

Combating Impunity and Enforcing Accountability as a Way To Promote Peace and Stability – The Role of International War Crimes Tribunals

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We are often criminals in the eyes of the earth, not only for having committed crimes, but because we know that crimes have been committed.

Michael Ondaatje, Anil's Ghost (2000)

INTRODUCTION

The twentieth century will be remembered for the millions of innocent children, women, and men who perished needlessly in war or in large-scale, organized extrajudicial killings. More than 170 million civilians lost their lives,¹ many of them victims of “unimaginable atrocities that deeply shock[ed] the conscience of humanity.”²

Civilian populations grew more vulnerable throughout the century. During World War I, civilian deaths were roughly one-tenth the number of soldier deaths. In World War II, the ratio was 1:1. In Vietnam, nine civilians died for every soldier.

The face of war itself was also changing. The number of civil wars and internal conflicts grew sharply after 1945, spurring an unprecedented rise in the incidence of gross violations of international humanitarian law.³ During this period, an estimated 250 internal conflicts resulted in more than 86 million casualties.⁴ Ninety percent of those casualties were innocent civilians.⁵

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1. Gabrielle Kirk McDonald, *Crimes of Sexual Violence: The Experience of the International Criminal Tribunal*, 39 COLUM. J. TRANSNAT'L L. 1, 3 (2000).

2. Rome Statute of the International Criminal Court, U.N. Doc. A/Conf. 189/3 (July 17, 1998) [hereinafter ICC Statute], at preamble ¶2, available at <http://www.un.org/law/icc/index.html>.

3. See POST-CONFLICT JUSTICE 5 (M. Cherif Bassiouni ed., 2002).

4. *Id.* at 6.

5. Interview with Justice Richard Goldstone, former Chief Prosecutor for the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), Aug. 6, 2004. During the month of August 2004, a series of interviews for this article were conducted with a number of other international experts, as well. These included Jean Pél  Fom t  (Senior Legal Advisor, ICTR), Mathias Hellman (former

Despite the growing proportion of civilian casualties, individuals responsible for war crimes and other atrocities generally have not been prosecuted.⁶ Since 1948, there have been few criminal investigations or prosecutions.⁷ Domestic courts have rarely prosecuted such crimes.⁸ In fact, with the exception of the Nuremberg and Tokyo war crimes trials,⁹ prosecution of these crimes in any courts has been an “historical anomaly.”¹⁰ Why? The answer is that nations prefer not to hold the perpetrators accountable.

Whether acting out of political expediency or deliberately undermining the rule of law, states have too often let international crimes go unpunished. They have adopted a policy of impunity, which is the antithesis of accountability. The thesis of this article is that impunity based on “bartered settlements” leaves both the victims of crime and the concept of justice as losers.¹¹

Impunity is often presented as a precondition for peace; victims are essentially asked to forget the past and move on. But victims never escape unscathed, and impunity is just another affront. Archbishop Desmond Tutu, Chair of South Africa’s Truth and Reconciliation Commission, put it this way:

There were others who urged that the past should be forgotten – glibly declaring that we should “let bygones be bygones.” This option was rightly rejected because such amnesia would have resulted in further victimization of victims by denying their awful experiences The other reason amnesia simply will not do is that the past refuses to lie down quietly. It has an uncanny habit of returning to

Outreach Director, ICTY), David Tolbert (Deputy Prosecutor, ICTY), Bartram Brown (former Law Clerk for the ICTY), Sylvia De Bertodano (former Defense Counsel at the ICTY), Stuart Alford (former Prosecutor for the U.N. Serious Crimes Unit in East Timor), and Michael Johnson (Registrar for the War Crimes Chamber, Court of Bosnia & Herzegovina). Records of these interviews are on file with the author.

6. Interview with Justice Richard Goldstone, *supra* note 5.

7. See Amnesty International, *Universal Jurisdiction: The Duty of States To Enact and Implement Legislation*, ch. 2, Sept. 1, 2001, at <http://web.amnesty.org/pages/uj-memorandum-eng>.

8. See generally Prevent Genocide International, *Genocide and International Crimes in Domestic Courts*, July 21, 2003, available at <http://www.preventgenocide.org/punish/domestic>.

9. Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N. T.S. 279; Charter for the International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589.

10. Ruth Wedgwood, Harold K. Jacobson & Jonathan I. Charney, *International Criminal Law and the Role of Domestic Courts*, 95 AM. J. INT’L L. 120, 120 (2001).

11. See Bassiouni, *supra* note 3, at 7-8.

haunt one. “Those who forget the past are doomed to repeat it” are the words emblazoned at the entrance to the museum in the former concentration camp of Dachau. They are words we would do well to keep ever in mind. However painful the experience, the wounds of the past must not be allowed to fester. They must be opened. They must be cleansed. And balm must be poured on them so they can heal. This is not to be obsessed with the past. It is to take care that the past is properly dealt with for the sake of the future.¹²

The victims of former Chilean President Augusto Pinochet also were asked to forget. Yet for those who survived the torture camps and for relatives of the missing, the failure for many years to prosecute Pinochet kept truth and justice hidden. The policy was to dismiss, rather than confront, Chile’s dark past. Victims, their families, and indeed society at large still suffer from this policy of impunity.¹³ On September 14, 2005, however, when Chile’s Supreme Court stripped Pinochet of immunity from prosecution, victims felt vindicated for the tenacity of their campaign to hold Pinochet accountable for his crimes.¹⁴ The Court’s decision offered hope “that impunity will not prevail.”¹⁵

Decisions not to prosecute are often premised on a misguided belief that it is necessary to choose between justice and peace, but this is a false choice. There can be no lasting peace without justice, and justice cannot exist without accountability. Peace cannot exist unless society first deals with the deep divisions created by human rights abuses.¹⁶

Nevertheless, decision makers may be so desperate to achieve peace and stability in the short run that they broker deals with the very leaders who committed atrocities. These decision makers may even see justice as “retributive, backward-looking and . . . divisive.”¹⁷ Yet it is well documented

12. Quoted in Rosalind Shaw, *Rethinking Truth and Reconciliation Commissions: Lessons from Sierra Leone* (United States Inst. of Peace, Feb. 2005), at 6.

13. See generally MARK R. AMSTUTZ, *THE HEALING OF NATIONS: THE PROMISE AND LIMITS OF POLITICAL FORGIVENESS* (2005).

14. For a description of earlier efforts to challenge Pinochet’s claim to immunity, see Sebastian Brett, *Justice a Step Closer in Chile*, OBSERVER, May 30, 2004, available at <http://hrw.org/english/docs/2004/06/01/chile8682.htm>.

15. Statement by attorney Hernan Quezada, quoted in *Pinochet to Face Trial*, ASSOC. PRESS, Sept. 14, 2005.

16. See James D. Willets, *Introduction: The Building Blocks to Recognition of Human Rights and Democracy: Reconciliation, Rule of Law and Domestic and International Peace*, 7 ILSA J. INT’L & COMP. L. 597 (2001).

17. See Ramesh Thakur, Op-Ed., *When Peace and Justice Collide; East Timor*, INT’L HERALD TRIB., Aug. 31, 2005, at 6.

that political leaders who are reappointed to office after committing flagrant atrocities sometimes commit new abuses and allow a return to lawlessness.¹⁸

Impunity suggests to the wider community that atrocities can somehow be condoned. Leo Valladares, the Human Rights Commissioner of Honduras, observed that “government officials, the police and military . . . break the law without fear of punishment, for there is a shared understanding that each person will be silent about the other’s abuses as long as the favor is returned.”¹⁹

Impunity actually prevents reconciliation. Indeed, the greatest impediment to peace is the presence of criminals in communities where victims and witnesses still live.²⁰ The failure to bring these criminals to justice contributes not only to the continuation of their crimes, but also to continuing instability within their country.

A. *A Shift in Policy*

International sensibilities about impunity began to change toward the end of the Cold War. The impetus for change was a shift in thinking from the accepted doctrine that humanitarian law was the exclusive domain of the sovereign state. In the traditional view, states were the only relevant actors in international law. Moreover, all states were sovereign and legally equal; no state could be held liable in the courts of another.²¹

The adoption of human rights conventions purporting to limit governments’ grant of impunity marked the beginning of a new era. A new doctrine – that individual human rights could “trump” state sovereignty – changed the international legal order forever.

One part of this emergent human rights law is particularly relevant here. The crime of genocide (according to the 1948 Genocide Convention²²), crimes against humanity (as defined by the Nuremberg Charter²³), grave breaches (as set out in the four Geneva Conventions of 1949²⁴ and their two Additional

18. Human Rights Watch, *Afghanistan: Bring War Criminals to Justice*, July 7, 2005, available at http://hrw.org/english/docs/2005/07/06/afghan11287_txt.htm.

19. David A. Crocker, *Transitional Justice and International Civil Society: Toward a Normative Framework*, 5 *CONSTELLATIONS* 492, 506 (1998).

20. Interview with Michael Johnson, *supra* note 5.

21. Concerning the traditional doctrine of “absolute” state (or “sovereign”) immunity, see generally *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812).

22. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

23. Charter of the International Military Tribunal, *supra* note 9, art. 6(c).

24. Convention (No. I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention (No. II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members

Protocols²⁵), and torture (as defined in the 1984 Convention Against Torture²⁶) have all been recognized as serious violations of international law.

Crimes of this magnitude – crimes that shock the conscience of the world – are described as *jus cogens* in international law.²⁷ *Jus cogens* rules are nonderogable; they override and are superior to other rules and laws. What is more, the prohibition against these core crimes is *erga omnes* and must, therefore, be applied by all states.²⁸ These rules apply not only because of treaty obligations, but also because they have become part of customary international law.²⁹ Thus, even states that are not party to any of the human rights conventions are required to prosecute or extradite perpetrators of these crimes.

States may grant amnesty or may pardon individuals charged with violating most national criminal laws. But a state's power does not extend to excusing gross human rights violations.³⁰ These are basic tenets of international law.

of Armed Forces at Sea, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention (No. III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention (No. IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

25. Protocol Additional (No. I) to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391 (1977); Protocol Additional (No. II) to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609, 16 I.L.M. 1442 (1977).

26. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85.

27. The term "*jus cogens*" means "the compelling law." According to one commentator, such crimes "affect the interests of the world community as a whole because they threaten the peace and security of humankind and because they shock the conscience of humanity." Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63, 69 (1996); see also Lee M. Caplan, *State Immunity, Human Rights and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 27 AM. J. INT'L L. 741, 741-742 (2003).

28. Bassiouni, *supra* note 27, at 72-74.

29. One definition of customary international law is "general practice accepted as law." Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1055, T.S. No. 993. It requires both wide state practice and the belief that such state practice is "required, prohibited or allowed, depending on the nature of the rule, as a matter of law." 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW xxxii (2005).

30. See, e.g., Human Rights Comm., *Comm. No. 124/1982: Democratic Republic of the Congo (Muteba v. Zaire)*, U.N. Doc. No. CCPR/C/22/D/124/1982, at ¶13 (July 24, 1984), available at <http://www1.umn.edu/humanrts/undocs/session39/124-1982.htm>; *Tepe v. Turkey*, No. 27244/95, Eur. Ct. H.R. 238 (May 9, 2003), at ¶¶176-177, available at <http://www.worldlii.org/eu/cases/ECHR/2003/238.html>; *Velásquez Rodríguez Case*, Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4 (1988), at ¶176, available at http://www1.umn.edu/humanrts/iachr/b_11_12d.htm.

International practice has begun to exhibit a trend in favor of prosecution and away from granting amnesties for human rights violations. In the case of *Barrios Altos v. Peru*, for example, the Inter-American Court on Human Rights held that “all amnesty provisions, provisions on prescription, and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations”³¹ In *Abdülsamet Yaman v. Turkey*, the European Court of Human Rights pointed out that “where a state agent has been charged with crimes involving torture and other ill-treatment, it is of the utmost importance for the purposes of an ‘effective remedy’ that criminal proceedings and sentencing not be time-barred and that the granting of an amnesty or pardon not be permissible.”³² The Appeals Chamber of the Special Court for Sierra Leone held in *Prosecutor v. Morrison Kallon*³³ that there is a “crystallizing international norm that a government cannot grant amnesty for serious violations of crimes under international law.”³⁴

These core international crimes also call for the application, at least in part, of the principle of universal jurisdiction. Dating back to the fourteenth century,³⁵ this principle is now recognized by most contemporary legal scholars.³⁶ Thus, arguments that state sovereignty allows impunity are negated by the state’s obligation to prosecute or extradite those who have committed grave crimes elsewhere, including heads of other states. The Nuremberg Tribunal implicitly recognized the concept of universal jurisdiction for crimes against peace, war crimes, and crimes against humanity.³⁷

The primacy of international humanitarian law over national domestic law is strengthened by the fact that universal jurisdiction does not require an assessment of relevant “personal jurisdiction.” Thus, any state has the

31. *Barrios Altos Case*, Judgment of May 14, 2001, Inter-Am. Ct. H.R. (Ser. C) No. 75 (2001), at ¶41, available at <http://www1.umn.edu/humanrts/iachr/C/75-ing.html>.

32. No. 32446/96, Eur. Ct. H.R. 572 (Nov. 2, 2004), at ¶55, available at <http://www.worldlii.org/eu/cases/ECHR/2004/572.html>.

33. Case No. SCSL-04-15-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (Mar. 16, 2004).

34. *Id.* ¶82.

35. See Amnesty International, *supra* note 7, at ch. 2.

36. Scholars differ on the scope and content of the principle. See LUC REYDAMS, UNIVERSAL JURISDICTION – INTERNATIONAL AND MUNICIPAL LEGAL PROSPECTORS 28 (2003); see also Michael Akehurst, *Jurisdiction in International Law*, 46; BRIT Y.B. INT’L L. 145 (1973); STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 140-141 (2d ed. 1997).

37. See Amnesty International, *supra* note 7, at ch. 2.

authority unilaterally to pursue an action against an individual, regardless of the individual's nationality.

The principle of universal jurisdiction achieved greater currency in the 1980s, when many individuals responsible for genocide, crimes against humanity, and war crimes during World War II were found living in Western countries.³⁸ Criminal investigations were then initiated in Australia, Canada, the United Kingdom, France, Italy, and elsewhere.³⁹

The United Kingdom's case against Pinochet in the House of Lords – that country's highest court – was key in solidifying the principle of universal jurisdiction.⁴⁰ On November 25, 1998, in the first of its rulings in the *Pinochet* case, the House of Lords held that he had no immunity from the jurisdiction of British courts with respect to his alleged crimes under international law, and thus no immunity from extradition.⁴¹ The majority decided the case on simple, if not analytically rigorous, grounds. It ruled that a Head of State who ordered or committed torture was not, when so doing, acting as a Head of State. As Lord Steyn wrote,

the development of international law since the Second World War justifies the conclusion that by the time of the 1973 coup d'état, and certainly ever since, international law condemned genocide, torture, hostage taking and crimes against humanity (during an armed conflict or in peace time) as international crimes deserving of punishment. Given this state of international law, it seems to me difficult to maintain that the commission of such high crimes may amount to acts performed in the exercise of the functions of a Head of State.⁴²

38. *Id.*

39. *Id.*

40. Section 134 of the Criminal Justice Act of 1988, c. 33, which implements the 1984 Torture Convention, establishes the jurisdiction of the domestic courts in the United Kingdom to prosecute or extradite those accused of torture. For an excellent review of the case, see Michael Byers, *The Law and Politics of the Pinochet Case*, 10 DUKE J. OF COMP. & INT'L L. 415 (2000). See generally J. Craig Barker, *The Future of Former Head of State Immunity After Ex parte Pinochet*, 48 INT'L & COMP. L.Q. 937 (1999); Andrea Bianchi, *Immunity Versus Human Rights: The Pinochet Case*, 10 EUR. J. INT'L L. 237 (1999); Christine M. Chinkin, *In re Pinochet*, 93 AM. J. INT'L L. 703 (1999); Hazel Fox, *The Pinochet Case No. 3*, 48 INT'L & COMP. L.Q. 687 (1999); Colin Warbrick, *Extradition Law Aspects of Pinochet 3*, 48 INT'L & COMP. L.Q. 958 (1999).

41. *R v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte*, 3 W.L.R. 1456 (H.L. 1998); see also Michael Byers, *The Right Ruling for Humanity*, TIMES (London), Nov. 26, 1998, at 24.

