Denver Journal of International Law & Policy

Volume 26
Number 4 *Summer*

Article 4

January 1998

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Keywords

Human Rights Law, Criminals, Jurisdiction, War, Humanitarian Law

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I. INTRODUCTION

This year celebrates the fiftieth anniversary of the Universal Declaration of Human Rights,[1] a document that is regarded both as the wellspring and cornerstone of modern international human rights law. The Universal Declaration, though not intended to be legally binding, aims to set "a common standard of achievement for all peoples and nations."[2] And that it surely does. Its thirty articles cover a raft of human rights and fundamental freedoms, ranging from the liberty and security of the person, equality before the law, due process, prohibitions against torture and arbitrary interference with privacy, to civil and political rights that protect freedom of movement, asylum, expression, conscience and religion, and assembly. There are in addition economic and social rights, such as the rights to work and equal pay and to social security and education.

The Universal Declaration clearly is not an enforceable international instrument. Yet, the fact remains that its contents have subsequently become regarded as binding customary international law,[3] or as embodying general principles of law,[4] or as conventional law by virtue of being codified through specific provisions in specific international treaty instruments.[5]

Nevertheless, underpinning the proclaimed rights in the Universal Declaration is a critical provision that tends to be passed over in most treatments of human rights law. This provision is Article 8, which in

1. Universal Declaration of Human Rights, G.A. Res. 217 (III 1948), Dec. 10, 1948.

2. *Id.* preamble.

3. *See* RICHARD B. LILLICH, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY AND PRACTICE 86-163 (1991).

4. Hurst Hannum, *Human Rights*, *in* THE UNITED NATIONS AND INTERNATIONAL LAW 138 (Christopher C. Joyner ed., 1997).

5. *See* OPPENHEIM'S INTERNATIONAL LAW 1002 (R.Y. Jennings & A.D. Watts eds., 9th ed. 1992); MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 248-49 (1993).

full emphatically asserts the following: "Everyone has the right to an effective remedy by the competent national tribunal for acts violating the fundamental rights granted him by the constitution or by law."[6] This is the effective remedies provision that explicitly intends to protect the rights of the victim. Each person therefore possesses and can exercise the right to obtain redress for harm done by public or private agents to him or her. The premise here is that no person is above the law. Every person should have recourse to protection under the law, to equal protection against discrimination of his or her fundamental human rights, and to justice in seeking juridical remedies under the law. Furthermore, in the event that the fundamental human rights of a person are violated, there remains the overarching right to justice. States are obligated to investigate those violations, take appropriate measures against the perpetrators, ensure that they are prosecuted, and furnish the victims with effective remedies.

Such remedies for victims have not, in fact, often been attained. Human rights have been grossly violated, on massive scales, usually leaving as stark legacies the scars of profound suffering for victims and scabs of impunity for perpetrators. This realization points up the main purpose of this paper, namely, to examine the notion of allowing impunity for serious violators of fundamental human rights as opposed to the obligation of obtaining effective remedies for victims as affirmed under Article 8 of the Universal Declaration. To address this theme, Part II section briefly treats the scope of impunity, as it appraises the contemporary system of international criminal law that prohibits impunity for human rights violations and supplies the legal basis for governments to comply with and enforce the obligation for juridical redress in Article 8 of the Universal Declaration. Part III deals with the nature of impunity, specifically by exploring the rationales concerning why governments do so little in prosecuting and punishing persons who have committed the most horrendous of crimes. The availability under national and international law of various accountability mechanisms for bringing alleged perpetrators to justice is treated in Part IV, as is how the need for justice squares with the need for national reconciliation. Part V appraises the prospects for obtaining Article 8 effective remedies through competent tribunals (inclusive of international courts), as guided by principles designed to ensure restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, and the final section proffers some conclusions for reflective consideration.

6. Universal Declaration of Human Rights, *supra* note 1, art. 8.

II. THE SCOPE OF IMPUNITY

In the last half century, violent internal conflicts and tyrannical regimes have victimized millions of people throughout the world.[7] One authoritative report estimates that from World War II through 1996, at least 220 non-international conflicts involving civil war or oppressive regimes may have killed as many as 86 million people.[8] That victimization has included the most serious violations of fundamental human rights — genocide, crimes against humanity, non-juridical executions, torture, arbitrary arrests and unlawful detentions.

The scope of these high crimes is monstrous indeed. Yet, there have been relatively few prosecutions and only scarce accountability, either nationally or internationally for these grave violations of human rights and the resultant pervasive suffering. In fact, only a handful of remedies for these massive human rights violations have been attempted, and these have come as piecemeal and ad hoc offerings mainly during the past decade.[9] Two international investigatory commissions[10]

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7. Rudolph Rummel has recently calculated that during the present century, civil wars, internal conflicts and tyrannical regimes have caused some 170 million deaths, as compared to 33 million persons killed in international military conflicts. RUDOLPH J. RUMMEL, DEATH BY GOVERNMENT 9 (1994).

8. Jennifer Balint, *An Empirical Study of Conflict, Conflict Victimization, and Legal Redress*, REINING IN IMPUNITY FOR INTERNATIONAL CRIMES AND SERIOUS VIOLATIONS OF FUNDAMENTAL HUMAN RIGHTS, 14 NOUVELLES ETUDES PENALES 1998 101, 107 (Christopher C. Joyner ed. 1998) [hereinafter REIGNING IN IMPUNITY]. *See also* M. Cherif Bassiouni, *Considerations on Peace and Justice and the Imperative of Accountability for International Crimes and Consistent and Widespread Violations of Fundamental Human Rights*, 59 LAW & CONTEMP. PROBS. 9, at 10 (Autumn 1996) [hereinafter Bassiouni], *reprinted in* REINING IN IMPUNITY, at 45, 46.

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

10. For Bosnia, see *Report of the Special Rapporteur to the Commission on Human Rights of 28 August 1992*, U.N. Doc. E/CN.4/1992/S-1/9; *Report of the Special Rapporteur to the Commission on Human Rights of 27 October 1992*, U.N. Doc. ECN.4/1992/S-10; *Report of the Special Rapporteur to the Commission of Human Rights to the Forty Seventh Session of the General Assembly of 17 November 1992*, U.N. Doc. A/47/666-S/24809; *Report of the Special Rapporteur to the Commission on Human Rights to the Economic and Social Council of 10 February 1993*, U.N. Doc. E/CN.4/1993/50. *See The Final Report of the Commission of Experts Established Pursuant to Security Council Resolution* 780 (1992), U.N. SCOR, 49th Sess., Annex, U.N. Doc. S/1994/674 (1994) [hereinafter *Final Report of the Commission of Experts*]; *Final Report*, U.N. SCOR, 49th Sess., Annexes, U.N. Doc. S/1994/674/Add.2 (1994). *See also* M. Cherif Bassiouni, *The United Nations Commission of Experts Established Pursuant to Security Council Resolution* 780 (1992), 88 AM. J. INT'L L. 784-805 (1994); M. Cherif Bassiouni, *The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia*, 5 CRIM. L. F. 279-340 (1994). For Rwanda, see *Letter Dated 1 October 1994 from the Secretary-General Addressed to the President of the Security Council, S/1994/1125, transmitting the Commission of Experts' Preliminary Report* (Oct. 1, 1994); *Report on the Situation of Human Rights in Rwanda*, UN Doc.

and two special tribunals were respectively established for the former Yugoslavia[11] and Rwanda.[12] An international truth commission was held for El Salvador, although it failed to produce any prosecutions.[13] Two national prosecution programs were undertaken following the civil conflicts in Ethiopia[14] and Rwanda.[15] Certain national prosecutions were undertaken in Argentina,[16] and a national inquiry commission was set up in Chile.[17] In South Africa, a special body known as the Truth and Reconciliation Commission was established, which may yet produce some prosecutions.[18] Finally, some East and Central European countries adopted special "lustration" laws to preclude select people in the former communist regimes from holding public office, or participating in politics.[19] Ideally, impunity for these most heinous of acts —

E/CN.4/1995/7 (June 28, 1994); *Report on the Situation of Human Rights in Rwanda*, UN Doc. E/CN.4/1995/12 (Aug. 12, 1994).

11. *See* Statute of the International Criminal Tribunal for the Former Yugoslavia, *adopted at* New York, May 25, 1993, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., at 1-2, U.N. Doc. S/RES/827 (1993), 32 I.L.M. 1159 [hereinafter ICTY Statute].

12. Statute of the International Criminal Tribunal for Rwanda, *adopted at* New York, Nov. 8, 1994, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598 [hereinafter ICTR Statute].

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

14. *See* Girma Wakjira, *National Prosecution: The Ethiopian Experience*, *in* REINING IN IMPUNITY, *supra* note 8, at 189.

15. *See generally* United Nations Human Rights Field Operation in Rwanda Status Report, *The Administration of Justice in Post-Genocide Rwanda* (June 1996). *See also* Lawyers Committee for Human Rights, *Prosecuting Genocide in Rwanda: The ICTR and National Trials* 47-66 (1997).

16. *See* NUNCA MAS, INFORME DE LA COMISION SOBRE LA DESAPARICION DE PERSONAS (1985); CAROLOS SANTIAGO NINO, RADICAL EVIL ON TRIAL (1996).

17. *See* REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION (Philip E. Berryman trans., 1993). *See* Edward C. Snyder, *The Dirty Legal War: Human Rights and the Rule of Law in Chile 1973-1995*, 2 TULSA J. COMP. & INT'L L. 253 (1995).

