Genocide Trial*, CAMBODIA NEWS REPORTS (March 16, 2000), *available at* http://www.cambodia-hr.org/NewsReports/March-2000/NR16032000.htm.

121. *Id.*

122. Seth Mydans, *East Timor, Stuck at 'Ground Zero,' Lacks Law, Order and Much More*, N.Y. TIMES, Feb. 16, 2000, at A8; *see also* Associated Press, *Indonesian General Issues Denials on War Crimes in East Timor*, N.Y. TIMES, Dec. 25, 1999, at A9.

123. *See supra* text accompanying notes 101-105.

Criminal Court.[124] As of July 2001, 139 countries had signed this treaty, and 37 had already ratified it.[125] When 60 countries ratify this treaty, it will come into force.[126]

Under this treaty, crimes against humanity, genocide, and war crimes[127] would be subject to the jurisdiction of the international tribunal in situations where national courts are not able to prosecute these crimes, as determined by the United Nations Security Council or the Court's Prosecutor.[128] No longer would *ad hoc* tribunals have to be set up each time a horrendous crime against humanity occurs, with all the attendant delays and political confusion that such an event requires. Having a respected tribunal in place would allow the international community to work rapidly to put the Pol Pots and Saddam Husseins on trial in a fair and expeditious manner.[129]

The United States signed the treaty establishing this new Court, in December 2000,[130] but continues to harbor significant reservations regarding the draft that has emerged.[131] David Scheffer, the U.S. Ambassador at Large for War Crimes Issues, has been campaigning to have Saddam Hussein indicted for crimes against humanity,[132] but he has also been leading the U.S. effort to thwart the coming-into-force of the present Statute of the International Criminal Court.[133] He has repeatedly expressed the U.S. concern that the Court will have jurisdiction over nationals of countries that have not ratified the treaty if they commit the designated crimes in a country that has ratified the treaty.[134] The United States is comfortable with the listing of war

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124. Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 999 [hereinafter Rome Statute].

125. *Rome Signature & Ratification Chart*, CICC International Criminal Court Homepage, *available at* wysiwyg://240/http://www.icc.now.org (visited August 21, 2001).

126. Rome Statute, note 124, art. 126, at 1068.

127. *Id.*, art. 5, at 1004 ("Aggression" will also be under the jurisdiction of the Court once a later meeting defines this term).

128. *Id.*, art. 1 –17, at 1003-12.

129. *Id.*

130. Seth Myers, *U.S. Signs Treaty for World Court to Try Atrocities*, N.Y. TIMES, Jan. 1, 2001, at A1.

131. Christopher S. Wren, *Hussein's Worst Enemies Meet, But With Little Meeting of Minds*, N.Y. TIMES, Nov. 1, 1999, at A6 (At a New York City conference of more than 300 representatives of Iraq's opposition groups that began on October 29, 1999, Ambassador Scheffer "explained his plan for having President Hussein indicted for crimes against humanity").

132. *U.S. Statement before the U.N. General Assembly Sixth Committee: The Rome Treaty on the International Criminal Court*, CICC Web Page, Oct. 21, 1999, *available at* http://www.igc.apc.org/icc/html/us19991021.html; *see generally* David Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 16-18 (1999).

133. *U.S. Statement before the U.N. General Assembly Sixth Committee*, *supra* note 132.

134. *See* Address by Ambassador David Scheffer, "International Criminal Court: The Challenge of Jurisdiction," Annual Meeting of the American Society of International Law,

crimes and their elements, but is concerned that a political agenda (related to the Middle East peace process) underlies the crime of an occupying power transferring its population into the territory it occupies and is concerned that the crime of aggression might interfere with "the need for the international community to respond to humanitarian and other crises without being harassed and much worse, charged with violations of the Statute."[135]

The situation the United States is most concerned about involves an atrocity committed by a U.S. soldier on a peacekeeping mission in a country that has accepted the jurisdiction of the International Criminal Court during a period in which the United States may have signed but has not yet ratified the Court's Treaty. Could the Court exercise jurisdiction over this U.S. soldier? The United States would have a responsibility to prosecute the soldier under applicable treaties and U.S. statutes, and the country where the atrocity took place could also exercise jurisdiction.[136] But could the country where the incident occurred transfer its jurisdiction to the International Criminal Court? Ambassador Scheffer argues vigorously that such jurisdiction cannot be delegated. He quotes Duke Law Professor Madeline Morris for the proposition that "territorial jurisdiction is not 'a form of negotiable instrument'" and offers in horror her hypothetical that the country where the atrocity took place might transfer jurisdiction to Libya (in exchange for Libya's transferring jurisdiction over a national of the country where the atrocity occurred).[137]