42. *Ex parte Pinochet Ugarte*, 3 W.L.R. at 1506.

This ruling ushered in a “sea change in international law and relations.”⁴³ It reinforced the principle that human rights conventions are primary, and enforceable against anyone.

Although no other national court of final appeal has gone quite so far, the authority and influence of the Law Lords are such that it is not surprising that other courts around the world have followed their lead. In October 2005, for example, two former Afghan military officers found themselves in a Dutch court, accused of crimes committed twenty years earlier during the Soviet occupation of Afghanistan.⁴⁴ The court applied universal jurisdiction as the legal basis for trying Habibullah Jalalzoy and Heshamuddin Hesam, convicting both of them of war crimes and crimes against humanity.⁴⁵ A Belgian court has also invoked the principle of universal jurisdiction to charge Hisséne Habré, former dictator of Chad, with crimes against humanity and torture.⁴⁶ When states have been reluctant to prosecute gross violations of international law, however, the international community has created international war crimes tribunals to do the job.

B. The Emergence of Modern-Day War Crimes Tribunals

In response to the unimaginable genocides in Rwanda and the former Yugoslavia, the United Nations Security Council created two special courts, the International Criminal Tribunal for the Former Yugoslavia (ICTY)⁴⁷ and the International Criminal Tribunal for Rwanda (ICTR).⁴⁸ These two

43. *Id.*

44. See Marlise Simons, In Rare Case, Dutch Try 2 Afghan Ex-Generals, INT'L HERALD TRIB., Sept. 29, 2005, at 2.

45. *Dutch Court Jails Afghan Officers*, BBC NEWS, Oct. 14, 2005.

46. See Reed Brody, *Somewhere There Is Justice*, INT'L HERALD TRIB., Oct. 7, 2005, at 6; Marlise Simons, *Ex-Dictator of Chad Is Indicted in Belgium*, INT'L HERALD TRIB., Sept. 30, 2005, at 3.

47. See Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), as amended, available at <http://www.un.org/icty/legaldoc-e/index.htm>. The ICTY was established by the U.N. Security Council, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993), to try those responsible for violations of international humanitarian law in the territory of the former Yugoslavia since 1991. The tribunal's jurisdiction covers crimes under the Geneva Conventions, genocide, and crimes against humanity. See generally Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704 (May 3, 1993).

48. Statute of the International Criminal Tribunal for Rwanda (ICTR), Annex to S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994), available at <http://www.ohchr.org/english/law/itr.htm>. The ICTR was established by the U.N. Security Council in November 1994, eighteen months after the ICTY was approved. The Tribunal for Rwanda was charged to prosecute those responsible for the 1994 genocide during which hundreds of thousands of Tutsi and Hutu were massacred.

tribunals were designed to end a tradition of impotence in responding to human rights abuse cases and to make certain that those responsible for committing atrocities would be prosecuted. There would be no impunity. These tribunals have had a profound effect on international law, signaling a shift away from “toothless monitoring and supervision.”⁴⁹

The inauguration of the International Criminal Court (ICC) on July 1, 2002, marked another pivotal development in international law.⁵⁰ Created to investigate and prosecute egregious violations of international law – genocide, crimes against humanity, and war crimes – the ICC holds the promise of justice through effective enforcement.⁵¹ Because the ICC statute calls upon states to enact conforming legislation, it has the potential to close the gap between international law and national policy, making it easier for states to hold perpetrators accountable.

The shift in international law and policy is woven into a set of principles articulated in the three tribunals’ statutes.⁵² These principles are as dramatic

49. Douglas Lee Donoho, *Human Rights and Development in the 21st Century: The Complex Path to Peace and Democracy: Themes from the 2000 Goodwin Seminar* 7 ILSA J. INT’L & COMP. LAW 605, 615 (2001).

50. See ICC Statute, *supra* note 2.

51. For a more extensive review of the ICC, see Mark S. Ellis, *The International Criminal Court and Its Implication for Domestic Law and National Capacity Building*, 15 FLA. J. INTL. L. 215 (2002).

52. In deciding to create the ICTY, the U.N. Security Council stated that it was: *Determining* that this situation constitutes a threat to international peace and security, *Determined* to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them, *Convinced* that in the particular circumstances of the former Yugoslavia the establishment of an international tribunal would enable this aim to be achieved and would contribute to the restoration and maintenance of peace S.C. Res. 808, U.N. Doc. S/RES/808 (Feb. 22, 1993). The Security Council subsequently indicated that its action was based on a belief that:

the establishment of an international tribunal and the prosecution of persons responsible for the above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993). The Security Council used similar wording when it created the ICTR. See S.C. Res. 955, S/RES/955 (Nov. 8, 1994).

In creating the ICC, member states set forth their objectives in the tribunal’s statute, which declares that they were:

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shocked the conscience of humanity, *Recognizing* that such grave crimes threatened the peace, security and well-being of the world,

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes

in their pronouncement as they are audacious in their aspirations. The statutes reflect a belief that the creation of international war crimes tribunals will ensure respect for and enforcement of international justice, and a determination that grave breaches of international humanitarian law will not go unpunished. They are designed to end impunity for the perpetrators of these crimes and to contribute to the prevention of such crimes in the future. And because such crimes threaten the peace, security, and well-being of the world, the statutes embody a hope that the tribunals' interventions will assist in maintaining or restoring peace and security.

This article examines the role of international tribunals in countering impunity and in enforcing accountability. By exploring the devastating impact of impunity in East Timor, Cambodia, Colombia, Guatemala, Liberia, and Afghanistan, it looks closely at the inherent conflict between impunity and accountability. It also analyzes the crucial need for political will in ending impunity and supporting the tribunals' goal of accountability. In addition, the article assesses the principle of command responsibility, a key international legal development in achieving the goals of the tribunals. The article ends with an evaluation of the overall impact of war crimes tribunals in combating impunity and facilitating peace and reconciliation in regions of conflict.

I. A SURVEY OF STATE POLICIES OF IMPUNITY

The effect of impunity on reconciliation, peace, and stability in a country or region is neither a hypothetical nor a theoretical proposition. There is compelling evidence that impunity has had a devastating impact in Yugoslavia, Sudan, Uganda, Somalia, Rwanda, Burundi, Lebanon, Mexico, Algeria, Northern Ireland, the Congo, Iraq, and other countries. While it is beyond the scope of this article to survey every relevant example, a review of several major conflict zones during the past 25 years reveals a pattern that is both clear and alarming.

ICC Statute, *supra* note 2, at preamble ¶¶2-5.

A. East Timor

After more than 24 years of occupation by Indonesia, East Timor voted in 1999, pursuant to a U.N. Agreement,⁵³ for independence. Some 200,000 persons, approximately one-third of East Timor's population, had lost their lives during the occupation.⁵⁴ In the months preceding and following the independence vote, the Indonesian military and police carried out a scorched-earth policy against the Timorese.⁵⁵ More than 400,000 people were displaced,⁵⁶ at least 1,000 were killed,⁵⁷ and 60 to 80 percent of all property in the country was damaged or destroyed.⁵⁸

A U.N. International Commission of Inquiry recommended in a January 2000 report that an international tribunal be created to try war crimes suspects, calling such a move "fundamental for the future social and political stability of East Timor."⁵⁹ No such tribunal was established, however. It was rejected by the U.N. Secretary-General, who favored national trials in both Indonesia and East Timor,⁶⁰ and by the Indonesian government, which assured the United Nations that it would conduct domestic trials.⁶¹

53. Agreement Regarding the Modalities for the Popular Consultation of the East Timorese Through a Direct Ballot (between Indonesia, Portugal, and the Secretary-General of the United Nations), May 5, 1999, available at <http://www.etan.org/etun/modaliti.htm>.

54. See Coalition for International Justice & Open Society Justice Initiative, *Unfulfilled Promises: Achieving Justice for Crimes Against Humanity in East Timor*, Nov. 24, 2004 [hereinafter *Unfulfilled Promises*], available at http://www.justiceinitiative.org/db/resource2?res_id=102368.

55. See United Nations Office of the High Commissioner for Human Rights, *Report of the International Commission of Inquiry on East Timor to the Secretary-General, Delivered to the Security Council and the Commission on Human Rights*, U.N. Doc. S/2000/59, A/54/726 (Jan. 31, 2000) [hereinafter *OHCHR Report*]; see also *Report of the Security Council Mission to Jakarta and Dili, 8 to 12 September 1999*, U.N. Doc. S/1999/976 (Sept. 14, 1999); Jeff Kingston, Op-Ed., *The Search for Truth Divides East Timor*, INT'L HERALD TRIB., Dec. 21, 2005, at 8.

56. See Special Rapporteur of the Commission on Human Rights on Extrajudicial, Summary, or Arbitrary Executions, Special Rapporteur of the Commission on the Question of Torture, and the Special Rapporteur of the Commission on Violence Against Women, Its Causes, and Consequences, *Situation of Human Rights in East Timor*, U.N. Doc. A/54/660 (Dec. 10, 1999) [hereinafter *Joint Mission Report*].

57. See *id.*

58. See *OHCHR Report*, *supra* note 55, at ¶130.

59. See *id.* ¶155.

60. See Suzannah Linton, *Cambodia, East Timor, and Sierra Leone: Experiments in International Justice*, 12 CRIM. L.F. 185 (2001).

61. See Megan Hirst & Howard Varney, International Center for Transitional Justice, *Justice Abandoned? An Assessment of the Serious Crimes Process in East Timor* (June 2005), at 4 n.19, citing Letter from the Minister for Foreign Affairs of Indonesia to the U.N. Secretary-General, U.N. Doc. S/2000/65, A/54/727 (Jan. 31, 2000).

In 2000, the Indonesian government established an Ad Hoc Human Rights Court to investigate charges of genocide and human rights violations in East Timor committed during the period April-September 1999.⁶² The court was a complete failure; most of the highest ranking individuals who were charged enjoyed complete impunity.⁶³ According to one human rights advocate, the court was in fact designed to “legitimize the army’s views that this was not . . . a crime against humanity . . . just an unfortunate event.”⁶⁴

In parallel with the Ad Hoc Human Rights Court, the United Nations established a Special Crimes Unit to prosecute cases before Special Panels for Serious Crimes in East Timor.⁶⁵ These panels were staffed by international and East Timorese judges.⁶⁶ By the time the Special Panels ended in December 2004, nearly 400 people had been indicted at least once; more than 300 of them were senior Indonesian military and police officers.⁶⁷ The Indonesian government refused to extradite any of the officials, however, and the panels convicted only low-level Timorese perpetrators.⁶⁸ The Timorese government, not wanting to jeopardize newly built relationships with Indonesia, accused the panels of lacking credibility.⁶⁹ The East Timorese people never gained a sense of justice from the Special Panels. As Stuart Alford, Prosecutor for the Serious Crimes Unit, stated, “We were able to indict Indonesians but we had no authority to enforce the indictments . . . we had no cooperation from the Indonesian government . . . we issued arrest warrants; we requested Interpol arrest warrants, but in terms of the Court’s effectiveness, it was quite ineffective.”⁷⁰

For its part, East Timor created its own Commission for Reception, Truth, and Reconciliation in East Timor to investigate human rights violations.⁷¹ The Commission was to focus on the entire 24-year period of Indonesian occupation. Seven national commissioners were appointed on January 17, 2002. The Commission was authorized to facilitate “community rec-

62. See *Unfulfilled Promises*, *supra* note 54, at 19-33.

63. See *id.* at 23.

64. *Id.* at 24.

65. See *id.* at 34-45.

66. See *id.* at 34.

67. See Seth Mydans, *No Prosecution for Atrocities – East Timor Agreement on Immunity Draws Criticism*, INT’L HERALD TRIB., May 11, 2005, at 7.

68. See *id.*; see also *Unfulfilled Promises*, *supra* note 54, at 39.

69. See Tim Curry, *Review of Conference: International Criminal Tribunals in the 21st Century*, 13 Hum. Rts. Brief 6, 8-9 (Fall 2005).

70. Interview with Stuart Alford, *supra* note 5.

71. The Commission was authorized by United Nations Transitional Administration in East Timor, *Regulation No. 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation*, U.N. Doc. UNTAET/REG/2001/10 (July 13, 2001). A history of the Commission may be found at <http://www.easttimor-reconciliation.org/bgd.htm>.

conciliation procedures” (CRPs) for reintegrating individuals who had committed minor criminal offenses and other harmful acts.⁷² But the CRPs were restricted to low-level crimes; serious crimes such as murder, rape, and orchestrated violence were left to the courts.⁷³ The Commission thus effectively implemented a blanket amnesty for those responsible for the atrocities.⁷⁴

The Commission for Reception, Truth and Reconciliation in East Timor severely undermined the very essence of accountability.⁷⁵ It is difficult to imagine how this process could have brought closure to the victims of atrocities or created a sense of security that such crimes would not be committed again. As the Bishop of Dili, Dom Alberto Ricardo da Silva, put it, “If there is a crime, there has to be justice.”⁷⁶

When the Commission was finally dissolved in December 2005, its 2,500 page report was not made public, causing widespread dismay within East Timor.⁷⁷ East Timor’s President Xanana Gusmao, however, supported the report’s embargo and criticized the report for its “grandiose idealism.”⁷⁸

In the end, both the Timorese and Indonesian governments abandoned their original promises to bring perpetrators to justice. Instead, the Timorese government joined the Indonesian government in agreeing that the judicial process would be replaced by a reconciliation process (the Truth and Friendship Commission), which started its work on August 11, 2005.⁷⁹ East Timor decided that it was futile to pursue perpetrators outside its jurisdiction.⁸⁰ The Timorese government even went so far as to state that the victims of crimes committed in East Timor did not want an international tribunal or cooperation.⁸¹ Its decision to abandon criminal prosecutions was strongly condemned by human rights groups.⁸² As one prominent human rights lawyer stated, “Justice and human rights are the values we fought for

72. *Regulation No. 2001/10*, *supra* note 71, §3.1(h).

73. *Id.* §27.

74. See Seth Mydans, *No Prosecution for Atrocities: East Timor Agreement on Immunity Draws Criticism*, INT’L HERALD TRIB., May 11, 2005, at 7.

75. See Ellen Nakashima, *For Survivors of East Timor Massacres, Justice Still Elusive*, WASH. POST, Sept. 16, 2005, at A22.

76. See Jill Jolliffe, *Justice at a Crossroads in East Timor*, ASIA TIMES, Feb. 24, 2005, available at http://www.atimes.com/atimes/Southeast_Asia/GB24Ae03.html.

77. See Kingston, *supra* note 55.

78. *Id.*

79. See Thakur, *supra* note 17. The website for the Commission of Truth and Friendship Indonesia – Timor Leste may be found at <http://www.ctf-ri-tl.org/>.

80. See Thakur, *supra* note 17.

81. See East Timor National Alliance for International Tribunal, *Victims Wish for An International Tribunal*, Aug. 7, 2005, available at <http://etan.org/news/2005/08all.htm>.

82. See Thakur, *supra* note 17.

during 24 years, and suddenly we see the [governments] betray all those principles.”⁸³

Indonesian prosecutors brought charges against eighteen individuals accused of participating in the Timor violence of 1999. However, seventeen of the defendants, all Indonesian security officers and government officials, were cleared of all charges by the Indonesian appellate court or Supreme Court.⁸⁴ Their acquittals were viewed by some as a “whitewash” of the Indonesian government’s involvement in the atrocities.⁸⁵

The international community is again calling for the establishment of a war crimes tribunal.⁸⁶ A U.N. Commission of Experts has called upon the Indonesian government to retry police and military officials who were acquitted in earlier trials the commission called “manifestly inadequate.”⁸⁷ There is also new evidence suggesting that the governments of the United States, Britain, and Australia were complicit in the events that led to Indonesia’s brutal occupation of East Timor.⁸⁸ However, so long as both the Indonesian and East Timorese governments continue to oppose this level of accountability, the creation of such a tribunal is unlikely.