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

19. *See generally* TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES (Neil J. Kritz ed., Vol. III. Law, Rulings and Reports 1995); Maria Lon, *Lustration and Truth Claims: Unfinished Revolutions in Central Europe*, 20 L. & SOC. INQUIRY 1, 117 (1995); Adrenne M. Quill, *To Prosecute or Not to Prosecute: Problems Encountered in the Prosecution of Former Communist Officials in Germany, Czechoslovakia, and the Czech Republic*, 7 IND. INT'L & COMP. L. REV. 1, 165 (1996); Mark S. Ellis, *Purging the Past: The Current State of Lustration Laws in the Former Communist Bloc*, 59 LAW & CONTEMP. PROB. 181 (1996); Ved Nanda, *Civil and Political Sanctions as an Accountability Mechanism for Massive Violations of Human Rights*, in REINING IN

war crimes, genocide and crimes against humanity — should not be tolerated under any circumstances. In an ideal world, governments would adopt international agreements in which they pledge not to use impunity from prosecution by international tribunals as a bargaining chip in negotiations to facilitate a transfer of power from one government to a successor regime. But, we do not live in an ideal world. Political considerations are inevitable — indeed, they are inescapable — and will affect the international response to high crimes involving human rights violations.

The rather modest efforts at fact-finding, prosecution and punishment hardly measure up to the massive human rights victimization that has occurred since World War II. Indeed, the vast extent of human rights deprivations that has taken so many millions of lives profoundly violates the inherent dignity and the equal and inalienable rights of persons affirmed for protection in the Universal Declaration of Human Rights.[20] No less egregious, though, is that nearly all the persons who perpetrated these gross violations of human rights have gone unpunished. This situation personifies the pervasive practice of impunity, of letting the guilty get away with murder, literally, scot-free.

III. THE NATURE OF IMPUNITY

One authoritative United Nations rapporteur has defined impunity as "the impossibility, *de jure* or de facto, of bringing the perpetrators of human rights violations to account — whether in criminal, civil, administrative or disciplinary proceedings — since they are not subject to any inquiry that might lead to them being accused, arrested, tried and if found guilty, convicted."[21] Impunity, then, means exemption or free-

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IMPUNITY, *supra* note 8, at 313.

20. To wit, relevant provisions in the Universal Declaration that were grossly violated would, inter alia, include the following: "Everyone has the right to life, liberty and security of person." (article 3); "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." (article 5); "Everyone has the right to recognition everywhere as a person before the law." (article 6); "All are equal before the law and are entitled without discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination." (article 7); and, "No one shall be subjected to arbitrary arrest, detention or exile." (article 9). Universal Declaration of Human Rights, *supra* note 1.

21. *Question of the Impunity of Perpetrators of Violations of Human Rights (civil and political rights):* Revised final Report prepared by Mr. Joinet, Pursuant to Sub-Commission Resolution 1996/119, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 49th Sess., Item 10, (June 26, 1997) UN Doc. E/CN.4/Sub.2/1997/20, at 3, *reprinted in* REINING IN IMPUNITY, *supra* note 8, at 501-24. [hereinafter the Joinet Principles] (subsequent citations refer to the reprinted text).

dom from punishment and connotes the lack of effective remedies for victims of crimes. Within the context of human rights law, impunity implies the lack of or failure to apply remedies for victims of human rights violations.[22]

In the grand scheme of things, one might be tempted to ask, "So what? Why should the international community care about impunity and its relevance for the human rights situation in a particular state? Why should that situation involving the internal affairs of a some state be a grave concern of other peoples, in other states?" The answers to these queries are bound up in the kinds of crimes and the degree of violations that escape prosecution. Usually these acts are the vilest of human rights deprivations. They include violations of the right to life, i.e., extralegal executions, "disappearances," and massacres; violations of personal integrity, including torture and other physical injuries; and, unlawful restrictions on personal liberty, such as arbitrary detention, illicit search and seizure, and unwarranted arrest.

In short, these are acts that violate the principles and protections most sacred to the Universal Declaration of Human Rights. No less repugnant is that the perpetrators of these depredations often go unpunished. If contemporary international society is to be governed by the rule of law, rather than by the savagery of men, those who perpetrate these gross violations of human rights must be held personally accountable for their unlawful acts. Article 8 of the Universal Declaration mandates this action, and subsequent international instruments of modern human rights law have codified the demand alleged offenders

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22. *See Progress Report on the Question of Impunity of Perpetrators of Human Rights Violations,* prepared by Mr. Guisse and Mr. Joinet, pursuant to Sub-Commission Resolution 1992/23, Sub-Commission on Prevention and Protection of all Minorities, 45th Sess., Item 10(a), (July 19, 1993) E/CN.4/Sub.2/1993/6; *Preliminary Report on Opposition to the Impunity of Perpetrators of Human Rights Violations (economic, social and cultural rights),* prepared by Mr. Guisse and Mr. Joinet, pursuant to Sub-Commission Resolution 1993/37, Sub-Commission on Prevention and Protection of all Minorities, 46th Sess., Item 10(a), (June 22, 1994) E/CN.4/Sub.2/1994/11; *Progress Report on the Question of the Impunity of Perpetrators of Violations of Human Rights (civil and political rights),* prepared by Mr. Joinet, pursuant to Sub-Commission Resolution 1994/34, Subcommission on Prevention and Protection of all Minorities, 47th Sess., Item 10, (June 28, 1995) E/CN.4/Sub.2/1995/18; *Question of the Impunity of Perpetrators of Violations of Human Rights (civil and political rights):* Final Report prepared by Mr. Joinet, Pursuant to Sub-Commission Resolution 1995/35, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 48th Sess., Item 10, (June 29, 1996) UN Doc. E/CN.4/Sub.2/1996/18, at 8; Joinet Principles, *supra* note 21. For analyses that call for combating impunity, *see generally* IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 14 (Naomi Roht-Arriaza ed., 1995); Naomi Roht-Arriaza, *Combating Impunity: Some Thoughts on the Way Forward,* 59 LAW & CONTEMP. PROBS. 93 (Autumn 1996) [hereinafter Roht-Arriaza, *Combating Impunity*]; Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,* 100 YALE L.J. 2537 (1991) [hereinafter Orentlicher, *Settling Accounts*].

be prosecuted.

IV. THE LEGAL FRAMEWORK FOR ACCOUNTABILITY

The corpus of international law that has evolved since 1945 clearly imposes obligations upon government parties to investigate and prosecute suspected violators of humanitarian law (i.e., the laws of war) and other high human rights crimes (including genocide, torture, and crimes against humanity). In this way, these international treaty instruments establish a legal framework designed to combat impunity, as they prohibit certain offenses that violate human rights norms and obligate either the national or international prosecution of offenders.

A. The Nuremberg Precedent

International codification and consensus since the Second World War have confirmed war crimes as international criminal acts, thus permitting states to define and punish those extraterritorial crimes wherever, and by whomever, they are committed.[23] Governments have seen fit to allocate to the international community legal competence to deal with crimes designated to have an international character, perpetrated by certain persons, during a specified time period, in a given territory.

The legal competence to deal with high crimes involving human rights violations evolved from the precedent set down by the International Military Tribunal at Nuremberg,[24] the Article VI provisions of its Charter,[25] and the Nuremberg Trials that followed in 1945. This legal

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23. *See* Christopher C. Joyner, *Enforcing Human Rights Standards in the Former Yugoslavia: The Case for an International War Crimes Tribunal*, 22 DENV. J. INT'L L. & POL'Y 235 (1994) [hereinafter Joyner, *Enforcing Human Rights*].

24. Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Charter of the International Tribunal, Aug. 8, 1945, 59 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 279 [hereinafter Charter of the International Tribunal]. *See also* 13 DEP'T OF STATE BULL. at 222 (1945). For the relevance of the Nuremberg Court to the International Tribunal for war crimes in Bosnia, see the discussion in Joyner, *Enforcing Human Rights*, *supra* note 23, at 237-255.

25. Key among the Nuremberg Charter's central provisions was its Article VI, which defined the jurisdiction of the court in these terms:

> The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
> (a) Crimes against the Peace: Namely, planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
> (b) War crimes: Namely, violations of the laws or customs of war. Such viola-

legacy has been reaffirmed during the 1990s in the statutes of two special international tribunals created by the United Nations Security Council to prosecute and try alleged offenders for high crimes and human rights violations in the former Yugoslavia[26] and Rwanda.[27]

Persons may be prosecuted under contemporary international law for four groups of high human rights criminal offenses, namely: (1) grave breaches of the four Geneva Conventions of 1949;[28] (2) violations of the laws or customs of war; (3) acts of genocide;[29] and (4) crimes against humanity.[30] These acts have been stipulated by the interna-

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> tions shall include, but shall not be limited to, murder, ill-treatment or deportation to slave labor or from any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, town or villages, or devastation not justified by military necessity;
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> (c) Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.
>
> Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan . . . .

Charter of the International Tribunal at Nuremberg, *supra* note 24, art. VI.

26. ICTY Statute, *supra* note 11.

27. ICTR Statute, *supra* note 12.

28. The Four Geneva Conventions of Aug. 12, 1949 are the: Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 31 [hereinafter Geneva Convention No. I]; Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention No. II]; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention No. III]; Convention Relative to the Protection of Civilian Persons in Times of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 28 [hereinafter Geneva Convention No. IV] [hereinafter collectively Geneva Conventions of 1949].

29. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 1 U.N. GAOR Res. 96 (Dec. 11, 1946) 78 U.N.T.S. 277 [hereinafter Genocide Convention]. *See also* ICTY Statute, *supra* note 12, art. 4; ICTR Statute, *supra* note 12, art. 2.