Although it is always possible to come up with blood-curdling hypotheticals, it seems disingenuous and is ultimately unconvincing to compare the exercise of jurisdiction by the carefully-constructed and internationally-recognized International Criminal Court with that of an international pariah like Libya. Although the United States has been trying to generate a lot of smoke to explain its reservations about the current draft text of the International Criminal Court, most observers cannot understand why our country is not able to embrace enthusiastically this important international initiative and to work with other enlightened countries to make it work effectively. The advantages of having such an institution in place to ensure effective prosecution of those committing atrocities surely outweighs the highly-technical and mostly-unlikely scenarios developed by Ambassador Scheffer.

Washington, D.C., March 26, 1999.

135. *See* Address by Ambassador David Scheffer, "International Criminal Court: The Challenge of Jurisdiction," Annual Meeting of the American Society of International Law, Washington, D.C., March 26, 1999..

136. *See* Geneva Conventions, *supra* note 64.

137. *See* Address by Ambassador David Scheffer, *supra* note 134.

VI.. SOME HARD CASES AND UNRESOLVED SITUATIONS

Almost every rule has some exceptions, and the question arises whether some situations present exceptions to the general rule that human rights violators should be punished and victims should be compensated. What about the South African Truth and Reconciliation Commission? Was its strategy – to provide amnesty to those who told the complete truth about their crimes – legitimate? Are there some situations when an apology and an accounting are enough, and no compensation or prosecution is needed? What about wrongs that took place in the relatively distant past, such as the illegal overthrow and taking of lands of the Kingdom of Hawai'i in the 1890's, which has left the Native Hawaiian People scarred, impoverished, and frustrated?[138] What about the centuries of the brutal slave trade and the practice of slavery, which finally ended in the second half of the nineteenth century, but whose effects are still felt?

Randall Robinson makes a compelling argument in his recent book *The Debt: What America Owes to Blacks*[139] that the enslavement of blacks in America from 1619 to 1865 was "far and away the most heinous human rights crime visited upon any group of people in the world over the last five hundred years,"[140] and that we must look at the claims of the descendants of slaves as a form of property.[141] It is a form of property because the descendants of former slave-holders have an enormous economic advantage over those who are descendants of former slaves that can be linked directly to wealth accumulated from the labors of the slaves and the oppression that continued for a century after the end of slavery during the Jim Crow period.[142] When it freed the slaves, the United States provided no meaningful compensation to them for the value of their labor, nor did it provide them with the wherewithal to establish themselves economically to compete with the white community in the marketplace.[143] Robinson convincingly argues that a transfer of wealth from those who benefited to those who still suffer because their ancestors were oppressed is the only way to achieve a meaningful reconciliation: "Until America's white ruling class accepts the fact

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138. Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1983 Overthrow of the Kingdom of Hawai'i, Pub. L. 103-50, 107 Stat. 1510 (1993).

139. *See* Randall Robinson, *supra* note 94. *See also* Boris Bittker, *The Case for Black Reparations* (1973); Robert Westley, *Many Billions Gone*, 40 B.C.L. REV. 429 (1998); and 19 B.C. THIRD WORLD L.J. 429 (1998).

140. Robinson, *supra* note 94, at 216. Robinson argues that slavery involved the "loss of millions of lives," but also was worse than other acts of genocide because "with its sadistic patience, asphyxiated memory, and smothered cultures, slavery has hulled empty a whole race of people with inter-generational efficiency." *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 204-05, 211.

that the book never closes on massive unredressed social wrongs, America can have no future as one people."[144]

Since 1989, Representative John Conyers has repeatedly introduced a bill to "acknowledge the fundamental injustice, cruelty, brutality, and inhumanity of slavery in the United States and the 13 American colonies between 1619 and 1865" and to establish a commission to make recommendations "on appropriate remedies."[145] The bill has never made it out of committee, but it reflects a proper approach to the festering problem of racism in the United States. With the recent focus on affirmative action, those opposed to justice for African Americans have been able to dismiss their claim by arguing that they are claiming preferential rights. In fact, African-Americans are simply claiming property that has been denied to them by virtue of the continuing impact of the mistreatment of their ancestors. If their claim can be recharacterized as a property right, it may be more understandable to the conservatives who currently dominate the federal judiciary.