To complicate matters, Australia has recently resumed training assistance to Kopassus, the Indonesian elite commando force allegedly involved in human rights abuses in East Timor and in Indonesia.⁸⁹ The United States has also lifted a ban on arms sales to the Indonesian military.⁹⁰

Following the failure to hold Indonesian perpetrators accountable for their crimes in East Timor, similar atrocities took place in Indonesia’s Aceh province. Some of the same officials accused of serious crimes in East Timor but given immunity for their actions are in Aceh. The same tactics employed by the Indonesian government to repress the opposition in East Timor have been used again.⁹¹ Two international human rights organizations reported that “[t]he Indonesian government is allowing its security forces to target

83. See Jolliffe, *supra* note 76.

84. See *Indonesia Top Court Doubles Timor Militiaman’s Term*, REUTERS, Mar. 13, 2006.

85. *Id.*

86. See Ellen Nakashima, *Indonesia Attempts to Avert Tribunal to Probe East Timor*, WASH. POST, July 16, 2005, at A11.

87. *Id.*

88. See Donald Greenlees, *Complicity Shown in Timor Takeover; Files from 1975 Point to U.S. and Britain*, INT’L HERALD TRIB., Dec. 2, 2005, at 1.

89. *Australia Cancels Boycott of Indonesian Military*, INT’L HERALD TRIB./ASIA-PACIFIC, Dec. 11, 2005.

90. *Id.*

91. See Samantha F. Ravich, *Eyeing Indonesia Through the Lens of Aceh*, WASH. Q., Summer 2000, at 7; and Human Rights Watch, *Indonesia: Why Aceh is Exploding*, Aug. 27, 1999.

humanitarian workers in Aceh, just as it allowed militias to target such workers in West Timor.”⁹² Because of the effects of the tsunami in 2004, the separatist rebels in Aceh formally abandoned their armed fight for independence in August 2005.⁹³ But if the peace agreement between the Indonesian government and the rebels is to hold, it will be crucial to adopt accountability mechanisms in order to end the cycle of impunity. The peace agreement fails to refer to past abuses, however, or to provide for investigations of alleged human rights violations.⁹⁴

B. Cambodia

Between April 1975 and January 1979, approximately two million Cambodians lost their lives as a result of acts committed by the Khmer Rouge. This genocidal regime killed an estimated one-third of the Cambodian population in less than four years.⁹⁵ These killings went entirely unchecked.⁹⁶ When the slaughter stopped, immediate implementation of an effective mechanism for accountability might have prevented the government from engaging in further torture and other human rights abuses.⁹⁷ But neither the Cambodian government nor the international community took the issue of accountability seriously.⁹⁸ This has been the Achilles heel for bringing justice to the victims.

There have been feeble attempts over the years to focus attention on the perpetrators. But the Cambodian government has thrown up roadblocks to

92. *Indonesia: Aid Workers Executed in Aceh*, HUMAN RTS. NEWS, Dec. 8, 2000, available at <http://hrw.org/english/docs/2000/12/08/indone644.htm>; see also *Unfulfilled Promises*, *supra* note 54, at 36.

93. See Evelyn Rusli, *Accord Brings New Hope for Lasting Aceh Peace*, INT’L HERALD TRIB., Aug. 16, 2005, at 2.

94. See International Crisis Group, *Aceh: Now for the Hard Part*, Mar. 29, 2006, at 5.

95. Jaya Ramji, *Reclaiming Cambodian History: The Case for a Truth Commission*, 24 FLETCHER F. WORLD AFF., Spring 2000, at 137, 137.

96. United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Background Information: Overview* (n.d.), available at <http://www.un.org/icc/overview.htm>.

97. Even though Cambodia and the United Nations have agreed to establish a mixed domestic and international tribunal under Cambodian law, there is still concern that no enforcement mechanism is being created to bring the Khmer Rouge leaders to justice. The Cambodian government’s influence and involvement in the judicial process have hampered progress in reforming the judicial system. Human Rights Watch, *Human Rights Review: Cambodia*, Jan. 2004, available at <http://hrw.org/english/docs/2004/01/21/cambod6974.htm>.

98. See Theresa Klosterman, Note, *The Feasibility and Propriety of a Truth Commission in Cambodia: Too Little? Too Late?* 15 ARIZ. J. INT’L & COMP. LAW 833, 850 (1998).

prosecution. Many high-profile cases faced clear political interference from the government under Prime Minister Hun Sen.⁹⁹

Today, twenty-five years after the killings ended, those who committed the worst atrocities since the Holocaust still have not been brought to justice. Two prominent members of the Khmer Rouge – Nuon Chea¹⁰⁰ and Khieu Samphan – live freely among the Cambodian people, protected by a government amnesty.¹⁰¹ Each has at least acknowledged that the killings occurred.¹⁰² In a recent report, a U.N. human rights expert noted that “rampant corruption in Cambodia is hindering the country’s progress toward democracy and economic development.”¹⁰³ She stated further that “problems of impunity have become systemic to the detriment of the society” and that the chaos in Cambodia was due to the lack of a mechanism for accountability.¹⁰⁴

In 1997, the General Assembly adopted Resolution 52/135, which authorized the Secretary General to appoint a three-member Group of Experts to study the issue of accountability.¹⁰⁵ The group’s 1999 report recommended the creation of an *ad hoc* international tribunal to try Khmer Rouge leaders for crimes against humanity and genocide.¹⁰⁶ The Cambodian government rejected the report and instead sought international assistance for a domestic war crimes court.¹⁰⁷

99. A noteworthy example is the politically motivated murder of Chea Vichea, leader of the free trade union in Cambodia as well as a human rights defender, in early 2004. Even though two men who initially admitted to the murders were detained, they were later released. To this day, no one has been brought to justice for Mr. Vichea’s murder. See Amnesty Int’l, *Cambodia*, Dec. 2004, at <http://web.amnesty.org/report2005/khm-summary-eng>; see also Steven R. Ratner, *Accountability for the Khmer Rouge: A (Lack of) Progress Report*, in POST-CONFLICT JUSTICE, *supra* note 3, at 613, 614-615.

100. Nuon Chea was Deputy General Secretary of the Communist Party. He was the architect of the notorious center called Tuol Sleng, which I visited in 2005. Some 14,000 men, women, and children were tortured there; only 14 survived. See Evan Osnos, *A Chilling Visit with Pol Pot’s “Brother,”* CHICAGO TRIB., Feb. 17, 2006, at C1.

101. See Ratner, *supra* note 99.

102. See Osnos, *supra* note 100; *Khieu Samphan Admits to Cambodian Genocide*, ASIA NEWS.IT, Jan. 2, 2004, available at <http://www.asianews.it/view.php?l=en&art=216>.

103. Lisa Schlein, *UN Says Corruption in Cambodia Hinders Progress*, VOANEWS.COM, Apr. 18, 2005, available at <http://www.voanews.com/english/2005-04-18-voa33.cfm>.

104. *Id.*

105. Situation of Human Rights in Cambodia, G.A. Res. 52/135, U.N. GAOR, 52d Sess., 70th plen. mtg., ¶16, U.N. Doc. A/RES/52/135 (Dec. 12, 1997).

106. Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135, U.N. GAOR, 53d Sess., Annex, Agenda Item 110(b), at 18-27, 41-42, U.N. Doc. A/53/850, S/1999/231 (1999) (noting that the Group of Experts consisted of Sir Ninian Stephen, Judge Raj Soomer Lallah, and Professor Steven Ratner).

107. See Ramji, *supra* note 95, at 139.

In 2001, despite U.N. objections, the Cambodian government passed its own law establishing the Extraordinary Chambers in the Courts of Cambodia Tribunal to prosecute senior Khmer Rouge leaders responsible for serious violations of Cambodian and international law committed between April 17, 1975, and January 6, 1979.¹⁰⁸ The United Nations rejected the law and withdrew from negotiations because the measure did not guarantee independence, impartiality, and objectivity for the tribunal.¹⁰⁹

After significant delays caused by government inaction, and following extended negotiations, the United Nations and Cambodia finally agreed on June 6, 2003, to establish an internationally supported tribunal to bring the former Khmer Rouge leaders to justice.¹¹⁰ The Cambodia National Assembly approved the agreement four months later.¹¹¹ The agreement took effect on April 29, 2005.¹¹²

There is little doubt that the United Nations focused primarily on the issue of impunity when negotiating with the Cambodian government to establish the tribunal.¹¹³ The goal was “an end to impunity.”¹¹⁴

The tribunal’s jurisdiction extends to crimes outlined in the 1956 Penal Code of Cambodia,¹¹⁵ including homicide, torture, and religious persecution.¹¹⁶ The enabling statute also covers genocide¹¹⁷ and crimes against humanity.¹¹⁸ Finally, the statute covers crimes against internationally protected persons, pursuant to the Vienna Convention of 1961 on Diplomatic Relations.¹¹⁹

108. *Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea* (n.d.) [hereinafter Cambodia Statute], available at <http://www.derechos.org/human-rights/seasia/doc/krlaw.html>.

109. See Ratner, *supra* note 99, at 617-618.

110. *Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea*, U.N.-Cambodia, June 6, 2003, available at <http://www.genocide-watch.org/CambodiaDraftAgreement17-03-03.htm>. See *UN and Cambodia Sign Court Deal*, BBC NEWS, June 6, 2003, available at <http://news.bbc.co.uk/2/hi/asia-pacific/2968080.stm>.

111. Amy Kazmin, *Cambodia in Agreement on UN Genocide Tribunal Plan Khmer Rouge*, FINANCIAL TIMES (LONDON), Oct. 5, 2004.

112. *Agreement Between Cambodia and UN on Khmer Rouge Trials Takes Effect*, UN NEWS CENTER, Apr. 29, 2005.

113. Discussion with Hans Correll, former U.N. Legal Advisor, Aug. 6, 2004.

114. *Id.*

115. Cambodia Statute, *supra* note 108, at art. 3.

116. *Id.*

117. *Id.* art. 4.

118. *Id.* art. 5.

119. *Id.* art. 8.

The tribunal is designed to be a “mixed court,” with both domestic and international judges.¹²⁰ The U.N. Secretary-General will recommend two international judges to the Cambodian government.¹²¹ The court will have two prosecutors, one Cambodian and one international lawyer,¹²² and will require significant outside administrative support.¹²³ The Cambodian tribunal has jurisdiction over “individuals” who “planned, instigated, ordered, aided and abetted, or committed the crimes referred to in the Statute.”¹²⁴ In further deference to the existing body of international law, the statute unambiguously incorporates the principle of command responsibility.¹²⁵

In an effort to countermand the government’s policy of granting amnesty, the statute requires the Cambodian government “not (to) request an amnesty or pardon for any persons who may be investigated for or convicted of crimes referred to in [the statute].”¹²⁶ This requirement does not, however, apply to persons to whom the government has *already* granted amnesty from investigation and/or prosecution.

There is clear evidence that the Cambodian government and government supported entities, like the Cambodian Bar Association, continue their policy of thwarting the work of the tribunal. Recently, the International Bar Association (IBA) cancelled a training program in support of the tribunal because of direct interference by the Cambodian Bar Association.

Unless the Cambodian government and the international community reverse their current policy of impunity and implement a program that accounts for atrocities committed by the Khmer Rouge, “the Cambodian people will be unable to live in a peaceful society.”¹²⁷ The tribunal is set to begin trials in late 2006. There is concern, however, that time is running out. The Khmer Rouge leaders eligible to stand trial are now elderly men. The twenty-five year delay in justice may, in the end, effectively grant immunity for the crimes.

120. *Id.* art. 9.

121. *Id.* arts. 11 & 18. On March 10, 2004, U.N. Secretary-General Kofi Annan submitted a list of 12 international judges and legal experts to the Cambodian government.

122. *Id.* art. 16.

123. *Id.* art. 13.

124. Cambodia Statute, *supra* note 108, at art. 29.

125. *Id.*; *see also* discussion with Hans Correll, *supra* note 113.

126. Cambodia Statute, *supra* note 108, at art. 40.

127. Ramji, *supra* note 95, at 137; *see also* Floyd Abrams & Diane Orentlicher, *Last Chance To Try the Khmer Rouge*, INT’L HERALD TRIB, Apr. 13, 2000, at 8.

C. Colombia

For nearly 40 years, Colombia has suffered from a bloody civil war between the United Self-Defense Forces of Colombia (AUC) and left-wing guerrillas known as the Revolutionary Armed Forces of Colombia (FARC). During this period, the FARC has controlled large sections of Colombia. Both the FARC and the AUC have funded their activities through kidnappings and the export of drugs.¹²⁸ Yet the Colombian government, with the strong backing of the United States, has fought hard against the FARC while widely ignoring criminal acts committed by the AUC.¹²⁹

The Colombian Congress recently approved a law granting near-immunity from prosecution to paramilitary commanders accused of atrocities. The Justice and Peace Law (JPL), which came into force on July 25, 2005, is part of President Álvaro Uribe's efforts to close a dark chapter in that country's history.¹³⁰ The law has been roundly criticized by domestic and international human rights groups, including the U.N. High Commissioner for Human Rights.¹³¹ The Colombian government argues, however, that the new law will demobilize up to 20,000 paramilitary fighters of the United Self-Defense Forces of Colombia (AUC), which is charged with killing Colombian civilians during a campaign against "guerrilla groups."¹³² Separately, more than 24,000 paramilitaries have been demobilized under a 2002 law that authorizes pardons for rebellion and sedition.¹³³

Officially the JPL applies equally to the AUC and groups like the FARC. The FARC, however, has shown no interest in participating in demobilization under the law.¹³⁴ In contrast, because the AUC's stated goals are identical with those of the government, the law seems to be designed to grant amnesty to AUC fighters. In other words, the Justice and Peace Law effectively

128. See Isabel Hilton, *Colombia's Drug Untouchables*, GUARDIAN, July 13, 2005; see also Mathea Falco, Council on Foreign Relations, *U.S. Interests and Objectives in Colombia*, Oct. 2000; Council on Foreign Relations & The Inter-American Dialogue, *Toward Greater Peace and Security in Colombia* 31, Oct. 2000. See generally International Crisis Group, *Colombia: Presidential Politics and Peace Prospects*, June 16, 2005; International Crisis Group, *War and Drugs in Colombia*, Jan. 27, 2005.

129. See International Crisis Group, *Colombia: Towards Peace and Justice?*, Mar. 14, 2006.

130. See Juan Forero, *Relatives of Colombian Victims Protest Concessions to Militias*, N.Y. TIMES, June 25, 2005, at A4.

131. See International Crisis Group, *supra*, note 129.

132. See Juan Forero, *New Colombia Law Grants Concessions to Paramilitaries*, N.Y. TIMES, June 23, 2005, at A3.

133. See International Crisis Group, *supra* note 129, at 18.

134. See International Crisis Group, *supra* note 129, at 1-2.

pardons paramilitaries who committed crimes in support of government policies,¹³⁵ making it a tool of impunity.

To understand the impact of the Justice and Peace Law it is crucial to understand the scale of the AUC's activities. A recent report published by the Centre for Popular Research and Education and presented to the International Criminal Court documents 12,398 extrajudicial executions and 1,339 cases of torture by the AUC between 1988 and 2003.¹³⁶ Another report implicates the AUC in the deaths of more than 2,000 people *following* a 2002 cease-fire.¹³⁷

The government has presented the Justice and Peace Law not as a general amnesty bill but as a balance between justice and peace.¹³⁸ However, only a small number of former paramilitaries from either FARC or AUC are expected to be prosecuted.¹³⁹ Furthermore, the government has been reluctant to send a clear message that the JPL itself will be aggressively and widely enforced.¹⁴⁰ According to one Colombian Senator, the JPL brings "no justice, no peace It should be called what it really is, a law of impunity and immunity."¹⁴¹

The JPL shields the paramilitary commanders from extradition for drug trafficking and categorizes their actions as political crimes, further safeguarding them from extradition and prosecution.¹⁴² In theory, commanders can be charged with crimes, but their punishment will likely be less than twenty-two months, and they may be allowed to serve their time on farms, not in prisons.¹⁴³ The commanders do not have to guarantee that all of their fighters will disarm.¹⁴⁴ There is evidence that while many paramilitary fighters have given up their weapons, some groups have preserved their command structures, and they continue to control drug trafficking.¹⁴⁵ They act as "powerful mafia-like groups" and are still not willing to abide by the provisions of the law.¹⁴⁶

135. See Hugh Bronstein, *Colombian Paramilitaries Give Up Their Guns*, REUTERS, Mar. 10, 2006.

136. See Constanza Vieira, *Rights-Colombia: Survivors Refuse To Give Up Struggle for Justice*, INTER PRESS SERVICE, June 29, 2005, available at <http://ipsnews.net/print.asp?idnews=29267>.