30. *See* Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis (London Charter), *signed at* London, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, 3 Bevans 1238, *entered into force* Aug. 8, 1945; Control Council Law No. 10 (Punishment of Persons Guilty of War crimes, Crimes Against Peace and Against Humanity), *adopted at* Berlin, Dec. 20, 1945, Official Gazette of the Control Council for Germany, No. 3, Berlin, Jan. 31, 1946, *reprinted in* BENJAMIN B. FERENCZ, 1 AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE 488 (1980) [hereinafter

tional community as criminal offenses against all humankind, from which there ought to be no impunity. Perpetrators of these horrendous acts must be prosecuted and held accountable for their crimes.

B. Grave Breaches of the 1949 Geneva Conventions

Perhaps the clearest articulation of these offenses is found in the four Geneva Conventions of 1949, in particular the common Article (50/51/130/147) of those instruments.[31] This provision defines the "grave breaches" of international humanitarian law that states are required to punish.[32] Common Article 50/51/130/147 of the conventions also prescribes minimum rules applicable to situations of armed conflict

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FERENCZ]; International Military Tribunal for the Far East, *proclaimed at* Tokyo, Jan. 19, 1946 and amended Apr. 26, 1946, T.I.A.S. No. 1589, 4 Bevans 20; Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal (United Nations General Assembly Resolution), *adopted at* New York, Dec. 11, 1946, U.N.G.A. Res. 95(I), U.N. Doc. A/64/Add.1 (1946); Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, *adopted at* Geneva, July 29, 1950, 5 U.N. GAOR Supp. (no. 12), at 11, U.N. Doc. A/1316(1950), 44 AM.J.INT'L L. 126 (1950); Code of Crimes Against the Peace and Security of Mankind: Titles and texts of articles on the Draft Code of Crimes Against the Peace and Security of Mankind adopted by the International Law Commission at its forty-eighth session (1996), U.N. GAOR Int'l Law Comm., 48th Sess., U.N. Doc. A/CN.4/L.532 (1996), July 15, 1996, *revised by* U.N. Doc. A/CN.4/L.532/corr.1, U.N. Doc. A/CN.4/L.532/corr.3; Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, *opened for signature at* New York, Nov. 26, 1968, G.A. Res. 2391, U.N. GAOR, 23d Sess., Supp. No. 18, at 40, U.N. Doc. A/RES/2391 (1968), 754 U.N.T.S. 73, 8 I.L.M. 68, *entered into force* Nov. 1970; European Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes (Inter-European), *signed at* Strasbourg, Jan. 25, 1974, Europe. T.S. No. 82, 13 I.L.M. 540, not yet entered into force; ICTY Statute, *supra* note 11, at art. 5; ICTR Statute, *supra* note 12, at art. 2.

31. As defined in the Geneva Conventions of 1949, *supra* note 28, certain "grave breaches" are crimes committed against persons or property protected by the conventions and include:

> (i) Willful killing, torture or inhuman treatment of protected persons;
> (ii) Willfully causing great suffering or serious injury to body or health of protected persons;
> (iii) Taking of hostages and extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly;
> (iv) Unlawful deportation or transfer or unlawful confinement of a protected person;
> (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile power; and,
> (vi) Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial prescribed in the Geneva Conventions.

Id. common arts. 50/51/130/147, respectively.

32. Geneva Conventions of 1949, *supra* note 28, at common art. 3.

that are not international in character. Commission of a grave breach warrants individual criminal liability, and governments party are bound by the corresponding duty to prosecute accused offenders.[33] Similarly, parties have the obligation to search for, prosecute, and punish perpetrators of grave breaches, unless they opt to turn such persons over for trial to another state party.[34]

Importantly, the duty to prosecute grave breaches under the Geneva Conventions is limited to international conflicts. The international conflict requirement derives from common article 2 of the four Geneva Conventions. More recently, the Statute of the international tribunals for the former Yugoslavia incorporated the essential language of this common "grave breaches" provision into its Article 2, giving the tribunal lawful authority to prosecute persons "committing or ordering to be committed" certain acts that rise to the level of war crimes under modern international humanitarian law. Thus, at present commission of any of the following acts, without qualification, may be considered a war crime:

(a) willful killing;

(b) torture or inhuman treatment, including biological experiments;

(c) willfully causing great suffering or serious injury to body or health;

(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;

(f) willfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;

(g) unlawful deportation or transfer or unlawful confinement of a civilian;

(h) taking civilians as hostages.[35]

Since the violence in Rwanda was more of an ethnic rampage than an internal war, the Statute for the Rwanda tribunal does not address "grave breaches" per se. Rather it refers to "violations of Article 3 common to the Geneva Conventions and of Additional Protocol II."[36] In this

33. See VIRGINIA MORRIS & MICHAEL SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 64-65 (1995).

34. Geneva Convention I, *supra* note 28, art. 51; Geneva Convention II, *supra* note 28, art. 52; Geneva Convention III, *supra* note 28, art. 131; Geneva Convention IV, *supra* note 28, art. 148.

35. ICTY Statute, *supra* note 11, art. 2. Compare the language cited in common articles 50/51/130/147 of the Geneva Conventions of 1949, *supra* note 28.

36. ICTR Statute, *supra* note 12, art. 4.

regard, violations as enumerated in the Rwanda Statute "include, but are not limited to," the following acts:

(a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment.

(b) Collective punishments;

(c) Taking of hostages;

(d) Acts of terrorism;

(e) Outrages against personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution, and any form of indecent assault;

(f) Pillage;

(g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the juridical guarantees which are recognized as indispensable by civilized peoples;

(h) Threats to commits any of the foregoing acts.[37]

As initially contained in the 1949 Geneva Conventions and subsequently upgraded in the two international tribunal statutes, accused offenders of these grave breach prohibitions should be apprehended, prosecuted and if convicted, duly punished. Put tersely, neither the Geneva Convention nor the Statutes of the two current international criminal tribunals contain provisions that approve of or guarantee impunity for offenders under special conditions or circumstances. Perpetrators are not to receive absolution for their high crimes, either from a national court or under a special domestic law. The Geneva Conventions and both the ICTY and ICTR Statutes are action instruments intended to promote prosecution of alleged offenders, not absolve them of individual responsibility or accountability.

C. Violations of the Laws or Customs of War

Another vital ingredient of international humanitarian law is the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, especially the regulations annexed thereto.[38] The ICTY Statute upgrades and places into a more modern context these prohibitions, with the assertion that persons should be prosecuted for violating the laws or customs of war (as derived from the Hague Regulations), in-

37. *Id.*

38. Hague Convention No. IV Respecting the Laws and Customs of War on Land, October 18, 1907, 36 Stat. 2277.

cluding, but not restricted to the following:

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;

(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) attack, bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;

(d) seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works or art and science;

(e) plunder of public or private property.[39]

These provisions originate from Articles 23-28 of the 1907 Hague Regulations and they are generally regarded today as violations of the laws of war under international humanitarian law. That is, certain war crimes might be committed, which states are required to prosecute that are neither "grave breaches" nor genocide, but nonetheless entail serious depredations of human rights.[40] In particular, the Yugoslavia Tribunal Statute explicitly underscores for the modern context the persistent unlawfulness of acts articulated in the 1907 Hague Regulations and 1949 Geneva Conventions as grave breaches of international law.[41] These fiats are intended specifically to dissuade persons from committing such offensive acts. If however, persons do violate these norms, states party are legally bound to punish those offenders. These regulatory mechanisms aim to punish, not pardon, perpetrators who violate the normative customs of war. Offenders committing war crimes must be held accountable for their unlawful acts; they are not to be excused for purposefully violating the laws and customs of war.[42]

D. Genocide

The 1948 Convention on the Prevention and Punishment of Genocide[43] provides an absolute obligation to prosecute persons responsible

39. ICTY Statute, *supra* note 11, art. 3. *See* Hague Convention (IV) Annex (Regulations), *supra* note 38, especially arts. 23, 25, 27, and 28.

40. *See generally* Diane F. Orentlicher, Responsibilities of States Participating in Multilateral Operations with Respect to Persons Indicted for War Crimes, *in* REINING IN IMPUNITY, *supra* note 8, at 193.

41. *See generally* Jordan J. Paust, *Applicability of International Criminal Laws to Events in the Former Yugoslavia*, 9 AM. J. INT'L L. & POL'Y 499, 511-12 (1994).

42. *See generally* Public International Law and Policy Group of the Carnegie Endowment for International Peace, *Bringing War Criminals to Justice: Obligations; Options; Recommendations* (Sept. 1997), *reprinted in* REINING IN IMPUNITY, *supra* note 8, at 549-580.

43. *See* Genocide Convention, *supra* note 29. The crime of genocide is conceptually

for committing acts of genocide. As defined in the Convention, genocide is any of the following acts when committed "with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such":

(a) killing members of the group;

(b) causing serious bodily or mental harm to members of the group;

(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) imposing measures intended to prevent births within the group;

(e) forcibly transferring children of the group to another group.[44]

These provisions, then, enumerate various acts that specifically qualify as war crimes that are prosecutable as acts of genocide under modern international law. Further, the Genocide Convention goes on to stipulate that certain specific actions shall be punishable:

(a) genocide;

(b) conspiracy to commit genocide;

(c) direct and public incitement to commit genocide;

(d) attempt to commit genocide;

(e) complicity to commit genocide.[45]

The Genocide Convention obligates that persons accused of committing genocide be tried by a "competent tribunal of the State in the territory of which the act was committed" or an acceptable international tribunal and that parties punish convicted offenders through "effective penalties."[46] The convention does not, however, obligate parties to prosecute all offenders in their custody, nor does it explicitly address the prosecution of all such offenders irrespective of their location. Under Article VI of the Genocide Convention, parties are obligated only to exercise domestic jurisdiction pursuant to the territorial principle, with offenders possibly being tried by a competent tribunal of the state where the offense was committed, or by an international penal tribunal

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derivative of the crimes against humanity prosecuted by the International Military Tribunal at Nuremberg and the War Crimes Tribunal for the Former Yugoslavia. The General Assembly resolution, adopted unanimously on December 11, 1946, affirmed the "principles of international law recognized by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal." G.A. Res. 96, 1 UN GAOR, U.N. Doc. A/64, at 188 (1946).