Once the wrong is acknowledged, what remedy is appropriate? Because of the passage of time, it may seem improper just to hand money to all the descendants of slaves, some of whom have been able to prosper economically despite the obstacles in their path. The approach of funding a foundation to address specific needs of the descendants of slaves has been suggested by Daedria Farmer-Paellman, a New York attorney whose great-great-grandmother was a slave in South Carolina.[146] She has demanded that Aetna Inc. set up a $1 billion foundation to benefit minority education and business because it profited from slavery, selling policies in the 1850s that reimbursed slave owners for financial losses when their slaves died.[147]

The Native Hawaiian situation is similar. As a result of the illegal overthrow of the Kingdom of Hawaii in 1893, lands belonging to the Native Hawaiian People and their monarchs were acquired by the United States without the consent of or compensation to the Native Hawaiian People.[148] And just as one group – the Native Hawaiians – lost economic wealth as a result of this illegal action, another group – the non-Hawaiians – gained.[149] The Native Hawaiians have a claim for the lands that were taken, as well as for their lost sovereignty, and this claim is a form of property that should be treated as such.[150]

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144. Robinson, *supra* note 94, at 208.

145. *Id.* at 201; *see, e.g.*, H.R. 3745 (1989) and H.R. 40 (1999).

146. Robinson, *supra* note 94, at 201.

147. Associated Press, *Reparations for Slavery Demanded from Aetna*, SAN FRANCISCO CHRONICLE, March 20, 2000, at A2.

148. *See supra* note 138.

149. *Id.*

150. In the decision in Rice v. Cayetano, 120 S.Ct. 1044 (2000) the U.S. Supreme Court included a historical summary explaining the losses the Native Hawaiians had suffered at

VII. CONCLUSION

How can a society build a future if it is still poisoned by the past? If someone has killed your spouse or your child, is it possible to forgive and forget, or is the innate need for justice – including punishment, compensation, and a final accounting – too strong to set aside?

Some argue that countries returning to democracy after a period of authoritarian rule should forego investigations and prosecutions of human rights abusers in order to promote the healing and nation-building process.[151] They argue that protracted trials will exacerbate the wounds that have divided the country, and that the transition to democracy can be promoted by encouraging the members of the previous regime to participate in the new government.[152] They also argue that if the fear of legal retribution is removed, the authoritarian leaders will be more willing to relinquish power and permit the new democracy to function.[153]

These arguments frequently have a short-term appeal, but in the long run it will always be better to conduct full investigations, prosecute the abusers, and enable the victims to receive appropriate compensation. In any orderly civilized society, prosecution of criminals is an essential responsibility, and disclosure of historical events is an important responsibility of any government. Each victim has a right to know what happened and a right to compensation for their injuries and suffering. The orderly administration of justice "dissipates the call for revenge."[154] Even though prosecutions may be disruptive in the short run, they are necessary to serve to deter future human rights abuses. Although pardons and plea agreements may be appropriate in some situations, it is never legitimate to ignore atrocities.

If the national courts of the country where the abuses occurred are functioning properly and can conduct the prosecutions and determine the claims for compensation, these national courts should be given the responsibility to do so. But in some situations, because the judiciary is not independent or because the country is still in turmoil, its courts cannot be expected to provide a fair forum for the accused and the victims. In those situations, an international tribunal can play an impor-

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the hands of Westerners, but nonetheless declared unconstitutional the program established by the people of the State of Hawai'i to provide a procedure to redress those grievances. *See generally*, Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE LAW & POL'Y REV. 95 (1998). The U.S. Supreme Court has recognized that legally cognizable claims are a form of property in, for instance, Dames & Moore, *supra* note 46.

151. *See* Van Dyke and Berkley, *supra* note 70, at 245-46.

152. *Id.*

153. *Id.*

154. Antonio Cassese, *Reflections on International Criminal Justice*, 61 MOD. L. REV. 1, [3-6] (1998).

tant role to ensure accountability and orderly prosecutions. The 1998 Statute creating the International Criminal Court is a responsible and well-drafted effort to establish a permanent tribunal that will be available for such situations. The United States has presented some highly technical complaints about the jurisdiction of this proposed Court, but these concerns have not convinced the 139 countries that have signed the Statute and are proceeding toward ratification. The United States should also ratify this Statute and help bring into being this new Court.