137. See *id.*; *Colombia: Presidential Politics and Peace Prospects*, *supra* note 128.

138. See International Crisis Group, *supra* note 129, at 1.

139. *Id.* at 9, 14.

140. *Id.* at i.

141. See Forero, *supra* note 132.

142. *Id.*

143. *Id.*

144. *Id.*

145. See International Crisis Group, *supra* note 129, at 4.

146. *Id.* at 5.

Members of the AUC who confess to so-called “atrocious crimes” are not required to provide any information on the structure of the AUC. Consequently, the JPL fails to ensure the proper decommissioning of paramilitaries. Amnesty International reports that AUC structures remain intact, that human rights violations continue, and that many fighters are simply being “recycled” as paid military informers.¹⁴⁷

Practically speaking, the most serious flaws in the JPL are the procedural mechanisms for trying individuals accused of “atrocious crimes” and for providing victims with reparations. The reduced sentence process starts with a confession or voluntary statement by a “defendant” whose name is on the government’s reduced sentence list, stating any actions in which he has been involved.¹⁴⁸ The beneficiary of a reduced sentence must meet six conditions, including handing over illegally obtained assets to the authorities. If the prosecutor believes that the defendant has not been honest in his confession, he must request a hearing within twenty-four hours, file charges, and conclude his investigation within sixty days.¹⁴⁹ However, if the defendant accepts responsibility for the crimes for which he is being investigated, the prosecutor sends all the charges to the judge, who must present a verdict within ten days; no investigation is held.¹⁵⁰ If a prosecutor later discovers that the defendant was not being fully truthful, the defendant still faces the same sixty-day prosecution. Moreover, the defendant has the right to ask for a reduced sentence, or even no sentence. If the defendant has already served time in prison, that time can count toward any new prison sentence.¹⁵¹

Even if defendants are found guilty of serious crimes, their sentences are likely to be inadequate. The JPL does not provide a minimum sentence, yet it does state a maximum sentence of only eight years.¹⁵²

Another procedural problem is the way in which the JPL addresses reparations. An administrative body determines the amounts of reparations to be paid by perpetrators to victims.¹⁵³ Nearly every Colombian believes that victims have a right to receive reparations. Victims play no part in the peace and justice process, however, and they have no guarantee of compensation. Individuals found guilty of committing atrocities are merely requested to hand

147. Press Release, Amnesty, *Colombia: President Uribe Must Not Ratify Impunity Law*, July 13, 2005, available at <http://web.amnesty.org/library/Index/ENGAMR230212005>.

148. Colombian Comm’n of Jurists, *Without Any Guarantee of the Right to Truth*, June 14, 2005, available at http://www.icj.org/IMG/pdf/sobre_verdad_ENG.doc.pdf.

149. See *id.*; see also *Between Peace and Justice; Colombia*, ECONOMIST, July 23, 2005, at 49.

150. See Colombian Comm’n of Jurists, *supra* note 148.

151. *Id.*

152. *Colombia: Human Rights Groups Criticize “Peace and Justice” Process to Negotiate with Paramilitaries*, NOTISUR S. AM. POL. & ECON. AFF., June 17, 2005.

153. See International Crisis Group, *supra* note 129, at 8.

over illegally acquired funds; there are no safeguards to stop them from hiding such assets.¹⁵⁴ A victim has no legal recourse to obtain reparations if the defendant is not forthcoming.¹⁵⁵ As one victim's family member said, "This law tries to simulate truth, justice and reparations, but what it really offers is impunity."¹⁵⁶

Colombia's conflict is far from over. The JPL has had a polarizing effect by aligning the government with right-wing paramilitaries. By providing immunity to human rights offenders without addressing the needs of victims, the JPL also effectively consolidates the power of the paramilitaries over the country's politics. There is strong evidence that the demobilized paramilitaries have used force, intimidations and bribery to gain congressional seats.¹⁵⁷ The legacy of, and the political and economic pressure from, the paramilitary groups are powerful electoral weapons. It is estimated that the AUC may control 30-35% of the Colombian Congress.¹⁵⁸ These lawmakers should be forced to explain their collusion with right-wing militias.

The experience of Colombia's neighbor to the south, Argentina, offers hope for an approach more likely to produce accountability and justice. According to one estimate, "up to 30,000 political opponents of the government were kidnapped, detained, and later executed during seven years of military rule" between 1976 and 1983."¹⁵⁹ On June 14, 2005, the Argentine Supreme Court struck down two amnesty laws passed by that country's Congress in 1986 and 1987 to protect military officers who committed atrocities.¹⁶⁰ Thus, members of the Argentine military junta who were responsible for more than 10,000 disappearances had their immunity revoked.¹⁶¹ The Court cited international conventions to which Argentina is a party as overriding the immunity law.¹⁶² Argentina is now preparing to try more than 200 people, including top military officials, for their complicity in

154. Colombian Comm'n of Jurists, *With No Guarantee of the Right to Reparation*, June 20, 2005, available at http://www.icj.org/IMG/pdf/sobre_reparacion_ENG.doc.pdf.

155. *Id.*

156. See Forero, *supra* note 132.

157. See International Crisis Group, *supra* note 129, at 5.

158. Sibylla Brodzinsky, *Paramilitaries Still Sway Colombian Votes*, CHRISTIAN SCI. MONITOR, Mar. 10, 2006, at 7; see also *Colombia: Presidential Politics and Peace Prospects*, *supra* note 128.

159. *Argentina to Open Secret Archives*, BBC NEWS, Mar. 23, 2006, available at <http://news.bbc.co.uk/1/hi/world/americas/4836128.stm>.

160. See Human Rights Watch, *Argentina: Amnesty Laws Struck Down*, June 11, 2005, available at <http://www.hrw.org/english/docs/2005/06/14/argent1119.htm>.

161. See *Argentina: Amnesty Laws Declared Unconstitutional, Potential for Human Rights Prosecutions Expands*, NOTISUR S. AM. POL. & ECON. AFF., June 24, 2005.

162. *Id.*

the atrocities.¹⁶³ Even former President Isabel Peron has been arrested in connection with her role in these atrocities. Argentina's current President, Néstor Kirchner, has stated that there could be "no reconciliation if any trace of impunity remained."¹⁶⁴ The perseverance of victims and their families played an important role in reversing the Argentine government's policy of impunity. Requests for the extradition of Argentine military officers by such countries as Spain, France, Germany, and Italy also created pressure to reverse the policy.¹⁶⁵

D. Guatemala

Guatemala still suffers from the effects of an internal armed conflict that has been called the region's most brutal.¹⁶⁶ It is estimated that as many as 200,000 people were killed or disappeared during the 36-year civil war that ended in 1996.¹⁶⁷ Few families of Guatemala's Indian community were spared from these atrocities. The war was fought between anti-communist government forces and the leftist rebel group called the Guatemalan National Revolutionary Unit.¹⁶⁸ Government forces were responsible for the vast majority of killings.¹⁶⁹ More than 10 years after the 1996 peace accords, Guatemala has made little progress toward securing justice and protecting human rights and the rule of law. Moreover, according to one human rights organization, "[o]ngoing acts of political violence and intimidation threaten

163. Ian Black, *Thirty Years On Argentina Still Tries To Come to Terms with its "Dirty War,"* GUARDIAN, Mar. 22, 2006, at 23.

164. *Argentina Marks Coup Anniversary*, BBC NEWS, Mar. 24, 2006, available at <http://news.bbc.co.uk/2/hi/americas/4839896.stm>.

165. Amnesty International, *Report 2001: Argentina* (n.d.), available at <http://www.web.amnesty.org/web/ar2001.nsf/webamrcountries/ARGENTINA?OpenDocument>.

166. See Human Rights Watch, *World Report 2005: Guatemala* (n.d.), available at <http://www.hrw.org/english/docs/2005/01/13/guatem9849.htm>.

167. See Guatemalan Commission for Historical Clarification, *Guatemala: Memory of Silence* (n.d.), at Conclusions ¶2, available at <http://shr.aaas.org/guatemala/ceh/report/english/toc.html>; Editorial, *A Visit to Guatemala's Past*, N.Y. TIMES, Sept. 12, 2005, at A20.

168. See Mark Freeman & Priscilla B. Hayner, *The Truth Commissions of South Africa and Guatemala*, in RECONCILIATION AFTER VIOLENT CONFLICT 40 (David Bloomfield, Teresa Barnes & Eric Huyse eds., 2003), available at http://www.idea.int/publications/reconciliation/upload/reconciliation_chap08cs-safrica.pdf.

169. See *Guatemala: Memory of Silence*, supra note 167. The Commission for Historical Clarification concluded that 93 percent of the violations documented were attributable to state forces and related paramilitary groups. *Id.*

to reverse the little progress that has been made toward promoting accountability in recent years.”¹⁷⁰

The Guatemalan Commission for Historical Clarification (Comisión para el Esclarecimiento Histórico) began its work in 1997.¹⁷¹ The Commission operated for a total of eighteen months with a mandate to “clarify” the human rights violations and acts of violence committed between 1962 and 1996 in connection with the armed conflict.¹⁷² While the Commission’s proceedings were confidential, it publicized its mandate and invited interested parties to testify.¹⁷³

Despite significant challenges, the Commission visited almost 2,000 communities and registered 7,338 testimonies.¹⁷⁴ With the assistance of the National Security Archive in the United States, it also obtained thousands of declassified U.S. government documents.¹⁷⁵ Considerably less information was forthcoming from the Guatemalan armed forces, although the complete files of the National Police were found.¹⁷⁶ These files, with names such as “Disappeared People 1989” and “Kidnapped Children 1993,” contain key evidence that can be used to try those responsible for major crimes.¹⁷⁷

170. Human Rights Watch, *Human Rights Overview: Guatemala* (n.d.), available at <http://www.hrw.org/english/docs/2006/01/18/guatem12208.htm>.

[T]he people responsible for these acts of intimidation are affiliated with private, secretive, and illegally armed networks or organizations, commonly referred to in Guatemala as “clandestine groups.” . . . The Guatemalan justice system, which has little ability even to contain common crime, has so far proven no match for this powerful and dangerous threat to the rule of law.

Id.

171. See Freeman & Hayner, *supra* note 168, at 141.

172. See *id.* at 142.

173. *Id.*

174. *Id.*

175. See *id.* For example, Commission staff sometimes met persons in isolated communities who were not even aware that the civil war was over and who assumed that the Commission staff members were guerrillas. *Id.* These documents are summarized and compiled in Kate Doyle, *The Guatemalan Military: What the U.S. Files Reveal*, June 1, 2000, at <http://www.gwu.edu/nsarchiv/NSAEBB/NSAEBB32/index.html>. Additional relevant materials from the National Security Archive are at <http://www.gwu.edu/%7Ensarchiv/NSAEBB/index.html#Latin%20America>.

176. The files date back to 1902 and therefore cover Guatemala’s 36-year civil war. See Kate Doyle, *The Guatemalan Police Archives*, Nov. 21, 2005, at <http://www.gwu.edu/%7Ensarchiv/NSAEBB/NSAEBB170/index.htm>; Eduardo Garcia, *Rescued Police Files Hold Guatemala’s Dark Secrets*, REUTERS, July 22, 2005, available at <http://www.vanderbilt.edu/AnS/Anthro/GSN/september.doc>; Ginger Thompson, *Mildewed Police Files May Hold Clues to Atrocities in Guatemala*, N.Y. TIMES, Nov. 21, 2005, at A1.

177. See Garcia, *supra* note 176.

The Commission's report, released in February 1999, describes acts of extreme cruelty and notes that a "climate of terror" permeated the country.¹⁷⁸ One of the Commission's strongest conclusions was that, on the basis of the patterns of violence in the four worst-affected regions of the country, agents of the state committed acts of genocide in the years 1981-1983 against groups of Mayan people.¹⁷⁹ The Commission was absurdly precluded from naming those responsible. However, it did report that the majority of human rights violations occurred "with the knowledge or by order of the highest authorities of the State."¹⁸⁰

The Commission's report includes a recommendation to hold those accountable who committed crimes. Such individuals "should be prosecuted, tried and punished, particularly [for] crimes of genocide, torture and forced disappearance"¹⁸¹ The report stresses the doctrine of command responsibility and the need to prosecute "those who instigated and promoted" the crimes.¹⁸² Three weeks after the release of the final report, however, the government responded that it considered all relevant matters in the Commission's recommendations to have been sufficiently addressed in the 1994 peace accord that led to establishment of the Commission.¹⁸³

In the view of one human rights group,

Guatemalans seeking accountability for these abuses face daunting obstacles. The prosecutors and investigators who handle these cases receive grossly inadequate training and resources. The courts routinely fail to resolve judicial appeals and motions in an expeditious manner, allowing defense attorneys to engage in dilatory legal maneuvering. The army and other state institutions fail to cooperate fully with investigations into abuses committed by current or former members. The police do not provide adequate protection to judges, prosecutors, and witnesses involved in politically sensitive cases.¹⁸⁴

178. *Guatemala: Memory of Silence*, *supra* note 167, at Conclusions ¶46.

179. *Id.* at Conclusions ¶¶85-88, 108-123.

180. *Id.* at Conclusions ¶105.

181. *Id.* at Recommendations ¶47.

182. *Id.* at Recommendations ¶48.

183. *See Freeman & Hayner*, *supra* note 168, at 143.

184. Human Rights Watch, *supra* note 170.

While the Commission documented 626 massacres, only one has led to successful prosecutions in the Guatemalan courts.¹⁸⁵

Life in Guatemala remains largely unchanged. There has been no renewal of the conflict, but its root causes persist – “pervasive insecurity, lack of justice, racism, and extreme and widespread poverty.”¹⁸⁶ Furthermore, limited dissemination of the Commission’s final report means that some communities that suffered the worst abuses are largely unaware of the Commission’s work.¹⁸⁷ Meanwhile, those who committed the atrocities live comfortably and remain immune from the reach of the law.

Although criminal justice is a fundamental requirement for victims of atrocities to achieve closure, thousands of Guatemalans are forced, painfully, to wait.¹⁸⁸ Without justice, any effort to heal affected families, communities, and ethnic groups will fail. Rigoberta Menchú Tum – a Quiché Mayan activist for the rights of indigenous people, survivor of the war in Guatemala, and winner of the Nobel Peace Prize in 1992 – aptly summed things up when she said, “Our sorrow will not end until there is justice. Only justice will heal these wounds.”¹⁸⁹

E. Liberia

In March 2003, the Special Court for Sierra Leone, a mixed *ad hoc* tribunal established by the U.N. Security Council,¹⁹⁰ indicted former Liberian President Charles Taylor on seventeen counts of crimes against humanity.¹⁹¹ The Court was designed to reverse disastrous policies that were implemented earlier in an effort to end Liberia’s long-standing conflict. The 1999 Lomé

185. *Id.* In 2004, a lieutenant and thirteen soldiers were found guilty of the 1995 Xamán massacre in which eleven civilians were murdered; they were sentenced to 40 years in prison each. By contrast, the prosecution of former military officers allegedly responsible for the 1982 Dos Erres massacre, in which 162 people died, has been held up for years by dilatory motions by the defense. *Id.*

186. Freeman & Hayner, *supra* note 168, at 143.

187. *Id.*

188. See Tim Willard, *Guatemalan Government’s Apology Leaves Unanswered Questions*, UPSIDE DOWN WORLD, July 25, 2005, available at <http://www.upsidedownworld.org/guatemala-apology.htm>.

189. Carol Amoruso, *Truth, Justice and Reconciliation in Guatemala*, IMDIVERSITY.COM (n.d.), at http://www.imdiversity.com/Villages/Hispanic/politics_law/amoruso_guatemala_reconciliation.asp.

190. S.C. Res. 1315, ¶14, U.N. Doc. S/RES/1315 (Aug. 14, 2000).

191. See Press Release, Special Court for Sierra Leone Office of the Prosecutor, *Chief Prosecutor Announces the Arrival of Charles Taylor at the Special Court*, Mar. 29, 2006.