44. *Id.* art. II. *Cf.* ICTY Statute, *supra* note 11, art. 4, para. 2.; ICTR Statute, *supra* note 12, art. 2, para. 2.

45. Genocide Convention, *supra* note 29, art. III. *Cf.* ICTY Statute, *supra* note 11, art. 4, para. 3; ICTR Statute, *supra* note 12, art. 2, para. 3.

46. Genocide Convention, *supra* note 29, at arts. IV, V, and VI.

that may have jurisdiction.[47]

These qualifications notwithstanding, genocide remains a gross crime under customary international law and gives rise to universal jurisdiction to the same degree as over war crimes and crimes against humanity.[48] Indeed, genocide was treated as an offense against the law of nations even before the Genocide Convention was drafted. The General Assembly adopted resolutions in 1946 affirming the Nuremberg principles[49] and declaring genocide to be an international crime.[50] Every state thus has the customary legal right to exercise universal jurisdiction to prosecute offenders for committing genocide, wherever and by whomever committed. The Genocide Convention does not derogate from that obligation. Parties to the anti-genocide instrument have merely obligated themselves to prosecute offenses committed solely within their territory.

E. Crimes Against Humanity

There has emerged since World War II a customary obligation under international law to prohibit and prosecute crimes against humanity.[51] These most egregious of war crimes are committed systematically, on a massive scale. Consequently, they cause acute revulsion and necessitate a direct international response. There clearly exists international jurisdiction over cases that allege crimes against humanity, and no statutory limitations are permissible.[52]

The criminalization of such acts originates in Article VI of the 1945 Nuremberg Charter.[53] Crimes against humanity are directed at any civilian population, and are prohibited in armed conflict, regardless of its

47. *Id.* art. 6.

48. *See* Christopher C. Joyner, *Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability*, 59 LAW & CONTEMP. PROBS. 153 (1996); Brigette Stern, Better Interpretation and Enforcement of Universal Jurisdiction, *in* REINING IN IMPUNITY, *supra* note 8, at 175; Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEXAS L. REV. 785 (1988).

49. Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, G.A. Res. 95, 1 U.N. GAOR, U.N. Doc. A/64/Add. 1, at 188 (1946).

50. G.A. Res. 96, 1 U.N. GAOR, U.N. Doc. A/64, at 188 (1946).

51. *See* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW, 492, 500-01 (1992) [hereinafter BASSIOUNI, CRIMES AGAINST HUMANITY]; Carla Edelenbos, *Human Rights Violations: A Duty to Prosecute?*, LEIDEN J. INT'L L. 5, 15 (Autumn 1994): Orentlicher, *Settling Accounts*, *supra* note 22, at 2585, 2593.

52. This is provided for in the Convention on the Non-Applicability of Statutory Limitations to War crimes and Crimes against Humanity, entered into force Nov. 11, 1970, 754 U.N.T.S. 73, *reprinted in* 8 I.L.M. 68 (1969). *See generally* BASSIOUNI, CRIMES AGAINST HUMANITY, *supra* note 51.

53. *See* Charter of the International Tribunal, *supra* note 25, art. VI para. (c).

international or internal character. The ICTY Statute stipulates these critical points in the modern context and enumerates eight categories of specific acts to be regarded as crimes against humanity: (1) murder; (2) extermination; (3) enslavement; (4) deportation; (5) imprisonment; (6) torture; (7) rape; and (8) persecution on political, racial and religious grounds. A ninth category, "other inhumane acts," was included to make the list potentially all-inclusive.[54] A significant realization is that the Statute pertaining to war crimes in the former Yugoslavia improves on Article VI of the 1945 Nuremberg Charter by specifically designating two new acts as crimes against humanity: torture and rape.

The condemnation of acts of torture finds explicit expression in the 1984 Convention Against Torture,[55] which is now in force with 105 parties[56] and is accepted as a peremptory norm in human rights law.[57] As defined in the Convention, "torture" means:

> [A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination or any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[58]

There is no question that many of the most brutal atrocities committed against victims of human rights abuse include acts of torture under this definition, which has been elaborated on by other international instruments prohibiting torture.[59]

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54. ICTY Statute, *supra* note 11, art. 5.

55. Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, *entered into force* June 28, 1987, G.A. Res. 39/46, 39 U.N. GAOR, Supp. (No. 51) at 197 (1984).

56. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Adopted by the General Assembly of the United Nations on 10 December 1984 (visited Apr. 29, 1998) <http:/www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_9.html> [hereinafter Torture Convention].

57. M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW CONVENTIONS AND THEIR PENAL PROVISIONS 489-99 (1997). *See also* M. Cherif Bassiouni, *International Crimes:* Jus Cogens *and* Obligatio Erga Omnes, 59 LAW & CONTEMP. PROBS. 57 (1996), *reprinted in* REINING IN IMPUNITY, *supra* note 8, at 133.

58. Torture Convention, *supra* note 56, art. 1.

59. *See* Treaty on European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Inter-European), *opened for signature at* Strasbourg, Nov. 26, 1987, Europe. T.S. No. 126, 27 I.L.M. 1152, *entered into force* Feb. 1, 1989; Inter-American Convention to Prevent and Punish Torture, *done at* Cartagena de Indias,

The Torture Convention obligates each state party to ensure that all acts of torture are made criminal offenses under its domestic law[60] and to establish its jurisdiction over the offense when, *inter alia*, the alleged perpetrator or victim is a national of that state.[61] Moreover, if a state does not extradite an alleged offender, that government is required to "submit the case to its competent authorities" for prosecution.[62] In addition, the Convention prohibits any "exceptional circumstances," including conditions or threats of war, internal political stability, or public emergencies from being used by a government to justify torture.[63] Nor may an order from a superior officer or public authority be used to justify acts of torture.[64]

The Torture Convention suffers from certain weaknesses in its application, however, especially when contrasted with the Genocide Convention. The Genocide Convention explicitly asserts forthright duties mandating that offenders "shall be punished,"[65] and persons accused of committing genocide "shall be tried by a competent tribunal of the State in the territory of which the act was committed" or an acceptable international tribunal.[66] Moreover, the state is required to "provide effective penalties" for persons found guilty of genocide.[67] In contrast, the Torture Convention requires parties only to "submit" cases of alleged torture to their "competent authorities for the purpose of prosecution," and makes acts of torture punishable simply by "appropriate penalties which taken into account their grave nature."[68] Regrettably, the anti-torture instrument fails explicitly to mandate that prosecution must occur for all alleged cases of torture, or to stipulate that, without exception, severe penalties will be handed down for persons found guilty of a torture offense.[69]

The crime of rape, the criminality of which largely has been overlooked in past wars, assumed great urgency with the reported massive sexual assaults against women in Bosnia and Herzegovina during 1992

Dec. 9, 1985, AG/Res. 783 (XV-0/85), O.A.S. General Assembly, 15th Sess. IEA/Ser.P. AG/Doc. 22023/85 rev. 1 at 46-54 (1986), O.A.S. Treaty Series, No. 67, 25 I.L.M. 519, *entered into force* Feb. 28, 1987.

60. Torture Convention, *supra* note 56, art. 4, para. 1.
61. *Id.* art. 5, para. 1.
62. *Id.* art. 7, para. 4.
63. *Id.* art. 2, para. 2.
64. *Id.* art. 2, para. 3.
65. *Id.* art. IV.
66. *Id.* art. VI.
67. *Id.* art. V.
68. *Id.* art. 7, para. 1; art. 4, para. 2.
69. *See* Orentlicher, *Settling Accounts*, *supra* note 22, at 2604.

and 1993.[70] By designating rape as a specific crime against humanity, the gross criminality of that act has been spotlighted as a grave violation of human rights — indeed, a war crime under international law — and international concern has been directly focused on the need to punish perpetrators. Important to note, however, is that crimes against humanity have not been legally codified into a special ad hoc convention for the purpose of explicitly outlining and detailing the criminal nature of acts of genocide and the specific obligations of states in confronting perpetrators.[71]

V. THE DUTY OF ACCOUNTABILITY

Fundamental to the punishment of high human rights crimes is the principle of individual criminal responsibility. For contemporary international law, a person who plans, instigates, orders, commits or otherwise aids and abets in the planning, preparation or execution of these acts shall be held individually responsible for the crime.[72] International criminal law today thus confronts the principle that individuals may be held criminally liable under international law, even though their conduct might have been sanctioned or even mandated by domestic law.

To enforce the laws of war and prohibitions against genocide and crimes against humanity only against ordinary soldiers and officers of low or mid-level rank is not enough. Although "superior orders" is insufficient as a defense against a charge of violating high human rights crimes, justice still demands that culpability apply throughout the chain of command. Accountability under international law must, thus, reach military elite and civilian government officials, as well as individual civilians and paramilitary forces who commit the acts. Indeed, as set by the Nuremberg precedent and resurrected for modern humanitarian law, the Statutes of the ICTY and ICTR both assert:

> 2. The official position of any accused person, whether as Head of

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70. *See* the discussion in *Final Report of the Commission of Experts, supra* note 10, at 55-60. In late 1992 and -early 1993, the European Community sent a special mission headed Dame Ann Warburton to investigate the treatment of Muslim women in the former Yugoslavia. This mission found that the number of women raped might range from 10,000-60,000, and that rape was used by the Serbs as a premeditated strategy to terrorize Muslim populations and to force them to leave their homes. *See European Community investigative mission into the treatment of Muslim women in the former Yugoslavia: Report to European Community Foreign Ministers*, U.N. Doc. S/25240 (3 Feb. 1993), Annex I, at 2; M. Cherif Bassiouni & Marcia McCormick, *Sexual Violence: An Invisible Weapon of War in the Former Yugoslavia*, Occasional Paper #1, (DePaul Int'l Hum. Rts. L. Inst. 1996).

71. For the logic demanding such a convention, *see* M. Cherif Bassiouni, *"Crimes Against Humanity:" The Need for a Specialized Convention*, 31 COLUM. J. TRANSNAT'L L. 457-94 (1994).

72. ICTY Statute, *supra* note 11, art. 7, para. 1.

State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the [criminal] acts . . . of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.[73]

It is clear, then, that due obedience can not exonerate a perpetrator from criminal responsibility. The soldier who pulls the trigger; the commander who gives the order, or knows the crime is going to be committed and does not use his authority to stop it from occurring; the civilian decision-maker who makes the policy generating the criminal act — all these persons are liable for criminal accountability for that offense.

The Tribunals

Member states of the United Nations are obligated to give various forms of assistance — including but not limited to arrest, detention and surrender of accused offenders — to international tribunals created by the Security Council. This obligation derives from Chapter VII of the Charter, which allocates to the Security Council broad responsibility "with respect to threats to the peace, breaches of the peace, and acts of aggression," with the specific authority to "decide what measures shall be taken . . . to maintain or restore international peace and security."[74]

The obligation to carry out these measures is explicitly stated in the UN Charter, which provides that "The action required to carry out decisions of the Security Council for the maintenance of international peace and security shall be taken by all Members of the United Nations."[75]

The obligation on states to surrender alleged offenders to these ad hoc international criminal tribunals is articulated in paragraph 4 of UN Security Council Resolution 827 (Yugoslavia) and paragraph 2 of Resolution 955 (Rwanda), both of which provide that:

[The Security Council] Decides that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under

73. ICTY Statute, *supra* note 11, art. 7, paras. 2 & 3; ICTR Statute, *supra* note 12, art. 6, paras. 2 & 3.

74. U.N. CHARTER art. 39.

75. U.N. CHARTER art. 48, para 1.

their domestic laws to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 [for Rwanda, Article 28] of the Statute. . . .[76]

Thus, all persons who participate in the planning, preparation or execution of serious violations of international humanitarian law share in the commission of the crime and are therefore individually responsible. Both tribunals also hold that principal responsibility for war crimes pursuant to orders falls to those in authority who gave the orders. There are no provisions for pardons, amnesties, or impunity laws. Alleged offenders are to be tried for their high crimes, not excused on account of their political power or military rank. The final word on impunity is this: High crimes that violate human rights are evil, vile and unlawful. Such gross delicts must be not be allowed to escape punishment. There can be no peace without justice, and there can be no justice without accountability.

Accepting these principles, certain weaknesses of international tribunals have been revealed by the experience of the ICTY and the ICTR since 1993. Both tribunals have been impotent to enforce arrest warrants and subpoenas. Exercising such means of apprehension remains in the hands of occupant military forces or local security police. Further, the tribunals' viability and success depend on continuing political and support from the United Nations, particularly the Great Powers on the Security Council. Such dependency obviously invites political considerations to creep in and impair the prospects for effective tribunal operations. Arrest of indictees ultimately depends on the genuine cooperation of the government in whose territory indicted persons are located, which this has been difficult to secure. Failure to apprehend the indictees further undercuts the credibility and effectiveness of both tribunals.

Have these international tribunals served justice and contributed to national reconciliation within the former Yugoslavia and Rwanda? Yes, but with certain qualifications. Again, these courts have been seriously hamstrung by insufficient funding, inadequate financial and military support, and only very limited opportunities to demonstrate

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76. In relevant part, Article 29 of the Yugoslavia Tribunal Statute and Article 28 of the Rwanda Tribunal Statute assert that:

> 1. States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
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> 2. State shall comply without undue delay with any request for assistance or an order issued by a Trials Chamber, including, but not limited to:
>
> . . .
>
> (d) the arrest or detention of persons;
>
> (e) the surrender or the transfer of the accused to the International Tribunal.

ICTY Statute, *supra* note 11, art. 29; ICTR Statute, *supra* note 12, art. 28.

their worthiness.

Truth Commissions

Truth commissions can be successful in fostering peace and national conciliation.[77] Such commissions establish a historical record of the crimes and context in which they were committed.[78] Truth commissions contribute to a sense of closure. For example, the South African Truth Commission is generally regarded as a successful instrument of national reconciliation. Its purpose was to rescue South Africa from denial and lies about its past, bestow dignity on those who had suffered, and extend a magnanimous offer of forgiveness to the perpetrators of horrible crimes. It granted amnesty to persons who disclosed fully their crimes during the period of apartheid, but only if their crime was not disproportionate to its political aim. When combined with prosecutions, the South African experience since 1995 proffered a unique model that worked successfully due to the right chemistry of conditions—peace, genuine political will and functioning local judicial system.[79] But other facts also remain: Truth commissions do not produce full justice. They are not intended to. Nor will a truth commission reveal the whole truth. But, then again, it could not have been expected to. Reconciliation will stay incomplete, and so, too, will the hope for justice. Forgiveness, not justice, is the price deemed necessary if a truth commission is to help heal a society of the pain and suffering brought about by internal war and violent ethnic strife. And this poses the crux of the dilemma: Should those who perpetrate the most terrible of crimes escape punishment, at the price only of admitting their guilt and showing remorse? For the experience chosen by South Africa, the price of peace and reconciliation is "the truth" with amnesty. It is neither justice nor compensation. How well forgiveness actually works as a strategy for fostering political stability will only be seen in coming years.

Ways and Means of Impunity

There is no question that contemporary international law man-

77. For a positive view of the role of truth commissions, *see* Michael P. Scharf, *The Case for a Permanent International Truth Commission*, 7 DUKE J. COMP. & INT'L L. 375 (1997).

78. *See* Priscilla B. Hayner, *Fifteen Truth Commissions — 1974 to 1994: A Comparative Study*, 16 HUM. RTS Q. 1 (1994); Stephan Landsman, *Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions*, 59 LAW & CONTEMP. PROBS. 81 (1996); Jo M. Pasqualucci, *The Whole Truth and Nothing But the Truth: Truth Commissions, Impunity, and the Inter-American Human Rights System*, 12 BOSTON U. INT'L L.J. 321 (1994).

79. *Burying South Africa's Past: Of Memory and Forgiveness*, THE ECONOMIST 21-23 (Nov. 1, 1997).

dates that persons who gravely violate human rights enshrined in the Universal Declaration must pay consequences. Indeed, the normative framework of modern international law clearly asserts that perpetrators of high human rights crimes should be prosecuted, and if convicted, punished accordingly. But this all too rarely occurs; the evil of impunity persists. The reasons for impunity are often couched in the nature of a country's government and its people's failure to produce a civil society based on the rule of law.

Impunity takes on factual and normative dimensions. The factual aspects of impunity refer to the particular circumstances and internal political-social conditions that permit gross human rights violators to evade prosecution in some state. The fact is that impunity can be and often is facilitated by the government.

Gross violations of human rights are often, but not always perpetrated by state security forces, be they military or police agents. Such depredations can be perpetrated also by unattached militias, paramilitary death squads and remnants of insurgent movements. In societies torn apart by ethnic hatreds and civil conflict, an extraordinary high potential for violence exists. In these situations, the possibility for impunity becomes an ever-present likelihood.

Conditions that tolerate impunity are personal; they center on the victim and demonstrate the intimate, powerless side of victimization. Such conditions personify being next to an abuser and feeling helpless at ever being able to obtain justice for the wrongs being perpetrated. Perhaps even more disheartening for victim survivors is watching as former perpetrators are subsequently elevated to positions of authority in the government—a situation that not only permits them to escape prosecution and punishment, but also enables them to exert even more power and control over their former victims.

In societies where a turn toward democracy has actually been made, impunity can become more a problem of looking backward to correct the past — a dilemma of trying to come to terms with past wrongs done to victims and of juridically evaluating crimes committed by members of the former government, or of their surrogates.

1. Military Justice Systems

The principal normative dimensions of impunity are often tied to the presence of a military justice system and various national impunity laws. Military justice systems, well known in Latin American states, have generated impunity for fellow officers who were alleged to have committed violations in the name of state security.[80] There appears to

80. *See generally* Kai Ambos, *Impunity and International Criminal Law*, 18 HUM.

be a logical link between impunity and military justice, which renders the latter even more of an oxymoron. Military proceedings, especially in Latin American states, have often been used to facilitate impunity sanctioned by the state and only rarely bring to trial and prosecution military officers accused of serious human rights deprivations.[81] By the same token, pervasive efforts by the military to intimidate civil government officials and make direct threats against the judicial branch and witnesses stand out as real actions intended to produce impunity in fact, if not in law.