Peace Accord had provided a blanket amnesty for all combatants, including those who committed gross violations of international humanitarian law.¹⁹²

In establishing the Special Court, the Security Council reaffirmed that “persons who commit or authorize serious violations of international humanitarian law are individually responsible and accountable for those violations and that the international community will exert every effort to bring those responsible to justice in accordance with international standards of justice, fairness and due process of law.”¹⁹³

In hopes of ending the violence, Taylor, with support from the United States, was granted asylum in Nigeria in August 2003.¹⁹⁴ Even though the principal intent behind granting Taylor asylum was to deter the brutal massacres of civilians under Liberia’s government, the Nigerian government refused to transfer Taylor to the Special Court for Sierra Leone without proof that he was still actively involved in criminal activities.¹⁹⁵

Yet there was always ample proof that Charles Taylor was threatening to destabilize Liberia and neighboring states.¹⁹⁶

First, much of his current capital flow is channeled into undermining Liberia’s fragile peace process. Special Court investigators believe he is giving money to at least nine of the eighteen parties vying in the October 2005 presidential elections. Political leaders inside Liberia, including staunch Taylor allies, and other investigators, corroborate these charges. Taylor is also thought by the Court to have funded violent demonstrations in Monrovia, Liberia’s capital, in October 2004.

Second, Taylor appears to be funding, training, and arming a small but potent military force that posed a significant threat to the stability of West Africa and beyond. There is evidence that Taylor has given hundreds of thousands of dollars to two long-standing, loyal military commanders, with instructions to recruit several hundred combatants among the floating population of experienced fighters left over from the region’s wars.

Third, Taylor has been publicly accused by the Special Court of involvement in an assassination attempt on January 19, 2005, against

192. Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, Sierra Leone-RUSFL, June 3, 1999.

193. S.C. Res. 1315, *supra* note 190, ¶6.

194. See Karl Vick, *Taylor Resigns, Leaves Liberia*, WASH. POST, Aug. 12, 2003, at A1.

195. See Michael A. Fletcher, *Nigerian Leader Says He Won’t Turn Taylor Over for Trial*, WASH. POST, May 6, 2005, at A20.

196. See, e.g., Dino Mahtani, *Taylor Accused Over Attempt To Kill Guinea Leader*, FIN. TIMES (London), Apr. 27, 2005, at 9.

Lansana Conté, the Guinean President, in retaliation for Conté's support of the rebel groups, Liberians United for Reconciliation and Democracy (LURD) and the Movement for Democracy in Liberia (MODEL), that precipitated Taylor's fall from power in 2003. The attempt failed when the wrong car was hit by gunfire in Conakry, the capital of Guinea.¹⁹⁷

Members of the international community, including the U.N. Special Representative for Liberia, described Taylor's activities as a "clear and present danger to Liberia, West Africa, and the international peace and security generally."¹⁹⁸

By continuing to harbor and protect a war criminal who was the principal leader behind atrocities in Sierra Leone, Liberia, and throughout West Africa, Nigeria compromised the mandate of the Special Court – to hold responsible individuals accountable in order to bring peace and stability to the region. Undoubtedly, this was the reason the U.N. Security Council voted unanimously to authorize U.N. peacekeepers to arrest Charles Taylor if he returned to Liberia.¹⁹⁹

Allowing a demagogue like Taylor to remain free was a mockery of justice. Many wanted him brought before the Special Court, seeing his trial

197. Coalition for International Justice, *Following Taylor's Money: A Path of War and Destruction*, May 2005, at 4, available at <http://allafrica.com/peaceafrica/resources/view/00010642.pdf#search=%22%22Following%20Taylor's%20Money%22%22>. Charles Taylor had access to private lines of communication via telephone and internet, private transportation service, and banking services in West Africa. Much of the money he received from insiders in Liberia was sent to him via courier to Calabar, Nigeria, where he lived. The Nigerian government did not pay much attention to his visitors. Regarding money coming from countries other than Liberia, unidentified young women or spouses of Taylor's close companions were used to travel back and forth to Calabar to transfer the money, as most of his companions were on the United Nations travel ban list. *Id.* at 6-7.

Through two of his most trusted field commanders, Taylor continued to fund a group of armed fighters. These two commanders, "Coco" Dennis and Adolphus Dolo, received significant amounts from Taylor. In addition, Taylor oversaw the recruiting of several hundred armed fighters from a group of veterans of the region's wars. These combatants were recruited in the conflict areas of Liberia, Guinea, and Côte d'Ivoire, and they received regular payments while being told to prepare for undisclosed missions. Taylor reportedly believed that regional instability would help him regain power in Liberia or at least establish shelter there for him. *Id.* at 15. He apparently also believed that such instability would help to remove the government of President Conté. *Id.* at 15-16.

198. *Id.* at 4; see also Ken Shulman, Op-Ed., *The Butcher and the Ballot*, INT'L HERALD TRIB., Oct. 7, 2005, at 6; Lydia Polgreen, *In Liberia, a Vote of Confidence in Peace*, INT'L HERALD TRIB., Oct. 4, 2005, at 2.

199. S.C. Res. 1638, U.N. Doc. S/RES/1638 (Nov. 11, 2005); see Dept. of Public Information, U.N. Security Council, Security Council Includes Former Premier's Apprehension, Transfer to Special Court in Mandate of United Nations Mission in Liberia, Nov. 11, 2005.

as key to achieving justice and political stability in the region.²⁰⁰ Calls for Taylor's extradition, including some from this author, were always consistent and clear.²⁰¹

At first the country's newly elected President, Ellen Johnson-Sirleaf, stated that prosecuting Charles Taylor was not a priority for her new government.²⁰² Reports that Liberia's new government had requested the extradition of Taylor were denied.²⁰³ Finally, under international pressure, President Johnson-Sirleaf asked Nigeria to extradite Taylor to face war crimes charges in Sierra Leone.²⁰⁴ On April 3, 2006, Charles Taylor stood in front of the Special Court for Sierra Leone in Freetown and faced eleven counts of crimes against humanity.²⁰⁵

F. Afghanistan

In 2004, the Afghanistan Independent Human Rights Commission finalized the report on Afghans' attitudes toward human rights violations in the country during 1978-2001.²⁰⁶ These violations included large-scale massacres, disappearances, summary executions, the killing of hundreds of thousands of civilians, and the displacement of at least half a million people.²⁰⁷ According to the report,

Almost everyone had been touched by this violence in some way. When . . . 4,151 Afghans [were asked] as part of [a] survey whether they had been personally affected by violations during the conflict,

200. See *Taylor's Extradition Key to Peace*, ANALYST (Monrovia), Mar. 14, 2006, available at http://www.analystliberia.com/81_csos_march14.html#taylor; John E. Leigh, Op-Ed., *Try Charles Taylor in Africa*, INT'L HERALD TRIB., Apr. 17, 2006, at 8; *Rights Activists Renew Call for Taylor's Turnover*, ANALYST (Monrovia), Mar. 7, 2006, available at http://www.analystliberia.com/right_activists_march7.html.

201. See, e.g., Ise-Oluwa Ige, *Government Should Try Charles Taylor or Hand Him Over – IBA Chief*, VANGUARD (Lagos), December 3, 2004, available at http://www.justiceinitiative.org/db/resource2?res_id=102462.

202. See *Taylor "Not Priority" for Liberia*, BBC NEWS, Jan. 27, 2006, available at <http://news.bbc.co.uk/2/hi/africa/4655186.stm>.

203. See *Liberia Denies It Requested Taylor Extradition*, REUTERS, Mar. 13, 2006.

204. See Warren Hoge, *Liberian Seeks Extradition of Predecessor for Atrocities Trial*, N.Y. TIMES, Mar. 18, 2006, at A4.

205. See Katherine Houreld, *Ex-President Is Defiant as He Faces Trials for War Crimes*, TIMES (London), Apr. 4, 2006, at 34; *Charles Taylor, A Big Man in a Small Cell*, ECONOMIST, Apr. 6, 2006.

206. AFGHANISTAN INDEP. HUMAN RIGHTS COMM'N, *A CALL FOR JUSTICE: A NATIONAL CONSULTATION ON PAST HUMAN RIGHTS VIOLATIONS IN AFGHANISTAN* (n.d.), available at http://www.aihrc.org.af/Rep_29_Eng/rep29_1_05call4justice.pdf.

207. *Id.* at 4.

69 percent identified themselves or their immediate families as direct victims of a serious human rights violation during the 23-year period.²⁰⁸

Nearly 95 percent of those polled said that accountability for these crimes was either “very important” or “important.”²⁰⁹ Two-thirds of them said that bringing the perpetrators to justice would “increase stability and strengthen security.”²¹⁰

Nevertheless, many of the commanders and political leaders accused of committing atrocities in Afghanistan are now officials in the Afghan government serving in high-level positions, including the new Afghan parliament.²¹¹ The government’s talk about establishing a special war crimes court is so far just talk. In the eyes of the government “stability” must come first.²¹² Trials, the argument goes, “will do little but stir trouble and exacerbate old inter-ethnic tensions, derailing the drive for national unity.”²¹³ To date, only one individual, Asadullah Sarwari, a former Afghan intelligence chief, has been tried for war crimes.²¹⁴

Patricia Gossman, director of the Afghanistan Justice Project, observes:

Afghanistan’s leaders, and their American supporters, prefer for now that the victims of . . . the past remain buried, lest it imperil “stability.” But it is a vicious circle: Efforts to bury the past aggravate the very security risks cited as reasons to avoid addressing the past. In Afghanistan, those who benefit most from the international community’s silence on accountability for war crimes include many powerful figures with links to criminal or extremist networks, or both What Afghans want from the international community is assistance in disclosing the truth. As long as the truth

208. *Id.* at 8.

209. *Id.* at 75.

210. *Id.*

211. See Afghanistan Justice Project, *Casting Shadows: Crimes Against Humanity: 1978-2001* (2005), at 4-5, at <http://afghanistanjusticeproject.org/warcrimesandcrimesagainsthumanity19782001.pdf#search=%22%22afghanistan%20justice%20project%22%22>; *Where’s the Justice?*; *Afghanistan*, THE ECONOMIST, Jan. 21, 2006, at 43; Carlotta Gall, *Return of Former Communists Stirs Up Afghan Elections*, N.Y. TIMES, Sept. 5, 2005, at A3.

212. See *Where’s the Justice?*, *supra* note 211, at 43.

213. *Id.*

214. Abdul Waheed Wafa & Carlotta Gall, *Ex-Afghan Spy Chief Is Sentenced to Death*, N.Y. TIMES, Feb. 26, 2006, §1, at 12.

is buried in Afghanistan, any hope for the future will be jeopardized.²¹⁵

Continuing impunity for military and political leaders in Afghanistan is damaging efforts to establish a government there based on the rule of law. Some say the failure to prosecute human rights abusers, including the warlords who helped the United States drive out the Taliban, “is a stain on the international community’s efforts to rebuild Afghanistan and is sowing the seeds of future turmoil.”²¹⁶ The United States helped put the warlords back in power. “Now America and its allies need to act fast to ensure that these same warlords do not destroy what has been accomplished so far.”²¹⁷

The prospects for justice are not good. Afghanistan’s lower house of Parliament has recently passed a resolution granting full immunity for atrocities committed during the past 25 years of war.²¹⁸

II. POLITICAL WILL AND POLITICAL PRESSURE – THE KEY ENFORCEMENT INGREDIENTS IN COMBATING IMPUNITY

In the international legal system, just as in any domestic legal system, an effective enforcement mechanism to hold individuals accountable for war crimes is a prerequisite for achieving justice, peace, and security. Without this mechanism to impose individual accountability, grievous crimes go unpunished and may continue, and impunity becomes the norm.

But there can be no enforcement if there is a lack of political will. International and regional war crimes tribunals – the ICTY, ICTR, ICC, East Timor Court, and Special Court for Sierra Leone – have no armies, no police force, and no meaningful mechanisms to enforce their judgments and rulings. They are completely dependent on the will of national governments and the international community to uphold their decisions. These tribunals also lack the authority to require local law enforcement personnel to enforce their

215. Patricia Gossman, Op-Ed., *A Setback for Afghan Justice: Karzai’s Error*, INT’L HERALD TRIB., May 6, 2004, at 8. “The Afghanistan Justice Project is staffed primarily by Afghan volunteers and legal experts. . . . The staff is diverse and includes men and women from all of the countries [sic] major ethnic groups, working in different regions of the country.” Afghanistan Justice Project (n.d.), at <http://www.afghanistanjusticeproject.org/organization.htm>.

216. Daniel Cooney, *Afghanistan Weighs Launching Truth Panel*, ASSOC. PRESS, July 18, 2005.

217. Peter Bouckaert & Saman Zia-Zarifi, Op-Ed., *For the Sins of the Taliban*, WASH. POST, Mar. 20, 2002, at A33.

218. *See Afghan Assembly Grants Immunity for War Crimes*, REUTERS, Feb. 1, 2007.

indictments and sentences.²¹⁹ The following three case studies illustrate the problem.

A. *Former Yugoslavia*

If there is no political will within a country, political pressure must be brought to bear from outside. The experience of the ICTY shows the result of a failure of domestic political will and the need for outside “assistance.” During its initial year of operation, the tribunal was generally stymied by the ambivalence of key countries, including the United States.²²⁰ The North Atlantic Treaty Organization (NATO), for example, was unwilling actively to pursue indicted war criminals still living in the former Yugoslavia. It was not until 1997 that NATO altered its position and began taking a more aggressive approach to apprehending defendants.²²¹

While living in the former Yugoslavia in the 1980s, I was struck by the partisan, nationalistic myths that persisted among the different nationalities (Croats and Serbs) regarding their respective roles in atrocities committed during World War II. Unresolved war crimes from that earlier era helped to feed the Serbian nationalist movement in the 1980s and 1990s,²²² which in turn produced the worst atrocities on European soil since World War II.

For more than a decade since those atrocities were committed, the Serbian government maintained a “non-cooperation” policy with the ICTY. The country adopted a “Milosevic-era, nationalist mindset,” refusing even to acknowledge Serbia’s role in the crimes.²²³

Serbia has simply lacked the political will to tackle the difficult but crucial issue of accountability.²²⁴ Many government officials believe there is nothing for which local citizens accused of war crimes should be held accountable; in the eyes of these officials, those accused are Serbian heroes.²²⁵ For example, the Serbian government has refused to investigate, or even acknowledge, the cremations by Serbian police and security forces of more than 710 bodies found in a mass grave at a police training facility near Belgrade.²²⁶ The government’s support of domestic war crimes trials has been

219. Interview with Bartram Brown, *supra* note 5.

220. Interview with David Tolbert, *supra* note 5.

221. Interview with Justice Richard Goldstone, *supra* note 5.

222. See International Crisis Group, *Update Briefing, Serbia: Spinning its Wheels*, May 23, 2005, at 4.

223. See *id.* at 3.

224. See Mark S. Ellis, *Coming to Terms With Its Past – Serbia’s New Court for the Prosecution of War Crimes*, 22 BERKELEY J. INT’L L. 168 (2004).

225. See *id.* at 168.

226. See International Crisis Group, *supra* note 222, at 3.

sporadic, at best. There have been only a handful of “low-level” convictions.²²⁷

Srebrenica stands as the most perverse example of Serbia’s inaction regarding suspected war criminals. The Srebrenica massacre took place in 1995. Approximately 7,700 Bosnian Muslims reportedly were slain by more than 17,000 Bosnian Serbs.²²⁸ For the international community, Srebrenica was “a colossal collective and shameful failure.”²²⁹

For more than a decade, Radovan Karadzic, the malevolent wartime leader of the Bosnian Serbs, and General Ratko Mladic, his military commander – both indicted for their roles in the Srebrenica massacre – have avoided capture and are being protected by the Serbian government.²³⁰ One Yugoslav expert stated, “I can’t believe that the whereabouts of Mladic and Karadzic are a secret, either to the Serbian government or from the UN and NATO forces. It is likely that even the intelligence agencies of western governments can identify their whereabouts.”²³¹ The international community must accordingly bear some responsibility for this injustice. Justice Richard Goldstone has noted, “NATO failed in 1995 and 1996 to apprehend the two men – there was no international political will to do it.”²³² The failure to bring both men to justice has caused a rift in the local community, destabilized Bosnia, weakened the ICTY’s mandate, and hindered the restoration of peace and security in the region.²³³

Outside political pressure can be effective when utilized, however. The eventual arrest of former Yugoslav President Slobodan Milosevic in 2001 was a milestone in the use of such pressure. Milosevic’s apprehension and transfer to the ICTY deprived him of his power base in Serbia and prevented him from directly manipulating the country’s political environment.²³⁴ It also prevented him from overseeing an empire of organized crime that infected the entire society.²³⁵ His apprehension was the first step in bringing normalcy back to Serbia.