Direct links clearly exist between military justice and impunity. Military legislation is often crucial for granting impunity to perpetrators, since in many national circumstances, military tribunals hold extensive jurisdiction over human rights conditions in the country. Military courts are composed of military officers, many who may be sympathetic to accused offenders and may render judgments based on personal loyalties rather than evidence or considerations of justice.[82]

2. National Impunity Laws

The normative dimension also pertains to domestic legal considerations. Certain states have passed laws that are intended to grant impunity. These laws include provisions for amnesty or pardon for certain human rights violations, and exempt offenders from punishment or impede effective criminal prosecutions against them. An amnesty generally leads to the extinction or erasure of criminal prosecution and execution of a sentence; a pardon extinguishes only the execution of a sentence. These are direct, immediate forms of impunity, as they formally and factually exempt human rights violators from what most persons would consider just punishment.[83]

Impunity laws are obviously unique to each national situation and circumstance. Even so, such laws may well violate the principle of equality and the need for legal remedies to redress criminal acts. From a policy perspective, there also arises the question of to what extent the armed forces of a state are willing to accept international legal stan-

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RTS L.J. 1 (1997) [hereinafter Ambos].

81. *Id.* 4-5.

82. *See id.* at 4, 8-9.

83. Examples of such impunity laws include Ley 104 of Dec. 30, 1993, *Regimen Penal Colombiano* envio 36 (februro/abril de 1994) and envio 38 (noviembre de 1994), sections 8122 ff (Colombia); DL [Decree Law] 2.191 of Apr. 18, 1978, *Dario Oficial* No. 30.042 (Apr. 19, 1978) (Chile); DL 22.924 of Sept. 22, 1983, *Legislacion Argentina* (1983-B), at 1681 (Argentina). But see Ley 23.040 of Dec. 22, 1983, *Legislacion Argentina* (1983-B), at 1813; and Ley 26.479 of June 14, 1995, *Normas Legales* 229 (June 1995), at 143 (Peru).

dards and the requisite reforms of military law. These are vital considerations if impunity through miscarriages of military "justice" is to be averted.

The duty to prosecute certain grave human rights violations, derived from international criminal law, clearly implies that criminal acts subject to such a duty cannot at least in principle be amnestied. While an international norm affirming the permissibility of amnesties in certain situations does exist,[84] it does not apply to human rights violations.[85] Indeed, the practice of granting self amnesties violate the prohibition against privileging a particular group of people, as well as the principle of equality.[86] Such self-serving amnesties usually lack legitimacy, in that they violate the prohibition against acting in one's own self-interest. Further, amnesties are prohibited when a state of emergency is declared. Certain human rights are nonderogable, even under a state of emergency, and must be protected under national penal law.[87]

The question critical here is: Do amnesties actually contribute to the restoration of peace, national unity and reconciliation as often claimed by official policy? Or, do they generate new frictions and tensions within society—and thus exacerbate the potential for prolonged civil conflict—by disregarding the feelings and dignity of victims and their families? No blanket statement can be made that uniformly answers this conundrum. Obviously, understanding the political context within which such acts of amnesty might be taken could shed light on a state legislature's motive in granting amnesty, or even expose the true

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84. Not all amnesties are contrary to human rights law. *See* article 6(5) of Protocol Additional II to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609, 614 (calling for the "broadest possible amnesty" following non-international armed conflicts). Amnesties are also expressly foreseen in article 6(4) of the *International Covenant on Civil and Political Rights*, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16 at 52, UN Doc. A/6316 (1966), 999 U.N.T.S. 302 *entered into force* Mar. 23, 1976 [hereinafter ICCPR]. The ICCPR has 27 substantive articles addressing various aspects of political and civil rights.

85. *See generally* Roht-Arriaza, *Combating Impunity*, *supra* note 22; Orentlicher, *Settling Accounts*, *supra* note 22; Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CALIF. L. REV. 449-513 (1990); Douglas Cassel, *Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities*, 59 LAW & CONTEMP. PROBS. 197 (1996) [hereinafter Cassel].

86. The United Nations Human Rights Committee reaffirmed this fundamental principle in 1992. *See* UNHRC, General Comment No. 20 regarding Art. 7 of the Covenant of Civil and Political Rights, para. 15, UN Doc. CCPR/C/21/Rev.1/Add. 3 (Apr. 7, 1992).

87. *See generally* Michael P. Scharf, *Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?*, 31 TEX. INT'L L.J. 1 (1996); Robert O. Weiner, *Trying to Make Ends Meet: Reconciling the Law and Practice of Human Rights Amnesties*, 26 ST. MARY'S L.J. 857, 867 (1995).

political motivations behind a certain amnesty decision.[88]

From a criminal law perspective, recognition of an exemption from mitigation or punishment depends on the personal blameworthiness of the perpetrator. If the offender is unaware of the legal wrong, punishment depends on the extent to which that wrong was avoidable. A wrongful act is presumed to be avoidable if the order was manifestly illegal. Otherwise, the wrongful act could be deemed unavoidable, and the subordinate would not deserve punishment.

A directive that grants a pardon is permissible only if it takes effect after a significant portion of the sentence has been served.[89] Other provisions that might impede criminal prosecution, in particular national statutes of limitation, violate international law if they apply to crimes against humanity. No statute of limitation exists on such egregious violations of human rights. Nor do statutes of limitation apply to cases of disappearance — explicitly so at least in the Organization of American States system.[90] The admissibility of statutes of limitation in cases of torture and extralegal executions turns on how these crimes are classified. In any event, their prosecution as crimes against humanity cannot be barred by statute.[91]

VI. THE BALANCE SHEET

In the aftermath of internal war or ethnic conflict, there is the critical need to foster national reconciliation, deal with war criminals and rebuild foundations for a society governed by the rule of law. As regards Article 8 of the Universal Declaration, there is the underlying question of how to come to terms with serious violations of human rights and achieve lasting reconciliation. A variety of accountability mechanisms are available—national apology by head of state, reparations for victims, truth commissions, prosecution by international or national tribunals.[92]

Recognition of the international legal order, especially as regards human rights obligations, implies the need for strict compliance by governments of that law. As a dynamic legal order, international criminal law requires the constant adaptation of national laws so as to ensure their compatibility with the protection of fundamental human rights.

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88. *See generally* Jose Zalaquett, *Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints, in* STATE CRIMES: PUNISHMENT OR PARDON? 23-65 (Aspen Institute, 1989) [hereinafter STATE CRIMES: PUNISHMENT OR PARDON?]; Cassel, *supra* note 85.

89. Ambos, *supra* note 80, at 7.

90. *Id.*

91. *Id.*

92. *See generally* Bassiouni, *supra* note 8, at 15-20.

Article 8 of the Universal Declaration of Human Rights plainly asserts that victims of gross human rights abuse are entitled to redress. Individuals responsible for those heinous crimes must be held accountable, especially for war crimes, genocide and crimes against humanity. Absent a sense of justice for citizens who have suffered under ruthlessly abusive regimes or who have been divided by ethnic or civil war, the prospects for enduring peace and national reconciliation seem severely diminished.[93]

For the most part, internal conflict (i.e., civil war) and ruthless victimization of persons by their government lie beyond international law's regulation of armed conflicts. That admitted, human rights law has nonetheless evolved to prohibit war crimes, crimes against humanity, genocide, and torture by any government against its own citizens or other people in that state, regardless of the legal context of the conflict.[94]

Even so, significant weaknesses persist in state practice with respect to the performance of these normative prescriptions. Especially notable is the failure by governments to extradite or prosecute and to cooperate in the investigation, prosecution and adjudication of persons charged with genocide, war crimes and crimes against humanity and the punishment of those convicted of such crimes.[95] While the duty to prosecute or extradite is contained in the Genocide Convention and the Geneva Conventions of 1949,[96] it does not exist in international treaty law for crimes against humanity, simply because there is no special convention on those crimes.

Under international criminal law, no exemption from punishment is permitted for so-called international crimes, especially war crimes, genocide and crimes against humanity.[97] The responsibility of the superior follows from the doctrine of command responsibility, which has been universally recognized under customary international law.[98]

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93. *See* Yael Danieli, *Justice and Reparation: Steps in the Process of Healing*, *in* REINING IN IMPUNITY, *supra* note 8, at 303.

94. *See* Peter Baehr, *How to Deal with the Past*, *in* REINING IN IMPUNITY, *supra* note 8, at 415.

95. *See generally* Michael Scharf, *The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes*, 59 LAW & CONTEMP. PROBS. 41 (1996)

96. *See* Genocide Convention, *supra* note 29, art. VII; Geneva Conventions of 1949, *supra* note 28, arts. 49/50/129/146, respectively.

97. *See generally* STATE CRIMES: PUNISHMENT OR PARDON?, *supra* note 88.

98. *See generally* Note, *Command Responsibility for War Crimes*, 82 YALE L. J. 1274 (1973); Hays Parks, *Command Responsibility for War Crimes*, 62 MILITARY L. REV. 1 (1973); Weston D. Burnett, *Command Responsibility and a Case Study of the Criminal Responsibility of Israeli Military Commanders for the Pogrom at Shatila and Sabra*, 107 MILITARY L. REV. 71 (1985); Paul Williams & Norman Cigar, THE BALKAN INST., WAR CRIMES AND INDIVIDUAL RESPONSIBILITY: A PRIMA FACE CASE FOR THE INDICTMENT OF

Within the context of international criminal law, however, the legal dilemma persists as to whether the superior's conduct qualifies as perpetration or as complicity, which in turn depends on assessment of the superior's conduct. Often it may be difficult, if not impossible, to determine with precision the nature and degree of the superior's control over the subordinate.

The extensive use of military justice in cases of human rights violations has tended to contravene obligations derived from international criminal law, in that most of these proceedings have led to a factual exemption from punishment for perpetrators of serious human rights violations. Similar is the situation of unrestricted resort to defense of superior orders, which implies impunity for any act committed in execution of a superior's order. International criminal law has clearly and unmistakably established that orders leading to the commission of grave human rights violations are illegal and therefore cannot justify exemptions from punishment. In certain exceptional cases, though, punishment of a subordinate might be lessened if he/she had acted under mitigating circumstances, i.e., under coercion or duress.[99]

The causes of impunity are more factual than normative. Power and influence of security forces, particularly the armed forces, are real conditions in many societies. That these institutions possess certain privileges that ultimately produce impunity is explained by the facts and circumstances of situations, rather than the normative instruction or legal mandate of international criminal law. Thus, impunity derives not as a right or norm sanctioned by society, but rather more so as the result of the distribution of political and social power in that society. Control of that power determines the likelihood of impunity. If the distribution of power in a state changes, the normative character of and prospects for impunity also will change.[100]

It is not, therefore, the law that so greatly shapes power relations affecting objective considerations of justice; rather, it is the political power in the state that determines the interpretation and application of that law, which in turn approves policies of impunity. Hence, the responsibility for authorizing impunity rests with the individuals who shape, conceptualize, interpret and apply the law. It is they—the governing policy makers—who determine and are accountable for the legal disposition of human rights violations and effecting redress for vic-

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SLOBODAN MILOSEVIC (1995).

99. *See* the Joinet Principles, *supra* note 21, principle 29, para. 35 [sic], at 506 (at most due obedience may be taken into consideration as a mitigating circumstance).

100. *Cf.* the views of F.M. Lorenz, *Combating Impunity: Practical Limits on the Use of Military Force*, *in* REINING IN IMPUNITY, *supra* note 8, at 465.

tims.[101]

As Article 8 of the Universal Declaration affirms, means of redress must be afforded victims of gross violations of human rights.[102] To this end, participation of the victim in the criminal proceedings against a perpetrator can make impunity less likely. A truly fair-trial procedure must grant a victim adequate judicial remedies. The role of the victim depends on the national procedural code, and a sympathetic code should permit the active participation of the victim or his/her family in the case.[103]

While adequate respect for the interests of the victim during a criminal trial is necessary, it is not sufficient. Extra-penal means of compensation and reconciliation should be considered. The attempt should be made to restore the *status quo ante* situation of the victims, i.e., to seek a natural restitution of the victim in society. Restoration might include compensatory payments, the right of return, and rehabilitation.[104]

For genuine social reconciliation and peacemaking, serious efforts must be made to mitigate the pain and emotional suffering of victims and their families by taking measures that address the psychological aspects of human rights violations and the inability to return to the human situation before the violations were perpetrated. Symbolic and public forms of compensation, such as national truth and reconciliation commissions, can provide opportunities for such emotional catharsis, and these should be undertaken when and wherever deemed appropriate. They might assist in clarifying past human rights violations and bringing the society closer to reconciliation. As a minimum political

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101. *See generally* Theo van Boven, *Accountability for International Crimes: The Victim's Perspective*, *in* REINING IN IMPUNITY, *supra* note 8, at 349 [hereinafter van Boven]; Madeline H. Morris, *International Guidelines Against Impunity: Facilitating Accountability*, *in id.* at 359; Dinah PoKempner, *A Few Thoughts on Standards, Practice, and Mechanisms*, *in id.* at 373.

102. *See Study concerning the Right to Restitution, Compensation, and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms: Final Report Submitted by Mr. Theo van Boven*, Special Rapporteur, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 45th sess., Item 4, UN Doc. E/CN.4/SUB.2/1993/8 (July 2, 1993), *reprinted as* Appendix C *in* 59 LAW & CONTEMP. PROBS. 283 (1996) [hereinafter the van Boven Principles]. *See also Question of the Human Rights of all Persons Subjected to any Form of Detention or Imprisonment: Note by the Secretary-General*, E/CN.4/1997/104 (Jan. 16, 1997): Annex: Note prepared by the former Special Rapporteur of the Sub-Commission, Mr. Theo van Boven, in accordance with paragraph 2 of the Subcommission resolution 1996/28 (Jan. 13, 1997), Appendix: *Basic Principles and Guidelines on the Right of Reparation for Victims of [Gross] Violations of Human Rights and International Humanitarian Law*, (visited Apr. 6, 1998) <http://www.unhchr.ch/html/menu4/chrrep/10497.htm>.

103. van Boven, *supra* note 101, at 352.

104. *See* van Boven Principles, *supra* note 102, at 344.

goal, such truth commissions can create conditions that recognize the past suffering of victims and the perpetrators' criminal wrongdoing.[105] But this purging of the truth cannot be a substitute for punishment of the perpetrators. The search for truth remains a basic prerequisite for civil society, but it cannot be treated as a panacea to excuse war crimes and acts of genocide that offend the conscience of humanity.[106]

Upholding certain rights is critical if impunity is to be denied for violators of human rights. First, fundamental in this regard is the victim's *right to know*. This includes the right to learn the truth about events and circumstances surrounding gross violations, as well the causes giving rise to specific violations of human rights.[107] Second, closely tied to this is the state's (i.e., the government's) *duty to remember* the history of oppression. Presumably this is to guard against repetition of similar unlawful acts in the future.[108] Third, no less critical are *the victims' right to know the truth* about the fate of relatives and loved ones,[109] and the victim's fundamental *right to justice*.[110] No just and lasting reconciliation is possible without an effective response to the need for justice. If reconciliation is really to happen, an essential prerequisite is forgiveness.[111] This involves a private act by the victim that assumes the perpetrators are known and that they are genuinely repentant and remorseful.

Impunity also involves the failure of governments to meet certain obligations under international law. If Article 8 of the Universal Declaration is to satisfied, governments must undertake to investigate alleged violations, take appropriate measures toward the perpetrators, and ensure that the latter are prosecuted and tried, and provide victims with effective remedies.[112] Toward this end, national courts are given priority jurisdiction, though international tribunals may be used when national courts are unable to respond satisfactorily to the requirements of justice.[113]

Universal jurisdiction applicable to serious crimes under international and humanitarian law should be included in all human rights instruments dealing with such crimes.[114]

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105. *See generally* Juan Méndez, *Accountability for Past Abuses*, 19 HUM. RTS Q. 255 (1997).

106. *See* Juan Méndez, *The Right to Truth*, *in* REINING IN IMPUNITY, *supra* note 8, at 255; Naomi Roht-Arriaza, *Truth Commissions as Part of a Social Process*, *in id.* at 279.

107. *See* Joinet Principles, *supra* note 21, principles 1-17.

108. *Id.* principle 2.

109. *Id.* principle 3.

110. *Id.* principles 18-32.

111. *See* Joinet Principles, *supra* note 21, para. 26, at 505.

112. *Id.* principle 18.

113. *Id.* principle 19.

114. *Id.* principle 21.

States should take measures in their national law to establish extraterritorial jurisdiction over high crimes under international law which have been committed outside their territory, irrespective of the nationality of the victim or the perpetrator.[115]

More restrictive measures should be imposed in circumstances where governments might grant impunity. Legal opportunities that should be restricted would include:

1. *Prescription.* The assertion by a government of an authoritative directive or order granting impunity should not be applicable to high crimes involving human rights violations, since those violations entail such grave offenses to human dignity.[116]

2. *Amnesty.* Perpetrators of gross and systematic violations of human rights should not be included in amnesties so long as the victims are not able to avail themselves of fair and effective remedies for those violations.[117]

3. *The right of asylum.* States may not lawfully extend the protective status of asylum to persons who are suspected of having committed high crimes that violate fundamental human rights under international law.[118]

4. *Extradition.* Persons who have perpetrated high crimes that seriously violate human rights may not lawfully seek to be excluded from extradition on grounds of the political offense exception and the non-extradition of nationals, save in cases where they might be subject to the death penalty.[119]

5. *Defense of superior orders.* Persons who commit high crimes on the order of his government or a superior can not be exempt from criminal responsibility for those violations of human rights. Similarly, the fact that violations are perpetrated by a subordinate does not excuse his superiors from responsibility if they knew ordered the violations, or knew of the violations and failed to take action to prevent or halt the violations form occurring.[120]

6. *Jurisdiction of military courts.* In order to preclude military courts from perpetuating impunity for human rights violations perpetrated against civilians, military courts must be limited only to trying offenses committed among military personnel.[121]

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115. *Id.* principle 22.
116. *Id.* principle 24.
117. *Id.* principle 25.
118. *Id.* principle 26.
119. *Id.* principle 27.
120. *Id.* principle 29.
121. *Id.* principle 31.

There are also certain basic principles concerning the right to reparation for victims of high crimes involving human rights violations.[122] Accepting the premise presumed in the Universal Declaration that every state has the fundamental obligation to ensure respect for human rights under international humanitarian law, certain duties flow from that obligation, among them the duties to prevent violations, to investigate violations, to take action against violators, and to afford remedies and reparations to victims.[123] Given this, certain norms must be applied to ensue respect for international humanitarian law, especially the right to a remedy.[124] Every state should provide for universal jurisdiction over gross violations of human rights, which constitute high crimes under international law.[125] Moreover, reparations should be available for claim directly by the victims of high violations of human rights, their immediate family, or persons associated closely with the victims.[126]

States have the duty to adopt measures that implement expeditious and fully effective reparations. The purposes of reparations are to render justice by redressing the consequences of wrongful acts and by preventing or deterring such acts in the future. Forms of reparation should include *restitution*, which means restoring the situation for a victim that existed prior to violations of human rights or international humanitarian law.[127] In addition, there must be *compensation* for economically assessable damage resulting from human rights violations, especially for physical or mental harm, lost opportunities, material damages and loss of earnings, "harm to reputation or dignity," and costs for legal assistance.[128] Other basic needs include *rehabilitation* for le-

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122. *Id.* principles 33-42.