Serbian illusions about Milosevic collapsed when Serbs were forced in 2005 to acknowledge a videotape, presented at Milosevic’s trial in The

227. *See id.* at 3-4.

228. *See* Nicholas Wood, *New Trials Expected over Srebrenica Killings*, INT’L HERALD TRIBUNE, Oct. 7, 2005, at 4.

229. *See* Daria Sito-Sucic & Maja Zuvella, *Srebrenica Recalled with Grief and Shame*, WASH. POST, July 12, 2005, at A14 (quoting Javier Solana, EU chief of foreign policy).

230. *See* Nicholas Wood & David Rohde, *10 Years After Srebrenica, Many Questions*, INT’L HERALD TRIB., July 8, 2005, at 3.

231. Interview with Stuart Alford, *supra* note 5.

232. Interview with Justice Richard Goldstone, *supra* note 5.

233. *Id.*

234. Interview with David Tolbert, *supra* note 5.

235. *Id.*

Hague, showing the Srebrenica massacre.²³⁶ Thus, Serbs had to confront their own culpability in the worst massacre in Europe since the Holocaust.²³⁷ When Milosovic died on March 12, 2006, most Serbs responded to his death with silence.²³⁸

Milosevic's arrest and trial seemed to encourage a new, better coordinated approach to Serbia by the world community.²³⁹ The European Union (EU) made clear that Serbia would not be admitted to EU membership unless it fully cooperated in handing over other indicted war criminals to the ICTY.²⁴⁰ The United States suspended aid to Serbia in 2005 because of its failure to cooperate with the Tribunal.²⁴¹ As ICTY Prosecutor Carla Del Ponte noted, "Croatia and Serbia and Montenegro . . . have been cooperating with the tribunal only thanks to the international pressure."²⁴²

But continued pressure from both the EU and the United States for Serbian cooperation with the ICTY is essential. If the EU begins membership talks with Serbia while Mladic is still at large, this would gravely compromise the prospect of his arrest anytime soon. Such talks could be regarded as a passport to impunity.²⁴³

This is not to say that Serbian nationalism has disappeared, nor that the Serbian people have stopped denying that Serb forces committed human rights violations during the wars in former Yugoslavia. Getting Serbian society to accept responsibility for these violations will take at least a generation. After all, it took several generations following the judgments of the Nuremberg trials for the German people fully to acknowledge their complicity in Nazi war crimes.²⁴⁴ Yet we can see progress in the fact that five members of a paramilitary group were charged by Serbian officials with crimes committed during the 1995 massacre at Srebrenica; this was the first time Serbs have faced war crimes charges for the massacre in a Serbian

236. See Roger Cohen, *Nationalist Exploited Notion That He Was Acting To Defend the Serbs*, INT'L HERALD TRIB., Mar. 13, 2006, at 8.

237. See David Kaye, *Don't Bury the Hague with Milosevic*, INT'L HERALD TRIB., Mar. 14, 2006, at 6.

238. See Judy Dempsey & Nicholas Wood, *Resolving Problems in Balkans Gets Harder*, INT'L HERALD TRIB., Mar. 13, 2006, at 1.

239. International Crisis Group, *supra* note 222, at 1-2.

240. *Id.* at 1.

241. *Id.*

242. Pilar Wolfsteller, *EU Must Push Serbia, Croatia on Suspects – Del Ponte*, REUTERS, Sept. 1, 2005; see also *Balkan War Crimes Pressure on EU*, BBC NEWS, Sept. 1, 2005; see also James Kanter, *EU Threatens to Freeze Talks with Serbia*, INT'L HERALD TRIB., Feb. 28, 2006 at 3.

243. Interview with David Tolbert, *supra* note 5.

244. *Id.*; see also Walter Kalin, Op-Ed., *What Remains To Be Done in the Balkans*, INT'L HERALD TRIB., Dec. 23, 2005, at 8.

domestic court.²⁴⁵ In addition, Serbia has charged eight police and state security officers with war crimes committed in Kosovo in 1999.²⁴⁶

Political pressure is also being brought to bear against Croatia. Croatia's keen desire to join the EU was signaled by its willingness to negotiate a Stabilization and Association Agreement as the first step toward EU membership. The EU Commission has made it clear, however, that accession is conditioned on Croatia's full cooperation with the ICTY. As Olli Rehn, EU Enlargement Commissioner, put it,

The Commission has delivered its part of the job in timely fashion. Now it is up to the Croatian authorities to prove that they fully cooperate with the tribunal in The Hague. If the Commission were to give its recommendation on the basis of today's information, I could not recommend opening negotiations with Croatia. I trust the Croatian government will take this message seriously. There is no shortcut to Europe, just the regular road, which means the respect of the rule of law.²⁴⁷

The ICTY Prosecutor, Carla Del Ponte, sought to link accession talks to extradition of the indicted fugitive, Ante Gotovina.²⁴⁸ Gotovina, Croatia's most wanted war crimes suspect, was on the run for nearly four years. Like Mladic and Karadzic in Serbia, Gotovina is hailed in Croatia as a war hero. Four out of five Croats view his activities during Croatia's four-year war with Serbia as heroic.²⁴⁹ The EU, however, stood firm in its position that Gotovina must be handed over to the ICTY if Croatia wants EU membership. Luxembourg's Foreign Minister, Jean Asselborn, whose country held the EU presidency, warned, "We are in a crucial moment; . . . [W]e need to see that Croatia is cooperating fully with the international court, that's a very clear

245. See *Serbia: 5 in Video Charged with War Crimes*, N.Y. TIMES, Oct. 8, 2005, at A6.

246. See *Serbian Prosecutor Charges 8 with War Crimes in Kosovo*, VOICE OF AMERICA, Apr. 25, 2006, available at <http://www.voanews.com/english/archive/2006-04/2006-04-25-voa45.cfm?CFID=106904459&CFTOKEN=90099829>.

247. European Commn., *Croatia – One Step Closer to the EU, Provided There Is Full Cooperation with ICTY*, Jan. 31, 2005, available at http://europa.eu.int/comm/commission_barroso/rehn/news/pdf/ip_05_110_en.pdf.

248. See Jamie Cortazzo, *ICTY Prosecutor Calls for EU Pressure on Croatia, Serbia War Crimes Suspects*, JURIST PAPER CHASE NEWSBURST, Sept. 1, 2005, at <http://jurist.law.pitt.edu/paperchase/2005/09/icty-prosecutor-calls-for-eu-pressure.php>.

249. See Ian Traynor, *EU Tells Croatia To Find Fugitive General, or Forget About Joining*, TAIPEI TIMES, Mar. 12, 2005, at 9, available at <http://www.taipeitimes.com/News/editorials/archives/2005/03/12/2003245943>.

and unambiguous message.”²⁵⁰ EU Enlargement Commissioner Olli Rehn added, “If there is no progress from the Croatian side, we are ready to postpone the start of talks.”²⁵¹

The Croatian government has long maintained that it has no information regarding the whereabouts of ICTY indictees within its borders.²⁵² As a result of Croatia’s continued indifference toward the ICTY, the EU has refused even to *begin* accession talks.²⁵³

There are signs, however, that the Croatian government is yielding to political pressure. On October 3, 2005, the ICTY Prosecutor reported that “Croatia is [now] responding in a satisfactory manner to all my requests.”²⁵⁴ On the issue of the Gotovina arrest, the Prosecutor stated that “Croatia has been cooperating fully with us and is doing everything it can to locate and arrest Ante Gotovina.”²⁵⁵ The clearest evidence that political pressure is essential to reversing a government’s policy of impunity was provided by the actual arrest of Ante Gotovina, on December 7, 2005, in the Canary Islands.²⁵⁶

The arrest of Gotovina coincided with domestic war crimes trials in Croatia. A Croatian court found one defendant guilty of killing six prisoners in Eastern Bosnia in July 1995.²⁵⁷

Bosnia, too, has conducted its own war crimes trials. On April 7, 2006, a court there issued its first verdict against a Bosnian Serb for crimes against humanity.²⁵⁸

B. East Timor

In East Timor, a lack of political will sabotaged efforts to hold individuals accountable for atrocities committed in that country.²⁵⁹ The establishment of

250. See *EU Reviews Pressure on Croatia over Fugitive General*, EU BUSINESS, FEB. 21, 2005, available at <http://www.eubusiness.com/Croatia/050221115811.gv563lv4>.

251. *Id.*

252. See *US Pressure on Croatia and Slovenia Undermines Justice*, BBS NEWS, June 10, 2003, available at <http://bbsnews.net/bw2003-06-10a.html>; see also *Human Rights Watch Labels U.S. Pressure about ICC Hypocritical*, SLOVENIA NEWS, June 10, 2003, available at <http://slonews.sta.si/index.php?id=1010&s=43>.

253. See *EU To Review Croatia Candidacy Mid-September*, REUTERS, Sept. 1, 2005.

254. Press Release, Office of the Prosecutor, *Assessment by the Prosecutor of the Co-operation Provided by Croatia* (UN ICTY, JP/MO/1009e), Oct. 3, 2005, available at <http://www.un.org/icty/pressreal/2005/p1009-e.htm>.

255. *Id.*

256. See *Croatian Fugitive General Seized*, BBC NEWS, Dec. 8, 2005, available at <http://news.bbc.co.uk/2/hi/europe/4510122.stm>; see also Nicholas Wood, *Croats Case Offers Guide to Finding Bosnian Serb Fugitives*, N.Y. TIMES, Jan. 2, 2006, at A4.

257. See *Croatian Court Jails Srebrenica Killer*, REUTERS, Dec. 30, 2005.

258. See *Bosnian Serb Found Guilty of War Crimes*, REUTERS, Apr. 7, 2006.

259. See *supra*, text accompanying notes 65-83.

a domestic Ad Hoc Human Rights Court in Indonesia reflected a similar failure of political will there.²⁶⁰ Indictments issued by the UN-backed Court, had neither the political will nor the diplomatic muscle needed to carry them out. This was so despite the existence of a Memorandum of Understanding between UNTAET and the Attorney General of Indonesia requiring Indonesia to ensure effective prosecution, including transfer of suspects.²⁶¹ Furthermore, officials in East Timor were reluctant to issue international arrest warrants for those indicted or to submit such warrants to Interpol.²⁶² Unlike the situation in former Yugoslavia, little international or regional pressure has been brought to bear upon Indonesia to cooperate with the prosecution of human rights violations in East Timor. The result is impunity.²⁶³

Yet the international community does possess influence over the Indonesian government. While Indonesia initially steadfastly refused to allow peacekeepers into East Timor, when the United States and Great Britain announced military aid freezes, the Indonesian government acquiesced.²⁶⁴ Similarly, in West Timor, the Indonesian government acted to stop militia violence there only after a strong U.N. Security Council resolution and threats of economic sanctions.²⁶⁵ Stuart Alford noted, in addition,

Peace hasn't been maintained in East Timor because of the Ad-Hoc Human Rights Court. Peace has been maintained because its people have established their independence and the international community, particularly the international military force, led by Australia, have

260. See *supra*, text accompanying notes 62-64.

261. Memorandum of Understanding Between the Republic of Indonesia and the United Nations Transitional Administration in East Timor Regarding Cooperation in Legal, Judicial and Human Rights Related Matters, Apr. 6, 2000, available at <http://www.etan.org/et2000c/december/10-16/14mou.htm>.

262. See Jill Jolliffe, *UN Blocking Arrest of Wiranto*, SYDNEY MORNING HERALD, Jan. 14, 2004.

263. International pressure from governments and NGOs may have heightened the sensitivity of Indonesia's judicial system to some degree. That country's Supreme Court recently increased the sentence of a major pro-Jakarta militia leader, Eurico Guterres. While 17 Indonesian security officers and government officials had their convictions for atrocities set aside on appeal, Guterres's enhanced punishment is an important step forward. See *Indonesia Top Court Doubles Timor Militiaman's Term*, REUTERS, Mar. 13, 2006.

264. See Anup Shah, *Peacekeeping Began as World Powers Slowly Started to React*, GLOBAL ISSUES, Sept. 10, 2000, at <http://www.globalissues.org/Geopolitics/EastTimor/Intro.asp>.

265. See S.C. Res. 1319, U.N. Doc. S/RES/1319 (Sept. 8, 2000); Human Rights Watch, *Indonesia: Aid Workers Executed in Aceh*, available at <http://hrw.org/english/docs/2000/12/08/indone644.htm>.

ensured that the Indonesians have not returned. That is what has maintained peace – not the Court.²⁶⁶

C. Liberia

For more than three years, the deposed Liberian dictator Charles Taylor lived in exile in Nigeria, avoiding extradition for trial before the U.N.-backed Special War Crimes Court for Sierra Leone for war crimes and crimes against humanity. He remained free because of an internationally brokered deal to provide refuge for him in hopes of ending Liberia's long civil war. Despite an arrest warrant from the Special Court for Taylor, Nigeria's President, Olusegun Obasanjo, refused to comply with an extradition request.²⁶⁷

Upon her election as Liberia's new President in 2006, Ellen Johnson Sirleaf initially refused to seek Taylor's extradition because of her fear of violence and her view that the issue was of "low priority."²⁶⁸ Under intense international pressure, however, including a threat by the U.S. Congress to withhold aid to Liberia if she did not act, President Johnson Sirleaf finally requested Taylor's return.²⁶⁹ International political pressure was also directed at Nigeria.²⁷⁰ Taylor is the first African head of state to appear before the international justice system.

In a further sign of international cooperation in terminating the pernicious policy of immunity, the newly created International Criminal Court (ICC) in The Hague has agreed to allow the Special Court for Sierra Leone to conduct the court proceedings through the ICC.²⁷¹ For Sierra Leone, moving the trial to The Hague could avoid the security risks associated with bringing Taylor to a country that endured a decade-long war which killed tens of thousands of citizens. A trial chamber in The Hague will serve as an extension of the Sierra Leone Court.²⁷²

Once again, it has required not only the moral high ground of international law but also the political will of national governments, as well

266. Interview with Stuart Alford, *supra* note 5.

267. See Lydia Polgreen & Marc Lacey, *Nigeria Will End Asylum for Warlord*, N.Y. TIMES, Mar. 26, 2006, §1, at 11.

268. See Lydia Polgreen, *Nigeria Says Ex-President of Liberia Has Disappeared*, N.Y. TIMES, Mar. 29, 2006, at A3.

269. *Id.*

270. See Lydia Polgreen, *Liberian Seized To Stand Trial on War Crimes*, N.Y. TIMES, Mar. 30, 2006, at A1.

271. See Lydia Polgreen & Marlise Simons, *Sierra Leone Asks To Move Liberian's Trial*, N.Y. TIMES, Mar. 31, 2006, at A7.

272. See *Push on To Move Taylor Trial to Hague*, CNN/ASSOCIATED PRESS, Apr. 4, 2006.

as pressure from the international community, to make the international war crimes tribunals effective in bringing about accountability.

III. THE DOCTRINE OF COMMAND RESPONSIBILITY – THE KEY LEGAL INGREDIENT IN COMBATING IMPUNITY

The previous sections of this article have addressed the legal and political frameworks for combating impunity and enforcing accountability. This section is concerned with the doctrine of command responsibility, a fundamental legal principle upon which the application of international humanitarian law, the effectiveness of international war crimes tribunals, and the willingness of the international community to apply political pressure all are premised. Without this doctrine, the framework of international justice would be an empty shell.

The central purpose of war crimes tribunals is to hold *individuals* accountable for their actions. This especially includes high-ranking military and political decision-makers. The concept of command responsibility is the legal linchpin used to ensure that those who mastermind, incite, or order the commission of atrocities are brought to justice.