123. *See* U.N. Doc. A/RES/40/34, Dec. 11, 1985, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.* For a relevant discussion, see *International Protection of Victims,* 7 NOUVELLES ETUDES PENALES 1988 (M. Cherif Bassiouni ed. 1988). *See also* Security Council Resolution 808 establishing the ICTY: S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., at 1, U.N. Doc. S/RES/808 (Feb. 22, 1993); van Boven Principles, *supra* note 102.

124. As the van Boven Principles assert,

> Every State has a duty to make reparation in case of a breach of the obligation under international law to respect and to ensure respect for human rights and fundamental freedoms. The obligation to ensure respect for human rights includes the duty to prevent violations, the duty to investigate violations, the duty take appropriate action against the violators, and the duty to afford remedies to victims. States shall ensure that no person who may be responsible for gross violations of human rights shall have immunity for liability for their actions.

van Boven Principles, *supra* note 102, principle 2.

125. *See supra* note 48 and sources cited therein.

126. van Boven Principles, *supra* note 102, principle 6.

127. *Id.* principle 8.

128. *Id.* principle 9.

gal, medical and psychological care[129] and assurances of *satisfaction and guarantees of non-reputation*, including the cessation of violations, verification of the facts, official government restoration of the dignity of the persecuted victim, apology and acceptance of responsibility, judicial sanctions against the offenders, and prevention of the recurrence of violations.[130] These are minimum means of redress to give victims remuneration for the suffering they have experienced and provide them with the basic needs for personal recovery and re-entry into society.

Article 8 of the Universal Declaration calls for the right to an effective remedy by the "competent national tribunals" in order to obtain redress for violations of human rights. What if there exists no "competent national tribunal" to offer such remedies? International law is now evolving in anticipation of that situation with the drafting of an international convention for the creation of a permanent International Criminal Court (ICC) during the summer of 1998.[131] If adopted, supported and implemented, such an international criminal tribunal could try accused perpetrators of "core crimes" (i.e., war crimes, genocide, and crimes against humanity) that national governments, for one reason or another, choose not to prosecute.[132] Key to the proposed ICC's operation is the relationship between it and the legal institutions of states. This relationship is to be guided by the principle of "complementarity," which refers to the extent to which a domestic court may assert exclusive ju-

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129. *Id.* principle 10.

130. *Id.* principle 11.

131. *See Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. Doc. A/CONF.183/2/Add.1 (Apr. 14, 1998). For commentaries on salient facets of an earlier version of this draft, see generally OBSERVATIONS ON THE CONSOLIDATED ICC TEXT BEFORE THE FINAL SESSION OF THE PREPARATORY COMMITTEE, 13*bis* NOUVELLES ETUDES PENALES (Leila Sadat Wexler, ed., 1998). *See also* M. Cherif Bassiouni, *Establishing an International Criminal Court: Historical Survey*, 149 MIL. L. REV. 49 (1995); James Crawford, *Prospects for an International Criminal Court*, 48 CURRENT LEGAL PROBLEMS 303 (1995); Sandra L. Jamison, *A Permanent International Criminal Court: A Proposal that Overcomes Past Objections*, 23 DENV. J. INT'L L. & POL'Y 419 (1995); Timothy C. Everred, *An International Criminal Court: Recent Proposals and American Concern*, 6 PACE INT'L L. REV. 121 (1994).

132. *See* Christopher L. Blakesley, *Jurisdiction, Definition of Crimes and Triggering Mechanism*, *in* The International Criminal Court: Observations and Issues before the 1997-98 Preparatory Committee; and Administrative and Financial Implications, 13 Nouvelles Etudes Penales 1997 177 (Association International de Droit Penal, M. Cherif Bassiouni, ed., 1997). The notion of an international criminal court is not a recent one. *See* DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT (Annex to the Report of the Committee on International Criminal Jurisdiction, 31 Aug. 1951), 7 U.N. GAOR Supp. 11, UN Doc. A/2136 (1952); REVISED DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT (Annex to the Report of the Committee on International Criminal Jurisdiction, 20 Aug. 1953), 9 U..N. GAOR Supp. 12, U.N. Doc. A/2645 (1954). For an insightful history and compilation of documents detailing efforts to create such an international tribunal, see FERENCZ, *supra* note 30.

risdiction over a case relevant to the ICC, and vise-versa.[133] Once activated, this permanent international criminal court would come to supplant the activities of the international tribunals currently adjudicating crimes in the former Yugoslavia and Rwanda.

A permanent ICC notwithstanding, domestic prosecutions of accused war criminals, where available and effective, are generally much preferred. Even so, genuine attempts at any level to protect and enforce human rights through prosecution of persons who commit serious violations of humanitarian law are significant and laudable. The success of any tribunal, whether domestic or international, remains dependent on the promulgation, interpretation, application and enforcement of the law. Put tersely, the viability of both peace and justice rests on these processes and the degree to which they are achieved.

VII. CONCLUSION

Fifty years ago, the Universal Declaration of Human Rights was adopted by the UN General Assembly as the common standard to which all peoples and states should strive. In an ideal world, the rights and conditions exhorted in the Universal Declaration would prevail. People would coexist peacefully, cooperate, and exercise due diligence through nondiscrimination in their everyday affairs. Miscreants would be apprehended, prosecuted, and punished in accord with the rules of national and international law. Prescriptions for justice would be overriding guidelines for and considerations of law and policy. Every responsible authority would be held accountable for his or her acts or omissions. Article 8 of the Universal Declaration would be honored and upheld.

But we do not live in an ideal world. We live in a world of disparate sovereign states, governed by humans with selfish ambitions who perceive, formulate and execute policies in the name and under the guise of national interests, but often for their own private greed and personal ambitions. In the course of this governing process, the fundamental human rights of innocent persons are all-too-often brutally victimized by individuals claiming to act in the name of the state. What makes this situation all the more vile and repugnant is that in nearly all these cases the perpetrators have been able to evade prosecution and punishment, even for the most horrendous of crimes. In cases of war crimes, crimes against humanity, and acts of genocide—crimes that have been deemed offenses against all mankind and the perpetrators of which are branded war criminals and enemies of all mankind—most of the guilty

133. *See* Jeffrey L. Bleich, Esq., *Complementarity, in* THE INTERNATIONAL CRIMINAL COURT, *supra* note 132, at 231; Jeffrey L. Bleich, Esq., *Cooperation with National Systems, in id.* at 245.

have gone uncharged, unprosecuted and unpunished. There has been little remedy for the victims or their family survivors. Where justice should prevail, the scourge of impunity has reigned.

Impunity, the exemption from punishment for violations of civil and political rights, is multidimensional. Impunity rarely is generated by purely normative considerations. Instead impunity stems from a complex nexus of normative, circumstantial, and situational causes. Impunity is not a construct normally found in positive law. The normative dimension of impunity is found in special national laws authorizing impunity in certain circumstances, as well as in the practice of military justice and codes of law. Impunity laws and the practice of military justice often conflict with international criminal law.

Certain facts and circumstances contribute to impunity. In many developing countries, political traditions and strongly military dominated civil societies prevail. The weaker a civil government and that society, the deeper the potential intrusion of military justice into affairs normally reserved for civilian justice. Such circumstances provide the framework for encouraging impunity for military officials, as well as the lack of a profound conviction that human rights violators must be brought to justice.

Clearly, a duty exists for states to prosecute and punish persons who commit the most serious human rights violations. This comes as the logical extension of individual responsibility in international humanitarian law concerning grave breaches, as first articulated normatively in the 1949 Geneva Conventions. Thus, international legal obligations to punish grave human rights violations limit national discretion with regard to impunity. Impunity laws, such as amnesties, are legally limited in existing international criminal law. While sometimes politically convenient or expeditious, such laws may well be incompatible with international criminal law. The international lawfulness of such impunity laws will depend on the prosecutional performance of a state in any specific case.

Key concerns remain, though. Salient among these is how victims of serious human rights violations can enforce their rights to remedy by punishment of the perpetrator. One of the crueler ironies of international human rights protection is that the actual perpetrators of egregious human rights violations nearly always escape punishment. Implementation of the doctrine of individual criminal responsibility, widely recognized since Nuremberg, should compel individual offenders to accountability. Yet, the individual victim still lacks the fundamental right to initiate proceedings against an alleged perpetrator.

Critical problems of compliance and enforcement remain. Reversal of impunity through prosecution and punishment of perpetrators can only come about if there exists the resolute political will of governments

to do so. If governments are unwilling to comply with and enforce laws against human rights violators, and if governments are willing to tolerate abuses and exacerbate conditions of impunity, then remedies for victims will remain more fiction than fact, more sieve than substance. That situation will render Article 8 in the Universal Declaration only so much empty aspiration.

The fact is that international law is neither automatic nor self-enforcing. Governments must make compliance work by exercising the necessary political will to punish the guilty—whether it be the soldier in the field who pulls the trigger, or the militiaman in the countryside who rapes and pillages, or the officer who gave the orders to perpetrate unlawful acts, or the leader who made the decision for his armed forces to commit crimes against humanity. For human rights laws to be meaningful, the governments of states must institute and implement national *and* international laws, support and protect the national judiciary, and uphold and carry out sentences against those who are convicted. To do otherwise is to emasculate the law and perpetrate impunity. Until the requisite political will is demonstrated, particularly by the Great Powers on the UN Security Council, the international law to prohibit and punish war crimes, genocide, torture and crimes against humanity will remain inert and ineffective. Regrettably, so too will the ability of states to afford victims adequate remedies for human rights offenses committed unjustly against them.