The modern doctrine of command responsibility was first enunciated in war crimes cases decided after World War II. In its current form, the doctrine covers both military commanders and civilian leaders.²⁷³

Command responsibility gives rise to criminal liability for two different kinds of actions: (1) *direct responsibility*, when a commander or superior is held liable for ordering unlawful acts, and (2) *imputed criminal responsibility*, when a superior is held liable for a subordinate's unlawful conduct, even when the superior did not order such action.²⁷⁴ Imputed criminal responsibility arises when there is a failure to: (1) prevent the illegal acts; (2) provide measures that would have prevented or deterred these acts; (3) investigate any allegations of such acts; or (4) prosecute those who committed such acts.²⁷⁵

273. The doctrine dates back at least to the 1400s. In 1439, Charles VII of Orléans declared:

The King orders that each captain or lieutenant be held responsible for the abuses, ills and offences committed by members of his company, and that as such as he receives any complaint concerning any such misdeed or abuse, he bring the offenders to justice. . . . If he fails to do so or covers up the misdeed or delays taking action . . . the captain shall be deemed responsible for the offence. . . .

THEODOR MERON, *HENRY'S LAW AND SHAKESPEARE'S WARS* 149 n.40 (1994) (citation omitted).

274. M. CHERIF BASSIOUNI & PETA MANIKAS, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 345 (1996).

275. *Id.*

The laws applicable to military commanders are different from those that apply to civilian leaders. Both, however, incorporate the concept of international criminal and personal responsibility.²⁷⁶ For instance, a civilian leader who is not officially part of the chain of military command, but who acts in a policy-making capacity, can be held responsible for the actions of those who execute the policy.²⁷⁷ The key determining factor is whether the “superior” exercises “effective control” over his or her subordinates.²⁷⁸

The initial effort to codify command responsibility came in the 1907 Hague Convention.²⁷⁹ Article 19 of Convention X provides:

The Commanders-in-chief of the belligerent fleets must see that the above Articles are properly carried out; they will have also to see to cases not covered thereby, in accordance with the instructions of their respective Governments and in conformity with the general principles of the present Convention.²⁸⁰

This measure does not specifically hold a commander personally liable either for ordering an illegal action or for failing to redress a violation committed by a subordinate. These shortcomings were rectified in 1977 in Article 86(2) of Additional Protocol I to the 1949 Geneva Conventions, which provides:

The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from . . . responsibility . . . if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.²⁸¹

276. *Id.* at 346.

277. *Id.* at 349.

278. In line with this thinking, many national criminal laws have incorporated the concept of non-military leaders' criminal responsibility. *Id.* at 369.

279. Leslie C. Green, *War Crimes, Crimes Against Humanity, and Command Responsibility*, NAVAL WAR C. REV., Spring 1997, at 23.

280. Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, art. 19, Oct. 18, 1907, available at <http://www.icrc.org/IHL.nsf/FULL/225?OpenDocument>.

281. Protocol Additional (No. 1), *supra* note 25, art. 86(2).

This more recent provision clearly codifies the doctrine of command responsibility in international law for states parties, and it provides evidence that the doctrine has become part of customary international law.²⁸²

The resolutions and statutes establishing international tribunals have also played a pivotal role in establishing the doctrine of command responsibility as part of customary international law. The statutes of the ICTY and the ICTR acknowledge that a superior can be held criminally liable for a subordinate's illegal actions if the superior had knowledge or reason to know that the subordinate was about to commit a crime and the superior made no effort to prevent the subordinate's actions.²⁸³ Article 7(3) of the ICTY establishes the essential elements of command responsibility:

- (i) the existence of a superior-subordinate relationship;
- (ii) the superior's knowledge or reason to know that the criminal act was about to be or had been committed; and
- (iii) the superior's failure to take necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.²⁸⁴

Under the "reason to know" standard, when a commander has sufficient evidence or information about a subordinate's actions, the commander cannot escape responsibility by arguing pure ignorance of the subordinate's actions.²⁸⁵

The Statute for the Special Court for Sierra Leone incorporates the doctrine of command responsibility, as well.²⁸⁶ So does the ICC Statute, Article 28 of which provides that a military commander or other person in a superior-subordinate relationship can be held criminally responsible for

282. See 2 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* 3778 (2005).

283. See Statute of the ICTY, *supra* note 47, art. 7; Statute of the ICTR, *supra* note 48, art. 6.

284. See ICTY, *supra* note 47, art. 7(3); see also ICTR, *supra* note 48, art. 6(3).

285. See ILIAS BANTEKAS et al., *INT'L CRIMINAL LAW* 109 (2001).

286. See Statute of the Special Court for Sierra Leone, U.N.-Sierra Leone, Jan. 16, 2002, available at <http://www.sc-sl.org/scsl-statute.html>. Article 6 (3) of the Statute, dealing with "Individual criminal responsibility," provides:

The fact that any of the acts referred to in articles 2 to 4 of the present Statute [crimes against humanity, violations of common Article 3 of the Geneva Conventions and of Additional Protocol II, and other serious violations of international humanitarian law] was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

crimes committed by subordinates who were under the “effective control and authority” of the superior.²⁸⁷

Like the statutes of the ICTY and ICTR, the ICC Statute carries a “knowledge standard.” But that standard is stricter, making the superior criminally responsible if he or she “either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes.”²⁸⁸ It thus reinforces the concept that ignorance of a subordinate’s action will not lead to impunity for the superior.

Both the ICTY and the ICTR have been aggressive in applying the doctrine of command responsibility.²⁸⁹ The ICTY has enforced the doctrine

287. See ICC Statute, *supra* note 2, art. 28. The article reads:

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

288. *Id.* art. 28(b)(i).

289. Cases applying the doctrine of command responsibility date at least as far back as the Tokyo trials at the end of World War II. For example, Kuniaki Koiso, a Japanese Prime Minister during World War II, was found guilty of failing to stop the atrocities committed by Japanese troops during 1944. The Japanese Foreign Minister, Koki Hirota, was found criminally responsible for atrocities committed when Japanese forces entered Nanking. He was held personally accountable because he failed to put an end to the atrocities when he was fully aware that they were being committed. See IMTFE Judgment, Chap. X, *Verdicts*, Nov. 1, 1948, available at <http://www.ibiblio.org/hyperwar/PTO/IMTFE/IMTFE-10.html>.

against several notable leaders and commanders for their actions during the war in the former Yugoslavia. In the case of *Prosecutor v. Delalic*, for example, three of four defendants were charged under Article 7(3) of the Statute for the ICTY with criminal responsibility for acts – including torture and the willful killing of civilians – carried out by their subordinates.²⁹⁰ One in particular, Zejnir Delalic, who had authority over the Celebici prison camp, was charged with murder, torture, and other inhumane acts committed against detainees in the camp.²⁹¹ The tribunal concluded that Delalic, along with the other two superiors, Zrdavko Mucic and Hazim Delic, knew or had reason to know that their subordinates were mistreating the detainees, but none took any preventive measures or punished the perpetrators for their inhumane acts.²⁹² The *Delalic* case was important because it stated, unambiguously, that the doctrine of command responsibility extends not only to military commanders but also to individuals in non-military positions of superior authority.²⁹³

Perhaps the most significant case involving command responsibility was the prosecution of the former Yugoslav leader, Slobodan Milosevic, who was charged, beginning in 1999, with crimes against humanity and war crimes committed in Bosnia, Kosovo, and Croatia.²⁹⁴ As the President of the former Yugoslavia at the time of the atrocities, Milosevic was said to be criminally liable for ordering the crimes committed by his subordinates, and for failing to prevent those subordinates from committing crimes.

Within the ICTR proceedings, as well, several high-level leaders have been charged and found guilty under the doctrine of command responsibility. One of the most notable is former Prime Minister Jean-Paul Kambanda, who is the first leader of a government to be convicted by an international court.²⁹⁵ As interim Prime Minister of Rwanda during the 1994 genocides, Kambanda was found guilty of participating in the plans to massacre the Tutsi population, and of using the media to mobilize and provoke the massacres and other atrocities against the Tutsis.²⁹⁶ The Tribunal also found that he failed to take the necessary measures to prevent his subordinates from engaging in

290. *Prosecutor v. Zejnir Delalic*, No. IT-96-21-T, Nov. 16, 1998, at ¶¶5, 330, available at <http://www.un.org/icty/celebici/trialc2/judgement/index.htm>.

291. *Id.* ¶605.

292. *Id.* ¶607(7).

293. *Id.* ¶363.

294. See *ICTY Cases & Judgments* (regularly updated), at <http://www.un.org/icty/cases-e/index-e.htm>.

295. See Sukhdev Chhatbar, *Genocide Convicts To Serve Their Sentences in Mali*, INTERNEWS, Nov. 27, 2001, at <http://www.globalpolicy.org/intljustice/tribunals/2001/1127.htm>.

296. Press Release, *Rwanda Tribunal Hands Down Life Sentence for Crimes of Genocide Committed by Former Rwandan Prime Minister* (United Nations AFR/95 L/2898), Sept. 4, 1998.

the atrocities and that he did not punish those subordinates for their illegal acts.²⁹⁷

Enforcement of the doctrine of command responsibility is key to the effective punishment of human rights violations. It also demonstrates to political and military leaders that they will be held accountable for permitting gross violations of international humanitarian law on their watch.

IV. ASSESSING THE IMPACT OF INTERNATIONAL TRIBUNALS

It would be a mistake to generalize too broadly about the collective effectiveness of war crimes tribunals. It would certainly be too optimistic to assert that the tribunals unambiguously lead to successful reconciliation and restoration of peace in every region. They are not a panacea for society's failings. Each tribunal must be judged on its own record, and each has had both successes and failures. However, based on extensive interviews with experts involved in international justice, and on a review of the current climate in a number of post-conflict countries, we can make a preliminary assessment of the general effectiveness of international tribunals in promoting the accountability necessary to bring peace and stability to previously embattled regions.

It is important to emphasize that the international community has a vested interest in ensuring that crimes against humanity are prosecuted. The desire to avoid impunity for horrific violence is justified by both ethics and law; both humanity and the rule of law are diminished when heinous crimes go unpunished. As Chief U.S. Prosecutor Justice Robert Jackson said in his opening statement at the 1945 Nuremberg trials, "The wrongs which we seek to condemn and punish have been so calculated, so malignant and so devastating, that civilization cannot tolerate their being ignored because it cannot survive their being repeated."²⁹⁸ The duty to prosecute perpetrators is sufficient justification for the establishment of international criminal tribunals. In turn, the tribunals reinforce the idea that "core crimes" affect the interests of the global community. Core crimes threaten the peace and security of humankind, and they shock the conscience of humanity. They are part of *jus cogens*, and they hold the highest position in the hierarchy of international norms and principles. *Jus cogens* norms are thus deemed to be non-derogable. In other words, *jus cogens* principles are so fundamental that

297. *Id.*

298. Justice Jackson's Opening Statement for the Prosecution, Nov. 21, 1945, in II Trial of the Major War Criminals Before the International Military Tribunal, 11/13/45-11/30-45, Nuremberg, at 98-102, available at <http://www.law.umkc.edu/faculty/projects/ftrials/nuremberg/Jackson.html>.

no nation may ignore them or attempt to contract out of them by treaty.²⁹⁹ Genocide, crimes against humanity, and war crimes are all *jus cogens*.³⁰⁰

A central goal of international criminal tribunals is to combat impunity for these core crimes by enforcing accountability. The tribunals' effectiveness in achieving this goal can be evaluated by considering twelve separate, but related, criteria:

(1) To fully achieve reconciliation, peace, and stability in a post-conflict environment requires at least a generation. International criminal tribunals help to counter the resentments, biases, and prejudices of the current generation by shepherding a process of truth, justice, and accountability. If successful, this process allows a society to lay to rest former grievances before they can be assimilated by future generations. In practice, it takes years to evaluate the work of a tribunal, even after that work is completed. As Mathias Hellman, former ICTY Outreach Director, observes, "I think one has to be realistic and one can't expect war crimes tribunals to practice such positive results such as restoration and the maintenance of peace in a short term; it is a long-term objective."³⁰¹

With the passage of time, it has become more apparent that war crimes tribunals do contribute to peace and stability. As Judge Gabrielle Kirk McDonald, past President of the ICTY, notes,

In the ICTY's early days, some thought that the prosecution of alleged war crimes criminals was inconsistent with efforts to bring peace to the region. Now, the goals of peace and international criminal justice are no longer seen as mutually exclusive. Rather, they are interdependent and complementary.³⁰²

299. Article 53 of the Vienna Convention on the Law of Treaties establishes the rule that a "treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law." Vienna Convention on the Law of Treaties, art. 53, Jan. 27, 1980, 1155 U.N.T.S. 331, 8 I.L.M. 679. A "peremptory norm," also known as *jus cogens*, is defined as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *Id.*; see also *supra* text accompanying notes 22-29.

300. The legal basis for this conclusion consists of the following: (1) international pronouncements (or what can be called international *opinio juris*) reflecting the recognition that these crimes are deemed part of general customary law; (2) language in preambles or other provisions of treaties applicable to these crimes which indicates that these crimes have a higher status in international law; (3) the large number of States which have ratified treaties related to these crimes; and (4) *ad hoc* international investigations and prosecutions of perpetrators of these crimes. See *supra*, text accompanying notes 22-29.

301. Interview with Mathias Hellman, *supra* note 5.

302. Gabrielle Kirk McDonald, *The International Criminal Tribunals: Crime and Punishment in the International Arena*, 7 ILSA J. INT'L & COMP. L. 667, 683 (2001).

The contribution of the ICTR to the peace process in the Great Lakes region of Africa is becoming increasingly evident. There are clear signs that the military struggle between Rwanda and Congo began to abate when perpetrators were arrested and transferred to the ICTR.³⁰³ The fact that these individuals were held accountable for their actions was a deterrent to others who may have been “tempted to initiate a threat to peace.”³⁰⁴

(2) It would be unrealistic to expect tribunals and the judicial process *alone* to bring about peace and stability in a post-conflict country. The operative word should be *assist*. Too often, people expect too much from international law.³⁰⁵ They want the justice system to make them whole again, to restore the sense of normalcy they enjoyed before atrocities were committed. But as Bartram Brown, former clerk to the ICTY, insightfully stated, “Victims will continue to be disappointed in the judicial process; they will never see the tribunals’ actions as sufficient when compared to horrors that they and other victims endured.”³⁰⁶ Jean Pél  Fom t , ICTR Senior Legal Advisor, observed further, “The victims’ expectations are directly linked to the magnitude of their suffering; the occurrence of genocide warrants extremely high expectations.”³⁰⁷

(3) One important lesson of the current tribunals is that visibility and accessibility matter. The ICTR and ICTY, situated in Tanzania and the Netherlands respectively, dispense justice that might be viewed as too “removed” from the crimes and people affected by them. This problem has led to considerable animosity toward the tribunals, and misconceptions about their purpose.³⁰⁸

The tribunals were established away from the crime scenes in order to avoid security threats and to prevent the re-traumatization of victims and witnesses. Distance has also enabled careful, objective reflection by impartial judicial officers who were not connected to the violence.

The drawback, however, is that the people of Rwanda and the former Yugoslavia cannot easily see the wheels of justice turning. The tribunals are out of reach for many victims, who can neither attend proceedings nor obtain full-text judgments. Although judgments are published on the ICTR and ICTY websites, available data suggest that only a small percentage of the

303. Interview with Jean P l -Fom t , *supra* note 5.

304. *Id.*

305. Interview with David Tolbert, *supra* note 5.

306. Interview with Bartram Brown, *supra* note 5.

307. Interview with Jean-P l  Fom t , *supra* note 5.

308. Interviews with Jean-P l  Fom t  and Justice Richard Goldstone, *supra* note 5.

affected populations actually have access to them.³⁰⁹ According to one observer, “The ICTY’s proceedings in The Hague and ICTR’s proceedings in Arusha have made it nearly impossible for ordinary Bosnians and Rwandans to follow the Tribunals’ cases. . . . [T]he Tribunals’ rulings have had little impact on the wars’ victims.”³¹⁰

Conducting trials near the scene of the crimes would allow victims of atrocities to witness first-hand the principle of accountability.³¹¹ Local authorities must be seen to reject impunity and embrace justice. Domestic courts, following the example of the international tribunals, should become an important deterrent to those who would commit future crimes, thus contributing to peace and stability in conflict areas.

It is therefore important that the judicial process not be remote from the affected communities.³¹² As Justice Richard Goldstone has noted, “More effective steps should have been taken to provide outreach to the victims and citizens of the countries (Yugoslavia and Rwanda), considering the distances between the countries and The Hague.”³¹³ Jean-Pélé Fomété added that it is important that “justice is not only done, but that justice is seen to be done by those very people.”³¹⁴

Distance can also greatly hamper the collection of evidence, making it harder both for the prosecution to meet the required standard of proof, and for the defense to protect the accused. These difficulties are compounded when states actively oppose the prosecution of alleged war criminals and resist cooperating with the tribunals. Judges and court officers working at a distance may not understand the cultural and historical context of activities under investigation.³¹⁵ Furthermore, a language barrier is erected by the constant need for translation into English and French from local languages (Kinyarwanda and Bosnian/Croatian/Serbian). Translation not only alters meanings; it also results in delay and inefficiency.

Trials conducted “in the region” do not, however, necessarily guarantee acceptance by the effected citizens. For instance, deep ambivalence remains among citizens in West Africa toward the U.N.-backed Special Court for

309. The countries concerned have relatively low Internet access, and the number of “hits” registered for the Kinyarwanda and Bosnian/Croatian/Serbian websites, respectively, is much lower than the number registered for the equivalent English and French sites. The tribunals have instituted outreach programs to try to remedy this problem.

310. Michelle Sieff, *A Special Court for Sierra Leone*, CRIMES OF WAR MAGAZINE: THE TRIBUNALS, May 2001, available at http://www.crimesofwar.org/tribunmag/sierra_print.html.

311. Interview with Jean-Pélé Fomété, *supra* note 5.

312. *Id.*

313. Interview with Justice Richard Goldstone, *supra* note 5.

314. Interview with Jean-Pélé Fomété, *supra* note 5.

315. See Richard Dicker & Elise Keppler, *Beyond The Hague: The Challenges of International Justice*, HUM. RTS. WATCH, Jan. 2004, at <http://hrw.org/wr2k4/10.htm>.

Sierra Leone. They see the tribunal as an “expensive waste” that has little meaning to the lives of ordinary people.³¹⁶

(4) The value of justice on the international level may be lost if the tribunals lose credibility among local populations. Both the ICTY and the ICTR have collected testimony from hundreds of thousands of people. Once witnesses and victims give testimony, however, they are often “lost in the process” and unceremoniously “discarded,” never knowing whether their statements are even used.³¹⁷ The result can be a dramatic loss in confidence and a sense that justice is not being done.³¹⁸ If people’s expectations are raised and then not met, the result is cynicism and disillusionment, which weakens the process of reconciliation.

The international tribunals have also learned a hard lesson about the importance of “outreach programs” in educating citizens about their work. One of the failures of the ICTY was its reluctance early on to communicate with the citizens of former Yugoslavia, in a transparent way, about the goals, objectives, achievements, and challenges. It took more than five years after the creation of the ICTY to initiate an outreach program. By that time, unfortunately, misconceptions and disinformation about the work of the ICTY were rampant in former Yugoslavia. The Tribunal is still trying to reestablish its credibility in the region.

(5) Greater adherence to the rule of law is an important condition of stability in post-conflict environments. The tribunals have played a significant role in developing a legal vocabulary and a prodigious body of case law that further support the process of accountability through judicial channels. Countries are learning from the tribunals and incorporating principles of accountability into their own legal systems. Thus, internationally established legal norms and standards, such as command responsibility, can be absorbed into the body of criminal law already existing at the national level.

(6) International tribunals have played an important role in creating an official record of victims’ suffering.³¹⁹ This process of documentation, and even more fundamentally the process of bearing witness and having it “validated” by the international community, is essential to peaceful reconciliation. As Judge McDonald observes, the tribunals’ decisions typically detail the factual circumstances of the crime charged and provide an

316. See Polgreen & Simons, *supra* note 271.

317. Interview with Michael Johnson, *supra* note 5.

318. *Id.*

319. See Swedish Ministry of Foreign Affairs, *The Role of War Crimes Trials After Conflict: Re-Election on the Importance of Justice in Former Yugoslavia with a Focus on the ICTY*, Apr. 25, 2005 (on file with the author).

incontrovertible record of the brutality by ethnic groups pitted against each other “by incessant, virulent propaganda.”³²⁰

The desire to create an historical record must be tempered by the need to conduct efficiently run trials. The length of some trials, such as that of Slobodan Milosevic, has brought considerable criticism from the international community. According to Sylvia De Bertodano, former ICTY Defense Counsel, “international tribunals should stop talking so much about making an historical record and focus more on the actual trial process.”³²¹

(7) Another key cause of delay and inefficiency is the bureaucratic structure of international tribunals. The different backgrounds and legal cultures of court personnel, coupled with varying civil and common law traditions concerning the rules of procedure and evidence, have meant that justice sometimes has been done very slowly and that it has been quite costly. For example, the ICTR completed just fifteen trials after seven years of work, and it has been criticized for poor coordination between investigators and prosecutors, long pre-trial detentions, and inadequate protection of witnesses and victims. The cost of operating the tribunals has reached about US\$100 million a year.³²²

(8) The lessons learned to date suggest that international tribunals are best suited to undertake complex cases involving senior, high-level defendants, where security is paramount, and where a domestic court system is incapable of or unwilling to try the accused. In divided societies where war crimes and other human rights abuses have occurred, the government may seek impunity for its own leaders rather than prosecute them. Croatia’s judiciary offers a prime example of this type of “domestic bias.” In the aftermath of the wars in the former Yugoslavia, Croatia undertook a series of domestic war crimes trials. Of the nearly 800 persons found guilty since 1991, the vast majority of those convicted are Serbian.³²³ Most Croatian defendants were acquitted.³²⁴

(9) When atrocities are committed, international tribunals play a crucial role in determining and documenting what happened and in countering would-be deniers. The search for truth can take decades, and it may be

320. McDonald, *supra* note 302, at 683.

321. Interview with Sylvia De Bertodano, *supra* note 5.

322. This estimate is based on various U.N. figures regarding the operation of the tribunals.

323. See Organization for Security and Co-operation in Europe, Mission to Croatia, *Supplementary Report: War Crimes Proceedings in Croatia and Finding from Trial Monitoring*, June 22, 2004, at 2. See generally Organization for Security and Co-operation in Europe, Mission to Croatia, *Domestic War Crimes Trials 2004*, Apr. 26, 2005.

324. *Id.*

hampered by policies of repression and impunity.³²⁵ As Justice Goldstone has observed, “Stopping the denials is crucially important if there is going to be reconciliation. . . . The perpetrators must at least acknowledge, or at a minimum not deny, that the crimes were committed.”³²⁶

(10) It is now clear from experience that the international tribunals are not capable of addressing *every* atrocity committed within their jurisdiction. This limitation can affect the process of reconciliation. For instance, in Rwanda, half a million people were responsible for crimes committed against 800,000 people.³²⁷ How can a society deal with crimes of this magnitude? How can reconciliation occur when so many people were involved in atrocities and so many still escape accountability?

In the former Yugoslavia, the challenges are similar. Whereas the ICTY has brought an international dimension of accountability to the region, it has not, by its own admission, altered the mindset of citizens of the former Yugoslavia. As Michael Johnson, Registrar for the War Crimes Chamber, Court of Bosnia & Herzegovina, points out:

You still have substantial polarization in the region. Ten years after the conflict, there is still substantial debate in Serbia over the question of whether or not Serb forces were engaged in Bosnia, or whether the crimes were committed by these forces, or whether or not the politicians were responsible for these forces’ conduct, or whether or not there was a grand plan to commit massive crimes against the Serbian population.³²⁸

(11) The tribunals can play a significant role simply by removing from society those individuals who have committed atrocities. It is difficult to initiate a process of peace, stability, and reconciliation when such individuals are still at large. Victims directly affected by violence simply do not want to live in close proximity to those who have committed the atrocities. Thus, tribunals like the ICTY have made it possible to isolate key leaders through the trial process. According to Matias Hellman, “Without the ICTY, those perpetrators now on trial would be living lives based on impunity and interfering with the reconciliation process.”³²⁹

(12) It is difficult to ascertain whether international tribunals have had a deterrent effect on future atrocities. Halting recidivism is certainly a key objective in establishing these tribunals. The ICC, for example, was expressly

325. See Swedish Ministry of Foreign Affairs, *supra* note 319.

326. Interview with Justice Richard Goldstone, *supra* note 5.

327. Interview with Michael Johnson, *supra* note 5.

328. *Id.*

329. Interview with Mathias Hellman, *supra* note 5.

created to put an end to impunity for the perpetrators of gross crimes and thus contribute to their prevention in the future.³³⁰ At this time, however, empirical evidence simply does not exist to prove such a deterrent effect.

Some legal analysts have argued that in places like Serbia the cycle of impunity has been broken. They attribute this solely to the presence of war crimes courts,³³¹ thus concluding that the ICTY is contributing significantly to a durable peace in the region.³³² Judge Gabrielle Kirk McDonald, past President of the ICTY, argues, “Perhaps the most far-reaching contribution of the tribunals is that their very establishment signaled the beginning of the end of the cycle of impunity.”³³³

Other experts see the situation differently. Sylvia De Bertodano reports that she has “never seen any evidence that people are actually trying to avoid committing war crimes because they think there will be a court process as a result.”³³⁴

Finally, and notwithstanding the essential role of international tribunals, national courts will increasingly be asked to hold individuals accountable for atrocities committed. This is because of the concept of “complementarity” found in the ICC Statute. The ICC has jurisdiction over cases only when the national government concerned is incapable of pursuing justice or simply fails to do so.³³⁵ Complementarity is a procedural and substantive safeguard against an international court like the ICC encroaching on the sovereign rights of nations.³³⁶ It ensures that the judgments of a domestic court will not be replaced by the judgments of the ICC. The hope is that most serious crimes of concern to the international community will now be prosecuted at a national level.³³⁷

States parties to the ICC Statute are required to adopt domestic legislation that covers comprehensively the subject matter jurisdiction of the ICC.³³⁸ The statute specifically requires these states to “ensure that there are procedures available under their national law for all of the forms of cooperation.”³³⁹ States thus must update their domestic legislation in order to achieve complementarity with the ICC. This includes incorporation of the concept of command responsibility.

330. ICC Statute, *supra* note 2, preamble ¶¶4, 5.

331. Interview with David Tolbert, *supra* note 5.

332. Interview with Bartram Brown, *supra* note 5.

333. McDonald, *supra* note 302, at 682.

334. Interview with Sylvia De Bertodano, *supra* note 5.

335. ICC Statute, *supra* note 2, art. 17.

336. See Ellis, *supra* note 51, at 219.

337. See ICC Statute, *supra* note 2, preamble ¶¶4, 6, 10.

338. See Ellis, *supra* note 51, at 222-237.

339. ICC Statute, *supra* note 2, at art. 88.

We have already seen the first major implementation of the complementarity principle. In 2005 the UK government announced its intention to indict eleven soldiers accused of committing war crimes during military operations in Iraq. Instead of being transferred to the ICC, the soldiers will be tried in British courts under the UK's International Criminal Court Act,³⁴⁰ legislation adopted in accordance with the ICC Statute.

Some countries have struggled to incorporate the doctrine of command responsibility into their domestic laws.³⁴¹ Others have shown progress in adapting provisions that hold individuals liable for the crimes of their subordinates. For instance, the criminal codes of Armenia,³⁴² Azerbaijan,³⁴³ Canada,³⁴⁴ Germany,³⁴⁵ Belarus,³⁴⁶ Luxembourg,³⁴⁷ and Belgium³⁴⁸ all now hold superiors responsible, to varying degrees, for criminal acts committed by subordinates.

CONCLUSION

The twentieth century produced some of the worst atrocities in history, and impunity for even the most serious offenses under international law remains the norm. The Holocaust stimulated some changes in the international community's response to impunity in both international and

340. International Criminal Court Act 2001, 2001, c. 17 (Eng.), available at <http://www.opsi.gov.uk/acts/acts2001/20010017.htm>.

341. Serbia is an example of a country emerging from a conflict environment and struggling to create its own mechanism to bring war criminals to justice. In 2003, the Serbian government started the process of drafting a statute for a domestic war crimes court. One of the most contentious issues for the drafter was whether to add a command responsibility provision. The main fear expressed by Serbian government officials was that such a provision would apply retroactively and would, therefore, be illegal under the principle *nullum crimen sine lege* (no crimes without law). The Criminal Code also prohibits the retroactive application of criminal law. These officials wanted to be certain that they were not legislating *ex post facto* the concept of command responsibility. The solution, according to the Serbian side of the "debate," was to train judges and prosecutors to actively supply and interpret the existing Criminal Code as if it already incorporated the concept of command responsibility. Ultimately, the law that was enacted did not incorporate specific language regarding command responsibility. If courts are unable to prosecute individuals for command responsibility, it is doubtful that they will be effective. See Ellis, *supra* note 224, at 168.

342. Criminal Code §391 (2003) (Armenia).

343. Criminal Code art. 117 (1999) (Azerbaijan).

344. Crimes Against Humanity and War Crimes Act, 2000 S.C., c. 24, art. 7 (Can.).

345. Law Introducing the International Crimes Code art. 4 (2002) (Ger.).

346. Criminal Code art. 137 (1999) (Belarus).

347. Law of 2 August 1947 Concerning the Repression of War Crimes (*Loi du 2 août 1947 sur la repression des crimes de guerre*) (*Mém.1947. 755 - Pas. 1947. 500*) (Lux.).

348. Law of June 16, 1993 on the Repression of Grave Breaches of the Geneva Conventions of August 12, 1959 and Protocols I and II of June 8, 1977, arts. 3 and 4 (Belg.).

internal conflicts, and the Nuremberg judgments, the 1948 Genocide Convention, the Geneva Conventions of 1949, and the Convention Against Torture each represented a step in the direction of greater accountability. These important developments, and others along the same line, are also increasingly accepted as components of customary international law. Significantly, the prohibitions against the most serious crimes now reflect the principle of universal jurisdiction, since they require states to prosecute or extradite those who have committed atrocities, and even directly require States Parties to enact domestic laws incorporating the international norms.

Despite these expanding legal obligations, however, states often continue to pardon or ignore the perpetrators of heinous crimes. In conflict environments, governments defend their policies of impunity as being necessary to bring about a remission of hostilities, yet impunity is often linked to instability and further conflict. Cambodia, Colombia, Guatemala, East Timor, Afghanistan, and Liberia are troubling examples. The presence of perpetrators in communities where victims and witnesses still live may constitute a serious, or even insuperable, impediment to reconciliation.

With an emerging body of international law that clearly supports accountability over impunity, the international community took a profoundly important step in creating the three current war crimes tribunals. The objectives of the ICTY, ICTR, and ICC are bold: to end egregious violations of international criminal law, to hold accountable persons responsible for criminal acts, to restore peace and stability to the affected regions, and to contribute to the prevention of such crimes in the future.

The tribunals have also solidified, in international law, the fundamental doctrine of command responsibility – the single most important legal development in combating impunity. The doctrine holds that military commanders and civilian leaders may be held responsible for atrocities committed by their subordinates. That doctrine is now embedded in customary international law.

If the doctrine of command responsibility is the key legal ingredient in combating policies of impunity, political will and political pressure are the key ingredients in enforcing the doctrine. The lack of an effective enforcement mechanism is often the missing link in bringing peace, justice, and security to conflict areas. International criminal tribunals are entirely dependent upon, and will languish without, a willingness by governments to enforce the courts' judgments and rulings. The changing positions of the Croatian and Serbian governments demonstrate the critical role of national policies in supporting the work of the tribunals. With sufficient political will at the national level and pressure from international actors, the tribunals' aims can be achieved, and impunity can be countermanded.

Assessing the overall impact of international tribunals in promoting peace and stability is difficult, since each tribunal must be judged separately and

within the context of the environment in which it operates. Yet despite the short history of the current tribunals, I believe it is possible to make the preliminary assessment that the international tribunals have dramatically advanced the cause of justice. They have created a legal vocabulary and a body of case law that support the process of accountability through judicial channels; they have proved their legitimacy by handing down credible indictments and conducting fair trials; they have preserved an invaluable historical record of deadly conflicts; and they have provided communities with a framework to deal with their past and begin the reconciliation process. In addition to establishing the truth and thus forestalling efforts to deny the occurrence of atrocities, the tribunals have helped the healing process by removing from society those who have committed atrocities.

The task of enforcing international legal norms – an indispensable element in the protection of human rights and the preservation of stability and peace – must remain an urgent priority for the international community. Embracing the concept of accountability and rejecting the notion of impunity is fundamental to the process.